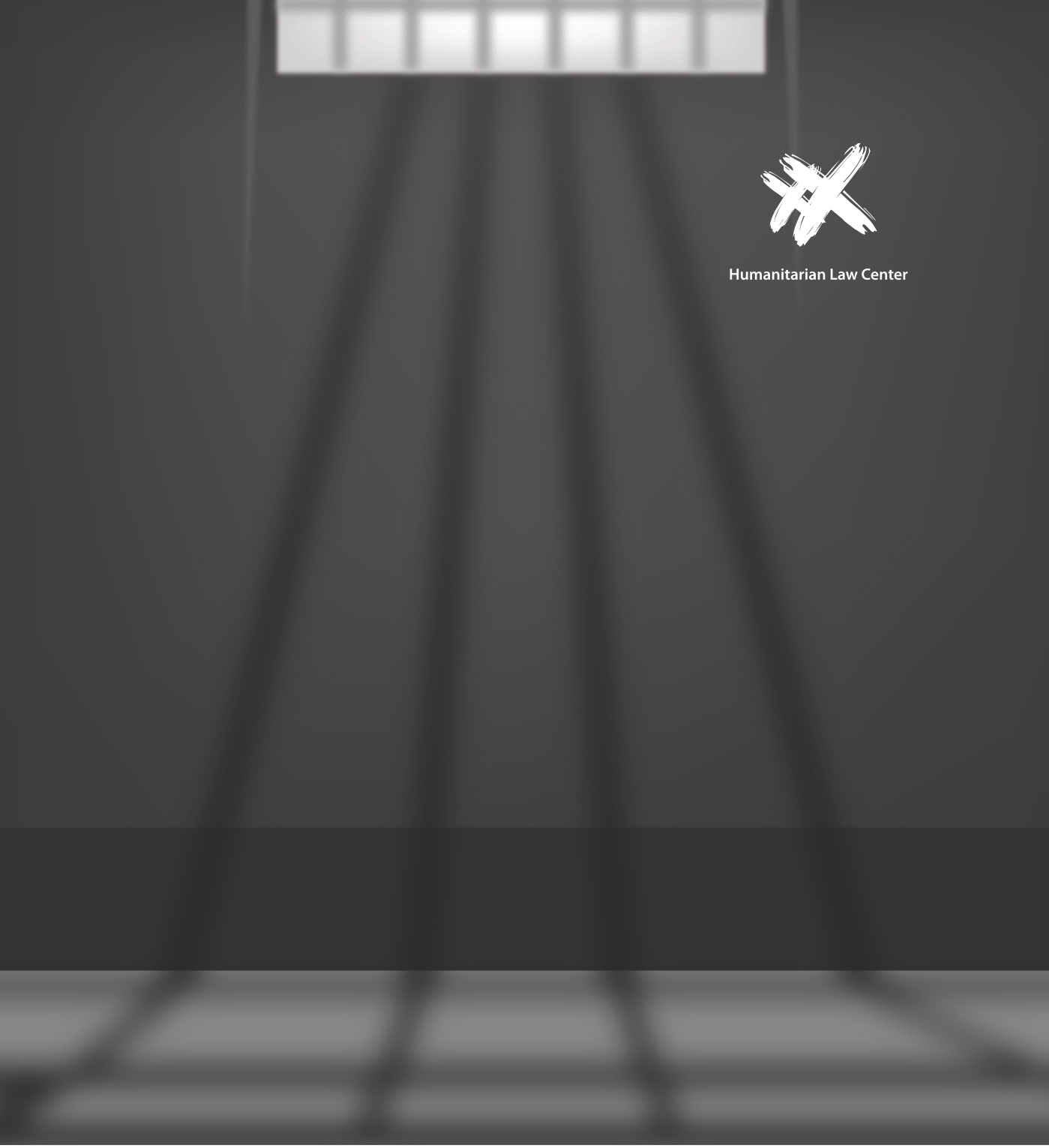

Humanitarian Law Center

REPORT
ON WAR CRIMES TRIALS IN SERBIA

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Contents

Abbreviations used in the text

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

Introduction and Methodology

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

The HLC has monitored all war crimes trials conducted in the territory of Serbia during 2017 and 2018, a total of 20 trials, conducted by the War Crimes Departments of the Higher Court in Belgrade or the Court of Appeal in Belgrade, including one trial conducted by a court of general jurisdiction. A brief overview of all cases observed, and the HLC's key findings on each case of interest to the public, are provided in the Report.

A significant portion of the war crimes proceedings presented in the Report have been ongoing for a number of years. Therefore the previous annual HLC Reports on war crimes trials may also be consulted for full appreciation of the course of the proceedings and the corresponding findings. The Report also includes a trial for a criminal offence that the competent prosecutor's office of general jurisdiction did not classify as a war crime, despite all the circumstances of the case indicating otherwise.[1]

The Report focuses particularly on the work of the War Crimes Office of the War Crimes Prosecutor (OWCP) and of the courts (in the parts of the proceedings which are open to the public), and analyses the indictments and judgments in each individual case. An analysis of the work of other institutions involved in war crimes prosecution (the War Crimes Investigation Service of the Serbian Ministry of the Interior, the Witness Protection Unit, et al.) could not be made within the context of each case because of the lack of publicly available information about their work.

The War Crimes Department of the Higher Court in Belgrade handed down first-instance judgments in three cases over the reporting period.[2] The War Crimes Department of the Court of Appeal in Belgrade handed down four rulings on appeals against judgments passed by the Higher Court in Belgrade.[3] One interim judgment was handed down by a court of general jurisdiction, and was subsequently confirmed by the Court of Appeal.[4] The OWCP issued a total of 14 indictments over the reporting period, three in 2017 (against four individuals),[5] and 11 in 2018 (against 15 individuals),[6] as indicated in the information supplied to the HLC by the OWCP.[7]

1 *Grupa Pauk* [Spider Group] Case.
2 *Ključ-Kamičak, Ključ –Šljivari* and *Bosanska Krupa.*
3 In the cases of *Gradiška, Bosanski Petrovac,* Ovčara and *Skočić.*
4 The case of *Grupa Pauk*.
5 OWCP indictment KTO 1/17 against Milorad Jovanović (*Sanski Most – Lušci Palanka* Case); OWCP indictment KTO 3/17 against Dragan Maksimović (*Caparde* Case); OWCP indictment KTO 4/2017 against Joja Plavanjac and Zdravko Narančić (*Bosanska Krupa II* Case).
6 Letter TRZPI no. 1/19 of 16 January 2019, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2019/01/DOPIS_TRZ-a.pdf, accessed on 24 January 2019. These are the following OWCP indictments: KTO 1/18 against Boško Soldatović; KTO 2/18 against Željko Budimir (*Ključ – Rejzovići* Case); KTO 3/17 against Nebojša Stojanović; KTO 4/18 against Nikola Vid Ljujić (*Brčko* Case); KTO 5/18 against Branko Branković; KTO 6/18 against Jovan Novaković; KTO 7/18 against Miloš Čajević; KTO 8/18 against Željko Maričić; KTO 9/18 against Ramadan Maloku, and KTO 10/18 against Husein Mujanović; KTO 1/15 against Gojko Lukić, Ljubiša Vasijević, Duško Vasiljević, Jovan Lipovac and Dragana Đekić (*Štrpci* Case).
7 These are the following OWCP indictments: KTO 1/18 against Boško Soldatović; KTO 2/18 against Željko Budimir (*Ključ – Rejzovići* Case); KTO 3/17 against Nebojša Stojanović; KTO 4/18 against Nikola Vid Ljujić (*Brčko* Case); KTO 5/18 against Branko Branković; KTO 6/18 against Jovan Novaković; KTO 7/18 against Miloš Čajević; KTO 8/18 against Željko Maričić; KTO 9/18 against Ramadan Maloku, and KTO 10/18 against Husein Mujanović; KTO 1/15 against Gojko Lukić, Ljubiša Vasijević, Duško Vasiljević, Jovan Lipovac and Dragana Đekić (*Štrpci* Case).

The case-by-case analyses are preceded by a summary of the general findings on war crimes trials in 2017-2018 and an overview of the significant social and political events that had a bearing on the war crimes trials.

General findings and socio-political context

Protracted delays in war crimes trials

Excessive length of proceedings, which has long been the hallmark of war crimes cases in Serbia, having a negative effect on efforts to establish the rule of law and end the culture of impunity for those responsible for the grave crimes committed in the 1990s, has continued to be the dominant characteristic of war crimes in Serbia during the reporting period too.

Postponements of main hearings, mainly due to the non-attendance of witnesses or the supposed ill health of the defendants (see, e.g., the *Trnje* and *Srebrenica* cases), have been the main causes of the excessive duration of proceedings.

The most glaring example of excessively and unjustifiably long proceedings has been the *Ovčara* Case, in which, four years after the final judgment was rendered, and 10 years after the indictment was issued, the judgment has been quashed and the case remanded to the War Crimes Department of the Court of Appeal for reconsideration on appeal. The appellate proceedings ended with a final judgment in late 2017, 14 years after the first indictment was issued.[8] The same is likely to happen with other complex cases that have not yet resulted in a final judgment, such as *Lovas*, in which the indictment was raised in 2007[9], and *Ćuška* and *Skočić*, in which the indictments were raised in 2010.[10]

The consequences of the excessive length of proceedings are both far-reaching and serious. As the years pass, defendants die and witnesses lose trust in the Serbian judiciary and refuse to testify at repeated trials (see the cases of *Ćuška* and *Lovas*). During the reporting period, another four defendants died (see the cases of *Ćuška*, *Ovčara, Lovas* and *Doboj*).[11] Additionally, the excessive length of proceedings and their repetition sends a negative and discouraging message to future witnesses and victims – that it would be difficult, if not impossible, for them to receive justice from Serbian institutions. Finally,

8 HLC press release '*Ovčara* Case: 14 years waiting for justice', 24 January 2018, available online at http://www.hlc-rdc.org/?p=34727, accessed on 14 May 2018.

9 OWCP indictment KTRZ 7/07 of 28 November 2007 (*Lovas*), available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2007_11_28_eng.pdf, accessed on 22 January 2019.

10 OWCP indictment KTRZ 4/10 of 10 September 2010 (*Ćuška*), available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2010_09_10_eng.pdf, accessed on 22 January 2019. OWCP indictment KTRZ 7/08 of 30 April 2010 (*Skočić*), available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2010_04_30_lat.pdf accessed on 22 January 2019.

11 Milojko Nikolić, defendant in the *Ćuška* Case (died in 2017), Đorđe Šošić, defendant in the *Ovčara* Case (died in 2017), and Dušan Vuković, defendant in the *Doboj* Case (died in 2018) and Petronije Stevanović in *Lovas* Case.

because of the delays in proceedings, the general public, who are already uninterested in war crimes trials, are further put off the idea of attending and following them. As a result of these delays and the associated lack of public interest, media outlets have virtually stopped sending their reporters to cover war crimes trials.[12]

Low visibility of war crimes trials

Keeping members of the public informed about war crimes trials and the judicially established facts concerning past war crimes is a key prerequisite for fostering a more objective understanding of the past and creating a communal memory of past crimes. It presupposes the state's duty to ensure that its citizens exercise their right to know the truth about crimes committed in the recent past, and who the key protagonists and actors in those events were. As laid down in the UN Principles for Combating Impunity, "every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances […] that led […] to the perpetration of those crimes [...]."[13]

A recent national opinion survey commissioned by the Belgrade-based daily newspaper *Danas* and carried out by Demostat Research and Publishing Centre during August 2017, assessed Serbian citizens' views on war crimes trials conducted before the domestic courts and The Hague Tribunal, the political rehabilitation of convicted war criminals, and their knowledge of the wars and crimes committed in the 1990s.[14] The responses collected from a random sample of 1,200 respondents reveal how alarmingly uninformed Serbian citizens are about the wars of the 1990s and the trials of war crimes indictees. The respondents were asked ten questions, which were selected as indicators of their level of knowledge about the topics surveyed. Only one in 100 respondents was able to answer all the questions, and one in four respondents could not answer any of the questions. Three fifths of respondents said they were not informed about war crimes trials in Serbia, with only 16 percent saying that they were.[15]

When asked to name their preferred sources of information about the wars of the 1990s and war crimes trials, as much as 72 percent chose television, 14 percent newspapers, 13 percent the Internet, and 1 percent radio.[16]

12 No "big" media outlets such as national free-to-air broadcasters cover war crimes trials. The only reporters that can be seen in courtrooms are those of the Belgrade daily *Danas*.

13 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. (E/CN.4/2005/102/Add.1), 8 February 2005; available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement, accessed on 22 January 2019.

14 Report on the public opinion survey 'Are Serbian citizens informed about war crimes of the 1990s and war crimes trials', available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/01/Istrazivanje_javnog_mnjenja_Sudjenja_za_ratne_zlocine_Demostat.pdf, accessed on 22 January 2019.

15 *Ibid.*

16 *Ibid.*

Yet, citizens have very little opportunity to obtain news about war crimes trials from television. Notwithstanding the legal framework which allows for the broadcast of war crimes trials[17], in the over 15 years of domestic war crimes prosecutions the general public in Serbia has not had a chance to see a single testimony of a victim, perpetrator or witness participating in a trial, or a court delivering a judgment in a war crime case. This is because requests for recording trials are regularly denied, contrary to the law, by the authorizing party, namely the President of the Higher Court in Belgrade, (see the *Gradiška*[18]*, Beli Manastir*[19] and *Lovas*[20] cases). Unlike in Serbia, war crimes trials in other countries in the region are regularly recorded and reported upon by the media.[21]

The survey also shows that a vast majority of respondents are against the political rehabilitation of war crimes suspects and convicts, including their reinstatement as public officials or their active participation in political life in any other form. As much as between 71 and 79 percent disapprove of this form of rehabilitation, with only 4 to 7 percent approving.[22]

However, despite the respondents' views, during the reporting period the public in Serbia could learn from the media far more about the participation in political life of finally convicted war criminals than about war crimes trials. Nearly all media organisations reported that former Hague convict Vladimir Lazarević would teach at the national Military Academy.[23] Also widely covered by the media was the

17 Law on Organization and Jurisdiction of State Authorities in Prosecuting Perpetrators of War Crimes (Official Gazette of the Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, 101/2011- other laws and 6/2015), Article 16a.

18 For further details, see HLC: *Report on War Crimes Trials in Serbia during 2016* (Belgrade: HLC, 2017) p. 94, available online at http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf, accessed on 22 January 2019.

19 *Ibid*, p. 156.

20 *Ibid*, p. 83.

21 See, e.g., Al Jazeera Balkans video report on the Basic Court in Mitrovica delivering verdict in the trial of Oliver Ivanović, available online at https://www.youtube.com/watch?v=gO6ChZRDiOs; video footage of Veselin Vlahović verdict; video footage of Aleksandar Cvetković in TV1 News; video footage in TV1 News on guilty plea in the *Naser Orić* Case; *Al Jazeera Balkans* video footage of the County Court in Zagreb delivering Tomislav Merčep verdict, accessed on 22 January 2019.

22 Report on public opinion survey 'How well-informed are Serbian citizens about the wars of the 1990s, war crimes and war crimes trials', p. 32, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/01/Istrazivanje_javnog_mnjenja_Sudjenja_za_ratne_zlocine_Demostat.pdf, accessed on 2 February 2018.

23 B92 Portal, 19 October 2017: 'Vulin o Lazareviću, Dikoviću, Deliću: to su izuzetni ljudi' [Vulin on Lazarević, Diković and Delić: They are exceptional men], available online at https://o2tv.rs/info/komentari.php, accessed on 2 February 2018; *Večernje novosti* evening newspaper, 'General Lazarević drži predavanje na vojnoj akademiji' [General Lazarević to deliver lecture at Military Academy], 26 October 2017, available online (in Serbian) at http://91.222.7.186/vesti/naslovna/drustvo/aktuelno.290.html:692546-VIDEO-General-Lazarevic-drzi-predavanje-na-Vojnoj-akademiji, accessed on 2 February 2018; B92 Portal, 26 October 2017: 'Psi laju, vetar nosi…; General stigao na predavanje' [The dogs bark but the caravan moves on… General arrives at Academy], available (in Serbian) at https://www.b92.net/info/vesti/index.php, accessed on 2 February 2018; Blic Online 26 October 2017: 'General Lazarević danas na Vojnoj akademiji drži predavanje' [General Lazarević deivers a lecture today at Military Academy], available (in Serbian) at https://www.blic.rs/vesti/politika/general-lazarevic-danas-na-vojnoj-akademiji-drzi-predavanje/98s9w8d, accessed on 2 February 2018. TV N1, 26 October 2017: 'Lazarević počeo da predaje na Vojnoj akademiji' [Lazarević starts lecturing at Military Academy], available (in Serbian) at http://rs.n1info.com/a337690/Vesti/Vesti/Lazarevic-poceo-da-predaje-na-Vojnoj-akademiji.html, accessed on 2 February 2018.

presentation of a war diary of Nebojša Pavković, the ICTY -convicted Commander of the VJ Third Army during the war in Kosovo, at the 63rd Belgrade Book Fair on 22 October 2018.[24]

Both the Action Plan for Chapter 23 (developed in the framework of Serbia's accession negotiations with the European Union) and the National Strategy for the Prosecution of War Crimes envisage a set of activities to increase the visibility of war crimes trials:

Activity	Time limit	Implementation status
"Defining the rules which regulate the 'anonymisation' of judicial decisions in different areas of law prior to their announcement in accordance with the rules of the European Court for Human Rights."[25]	2nd quarter of 2016	Partially implemented
"Improving access to regulations and case law, through establishment and promotion of comprehensive and widely available electronic databases of legislation and case law, with respect to the provisions governing data confidentiality and personal data protection."[26]	Continuously, commencing from 3rd quarter of 2014	Not implemented
"Enhancement of the OWCP website to enable the public to monitor what activities have been performed by the OWCP in relation to specific criminal charges and when they have been performed."[27]	Continuously, commencing from 2nd quarter of 2015	Not implemented
"Preparation of a report by the Office of the War Crimes Prosecutor, which will be available to the public indicating what has been done in respect of all criminal charges since 2005, to determine and to present whether all allegations of war crimes have been investigated appropriately."[28]	2nd quarter of 2016	Partially implemented

24 Vojvodina Radio-television: 'Promocija knjige na sajmu knjiga u Beogradu' [General Pavković's book promoted at Belgrade Book Fair], available online (in Serbian) at http://rtv.rs/sr_lat/drustvo/promocija-knjige-generala-pavkovica-na-sajmu-u-beogradu_960287.html, accessed on 22 January 2019.

25 *Action Plan for Chapter 23*, Activity 1.3.9.2, available online at https://mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf, accessed on 28 January 2019.

26 Ibid, Activity 1.3.9.4.

27 *Ibid*, Activity 1.4.1.9.

28 *Ibid*, Activity 1.4.1.10.

But despite the above-cited measures, public access to war crimes trials did not improve during the reporting period. The Higher Court's website still provides no information on war crimes trials, not even the schedule of hearings, only information identifying the existence of a war crimes department in the court.

On 24 December 2018, after a two-year delay, the OWCP at last published a report to present all its activities with regard to all criminal complaints filed since 2005. The report contains only basic information and statistics, without specifying what the OWCP has done so far to investigate the large number of as yet unprosecuted crimes. With 2,030 pending cases and only 14 new indictments in the period 2017-2018, of which 10 have been transferred from BiH, it is quite clear that the OWCP has failed to meet its obligations under the Action Plan to adequately investigate all war crimes allegations.[29] Furthermore, during 2017 the OWCP diverged from its usual practice of regularly and promptly posting indictments on its website.[30] Instead of full text of indictments, only basic information about indictments is now posted on the News and Announcements section - information such as: "The Office of the War Crimes Prosecutor has issued indictment KTO.no.10/18 of 24 December 2018 against H.M., national of Bosnia and Herzegovina, for a war crime against the civilian population under Article 142 of the CC of the FRY, in relation to events in Sarajevo in 1992".[31] The Court of Appeal, in contrast, has continued regularly to publish all its judgments on its website.

Anonymisation of documents pertaining to war crimes

Serbia does not have specific legislation regulating the anonymisation of court decisions. This matter is in part regulated by the internal rules and regulations of courts, namely their rules on anonymisation. The Higher Court in Belgrade adopted such rules in 2017. The Supreme Court of Cassation and the Court of Appeal in Belgrade had already had such rules in place.[32] Under all three sets of rules, personal data relating to persons accused and convicted of war crimes are not to be anonymised, whilst personal data of war crimes victims are not exempt from anonymisation. In the HLC's view, keeping the names of victims anonymous is to deny them a symbolic recognition of their suffering and deny the general public the right to know the truth about past crimes. Even though the rules are clear in terms of which data are to be anonymised, their application in practice is anything but consistent, as

29 OWCP report A no. 258/18 of 24 December 2018, available on the OWCP website at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__sr/2018-12/izvestaj_latinica.pdf, accessed on 22 January 2019.

30 OWCP website, Indictments, indictment against Boban Pop Kostić, available (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2014_03_31_lat.pdf, accessed on 2 February 2018.

31 OWCP website, 'The Prosecutor brings an indictment for a 1992 war crime against the civilian population in Sarajevo', available at http://www.tuzilastvorz.org.rs/en/news-and-announcements/announcements/the-prosecutor-brings-an-indictment-for-a-1992-war-crime-against-civilian-population-in-sarajevo, accessed on 22 January 2019.

32 Court of Appeal in Belgrade, Rules amending the Rules on minimum anonymisation of court decisions (Su. no. I -2 84/12), 26 April 2012, pp. 175-178, available online (in Serbian) at http://www.bg.ap.sud.rs/images/INFORMATOR_7_2013_LAT.pdf, accessed on 22 January 2019; Supreme Court of Cassation, Rules on editing and redacting (pseudonymisation and anonymisation) data in court decisions (I SU- 176/16-1), 20 December 2016, available online (in Serbian) at http://www.vk.sud.rs/sites/default/files/attachments/Pravilnik.pdf, accessed on 22 January 2019.

the personnel responsible for data anonymisation often redact data at their own discretion rather than following the rules. As regards the Court of Appeals, for instance, the accused are listed anonymously in its judgments posted on its website.[33] The Higher Court in Belgrade redacted even the names of the judges sitting in the chamber and the recording clerk in one case (the judgment upon a request for the recognition of the judgments of the Court of BiH in the *Štrpci* Case).[34] This was done contrary to the Court's Rules on minimum anonymisation of court decisions, which states explicitly as follows: "Personal information relating to judges, lay judges, jurors, recording clerks, public prosecutors, deputy public prosecutors, public attorneys and their deputies, public enforcement officers and lawyers shall not undergo pseudonymisation *or* anonymisation."[35]

The OWCP does not have rules on anonymisation of indictments transferred from other countries or those brought by the OWCP. In the indictments that the OWCP delivered to the HLC in 2017 under the Law on Free Access to Information of Public Importance, all victims were listed anonymously, making it impossible to figure out even the number of victims and making it difficult for the HLC to analyse the indictment and follow the trials.[36]

The Commissioner for Information of Public Importance and Personal Data Protection (Commissioner) has taken a firm stance against anonymisation of the accused, "because the information sought concerns persons charged with crimes against the civilian population, the commission of which poses a grave danger to society, and which crimes are prosecuted ex officio; as a result, requirements have been met for the application of an exemption to the obligation to protect privacy stipulated under Article 14, paragraph 2 of the Law on Free Access to Information of Public Importance". Under the said article, a public authority will not grant an applicant his/her right to access information of public importance if disclosure of the information sought would violate the right to privacy of the person who is the subject of information, *except where such information relates to a person, event or occurrence of public interest* [emphasis added].[37]

When it comes to the identity of victims, however, the Commissioner is of the opinion that their personal data should be kept anonymous because *their disclosure would seriously jeopardise the victims' right to privacy* [emphasis added].[38]

Explaining his decision to exempt the names of the accused from non-disclosure of personal data, the Commissioner states that they are charged with *the criminal act of a war crime against the civilian*

33 Court of Appeal in Belgrade, judgment Kž1 Po2 2/14 of 24 November 2017, available online (in Serbian) at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-2-2014.html, accessed on 22 January 2019.

34 Higher Court in Belgrade, judgment Kre-Po2-no. 6/2017 of 07 September 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Presuda_Mico_Jovicic.pdf, accessed on 5 February 2018.

35 Higher Court in Belgrade, Rules on minimum anonymisation of court decisions (Su I-1 no. /2017), 5 July 2017, available online (in Serbian) at http://www.bg.vi.sud.rs/cr/articles/o-visem-sudu/informator-o-radu.html, accessed on 10 February 2018.

36 OWCP indictment KTO 1/17 of 3 April 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/09/Optuznica-Milorad_Jovanovic.pdf, accessed on 22 January 2019.

37 Law on Free Access to Information of Public Importance, Article 14, paragraph 2.

38 Decision no. 07-00-04847/2014-03 of the Commissioner for Information of Public Interest, 11 May 2016.

population, the commission of which poses grave danger to society and which crimes are prosecuted ex officio. But it remains unclear on what grounds the Commissioner has found that persons accused of war crimes are to be considered persons of public interest and victims of war crimes are not. It also remains unclear why the Law on Free Access to Information of Public Interest applies to the accused and the more restrictive Personal Data Protection Law applies to the victims.

The Commissioner has found that the names of war crimes victims are to be considered *particularly sensitive data* protected under Article 16 of the Personal Data Protection Law, because they concern victims of violence.[39] Under the Law, such data may be released only with the consent of the data subjects. In the HLC's view, however, the Commissioner should have applied the very same exception from Article 17, paragraph 2 of the Law on Free Access to Information of Public to victims too, according to which personal data will not be withheld if it concerns *a person, event or occurrence of public interest.* In addition, it should be noted that personal data that are already publicly available, such as the name of a victim who testified in an open court, is not subject to protection under the Law.[40]

Particularly sensitive data are also subject to exceptions laid down in the Law on Free Access to Information of Public Importance. The HLC thinks that war crimes victims *ARE persons of public interest*, and a war crime *IS an event or occurrence of public interest*, and that therefore there are no legal or other obstacles to disclosing the names of victims. Moreover, a systemic violation of human rights and international humanitarian law is not only an event or occurrence of public interest, but also something that the public has the right to know about, as regards the circumstances surrounding it, and the motives behind it and the consequences. And when it comes to war crimes against the civilian population, the public has the right to know, besides the identities of the accused, the identities of the victims too.

There are situations where there is a legitimate public interest in disclosure of *particularly sensitive data*. For instance, where a crime of genocide has been committed or a hate crime.

In such situations, "particularly sensitive data", including the information revealing the ethnicity, race or religion of the victims, becomes of crucial importance and interest, because these personal characteristics constitute an element of the offence. The same applies to war crimes victims: it is only when their identity is revealed that the victims cease to be mere numbers in the statistics and become known to the public as real persons who, by virtue of their ethnicity or religion only, fell victims to a crime. Furthermore, disclosing their names to the public provides some sort of satisfaction to victims, and is a prerequisite for recognition of the suffering they experienced mainly because of their identity.

The Data Protection Working Party, which was set up pursuant to Article 29 of Directive 95/46/EC of the European Parliament and the Council of Europe, has in one of its Opinions cautioned against "mechanical" applications of the data protection provisions, because they can lead to "absurd

39 Law on Personal Data Protection, Article 16.
40 *Ibid*, Article 5, paragraph 1.

consequences", which is exactly what happened in the case described above. The Opinion calls for a flexible approach in the application of the provisions.[41]

It is worth recalling here that the special rules on processing sensitive personal information, such as information revealing the ethnicity, race and religion of the data subject, were developed on the basis of experiences under totalitarian regimes, in which individuals and groups have been persecuted on the basis of these very characteristics. The rules are aimed to serve as guarantees of non-repetition of such totalitarian practices in the future.

That the data protection rules should not be applied in an absurd manner and contrary to the interests of the very individuals they were created to protect, is made clear in the Global Principles on National Security and the Right to Information (Tshwane Principles). Specifically, Principle 10A, which relates to violations of international human rights and humanitarian law, stipulates that the general public have the right to know "the identities of all victims, so long as consistent with the privacy and other rights of the victims, their relatives, and witnesses".

Right below this principle there is a special note stating as follows: "[…] This Principle should be interpreted, however, bearing in mind the reality that various governments have, at various times, shielded human rights violations from public view by invoking the right to privacy, including of the very individuals whose rights are being or have been grossly violated, without regard to the true wishes of the affected individuals."[42]

In this regard, the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) should also be taken into account. Namely, in all cases heard before this tribunal, the names of all victims, except those whose privacy is protected under victims and witnesses protection measures, are revealed to the public. This includes victims who appeared as witnesses in the proceedings, victims who were killed or those who are still missing. In the ICTY judgments the victims are referred to by their full names, which means that their identities are disclosed to the public. It is therefore inexplicable why the courts in Serbia and the Commissioner, instead of doing likewise, chose to do the exact opposite. The ICTY is an institution that was established with the mandate to prosecute crimes committed in the territory of the former Yugoslavia, and the domestic courts in Serbia also prosecute these same crimes. If the victims of crimes prosecuted by the ICTY deserve to have their names revealed to the public, there is no reason why the victims of crimes prosecuted by the domestic courts should not enjoy the same right.

For that reason and for the reasons stated earlier in the text, the HLC opines that the domestic courts must follow the ICTY practice in this respect and publish the names of war crimes victims in their judgments because these victims have the right to have their identities revealed to the public. Revealing their names can bring at least some sort of satisfaction to victims and their family members.

41 Data Protection Working Party, Opinion 4/2007 on the concept of personal data (01248/07/EN), p. 5.
42 *Global Principles on National Security and the Right to Information* (*The Tshwane Principles*), 12 June 2013.

Prosecutorial strategy

The Prosecutorial Strategy for Investigation and Prosecution of War Crimes 2018-2023 (Prosecutorial Strategy) was only adopted on 4 April 2018,[43] two years later than envisaged in the Action Plan for Chapter 23 and the National Strategy (the first half of 2016).[44]

The National Strategy sets out that the Prosecutorial Strategy shall be drafted and adopted "through a transparent and consultative process with all relevant stakeholders",[45] but it turned out otherwise. The presentation of the draft version of the Prosecutorial Strategy was organized only for a small circle of representatives of government authorities responsible for war crimes prosecution and legal professionals, with no members of the press attending. Also, as the deadline for submission of written comments on the draft was 14 March 2018, and the strategy was adopted on 4 April 2018, very little time was left for the comments to be taken into consideration. All these raise doubts about whether the OWCP was genuine about adopting the strategy "through a transparent and consultative process". The fact that, apart from one graph, the draft and adopted versions of the Prosecutorial Strategy are substantially the same text, further reinforces these doubts.[46]

The final, adopted text of the Prosecutorial Strategy has a number of methodological flaws, which leave room for possible re-interpretations of the OWCP's commitments and also of what it sets out to achieve. The Prosecutorial Strategy's most glaring flaw is the absence of clear criteria for the OWCP to apply in prioritizing war crimes cases for prosecution. The National Strategy envisages that the case prioritization criteria are to be set out in detail in the Prosecutorial Strategy. Instead of doing this, the Prosecutorial Strategy merely lists the criteria laid down in the National Strategy, without expanding on them.

The absence of clear criteria for case prioritization can lead to the OWCP continuing its practice of prosecuting only the less demanding war crimes cases (those involving isolated and minor incidents, fewer victims and no high-ranking perpetrators).

In addition, from the text of the Prosecutorial Strategy it is impossible to precisely identify which activities the OWCP will carry out, and the time limits within which they must be completed. For

43 *Prosecutorial Strategy for Investigation and Prosecution of War Crimes in the Republic of Serbia (2018-2023) is available on the OWCP website at: http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2018-05/strategija_trz_eng.pdf*, accessed on: 20 November 2018.

44 See: *Action Plan for Chapter 23*, Activity 1.4.1.3. at: https://mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf; see also, *National Strategy for the Prosecution of War Crimes*, Area 1, Increasing efficiency of war crimes proceedings before the bodies of the Republic of Serbia, pp. 16–17: http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF. All sources accessed on 15 November 2018.

45 *National Strategy for the Prosecution of War Crimes*, pp. 16–17.

46 Note*:* The HLC has compared the two versions; a comparative analysis of the *Draft Prosecutorial Strategy* and its final version is available online (in Serbian) at: http://www.hlc-rdc.org/wp-content/uploads/2018/06/Tuzilacka_strategija_-_konacna_i_radna_verzija.pdf. See also: "Serbia's New War Prosecutions Strategy 'Flawed', NGOs Claim", available at: https://balkaninsight.com/2018/03/19/serbia-s-war-crimes-strategy-seriously-flawed-ngos-say-03-16-2018/, and *Prosecutorial Strategy for Investigation and Prosecution of War Crimes 2018-2023,* available online at: http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2018-05/strategija_trz_eng.pdf. All sources accessed on 11 November 2018.

example, the Prosecutorial Strategy does not set the deadlines for the OWCP to define the criteria for prioritizing cases for prosecution, or devise a five-year investigation plan, or compile a list of cases handled by the prosecutor's offices of general jurisdiction. There is only one deadline clearly laid down in the strategy – that for the first half of 2018, by which time the OWCP should have initiated the introduction of an electronic case management system in its office.[47]

Furthermore, the Prosecutorial Strategy fails to lay down some key success indicators – both quantitative (e.g. number of convictions, number of indictments raised against high-ranking suspects, number of indictments in cases involving a higher number of victims) and qualitative (e.g. enhanced regional cooperation and a drop in the number of missing persons as a result of a more proactive approach of the OWCP) by which to measure progress achieved in the prosecution of war crimes. Without these indicators, it is impossible to measure the impact of the Prosecutorial Strategy or the OWCP's performance.

The HLC recalls that the development and adoption of the Prosecutorial Strategy was envisioned as the centrepiece of all efforts to improve the efficiency of war crimes proceedings, since the OWCP is the body that institutes prosecutions and generates the activities of other bodies involved in war crimes prosecution. The coming five-year period, which is the period covered by the Prosecutorial Strategy, is crucial when it comes to fighting impunity. Even though there is no statute of limitations for war crimes, suspects are ageing, and so are victims and witnesses. The passing of time will make the investigation and prosecution of war crimes all the more difficult.

As the Prosecutorial Strategy, in the form in which was adopted, and its draft version, are basically the same text (except for one graph), the comments on the draft version, which the HLC prepared and delivered to the OWCP, still hold good.[48]

From the manner in which it was adopted and from the text itself, with its methodological flaws, it may be concluded that the whole job of adopting the Strategy was nothing more than a box-ticking exercise for the OWCP, a job done just because it had to be done under the Action Plan for Chapter 23 and the National Strategy for the Prosecution of War Crimes for 2016-2020.

47 *Prosecutorial Strategy for Investigation and Prosecution of War Crimes in the Republic of Serbia (2018-2023)*, p. 22.

48 *Comments of the Humanitarian Law Center (HLC) on the Draft Prosecutorial Strategy for Investigation and Prosecution of War Crimes in the Republic of Serbia in the period 2018 to 2023* are available online at http://www.hlc-rdc.org/wp-content/uploads/2018/03/Comments_of_the_Humanitarian_Law_Center_on_the_Draft_Prosecutorial_Strategy_for_Investigation_and_Prosecution_of_War_Crimes.pdf, accessed on 22 January 2019.

OWCP's inefficiency

The number of indictments have continued to decline over the reporting period, with fewer suspects indicted and fewer victims named. The fact that the vast majority of indictments did not result from the OWCP's own investigation but were transferred from the BiH Judiciary is an indication of the OWCP's inefficiency. According to the OWCP's records of 2018,[49] this office taken over 2009 cases from the prosecutor's offices of general jurisdiction.[50] If the OWCP continues to work at its present speed, over the next 10-year period it will solve only an insignificant portion of war crimes cases.

1. Paucity of indictments

During 2017 the OWCP brought three indictments against four individuals.[51] Each indictment involves one or two suspects and few victims, and all three concern rather simple cases. As all these indictments were in fact transferred to the OWCP after being confirmed by courts in BiH, it is clear that the OWCP did not issue a single indictment resulting from its own investigation in 2017. According to the information provided by the OWCP, this office launched just two investigations in 2017[52] and issued 11 indictments against 15 suspects in 2018,[53] seven of which were transferred from the BiH judiciary. Only nine of the 11 indictments were new indictments, while the other two were brought before 2018. One of those concerns the *Štrpci* Case (against five individuals); it was first

49 See: *Third Report on the Implementation of the National Strategy for War Crimes Prosecution*, HLC, 2018, p. 14, available online at http://www.hlc-rdc.org/wp-content/uploads/2018/12/Third_Report_on_the_Implementation_of_the_National_Strategy_for_the_Prosecution_of_War_Crimes.pdf, last accessed on 22 January 2019.

50 *Third Report on the Implementation of the National Strategy for War Crimes Prosecution*, HLC, 2018, p. 14; OWCP's reply TRZ no. PI.no. 5/18 of 25 January 2018, to an HLC request for information of public importance, available here, last accessed on 22 January 2019.

51 Indictment KTO 1/17 against Milorad Jovanović (*Sanski Most – Lušci Palanka* Case); indictment KTO 3/17 against Dragan Maksimović (*Caparde* Case); and indictment KTO 4/2017 against Joja Plavanjac and Zdravko Naradčić (*Bosanska Krupa II* Case).

52 OWCP information no. 309/17 of 22 November 2017, available here, accessed on 22 January 2019.

53 OWCP letter TRZPI.no. 1/19 of 16 January 2019, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2019/01/DOPIS_TRZ-a.pdf, accessed on 24 January 2019.

brought in 2015, but owing to some deficiencies, was not confirmed until 2018.[54] The other concerns the *Bogdanovci* Case and was initially brought in 2014, only to be repeatedly returned to the OWCP by Higher Court in Belgrade for further investigation. Hence, only two of the indictments filed in 2018, charging only two individuals, were the result of the OWCP's own investigations. The number of deputy prosecutors at the OWCP increased in the reporting period, so now the OWCP has a total of nine deputy prosecutors, but adding new staff has not improved the efficiency of the OWCP as yet.

54 The Court of Appeal returned the indictment in the *Štrpci* Case to the OWCP as much as ten times on various grounds - either the indictment was not worded in accordance with the formal requirements of the ZKP, or additional investigation was needed. Chronology of the *Štrpci* Case: **The initial indictment** (KTO No. 1/15 of 03 March 2015) was returned to the OWCP by the War Crimes Chamber of the Higher Court in Belgrade (decision K-Po2 No. 3/15 Kv- Po2 No. 14/15 of 06 March 2015) in order for the OWCP to correct the identified formal defects; **the second amended indictment** (KTO No. 1/15 of 09 March 2015) was returned to the OWCP by the War Crimes Chamber of the Higher Court in Belgrade (decision K.Po2 No. 3/15 Kv.Po2 No. 16/15 of 12 March 2015) in order for the OWCP to correct the identified formal defects; **the third amended indictment** (KTO No. 1/15 of 13 March 2015) was returned by the War Crimes Chamber of the Higher Court in Belgrade to the OWCP, ordering additional investigation, in order to better clarify matters, so that the merits of the indictment could be examined (Order K. Po2 No. 3/2015, Kv.Po2 No. 34/2015 of 9 April 2015.); **the fourth amended indictment** (KTO No. 1/15 of 15 October 2015) was returned to the OWCP by the War Crimes Chamber of the Higher Court in Belgrade (decision K Po2 No. 3/15, Kv-Po2 No. 73/15 of 19 October 2015), in order for the OWCP to correct the identified formal defects; **the fifth amended indictment** (KTO 1/15 of 20 October 2015) was returned ordering additional investigation, in order to better clarify matters, so that the merits of the indictment could be further examined (decision K.Po2 no. 4/2015, Kv-Po2 No. 76/2015 of 20 November 2015); **the sixth amended indictment** (KTO No. 1/15 of 06 April 2017) was confirmed by the War Crimes Chamber of the Higher Court in Belgrade (Decision K.Po2 No. 3/2015, Kv-Po2 No. 20/17 of 28 April 2017), but the Court of Appeal in Belgrade (Decision Kž2-Po2 6/17 of 05 June 2017) cancelled the decision on the confirmation of the indictment and returned it to the first-instance court for re-decision (the possibility of raising an indictment without an authorized prosecutor was considered controversial). The War Crimes Chamber of the Higher Court in Belgrade again made a decision (K.Po2 No. 3/15, Kv-Po2 No. 29/17 of 16 June 2017) to confirm the same indictment, but the Court of Appeal in Belgrade reversed the decision and returned it to the first-instance court again (Resolution Kž2 Po2 8/17 of 24 July 2017). The War Crimes Chamber of the Higher Court in Belgrade passed the ruling for the third time (K-Po2 No. 3/2015, Kv-Po2 No. 41/17 of 21 August 2017), which confirmed the indictment from April 6, but the Court of Appeal in Belgrade reversed this decision by dismissing the indictment, because it had not been raised by an authorized prosecutor (Kž2 Po2 12/17 of 02 October2017). **The seventh amended indictment** (KOT No. 1/15 of 26 October 2017) was returned to the OWCP by a decision of the War Crimes Chamber of the Higher Court in Belgrade (K-Po2 No. 4/17, Kv-Po2 No. 45/17 of 27 October 2017) in order for the OWCP to rectify the identified formal defects; **the eighth amended Indictment** (KTO No. 1/15 of 06 November 2017) was returned by the War Crimes Chamber of the Higher Court in Belgrade (decision K-Po2 No. 4/17, Kv-Po2 No. 47/17 of 8 November 2017) in order for the OWCP to correct the identified formal defects; **the ninth amended indictment** (KTO 1/15 of 20 November 2017) was returned by the War Crimes Chamber of the Higher Court in Belgrade with an order for the OWCP to order additional investigation (order K-Po2 No. 4/17, Kv-Po2 No. 51/17 dated 21 December 2017); **the tenth amended indictment** (KTO 1/15 of 10 May 2018) was returned by the War Crimes Chamber of the Higher Court in Belgrade (decision K-Po2 No. 4/17, Kv-Po2 No. 6/18 of 14 May 2018) in order for the OWCP to rectify the identified formal errors. The OWCP pleaded against the decision, after which the court found that the indictment was worded in accordance with the ZKP and sent it to the defendants for a plea. The tenth indictment, dated 10 May 2018, was confirmed by the War Crimes Chamber of the Higher Court in Belgrade on 1 October 2018 (decision Kv-Po2 24/18). On 24 October 2018, the Court of Appeal in Belgrade issued ruling Kž2-Po2 13/18 confirming the decision of the Higher Court in Belgrade.

2. Absence of indictments for crimes against Albanian civilians in Kosovo

During the reporting period, the OWCP did not issue a single indictment for crimes committed against Kosovo Albanians. The last such indictment, raised in 2014[55], concerns three newly identified perpetrators of the crime in Ljubenić, which had already been tried as part of the ongoing *Ćuška* Case, and therefore was not a new indictment but just an amendment to an existing indictment. The HLC, in contrast, has filed nine criminal complaints since 2013 for crimes committed in Kosovo. They concern the crimes in Peć/Pejë,[56] Mala Kruša/Krushë e Vogel,[57] Savine Vode,[58] Vučitrn/Vushtrri,[59] Goden,[60] Kraljani/Kralan,[61] Landovica/Landovicë,[62] Poklek,[63] and Rezala/Rezallë. Nevertheless, none of the suspects listed in the HLC's criminal complaints had been subject to OWCP investigation by the end of 2018. The HLC sent a number of letters to the OWCP urging it to act upon the complaints. The OWCP replied to only half the letters, stating that they were processing the complaints.[64]

3. Absence of cooperation with Kosovo judiciary

Lack of cooperation between the OWCP and Kosovo institutions continued into the reporting period. As explained by the OWCP, the EULEX mission, which previously facilitated judicial cooperation between Serbia and Kosovo, given that the EULEX mission has no longer the mandate to undertake new investigations since May 2014, when investigations were transferred to the competence of local prosecutors, who refuse to cooperate with the OWCP.

55 Indictment in relation to the crime in Ljubenić is available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Optuznica_07_04_2014.pdf, accessed on 10 February 2017.

56 HLC press release 'Criminal Complaint in Murder of Two Albanian Civilians in Peć on March 26th, 1999' on the occasion of filing the criminal complaint, 8 March 2013, available online at http://www.hlc-rdc.org/?p=22643&lang=de, accessed on 10 February 2017.

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

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

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

60 HLC press release 'Criminal Complaint against Officers, Non-Commissioned Officers and Soldiers with regard to the Murder of 21 Albanian Civilians on March 25th, 1999', 4 July 2013, available online at http://www.hlc-rdc.org/?p=23483&lang=de, accessed on 30 April 2018.

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

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

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

64 OWCP letter KTR 77/15 of 12 February 2018, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2019/01/Dopis_povodom_urgencije_za_postupanje_u_predmetu,__Rezala.pdf, accessed on 24 January 2019; OWCP letter KTR 33/13 of 14 May 2018, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2019/01/Odgovor_na_urgenciju_za_postupanje_u_predmetu_Mala_Krusa.pdf, accessed on 24 January 2019.

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

4. Absence of charges against high-level perpetrators

All confirmed indictments from the reporting period concern direct war crimes perpetrators of low rank or none. This just goes to show that the practice of non-prosecution of perpetrators who held senior positions in the hierarchies of the former military, police and political institutions of Serbia/the Federal Republic of Yugoslavia (FTY), has continued. The only high-ranking perpetrators charged so far by the OWCP have been members of the armed forces or civilian authorities of the Republic of BiH and the Republic of Croatia.[65]

It was only in 2014 that the OWCP for the first time launched an investigation into a high-ranking officer of the Serbian or Yugoslav Armed Forces.[66] This officer was General Dragan Živanović, against whom the HLC filed a criminal complaint with the OWCP in 2010,[67] and whose role in war crimes in Kosovo was described in a HLC dossier published in 2013 on crimes committed in the area of responsibility of the brigade under his command.[68] The investigation was completed in December 2016. On 1 March 2017 the OWCP ordered that this investigation be dropped, because there was not sufficient evidence to prosecute.[69] The order was served to the suspect and his lawyer the very next day. The injured parties' legal representative was only served the order on 16 November 2017, which was contrary to the ZKP, which requires the prosecutor to notify the injured party within eight days of his decision to discontinue investigation.[70] The HLC complained against the order with the Office of the Republic Public Prosecutor (RPP), as it remained unclear on what basis the deputy prosecutor in charge of investigations found that there was insufficient evidence to prosecute, without having examined even the witnesses he himself proposed, let alone all the witnesses proposed by the Defence and the legal representative of the injured parties. Also, when examining some of the witnesses proposed by the legal representative of the injured parties, the deputy prosecutor failed to notify

65 Among them were: Ejup Ganić, member of BiH Wartime Presidency; Jovan Divjak, BiH Army general; Vesna Bosanac, Director of the General Hospital in Vukovar; Vladimir Šeks, former Speaker of the Croatian Parliament; Naser Orić, Bosnian Army Commander in Srebrenica, and others.

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

67 See HLC press release 'Criminal Complaint Filed against Members of VJ and MUP Serbia Accused of War Crimes against Albanian Civilians in the Villages of Zahać/Zahaq and Pavljan/Pavlan', 25 August 2010, available online at http://www.hlc-rdc.org/?p=13073&lang=de, accessed on 7 May 2018.

68 *Dossier*: *125th Motorized Brigade of the Yugoslav Army*, available online at http://www.hlc-rdc.org/wp-content/uploads/2013/10/Dosije-125.pdf, accessed on 7 May 2018.

69 OWCP order to drop the investigation, KTI no. 01/14 of 1 March 2017.

70 ZKP, Article 51, paragraph 1.

the legal representative. The Office of the RPP dismissed the objection as unfounded.[71] Explaining its decision, the Office of the RPP argued that "submitted combat-relating documentation does not contain reports explicitly indicating that any of his [Živanović's] subordinates were preparing to commit war crimes", adding that the witnesses (all members of the VJ) were "unanimous in their claims that they had never heard of the crimes committed in the villages in the environs of Peć," and, lastly, that the suspect "was not at the scene at the time the crimes were committed, nor were the crimes committed in his presence, because at the time of the crimes he was tens of kilometres away".[72]

With this explanation the Office of the RPP has shown its stance towards prosecuting high-level military and police officers. According to this office, the facts that a crime was not announced in the official military documentation, that the witnesses (possible co-perpetrators at that) did not hear anything about it, and that the crime did not happen right in front of the commander's eyes are sufficient grounds not to prosecute. If this were the case, no person holding a high rank in the military of police could ever be prosecuted for war crimes.

On 14 December 2017, the HLC lodged a constitutional appeal against the ORPP decision, submitting that the order to drop investigation and the subsequent ORPP decision breached the injured parties' rights to a fair trial and to an effective investigation guaranteed by the Serbian Constitution.[73]

And, last but not least, non-prosecution of high-ranking suspects runs contrary to the National Strategy for the Prosecution of War Crimes, in which the Republic of Serbia has pledged that "the cases against high-ranking suspects, de jure or de facto, should have priority in the period 2016-2020".[74]

Criminal complaint against Commander of the JNA 2nd Brigade

In November 2016, the HLC filed a criminal complaint against Dušan Lončar, the former Commander of the Second Proletarian Elite Motorized Brigade of the Yugoslav People's Army, (JNA) over war crimes committed in the village of Lovas, Croatia.[75] The complaint is founded on Lončar's order to attack Lovas, which was attached to the complaint, and on other documents that had long been in the OWCP's possession, as indicated by their mention in the OWCP 2007 indictment in *Lovas*, against

71 ORPP decision KTPO. no. 58/17 of 7 December 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Resenje_o_odbijanju_prigovora_protiv_naredbe_Tuzilastva_za_ratne_zlocine_o_obustavi_istrage,_Dragan_Zivanovic,_Cuska.pdf?subject=http://www.hlc-rdc.org/wp-content/uploads/2018/02/Resenje_o_odbijanju_prigovora_protiv_naredbe_Tuzilastva_za_ratne_zlocine_o_obustavi_istrage,_Dragan_Zivanovic,_Cuska.pdf, accessed on 24 January 2019.

72 *Ibid.*

73 Constitution of the RS, Articles 32, 24 and 25.

74 *National Strategy for the Prosecution of War Crimes* (Official Gazette of the RS, no. 19/2016), point 1.3., available online at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF, accessed on 17 February 2017.

75 See HLC press release 'Criminal Complaint for Crime in Lovas Committed in 1991', 3 November 2016, available online at http://www.hlc-rdc.org/?p=32894&lanf=de, accessed on 17 February 2017.

low-ranking suspects[76] (see the *Lovas* Case below and what the Chair of the Trials Chamber said when reading out the judgment in this case in 2012). Since filing the criminal complaint, the HLC has repeatedly urged the OWCP to act upon it, to which the OWCP has replied that the case was undergoing preliminary investigation and that the allegations set out in the complaint were being examined. The HLC complained to the ORPP about the OWCP's inaction, but the ORPP dismissed the complaint as unfounded.[77] The HLC believes that the OWCP is trying to avoid prosecuting Dušan Lončar, and that with that purpose in mind, on 5 January 2017 it amended its earlier, 2015 indictment in the *Lovas* Case,[78] by removing the allegation that the attack on Lovas was carried out on Lončar's orders.[79] In this way, the OWCP has prevented the fact that Lončar ordered the attack on Lovas from being mentioned in the upcoming judgment in the *Lovas* Case, thus making Lončar's position in some potential future proceedings against him much more comfortable.

Serious delays in the implementation of the National Strategy for the Prosecution of War Crimes

On 20 February 2016, the Government of the Republic of Serbia adopted the National Strategy for the Prosecution of War Crimes for the period 2016-2020 (National Strategy). The adoption of the National Strategy was provided for in the Action Plan for Chapter 23.[80]

The National Strategy was adopted with a view to providing conditions that would help to significantly improve the efficiency of war crimes investigation and prosecution in the Republic of Serbia, the expected outcome of which will be: curtailed impunity for war crimes, regardless of the capacity and status of the perpetrators; support to the judiciary through the promotion of regional cooperation and greater uniformity of jurisprudence in order to achieve proportionality of punishment; improved mechanisms for the protection and support of witnesses and victims; more effective cooperation of state authorities involved in uncovering and prosecuting war crimes; and greater public awareness of the importance of punishing war crimes.[81]

The National Strategy sets forth nine indicators by which to measure the progress made in its implementation. They are: case prosecution based on the priorities established in accordance with the criteria defined in the Prosecutorial Strategy; an increase in the number of indictments in relation to the number of investigations; shorter average duration of war crimes proceedings; positive evaluation by the European Commission regarding the level of alignment of the system of protection

76 OWCP indictment, KTRZ 7/07 of 28 November 2007, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2007_11_28_lat.pdf, accessed on 24 January 2019.

77 ORPP reply KTR. No. 1245/18 of 22 November 2018.

78 OWCP indictment KT 7/07 of 1 December 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Izmenjena_optuznica_01.12.2015.pdf, accessed on 24 January 2019.

79 OWCP indictment KT 7/07 of 5 January 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/Izmenjena_optuznica_05.01.2017..pdf, accessed on 14 January 2018.

80 *National Strategy for the Prosecution of War Crimes* (Official Gazette of the RS, no. 19/2016), available online at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF, accessed on 24 January 2019.

81 *Ibid.*

and support to victims and witnesses in the Republic of Serbia with the European Union standards; a reduced number of missing persons whose fate has not been clarified; an increased number of cases initiated and resolved as a result of regional cooperation; positive reports by the Chief Prosecutor and the President of the ICTY to the U.N. Security Council; and positive reports from other relevant governmental and non-governmental organisations.[82]

The HLC has been monitoring the implementation of the National Strategy with a view to producing a *Shadow Report,* offering findings and an independent assessment, qualitative and quantitative, of the state of implementation of the activities and measures set forth in the National Strategy.

The research conducted by the HLC during 2017 and 2018 shows that the prosecution of war crimes not only has not significantly improved since the adoption of the National Strategy, but has, in many areas, worsened even further.

At present, 34 months since its adoption, no significant progress in war crimes prosecutions can be reported. Its implementation is still running behind schedule and at least 16 of the 21 indictments that have been issued since its adoption were not the result of the OWCP's own work but transferred from BiH.[83]

War crimes trials continue to be unreasonably delayed, no progress has been made in strengthening the procedural rights of victims, the number of missing persons is decreasing at a slower pace than foreseen in the National Strategy, and cooperation with the ICTY/MICT has reached an impasse owing to the decision of the Higher Court in Belgrade not to hand over to the ICTY/MICT members of the Serbian Radical Party (SRS) charged with contempt of court, but also owing to the ever-increasing attempts to re-interpret and deny the facts established during judicial processes conducted before the ICTY.

The HLC reports from 2017 and 2018 should be consulted to gain a comprehensive view of how the implementation of the National Strategy has been progressing.[84]

82 *Ibid.*

83 *Doboj*, *Ključ – Šljivari*, *Bratunac*, *Bosanska Krupa*, **Ključ – Kamičak*, **Ključ – Kamičak II*, *Srebrenica –Branjevo, Sanski Most – Lušci*, *Caparde*, *Bosanska Krupa II*, *Ključ – Rejzovići*, *Bogdanovci*, *Kožuhe – Doboj*, *Brčko*, the indictment against Branko Branković, indictment against Jovan Novaković, indictment against Miloš Čajević, and indictment against Nebojša Stojanović are the indictments that have been issued since the adoption of the National Strategy on 20 February 2016. Another three indictments were issued in 2018 (KTO8/18, KTO 9/18 and KTP 10/18), but by the end of the work on this report the HLC had not found out the identity of the persons charged. *The cases of *Ključ – Kamičak* and *Ključ – Kamičak II* have been merged.

84 See: *Initial Report on the Implementation of the National Strategy for the Prosecution of War Crimes*, HLC, 2017, available online on the HLC website at http://www.hlc-rdc.org/wp-content/uploads/2017/12/Izvestaj_Strategija_I_eng.pdf; *Second Report on the Implementation of the National Strategy for the Prosecution of War Crimes,* HLC, 2018, available online at: http://www.hlc-rdc.org/wp-content/uploads/2018/07/Izvestaj_Strategija_2_ENG-ff.pdf, *Third Report on the Implementation of the National Strategy for the Prosecution of War Crimes,* available online at: http://www.hlc-rdc.org/wp-content/uploads/2018/12/Third_Report_on_the_Implementation_of_the_National_Strategy_for_the_Prosecution_of_War_Crimes.pdf. All documents were accessed on 22 January 2019.

Lack of political support for war crimes trials

The current Serbian leadership's stance on the recent past and the issue of war crimes has had a direct impact on the results of the judicial institutions that handle war crimes, which are undoubtedly the worst in the last 10 years. Members of the government have shown through their actions that they attach no importance whatsoever to war crimes trials. At the same time, they have been actively engaged in creating a social environment where the prosecution of those responsible for war crimes, especially those who held medium or high ranks, has become virtually impossible. Serbia's claim to be fulfilling EU demands is only words; in reality, war crimes convicts and their close associates are being given back their jobs in government institutions and are often regarded as moral beacons of society, and attempts at a negationist revision of judicially established facts are stronger than ever.

Glorification of war criminals and their re-emergence in the public arena

The process of glorification of convicted war criminals has continued and even accelerated in the reporting period.[85] The process began in 2015 with the official, state-sponsored welcome for General Vladimir Lazarević, who was coming back to Serbia after serving the sentence passed on him by the ICTY for crimes committed against Kosovo Albanians.

In 2017, General Lazarević delivered a lecture at the national Military Academy and this event was widely reported in the press.[86]

The statement of Serbian Defence Minister Aleksandar Vulin at a reunion of ex-commanders of the VJ Third Army (who fought in the Kosovo war) in October 2017 in Niš best illustrates the current Serbian leadership's attitude towards convicted war criminals. The Minister said: "The Republic of Serbia, its soldiers and its people, should be proud of their part during all these years, proud of the men who are gathered today in Niš. The Third Army, General Lazarević, and all those who are gone or are far away deserve to be recognised as the best of the best," adding, "the days are over when these people were not allowed to come to the Military Academy and when we were made to be ashamed of them; the time has come for us to be quietly proud of them."[87]

85 HLC press release 'Victims Mocked by Government Reception for Lazarević', 4 December 2015, available online at http://www.hlcrdc.org/?p=30815&lang=de, accessed on 24 January 2018.

86 *Večernje novosti* evening newspaper, 'General Lazarević drži predavanje na vojnoj akademiji' [General Lazarević to deliver lecture at Military Academy], 26 October 2017, available online (in Serbian) at http://91.222.7.186/vesti/naslovna/drustvo/aktuelno.290.html:692546-VIDEO-General-Lazarevic-drzi-predavanje-na-Vojnoj-akademiji, accessed on 24 January 2019. Blic Online, 'General Lazarević danas na Vojnoj akademiji drži predavanje' [General Lazarević delivers a lecture today at Military Academy], 26 October 2017, available (in Serbian) https://www.blic.rs/vesti/politika/general-lazarevic-danas-na-vojnoj-akademiji-drzi-predavanje/98s9w8d, accessed on 24 January 2019. TV N1, 'Lazarević počeo da predaje na Vojnoj akademiji' [Lazarević starts lecturing at Military Academy], 26 October 2017, available online (in Serbian) at http://rs.n1info.com/a337690/Vesti/Vesti/Lazarevic-poceo-da-predaje-na-Vojnoj-akademiji.html, accessed on 24 January 2019.

87 *Dnevnik*, 'Vulin: prošlo je vreme stida ovo je vreme tihog ponosa' [The time for shame is over, now is the time for quiet pride), 7 October 2017, available online (in Serbian) at https://www.dnevnik.rs/index.php/drustvo/vulin-proslo-je-vreme-stida-ovo-je-vreme-tihog-ponosa-07-10-2017, accessed on 24 January 2019.

Vinko Pandurević, former Commander of the Zvornik Brigade of the Army of Republika Srpska, who was convicted by the ICTY of crimes in Srebrenica, participated and even spoke at a discussion organised as part of the state-sponsored 'internal dialogue' on Kosovo. Pandurević presented his views on how the Kosovo issue could be resolved.[88]

Nebojša Pavković, Commander of the VJ Third Army during the war in Kosovo, who was also convicted by the ICTY and is currently serving his 22-year sentence, had his war diaries promoted at the 63rd Belgrade International Book Fair on 22 October 2018. The diaries were published as part of the "Warrior" series, in four volumes entitled "The Third Battalion in 'Merciful Angel"s Embrace for 78 Days",[89] "The Battle for Mount Paštrik - Memories of Participants, 1999", "The Priština Corps 1998-1999 – Testimonies of Wartime Commanders" and "The Battle of Košare – Memories of Participants, 1999".[90]

Among the speakers at the promotion of the volume "The Battle for Mount Paštrik - Memories of Participants, 1999" was Božidar Delić, former Commander of the VJ 549th Motorised Brigade.[91] Evidence of this brigade's involvement in crimes committed during the Kosovo war were presented to the public in 2013 in the HLC's dossier on the 549th Motorized Brigade of the Army of Yugoslavia.[92] Also, the HLC filed a criminal complaint against Delić for a crime committed in the village of Trnje/Tërrnje, Kosovo, in March 1999.[93]

Retired General Dragan Živanović, who during the conflict in Kosovo was the Commander of the VJ 125th Motorized Brigade, was one of the speakers at the presentation of the publication "Battle of Košare - Memories of Participants, 1999". The HLC's *Dossier on the 125th Motorized Brigade of the Yugoslav Army* of 2013 presented evidence that implicates this brigade in the crimes committed in Kosovo in 1998 and 1999.[94] The HLC filed a criminal complaint against Živanović over the murder of 78 Kosovo Albanians in the village of Kraljane/Kralane (Đakovica/Gjakova municipality), in April 1999.[95]

88 N1 Portal, 'Unutrašnji dijalog: I haški osuđenik predlaže rešenja' [Internal dialogue: Hague convict proposes solutions], available online (in Serbian) at http://rs.n1info.com/a362492/Vesti/Vesti/Unutrasnji-dijalog-I-haski-osudjenik-predlaze-resenja.html, accessed on 24 January 2019.

89 'Merciful Angel' is a name incorrectly and ironically given by the Serbs to NATO 1999 Operation Allied Force in Yugoslavia.

90 Vojvodina Radio-Television: 'Promocija knjige na sajmu knjiga u Beogradu' [General Pavković's book promoted at Belgrade Book Fair], available online (in Serbian), at http://rtv.rs/sr_lat/drustvo/promocija-knjige-generala-pavkovica-na-sajmu-u-beogradu_960287.html, accessed on 22 January 2019.

91 Tanjug News Agency, 'Ministarstvo odbrane predstavilo dve knjige edicije 'Ratnik" [Ministry of Defence promotes two books of the "Warrior" series], news, 29 October 2018, available online at http://tanjug.rs/mobile/full-view.aspx?izb=438588, accessed on 22 November 2018.

92 *Dossier: 549th Motorized Brigade of the Army of Yugoslavia*, HLC, Belgrade, 2013, available online at http://www.hlc-rdc.org/wp-content/uploads/2013/03/Dossier-549th-Motorized-Brigade-of-Yugoslav-Army.pdf, accessed on 22 November 2018.

93 HLC press release 'Criminal complaint against Yugoslav Army officers for the crime committed against 17 Kosovo Albanians and one Ashkali', available online at: http://www.hlc-rdc.org/?p=26011&lang=de, accessed on 27 November 2018.

94 *Dossier: 549th Motorized Brigade of the Army of Yugoslavia*, HLC, Belgrade, 2013, available online at http://www.hlc-rdc.org/wp-content/uploads/2013/03/Dossier-549th-Motorized-Brigade-of-Yugoslav-Army.pdf, accessed on 22 November 2018.

95 HLC press release 'Criminal Report against Officers and Members of VJ and MUP on account of Crime Committed against 78 Kosovo Albanians' 10 October 2013, available online at: http://www.hlc-rdc.org/?p=24590, accessed on: 22 November 2018.

The fourth volume of the "Warrior" series entitled "The Priština Corps 1998-1999 – Testimonies of Wartime Commanders" was presented by Vladimir Lazarević, who during the conflict in Kosovo served as the Commander of the VJ Priština Corps, and who was sentenced by the ICTY to 14 years in prison for crimes committed against Kosovo Albanian civilians.[96]

On 11 April 2018, the Appeals Chamber of the Mechanism for International Criminal Tribunals (MICT) in The Hague passed a final judgment on Vojislav Šešelj, President of the Serbian Radical Party and Serbian MP, sentencing him to 10 years in prison after finding him guilty of instigating persecution, deportation and other inhumane acts (forcible transfer), as crimes against humanity, as well as of physical perpetration of persecution (violation of the right to security), as a crime against humanity, in the Vojvodina village of Hrtkovci.[97]

The judgment should have led to Vojislav Šešelj's dismissal from the National Assembly of Serbia. The Law on the Election of Members of the National Assembly stipulates that an MP's mandate shall be terminated before the expiry of his/her term if s/he has been convicted by final court decision to a prison sentence of not less than six months. The termination becomes effective immediately and the National Assembly, immediately upon being notified of the reasons for the termination of office of an MP, shall, either during the ongoing sitting or at the first next sitting, establish that the office of the MP has been terminated.[98] By the end of 2018, the National Assembly had not done this, and had thus, paradoxically, disregarded its own law.

Another convicted war criminal, Veselin Šljivančanin, continued to be a guest at public events hosted by the ruling Serbian Progressive Party (SNS). In exchange for his public support for the SNS, this party provides him with opportunities to promote himself. In January 2017, Youth Initiative for Human Rights activists (YIHR) unfurled a banner with the slogan "Criminals should be silent so we can talk about victims" as Šljivančanin was speaking at a promotion event in Beška. After that, they were hurled out of the room and beaten up, and had their car smashed. The SNS, who organized the event, was quick to issue a press release describing the YIHR activists as hooligans and their behaviour as fascist.[99] The Basic Public Prosecutor's Office in Stara Pazova then instituted misdemeanour proceedings against the YIHR for disorderly, impertinent, ruthless and offensive behaviour, violence, threats and brawl. But, as can be seen from a video footage broadcast by several media organisations,[100] the YIHR activists, who protested peacefully and politely, were actually the victims of the offensive,

96 See *Šainović et al. (IT-05-87)*, available online at: http://www.icty.org/cases/party/743/4, accessed on 22 November 2018.

97 United Nations Residual Mechanism for Criminal Tribunals, Judgment in *Vojislav Šešelj* (MICT -16-99-A), 11 April 2018, available online at http://jrad.irmct.org/view.htm?r=241238&s=, accessed on 24 January 2019.

98 Law on the Election of Members of the Parliament (Official Gazette of the Republic of Serbia, nos. 35/2000, 57/2003 - Decision of the USRS, 72/2003 - other law, 18/2004, 101/2005 - other law, 85/2005 - other law, 28/2011 - CS Decisions, 362011 and 104/2009 - other law), Article 88.

99 B92 Portal, 'Huligani upali i prekinuli tribinu: fašistički ispadi' [Hooligans storm the room and interrupt public discussion: Fascist Outburst], 17 January 2017, available (in Serbian) at https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=01&dd=17&nav_category=11&nav_id=1221326, accessed on 9 February 2018.

100 N1 Portal, 'Beška' situacija teška: Ko je koga tukao?' [What happened in Beška: who beat whom?], 18 January 2017, available (in Serbian) at http://rs.n1info.com/a222153/Vesti/Vesti/Beska-situacija-teska-Ko-je-koga-tukao.html, accessed on 12 February 2018.

violent and physically abusive behaviour of some people from the audience. The same prosecutor's office dismissed the YIHR's criminal charges against unidentified persons for inflicting bodily harm to its activists.[101]

The Misdemeanour Court in Ruma (its department in Inđija), on 26 July 2018 found eight YIRH activists guilty of misdemeanour, namely disorderly, impertinent and ruthless behaviour, and fined them each 50,000 dinars.[102] The Misdemeanour Court of Appeal in Novi Sad confirmed the fine on 25 September 2018.[103]

It is clear that the YIHR activists were subject to misdemeanour proceedings and fined just because they expressed the opinion that war criminals do not deserve to be given any space at events organised by political parties or in government institutions. The way in which the Prosecutor's Office handled this incident is worrisome, because it sends a clear message about how those who attempt to counter this growing trend of war criminals re-entering the public sphere will be treated by the state.

Denial and relativisation of crimes

The National Strategy underscores that the Republic of Serbia is "unequivocally committed to the idea that impunity for war crimes is unacceptable."[104] The reactions of the Serbian political elite to the closure of the ICTY and to the judgment in the case of Ratko Mladić, former Commander of the VRS Main Staff, just goes to show that the marginalisation and denial of crimes committed by Serb forces clearly continues, as well as the denial of the state's role in them.

When the ICTY sentenced Ratko Mladić to life imprisonment, the Serbian President and cabinet ministers in their pronouncements endeavoured to divert attention away from the crimes Mladić was convicted of. The President of Serbia thus called on citizens to look to the future and focus on a better future for their children.[105] Prime Minister Ana Brnabić followed suit and said that we should leave the past behind and look to the future.[106] Justice Minister Nela Kuburović said that the day when the

101 N1, 'Inicijativa mladih najavila žalbu na odluku Tužilaštva' [Youth Initiative announces appeal against the decision of the Prosecutor's Office], 9 August 2017, available online (in Serbian) at http://rs.n1info.com/a289774/Vesti/Vesti/Inicijativa-mladih-najavila-zalbu-na-odluku-Tuzilastva.html, accessed on 14 May 2018.

102 Misdemeanour Court in Ruma, Department in Inđija, judgment Pr.no. I6-6979/17 of 26 July 2018, available online (in Serbian) at http://www.yihr.rs/wp-content/uploads/2018/08/Presuda-Prekrsajnog-suda-u-Rumi-Pr.broj-I-6-6979-17.pdf, accessed on 24 January 2019.

103 Misdemeanour Court of Appeal in Novi Sad, judgment III-306 Prž.no. 17594/18 of 25 September 2018, available online (in Serbian) at http://www.yihr.rs/wp-content/uploads/2018/10/presuda-beska.pdf, accessed on 24 January 2019.

104 *National Strategy for the Prosecution of War Crimes*, p. 4, available online at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF, accessed on 12 February 2018.

105 RTS, 'Vučić: Svi smo mi znali koja će biti presuda, pustite nas da gradimo budućnost' [Vučić: we all knew what the judgment would be, let us build our future], 22 November 2017, available online (in Serbian) at http://www.rts.rs/page/stories/ci/story/1/politika/2947724/vucic-svi-smo-znali-koja-ce-biti-presuda-nasa-obaveza-da-gradimo-buducnost.html, accessed on 12 February 2018.

106 Radio Free Europe, 'Brnabić: ostaviti prošlost iza nas posle presude Mladiću' [Brnabić: Let us let go of the past after Mladić judgment], 22 November 2017, available online (in Serbian) at https://www.slobodnaevropa.org/a/28869924.html, accessed on 14 May 2018.

judgment was pronounced was "a tough day for Serbia."[107] National Assembly Speaker Maja Gojković said that the Hague Tribunal had failed to bring reconciliation in the region and to deliver justice for all victims.[108] Foreign Minister Ivica Dačić was particularly scathing about the ICTY, saying that this tribunal never intended to bring reconciliation but rather to prove that the blame for the civil war in the former Yugoslavia lies squarely with the Serbs.[109] Dačić's words were echoed by Defence Minister Aleksandar Vulin.[110] The media also played a part in portraying the ICTY as a 'political court' mandated to try Serbs alone. The *Večernje novosti* evening newspaper wrote as follows: "The curtain has come down on the hypocritical Hague justice", on the court that "over the past two and a half decades has convicted almost exclusively Serbs, turning a blind eye to all the crimes committed by Muslims and to the ethnic cleansing of our people in Croatia."[111]

In that same vein, Prime Minister Ana Brnabić spoke about the Srebrenica genocide in her interview with Deutsche Welle's (DW) Conflict Zone talk show. When asked by the journalist whether Serbia is now prepared to acknowledge that the massacre in Srebrenica was genocide, Brnabić said: "No. I do not think that terrible crime, the massacre in Srebrenica, was genocide. It was a heinous crime. It was a war crime. I'm not happy because of that. It was not done in the name of the Serbian people and Serbs cannot be collectively blamed for what happened there."[112]

With these views expressed by politicians and the media, it is no wonder that the citizens of Serbia have for the most part a negative opinion of the ICTY, and that as much as 56 percent of them doubt its impartiality, according to a public opinion survey conducted by Demostat Research and Publishing Centre in August 2017. [113]

107 B92 Portal 'Kuburovićeva: težak dan za Srbiju' [Kuburović: A tough day for Serbia], 22 November 2017, available at https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=11&dd=22&nav_category=11&nav_id=1328230, accessed on 14 May 2018.

108 B92 Portal, 'Reakcije u Srbiji na Mladić: od 'sramota' do 'normalno" [Reactions in Serbia to Mladić judgment: from "shameful" to "expected"], 22 November 2017, available at https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=11&dd=22&nav_category=64&nav_id=1328171, accessed on 14 May 2018.

109 RTS 'Reagovanja na presudu Ratku Mladiću' [Reactions to Ratko Mladić judgment], 22 November 2017, available online (in Serbian) at http://www.rts.rs/page/stories/ci/story/1/politika/2947669/reagovanja-na-presudu-ratku-mladicu.html, accessed on 12 February 2018.

110 SD Srbija danas portal, 'Vulin besan na rad nečasnog Haškog tribunala: Nije tajna da o ovom 'divnom' sudu mislim SVE NAJGORE' [Vulin enraged by wicked Hague Tribunal: it's no secret I take a dim view of this "marvellous" Tribunal], 2 December 2017, available (in Serbian) at https://www.srbijadanas.com/vesti/info/vulin-besan-na-rad-necasnog-haskog-tribunala-nije-tajna-da-o-ovom-divnom-sudu-mislim-sve-najgore-2017-12-02, accessed on 12 February 2018.

111 *Večernje Novosti* daily newspaper, 'Kraj haške farse uz operu I hvalisanje' [End of the Hague farce, with opera and self-panegyrics], 21 December 2017, available online (in Serbian) at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html%3A702338-Zatvaranje-Haskog-tribunala-pocelo-minutom-cutanja-za-sve-zrtve, accessed on 12 February 2018.

112 Deutsche Welle, interview with Ana Brnabić, available online at https://www.dw.com/sr/jo%C5%A1-nismo-spremni-za-eu/a-46290937?maca=ser-serbian_all-2277-rdf, accessed on 4 February 2019.

113 Report on the public opinion survey 'Are Serbian citizens informed about the war crimes of the 1990s and war crimes trials?', available online at http://www.hlc-rdc.org/wp-content/uploads/2018/01/Istrazivanje_javnog_mnjenja_Sudjenja_za_ratne_zlocine_Demostat.pdf, accessed on 2 February 2018.

Consequences of the severe delay in the appointment of a new War Crimes Prosecutor

The Republic of Serbia did not formally appoint a new War Crimes Prosecutor for a period of 17 months. The term of office of the former War Crimes Prosecutor, Vladimir Vukčević, expired on 31 December 2015, and the new one did not take office until 31 May 2017.[114] The Law on the Public Prosecution Service stipulates that if the term of office of a public prosecutor is terminated, the Republic's Public Prosecutor is to appoint an acting public prosecutor until a new public prosecutor takes office, for a period not exceeding one year. The acting public prosecutor is appointed by the State Prosecutors' Council.[115] With this appointment, the acting public prosecutor becomes an authorized prosecutor. This last stipulation is particularly important, because only an authorized prosecutor may participate in criminal proceedings and take actions in a case, including bringing and representing charges. As stipulated in the Criminal Procedure Code, charges brought by a prosecutor who is not an authorised prosecutor are to be dismissed[116], and conducting a trial in the absence of an authorized prosecutor constitutes a grave violation of the criminal procedure provisions,[117] and will result in the annulment of the judgment and the case being sent back to court for a new trial.[118]

Because of the Republic's Public Prosecutor's failure to meet her obligations under the ZKP, the OWCP was left without an acting war crimes prosecutor for a lengthy period of 17 months. As a result, conducting war crimes cases was jeopardised, as deputy war crimes prosecutors are not authorized to bring charges, or to act as prosecutors on cases, or to take any action in proceedings. This is because under the Law on Public Prosecution Service, the Public Prosecutor performs the public prosecution function, and all others in his/her office are subordinated to him/her.[119] At the same time, the Constitution of the RS stipulates that a deputy public prosecutor substitutes for the Public Prosecutor in his prosecution function, which means, in this specific case, that without a Public War Crimes Prosecutor his/her deputies are unable to act.[120]

Therefore, all the indictments and all the actions undertaken between 1 January 2016 and 31 May 2017 by deputy war crimes prosecutors, are deemed to have been performed in the absence of an authorized prosecutor. As a consequence, charges brought in that period were dismissed, including the charges in the *Srebrenica* Case.[121] The trial of this case had to be reopened afresh and all actions taken in the case had to be repeated (see the *Srebrenica* Case).

114 OWCP press release 'Snežana Stanojković takes office as Serbian War Crimes Prosecutor', 31 May 2017, available on the official website of the OWCP at http://www.tuzilastvorz.org.rs/en/news-and-announcements/announcements/sne%C5%BEana-stanojkovi%C4%87-takes-office-as-serbian-war-crimes-prosecutor, accessed on 14 May 2018.
115 Law on Public Prosecution Service, Article 36.
116 ZKP, Article 339, paragraph 2, and Article 416, paragraph 1, sub-paragraph 2.
117 ZKP, Article 438, paragraph 1, sub-paragraph 5.
118 ZKP, Article 458, paragraph 1.
119 Law on Public Prosecution Service, Article 12.
120 Constitution of the RS, Article 159, paragraph 4.
121 Also in *Bosanska Krupa, Bratunac, Ključ Kamičak, Ključ Šljivari, Sanski Most – Lušci Palanka.*

By failing to act in accordance with the law, the Republic's Public Prosecutor obstructed the fulfilment of the obligations undertaken in the Action Plan for Chapter 23 and the National Strategy. And the inactivity of the government authorities in the appointment of a new War Crimes Prosecutor is evidence of the lack of a genuine political will to improve Serbia's track record on war crimes prosecution.

Inconsistent practice of courts in cases where charges brought by unauthorised prosecutors were dismissed

The indictment in *Srebrenica* was the first to be dismissed on the grounds that it had not been filed by an authorized prosecutor. The Court of Appeal ruled to dismiss it in July 2017.[122]

Following this ruling by the Court of Appeal, one of the two trial chambers of the War Crimes Department of the Higher Court in Belgrade began dismissing, *sua sponte*, the indictments brought by unauthorized prosecutors in war crimes cases that were put before it.[123] The other chamber did not dismiss the charges filed or amended in that period, but did not hear these cases either, owing to some other procedural impediments (the absence of a member of the chambers or the absence of a witness).[124]

After a new War Crimes Prosecutor took office, the OWCP made motions to the court to proceed in the cases in which the indictments had been dismissed (*Srebrenica*, *Bosanska Krupa*, *Bartunac*, *Ključ –Kamičak*, *Doboj*, and *Sanski Most – Lušci Palanka*).

In September 2017, the Court of Appeal issued the first final decision granting an OWCP motion to proceed after the dismissal of the indictment. The court ruled that the proceedings in the *Srebrenica* Case could continue upon the very same indictment it had previously dismissed, without the OWCP having to file a new one.[125]

Such a decision of the Court of Appeal may be questionable, in terms of the Criminal Procedure Code, depending on how its provisions are interpreted. The Defence has already contested it and others will certainly follow suit, using various legal means.[126]

Following the decision of the Court of Appeal, the Higher Court resumed all the cases in which indictments had been dismissed, but its two chambers took different approaches to handling this situation. The chamber hearing the *Srebrenica* Case took the position that all actions that had been undertaken in the absence of an authorized prosecutor had to be repeated.[127] The other chamber, in

122 Court of Appeal in Belgrade, decision Kž1 Po2 7717 of 5 July 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/07/Resenje_o_odbacivanju_optuznice.pdf, accessed on 12 February 2018.
123 Cases of *Srebrenica*, *Bosanska Krupa*, *Bartunac*, *Ključ –Kamičak*, *Doboj* and *Sanski Most – Lušci Palanka.*
124 Cases of *Ključ-Šljivari* and *Lovas.*
125 Court of Appeal in Belgrade, decision Kž1 Po2 10/17 of 19 September 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/11/Resenje-Srebrenica.pdf, accessed on 12 February 2017.
126 Transcript of the main hearing held on 14 November 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/13-14.11.2017.pdf, accessed on 12 February 2018.
127 *Ibid.*

contrast, was of the opinion that there was no need to repeat the actions and that the proceedings should resume from the point where they had been interrupted as a result of the indictment being dismissed (see the *Bosanska Krupa*[128] and *Ključ Kamičak*[129] cases).

Such different approaches to the same situation constitute a dangerous precedent, because they alone can provide grounds for finding a breach of the right to equal protection by the law under Article 36 of the Constitution of the Republic of Serbia, and also of the right to a fair trial under Article 6 of the European Convention on Human Rights.

After judgments have been passed in these cases, the said breach may constitute sufficient grounds for these cases to be reviewed by the Constitutional Court and subsequently by the European Court of Human Rights too.

In addition, where proceedings have just been resumed from the point where they had been interrupted without repeating all the actions undertaken while the OWCP did not have an acting prosecutor, a grave violation of criminal procedure rules has occurred, which is sufficient grounds for quashing judgments resulting from such proceedings.[130]

These procedural errors are best avoided and the court must be mindful of the fact that the presence of an authorized prosecutor at all stages of the proceedings, is a *sine qua non* for any judicial proceedings. At the same time, uniformity of court practice is also a *sine qua non* for any lawful and fair trial.

Disregarding these rules and principles could lead to final judgments being quashed and proceedings reopened, as happened with *Ovčara*, in which the final judgment was set aside several years after it was delivered and the case remanded for reconsideration. It could also cause immeasurable harm to victims and their families and systematically obstruct the fulfilment of obligations undertaken in the Action Plan for Chapter 23 and the National Strategy.

128 Trial report of 23 November 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/11/Bosanska_Krupa_-_Izve%C5%A1taj_sa_su%C4%91enja__23.11.2017..pdf, accessed on 12 February 2018.

129 Trial report of 22 November 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/11/8._Kljuc_Kamicak_Izvestaj_sa_sudjenja_22.11.2017..pdf, accessed on 12 February 2018.

130 ZKP, Article 458, paragraph 1.

Pending war crime cases in the War Crimes Department of the Higher Court in Belgrade as the court of first instance

I. Bratunac Case[131]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 14 April 2016
Trial commencement date: 29 June 2016
Prosecutor: Bruno Vekarić
Defendant: Dalibor Maksimović
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Vladimir Duruz (Chair of the Chamber) Judge Vera Vukotić Judge Vinka Beraha-Nikićević

Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 8
Number of victims: 5	**Number of witnesses heard in the reporting period:** 12
Number of witnesses heard so far: 20	**Number of expert witnesses heard in the reporting period:** 0

Key developments in the reporting period:

Indictment was rejected, trial continued

131 *Bratunac* Case, trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/bratunac.html, accessed on 29 January 2019.

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

Dalibor Maksimović, a former member of the VRS, is charged in the OWCP's indictment of 14 April 2016 with involvement in the killing of four civilians – Huso, Omer and Nezir Salkić, and Mujo Šaćirović – on 9 May 1992 in the villages of Repovac and Glogova (in the municipality of Bratunac, BiH), unlawful confinement of two Bosniak women (witnesses VS1 and VS2), and raping VS1 on multiple instances.[132]

Defendant's defence

The defendant denied having committed the crimes, claiming that between April and June 1992 he was positioned ten kilometres from Milići with other members of the VRS, and that he occasionally left this position for a day or two just to go home and have a bath. He said he could not remember if in May 1992 he was at home, but did not rule out that possibility. He described his house in Milići, saying that at the relevant time his mother, stepfather, and two younger brothers were living in the house. When told by the Chair of the Chamber that witness VS1 in her testimony provided a comprehensive description of his house in Milići and the people she saw in it (she knew the house, she said, because she was raped in it), and that her description largely matched his own, Maksimović could not explain this point.[133]

Psychiatric examination of a protected witness

Before witness VS1 was put on the witness stand, she underwent a psychiatric examination, which was to assess her mental fitness to testify. The OWCP moved that the expert should also assess the level of anguish she suffered, determine whether she suffered from post-traumatic stress disorder as a consequence of the traumatic event she experienced, and whether a causal relationship could be established between the acts of the defendant and the witness's present psychological problems which are interfering with her daily life.[134] But after the court-appointed expert witness explained that such an examination would take time, and therefore could not be performed at that moment, the court dismissed the motion, invoking Article 252 of the ZKP (which stipulates that a compensation claim will be considered in the course of criminal proceedings if those proceedings would not be significantly prolonged by it), as well as other provisions requiring that criminal proceedings be conducted expeditiously. The court stated that its decision did not imply that the witness would not

132 OWCP indictment KTO no. 4/16 of 14 April 2016, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2016_04_14_lat.pdf, prisupljeno 8 January 2019. This case was referred to the OWCP by the Court of BiH under the agreement on International Legal Assistance in Criminal Matters, because Dalibor Maksimović is a citizen and resident of Serbia.

133 Transcript of the main hearing held on 29 June 2016.

134 Transcript of the main hearing held on 9 September 2016.

be able to file a compensation claim at a later date, "and, of course, undergo medical examination in the course of some other proceedings".[135]

The attorney for witness VS1, who joined the proceedings on 15 December 2016, also presented a motion seeking a medical examination of VS1 for the purpose of assessing the level of mental anguish she suffered during the events in question and their long-lasting effects on her, because the victim was planning to file a compensation claim, which according to the ZKP, has to be supported by appropriate evidence. The court's decision on this motion was still pending at the time of publication of this report.[136]

Witnesses' testimonies

The victim, participating in the proceedings under the pseudonym of witness VS1, said that on the relevant day she was with her cousin (witness VS2) in the village of Hranča (in the municipality of Bratunac, BiH). The Serbian army entered the village, drove its residents out into the road, put them on buses and transported to Repovac. In Repovac, they separated the men from the women and children. According to her account, the defendant shot Huso, the local Muslim imam, Nezir and Omer, and then slit Huso's throat.[137]

She did not know the defendant at the time, but heard that other soldiers called him "Dača". He was young, she said, of medium stature, wearing camouflage fatigues and a headband. Shortly afterwards, the bus that was to take them from Repovac to Kladanj pulled in. The witness (VS1) and witness VS2 were held by "Dača" and another soldier and ordered into a passenger car. The car drove behind the bus. When the bus arrived in Glogova, it stopped to pick up a man and a woman with children. The defendant got out of the car and shot the man, whose name was Mujo Šaćirović. He then got back into the car and they continued on their way.[138]

Somewhere between Milići and Vlasenica, they turned off the main road and entered a forest, where they stopped the car and ordered the victim and witness VS2 out. The other soldier took VS2 deeper into the forest and "Dača" raped VS1. After that, they continued driving through the forest until the car got stuck. The soldiers then split apart: "Dača" and VS1 headed for Milići ("Dača" told her he was taking her to his house), while the other soldier went away with witness VS2.[139]

The defendant's house was a two-storey structure built of blocks, she said. In the house she saw two men, two boys and the defendant's mother. The defendant took her to a room on the first floor and forbade her to leave it without his permission. That night, he raped her twice. The next morning, he told her to go to a bus stop to wait for a bus to Bratunac.[140]

135 *Ibid.*
136 Transcript of the main hearing held on 15 December 2016.
137 *Ibid.*
138 *Ibid.*
139 *Ibid.*
140 *Ibid.*

When giving her statement to the competent BiH authorities, the victim was presented with a photographic line-up and recognized the defendant as the person who raped her.[141]

Witnesses Ramo Salkić,[142] the son of the murdered Huso Salkić, and Nedžib Salkić, the son of the murdered Nezir Salkić, had no direct knowledge about the events in question.[143]

Witness VS3, the wife of the murdered Mujo Šaćirović, said that she, her husband and their three children were told by Serbian policemen to set off on foot from their village of Ramići towards the village of Glogova, and that a bus would pick them up along the road. As they walked down the road, a bus came along, followed by a car. The bus stopped and so did the car. A man of medium stature, wearing a patterned uniform and a headband, stepped out of the car and told her and her children to get on the bus and her husband to stay behind. When her husband tried to get onto the bus, the man killed him. Witness VS3 saw another man and a woman in the car; she recognized the women as her neighbour, witness VS1.[144]

Witness Mensura Brčaninović, the daughter of the murdered Mujo Šaćirović, said she did not see her father being killed but only heard a burst of automatic gunfire.[145]

Witnesses Zuhra and Zumra Salkić, eyewitnesses to the murder of Huso, Omer, and Nezir Salkić, described how the men were killed: a young soldier of medium stature, wearing a red headband, shot them. As Huso was still alive, the soldier slit his throat. Witness Zumra Salkić[146] positively identified the defendant in a photograph, while witness Zuhra Salkić pointed to the defendant's photograph saying it might be the soldier with a red scarf around his head.[147]

Overview of the proceedings in 2017

During six trial days held in 2017, 10 witnesses were examined.

Mensur Salkić, the son of the murdered Omer Salkić, who was only twelve-and-a-half years old at the time, Amir Salkić, who was 13 years old at the time,[148] and Nermin Salkić, who was 14 years old at the time,[149] testified as eye witnesses to the murder of Huso, Omer and Nezir Salkić. Their accounts of the event was identical to that given by witnesses Zumra and Zuhra Salkić.[150] They said that the defendant told them and another, unidentified, boy, to throw the bodies of the murdered men into the ditch along the side of the road, which they did. Witness Mensur Salkić said he was on the bus when witness VS3 and her three children got onto it. Her husband also wanted to get onto it, the witness

141 *Ibid.*
142 Transcript of the main hearing held on 15 December 2016.
143 Transcript of the main hearing held on 2 November 2016.
144 Transcript of the main hearing held on 5 October 2016.
145 *Ibid.*
146 Transcript of the main hearing held on 2 November 2016.
147 Transcript of the main hearing held on 15 December 2016.
148 Transcript of the main hearing held on 20 January 2017.
149 Transcript of the main hearing held on 9 March 2017.
150 Transcript of the main hearing held on 20 January 2017.

said, but the soldier who had killed his father and Huso and Nezir Salkić shoved him away from the bus and then killed him.[151]

Witnesses for the defence - Aleksandar Cvetković, Jovica Tešanović, Mile Lalić[152] and Ranko Đukanović,[153] all fellow-fighters and close friends of the defendant – said that at the relevant time they could not have travelled from Milići to Bratunac and villages around it because that territory was controlled by the Bosniak forces.

Witness Amor Mašović, Chairman of the Bosnian Federal Commission for Missing Persons and Chairman of the Board of Directors of the Missing Persons Institute of Bosnia and Herzegovina, stated that Huso, Nezir and Omer Salkić were still missing, whereas the mortal remains of Mujo Šaćirović had been found. He further said that, despite the fact that the reported times/dates of their disappearances do not coincide, there is a distinct possibility that the four victims were killed on the same day. He explained that when reporting the time/date of the disappearance of a family member, peoples sometimes state the date/time they last saw a missing person alive, and sometimes the date provided by a third person as the date a missing person was seen or otherwise known to be alive for the last time.[154]

During 2017, the court did not rule on the motion seeking a medical examination of the injured party/ witness VS1 for the purpose of assessing the level of mental anguish she had suffered during the events in question and their effects on her. The injured party therefore had no option but to hire expert witnesses herself, if she was to obtain evidence with which to support her compensation claim, as required by the CiPC.[155] The compensation claim was filed on 7 September 2017 and it was based upon the findings of a psychiatric expert, a forensic psychiatrist and a forensic psychologist. The reason why she opted for filing her compensation claim in the context of criminal proceedings rather than through civil litigation, was that as a rape victim in criminal proceedings, she was granted in-court protective measures, including testifying under a pseudonym and with her face hidden from view. If she claimed compensation through civil litigation, she would have to reveal her identity, which was something she rightly wanted to avoid.

Rejection of the indictment

On 1 November 2017, the court ruled to reject the indictment on the grounds that it was not filed by an authorised prosecutor.[156] This was because the indictment was filed on 15 April 2016, i.e. while the OWCP was without a war crimes prosecutor (from 1 January 2016 to 31 May 2017). As the War Crimes Prosecutor was present at the main hearing, she immediately moved that the proceeding be resumed, stating that once she took office on 31 May 2017 the legal requirements were met for resuming the proceedings.[157]

151 *Ibid.*
152 Transcript of the main hearing held on 21 April 2017.
153 Transcript of the main hearing held on 31 May 2017.
154 *Ibid.*
155 ZKP, Article 253, paragraph 2.
156 ZKP, Article 416, paragraph 1. Sub-paragraph 2.
157 Transcript of the main hearing held on 1 November 2017.

The defence contested the motion, seeing it as premature, as the decision rejecting the indictment had not yet become final.[158]

The chamber decided not to proceed to trial, stating that the motion by the OWCP could be decided upon only after the decision rejecting the indictment had become final.[159]

Overview of the proceedings in 2018

Continuation of the main hearing

On 12 January 2018, the chamber ruled to resume the proceedings by continuing with the presentation of evidence.[160]

Of eight trials days scheduled in 2018 only two were actually held, at which two witnesses were examined. Other hearings were postponed, pending delivery of the documentation concerning the proceedings for declaring deceased injured parties Huso Salkić, Omer Salkić and Nezir Salkić dead, which the court had requested from the competent BiH courts.

The mother of the defendant gave evidence too. She said that at the relevant time she lived with her husband (born in 1953) and their three sons – the defendant and two minor sons - in their house in Milići and worked in the catering industry. The house was a one-storey structure with an attic, made of blocks, with plastered outer walls. She denied that the defendant had brought any female person to stay the night in the house.[161]

HLC Findings

Regional Cooperation

This case is a good example of the cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. The Prosecutor's Office of BiH transferred this case to the OWCP because the defendant, being a national and resident of Serbia, was out of reach of the BiH judicial authorities.

Incomplete indictment delivered to the HLC

Invoking the Law of Free Access to Information of Public Importance, the HLC requested from the OWCP access to the indictment against Dalibor Maksimović. The OWCP delivered an incomplete

158 *Ibid.*
159 *Ibid.*
160 Transcript of the main hearing held on 12 January 2018.
161 *Ibid.*

version of the indictment,[162] as a result of which any analysis of the indictment was made impossible. Bearing in mind that the indictment had already been confirmed, and that the trial was to be held in open court, there can be no justification for delivering an incomplete indictment. Previously, the OWCP had always delivered a complete indictment, as required by the Law on Free Access to Information of Public Importance.

Violation of the right to defence

According to the ZKP, the identities of the protected witnesses must be disclosed to the defendant and his defence counsel no later than 15 days before the commencement of the trial.[163] But this was not done in the instant case. It was at the first main hearing that the Chair of the Chamber discovered that the defendant did not know the identities of the protected witnesses. Only after the hearing at which the defendant presented his defence were the identities of the protected witnesses disclosed to him and his attorney.[164] Nonetheless, his attorney failed to react to this violation of the ZKP (see *Srebrenica* Case for comparison).

In contrast to the ZKP, the Law on Witness Protection of BiH, under which witnesses VS1 and VS3 were initially accorded the status of protected witnesses, prescribes that a witness's identity must be revealed no later than on the date on which s/he testifies at the trial.[165] In spite of the fact that the Republic of Serbia assumed the criminal prosecution from BiH in this case, the proceedings ought to have been conducted from start to finish pursuant with the ZKP, which stipulates otherwise.

Compensation claim by a victim of sexual violence

In the course of criminal proceedings, including for war crimes, victims, as injured parties, are entitled to file a claim seeking compensation in respect of the material or non-pecuniary damages they have suffered. A compensation claim may be filed any time before the completion of the trial stage.[166] Yet, in the war crimes proceedings conducted so far, the court has never decided upon compensation claims filed in the course of criminal proceedings, but rather, has instructed the injured parties to seek compensation through civil litigation.[167]

The OWCP is required under the ZKP to gather the evidence necessary for adjudicating a compensation claim even before such a claim has been filed,[168] which the OWCP failed to do in the present case. Not one piece of evidence that might have supported a compensation claim was gathered during the

162 OWCP indictment KTO, no. 4/16 of 14 April 2016, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2016_04_14_lat.pdf, prisupljeno 8 January 2019.
163 ZKP, Article 106, para. 2.
164 Transcript of the main hearing held on 29 June 2016.
165 Law on Protection of Witnesses under Threat and Vulnerable Witnesses (Official Gazette of Bosnia and Hercegovina nos. 3/03, 21/03, 61/04, 55/05) Art. 12, para. 8.
166 ZKP, Articles 252–260.
167 Higher Court in Belgrade, judgment in *Sotin* (K.Po2 2/14), 26 June 2015. Higher Court in Belgrade, judgment in *Podujevo* (K.Po2 44/2010), 22 September 2010. Higher Court in Belgrade, judgment in *Zvornik II* (K.Po2 28/2010), 22 November 2010.
168 ZKP, Article 256.

investigation, nor did the OWCP propose at the preliminary hearing that such evidence, including expert opinion assessing the type and extent of mental suffering endured by the victim, be presented. Yet, during the main hearing, the OWCP presented a motion requesting the court to order a medical examination of the victim. The court denied the motion, stating that a medical examination would delay the proceedings.[169]

When deciding on the OWCP's motion, and also every time it refused to adjudicate a compensation claim, the court would justify its decision by vaguely saying that such an action would "delay the proceedings"[170], or by just citing the ZKP provisions governing compensation claims, without explaining the rationale behind its decisions. However, the relevant articles of the ZKP stipulate that a compensation claim shall be considered in criminal proceedings "if its consideration would not substantially delay those proceedings."[171] It appears that the courts have ignored the "substantial delay" requirement when deciding on whether or not to deal with compensation claims; as a "substantial delay" is a much higher threshold than just a "delay".

The HLC is of the opinion that the War Crimes Department of the Higher Court should be particularly conscientious when it comes to compensation claims by victims under protection measures. The Serbian Civil Procedure Code does not provide for withholding the identity of the parties in civil proceedings. When instructed by criminal courts to pursue compensation claims through civil proceedings, injured parties face a difficult choice between their personal security and obtaining the compensation they are entitled to.

Instructing injured parties whose identity is concealed to pursue compensation through civil proceedings, in which their identity will have to be revealed, amounts to a violation of the right to a fair trial[172], of the right to an effective remedy[173], of the right to respect for one's human dignity[174], and of the right to respect for one's private and family life.[175]

The court's failure to decide on the motion seeking a psychiatric assessment of witness VS1 was humiliating for her. Obtaining a psychiatric opinion was absolutely necessary in order for her to file a compensation claim which would be precise and well-founded. In the instant case, the court has deliberately avoided delivering a decision on the motion, while bringing the main hearing to a close, knowing that the compensation claim must be filed before the end of the main hearing before a court of first instance.[176] As a result, the injured party found herself in the very delicate situation of being prevented from fulfilling her legal obligation with regard to filing the compensation claim in time.

169 Transcript of the main hearing held on 9 September 2016.
170 *Ibid*.
171 ZKP, Article 252, paragraph 1.
172 Constitution of the RS, Article 32.
173 Constitution of the RS, Article 36.
174 Constitution of the RS, Article 23.
175 ECHR, Article 8.
176 ZKP, Article 254, paragraph 2.

Unlike in Serbia, the courts in Bosnia and Hercegovina have recognised the problems victims of wartime sexual violence face when pursuing compensation outside criminal proceedings, and have begun awarding them compensation in the course of criminal proceedings.[177] The HLC believes that the Serbian judiciary should do the same thing.

Rejection of the indictment and continuation of proceedings

The rejection of the indictment was the only correct decision that the trial panel could deliver, considering that it was raised during the time that the OWCP was without an authorised prosecutor. However, the decision arrived late. By the time it was made, the trial had got well under way, and the presentation of evidence was almost over, without the presence of an authorised prosecutor. The trial chamber could have rejected the indictment much earlier, at any previous stage of the trial.[178] The absence of an authorised prosecutor certainly constitutes a substantive infringement of procedural requirements, which may result in a sentence being set aside and retrial being ordered on appeal. Given that this is a sexual violence trial, any repetition of the proceedings will re-traumatise the protected witness, as she would have to testify again.

177 Court of Bosnia and Herzegovina, first-instance ruling in *Ostoja and Bosiljko Marković* (S1 1 K 012024 14 Kri); Court of Bosnia and Herzegovina, first-instance ruling in *Krsto Dostić* (S1 1 K 019771 15 Kri); Court of Bosnia and Herzegovina, second-instance ruling in *Slavko Savić* (S1 1 K 017213 14 Krž).

178 ZKP, Article 416, paragraph 1, sub-paragraph 2.

II. Brčko Case[179]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 12 September 2018
Trial commencement date: 3 December 2018
Prosecutor: Svetislav Rabrenović
Defendant: Nikola Vida Lujić
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Dejan Terzić (Chair of the Chamber) Judge Mirjana Ilić Judge Zorana Trajković

Number of defendants: 1	
Defendant's rank: no rank	**Number of trial days in the reporting period:** 1
Number of victims: 1	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard so far: 0	**Number of expert witnesses heard:** 0

Key developments in the reporting period:

Main hearing

179 *Brčko* Case trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/brcko2.html, accessed on 30 January 2019.

The course of the proceedings

Indictment

The defendant, Nikola Vida Lujić, at the time a member of the "Crvene beretke" [Red Berets] unit, is charged with having raped a Bosniak woman on 20 June 1992 in Brčko (BiH). Lujić, armed and uniformed, came to her house together with two other as yet unidentified soldiers, and holding her at gunpoint, ordered her to give him her gold jewellery and money, after which he raped her.[180]

Defendant's defence

The defendant denied having committed the crime. He claimed that he was not a member of any armed unit during the war in BiH, that he did not know the victim and that had never been in her house. During his testimony, his competence to stand trial seemed questionable.[181]

HLC Findings

Regional Cooperation

This case is a result of the ongoing cooperation between Serbian and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. Since the defendant is a citizen and resident of the Republic of Serbia, and as such not available to the BiH judicial authorities, the Court in Doboj referred the case against him to the Serbian judiciary.

Prosecution of sexual violence

The indictment against Lujić was the second ever indictment to deal exclusively with war-related acts of sexual violence. Sexual violence has rarely been prosecuted alone. In most cases, it has been prosecuted as a crime accompanying murders and other forms of physical violence.[182] The first indictment to deal with sexual violence – rape – was in the *Bijeljina II* Case.[183]

180 OWCP indictment KTO no. 4/2018 of 12 September 2018, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2018-10/redigovana_optuznica_kto_4_18_lat.pdf, accessed on 5 January 2019.

181 Transcript of the main hearing held on 3 December 2018.

182 See cases*: Lekaj*, *Skočić* and *Bratunac*.

183 OWCP indictment against Miodrag Živković, 4 June 2014, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2014_06_04_lat.pdf, accessed on 5 January 2019.

III. Ćuška Case[184]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings (retrial)
Date of indictment: 10 September 2010
Trial commencement date: 20 December 2010
Prosecutor: Bruno Vekarić
Defendants: Toplica Miladinović, Abdulah Sokić, Srećko Popović, Siniša Mišić, Slaviša Kastratović, Boban Bogićević, Veljko Korićanin, Vladan Krstović, Lazar Pavlović and Milan Ivanović
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Vladimir Duruz (Chair of the Chamber) Judge Vinka Beraha-Nikićević Judge Vera Vukotić

Number of defendants: 10	
Defendants' ranks: low and middle	**Number of trial days in the reporting period:** 9
Number of victims: 141	**Number of witnesses heard in the reporting period:** 13
Number of witnesses heard so far: 116	

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

184 *Ćuška* Trial reports and case documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/cuska.html, accessed on 27 November 2018.

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

The first indictment for the crime in Ćuška/Qyshk the OWCP filed on 10 September 2010, against nine individuals, namely Toplica Miladinović, Srećko Popović, Slaviša Kastratović, Boban Bogićević, Zvonimir Cvetković, Radoslav Brnović, Vidoje Koričanin, Veljko Koričanin and Abdulah Sokić.[185]

The nine, who were members of the VJ Peć Military Territorial Detachment (177th VTO), or Peć Territorial Defence Force, or active-duty and reserve police components at the relevant time, were charged with an attack on the civilian population in the village of Ćuška (in the municipality of Peć/Pejë, Kosovo), which they carried out under the command of Nebojša Minić (now deceased), on 14 May 1999. During the attack, they killed 44 Kosovo Albanian civilians; burned down at least 40 private houses and over 40 other buildings, three trucks and five passenger vehicles; robbed the residents of the village of gold, jewellery and other valuables the value of which has not been determined, as well as of 125,000 Deutsch Marks, several passenger vehicles and two trucks; and expelled more than 400 women, children and elderly people.[186]

In 2011 and 2012 the OWCP charged five more individuals over the crime: Zoran Obradović,[187] Milojko Nikolić[188], Ranko Momić[189], Siniša Mišić[190], and Dejan Bulatović.[191]

On 27 September, 2012, the indictment was again amended to include also the crimes committed on 14 April 1999 in the villages of Ljubenić/Lubeniq, Pavljan/Pavlane and Zahać/Zahaq. In Ljubenić, the accused killed at least 43 Albanian civilians and wounded 12, torched 11 houses, and seized money from civilians before expelling them to Albania. Later the same day, the accused killed 10 civilians, torched at least seven private houses, and seized money and valuables from local civilians in the village of Pavljan. Their killing spree continued in the village of Zahać, where they killed at least 22 Albanian civilians, robbed the locals of around 28,000 German marks and 30 vehicles, torched five houses and drove civilians out of the village.[192]

The OWCP dropped charges against Zvonimir Cvetković. On 17 December 2012, it filed a consolidated indictment which included 13 defendants: Toplica Miladinović, Srećko Popović, Slaviša Kastratović,

185 OWCP indictment KTRZ 4/10 of 10 September 2010, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2010_09_10_eng.pdf, accessed on 8 January 2019.
186 *Ibid*.
187 OWCP indictment, KTRZ 4/10 of 1 April 2011.
188 OWCP indictment, KTRZ 07/11 of 27 April 2011.
189 OWCP indictment, KTRZ 9/11 of 31 May 2011, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2011_05_31_eng.pdf, accessed on 8 January 2019.
190 OWCP indictment, KTRZ 19/11 of 7 November 2011.
191 OWCP indictment, KTO no. 5/2012 of 26 September 2018.
192 OWCP indictment KTRZ 4/10 of 27 September 2012.

Boban Bogićević, Radoslav Brnović, Vidoje Korićanin, Veljko Korićanin, Abdulah Sokić, Zoran Obradović, Milojko Nikolić, Ranko Momić, Siniša Mišić and Dejan Bulatović.[193]

With the proceedings already underway, on 2 July 2013, the OWCP dropped charges against Vidoje Korićanin. On 28 December 2012, the OWCP entered into a plea agreement with a defendant, who would later go by the pseudonym "A1". The agreement stipulated that the charges against "A1" would be dropped after his testimony, which was given on 19 June 2013. The indictment was amended three more times before the end of the first-instance proceedings: on 2 October[194], 16 October[195] and 5 December 2013.[196] The final version also included the rape of the 13-year-old G.N. in Pavljan.

First-instance judgment

On 11 February 2014, the Higher Court in Belgrade[197] judged nine of the defendants guilty of a war crime against the civilian population and sentenced them to imprisonment for periods ranging from two to 20 years. Two of the defendants – Radoslav Brnović and Veljko Korićanin – were acquitted for lack of evidence.[198]

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

193 Amended and consolidated OWCP indictment KTRZ 4/10 of 17 December 2012, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2012_12_17_eng.pdf, accessed on 8 January 2019.
194 Amended OWCP indictment KTRZ 4/10 of 2 October 2013.
195 Transcript of the main hearing held on 6 October 2018.
196 Amended OWCP indictment KTRZ 4/10 of 5 December 2013.
197 Sitting as a Chamber composed of Judge Snežana Nikolić-Garotić (Chair), and Judges Vinka Beraha-Nikićević and Rastko Popović (members).
198 Higher Court in Belgrade, judgment K Po2 no. 48/2012 of 11 February 2014.

Second-instance judgment

On 25 February 2015, The Court of Appeal in Belgrade[199] upheld the appeals of all the defendants, quashed the first-instance judgment and remanded the case to the court of first instance for retrial. The Court of Appeal found the first-instance judgment to be in breach of statutory procedural requirements, as its "operative provision is incoherent and self-contradictory", not containing sufficient reasons in relation to the decisive facts, with the reasons given being vague and somewhat contradictory. The court also found that the finding of facts presented by the court of first instance was incorrect and incomplete.[200]

Retrial

The retrial commenced on 8 June 2015 before a different chamber.[201] The case against the defendant Ranko Momić, who was still at large, was severed from the case. Also, the proceedings against the former police officers Vladan Krstović, Lazar Pavlović and Milan Ivanović, who were charged with involvement in the events of 1 April 1999 in Ljubenić (*Ljubenić* Case),[202] were merged with the *Ćuška* Case.

On 29 September 2015, the proceedings were discontinued against the defendant Radoslav Brnović, owing to his death.

Witness Zoran Rašković, who had appeared as a protected witness at the initial trial, testified again. He stood by his earlier testimony entirely, saying that the defendants Krstović and Ivanović were in Ljubenić on the relevant date, but was not sure if Pavlović was there too. Describing the attack on Ljubenić, Rašković said that between 60 and 100 men, Albanian civilians, were killed during the attack. He also said that the Commander of the "Šakali" [Jackals] unit ordered that all men over 12 years of age be separated from the assembled group of Ljubenić residents. The men thus separated were later executed.[203]

On 22 December 2015, the OWCP filed a consolidated indictment against 12 defendants – Toplica Miladinović, Srećko Popović, Milojko Nikolić, Siniša Mišić, Slaviša Kastratović, Boban Bogićević, Dejan Bulatović, Abdulah Sokić, Vladan Krstović, Lazar Pavlović, Milan Ivanović and Veljko Korićanin.[204]

199 Sitting as a Chamber composed of Judge Sonja Manojlović (Chair), and Judges Nada Hadži Perić, Vučko Mirčić, Bojana Paunović and Jasmina Vasović (members).

200 Court of Appeal in Belgrade decision Kž1 Kpo2 6/14 of 26 February 2015, available online (in Serbian) at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-6-14.html, accessed on 8 January 2019.

201 Composed of Judge Vladimir Duruz (Chair), and Judges Vinka Beraha-Nikićević and Vera Vukotić (members).

202 OWCP indictment KTO 8/13 of 7 April 2014, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2014_04_07_lat.pdf, accessed on 8 January 2018.

203 Transcript of the main hearing held on 23 November 2015.

204 OWCP indictment KTRZ no. 4/10 of 22 December 2015.

On 25 January 2016, the case against the defendant Dejan Bulatović was severed from the *Ćuška* Case because he was no longer able to participate in the proceedings owing to his ill health.[205]

Two witnesses called by Vladan Krstović's and Lazar Pavlović's defence attorneys were examined. They stated that at the time of the crimes the defendants were with them in restaurants.[206] The court also heard witnesses who had previously given evidence in this case.[207]

Overview of the proceedings in 2017

Seven main hearings were scheduled and six held during 2017. Nine witnesses who had testified at the initial trial were examined again.

The case against the defendant Milojko Nikolić was discontinued owing to his death.

On 7 September 2017, Boban Bogićević's attorney pointed out to the court that a few of the main hearings had been held without the presence of an authorized prosecutor, as the OWCP had no prosecutor from 1 January 2016, when the term of office of the previous incumbent expired, to 31 May 2017, when the new prosecutor took office. He moved that the evidence heard at these hearings be heard again.[208]

By the end of 2017, the court had not decided on the motion.

Overview of the proceedings in 2018

Five main hearings were scheduled but only three held during 2018. Four witnesses from Kosovo, who had already testified in this case, were heard.[209] Several witnesses failed to appear in court. With regard to some of them, there was no proof that they had been properly and timely summoned[210]; others did not want to come to court, preferring to give evidence via video link.[211]

Hearings of evidence will continue on into 2019.

205 Transcript of the main hearing held on 25 January 2016.
206 *Ibid.*
207 Transcript of the main hearing held on 17 March 2016. Transcript of the main hearing held on 21 April 2016. Transcript of the main hearing held on 6 July 2016.
208 Transcript of the main hearing held on 7 September 2017.
209 Transcript of the main hearing held on 26 February 2018; Transcript of the main hearing held on 25 April 2018; Transcript of the main hearing held on 24 September 2018.
210 *Ibid.*
211 *Ibid.*

HLC Findings

Excessive duration of the proceedings

This case has entered its ninth year with no end in sight, as the retrial is not likely to end any time soon. During 2016, nine trials days were scheduled, with only five actually being held. In 2017 only six trial days occurred, and in 2018 no more than three. The hearings were postponed mainly owing to the absence of witnesses from Kosovo. In the meantime, two defendants – Radoslav Brnović and Milojko Nikolić – had died, the charges against defendant Dejan Bulatović had been dropped, and Ranko Momić was no longer available to stand trial. In consequence, these four indictees will have to be removed from the indictment, as a result of which the victims whose deaths or suffering they caused will also have to be left out from further proceedings.

The prosecution's case was ill-prepared

Over the course of the trial, the OWCP kept bringing new charges against new suspects, dropping charges regarding some other suspects, and altering the indictment. Two years after bringing the initial indictment concerning the crime in Ćuška, the OWCP amended it to include in it the crimes committed in the villages of Pavljan and Zahać, in the vicinity of Ćuška. All these reveal how perfunctory the OWCP's approach to prosecuting the crimes in the said villages has been. Instead of resolving some matters during the investigation, they were left to be addressed at the trial, as a result of which the trial has been unduly prolonged and victims are further traumatised and frustrated. After so many years and with no end in sight to the proceedings, they may wonder if they will ever receive justice.

Incomplete indictment

Non-prosecution of senior army officers

A large amount of the evidence presented since the beginning of this trial has implicated certain senior VJ officers in the crime. Nevertheless, none of them have faced charges, only the lower ranking officers.

The Chair of the Chamber touched on this when pronouncing the judgment in February 2014: "The rules of military hierarchy compel us to conclude that there must have been someone else as well, besides Toplica Miladinović; however, we could only deal with what was set out in the indictment".

This was confirmed by the Prosecutor in his closing arguments: "…It was not determined at what level all this was planned, but that was not the subject of this case…."[212]

212 Transcript of the delivery of judgment of 11 February 2014.

The OWCP's decision of August 2014 to open an investigation against Dragan Živanović seemed to be a promising step towards determining the criminal accountability of more senior army officers for the crimes charged by the indictment in the *Ćuška* Case. Živanović was the Commander of the 125th VJ Motorized Brigade, whose area of responsibility included the villages where the crimes took place. However, it came to nothing, as the OWCP on 1 March 2017 decided to end the investigation because there was not sufficient evidence to charge him. This decision of the OWCP is highly questionable (for further details see the section on the OWCP's inefficiency/Absence of charges against high-level perpetrators).

MUP's part was left unclarified

The proceedings failed to clarify the MUP's part in organising, executing and covering up the crimes. A few witnesses and some of the defendants who took the stand in their own defence referred to the part played by the police forces in the crimes.[213] Furthermore, during the evidence presentation process, the war diary of the Military Recruitment Office in Peć was examined, which contains entries relating to the 177th VTO, with one entry stating that two MUP companies were attached to the 177th VTO. Also, several injured parties, and the defendants as well, testified that not only military personnel, but also many police officers were present in the villages at the time of the commission of the crimes. This point was highlighted by the Chair of the Chamber while she was pronouncing the judgment: "The court is certain and convinced that the victims do distinguish blue uniforms from green uniforms, and they say that someone else was there..."[214] Notwithstanding this, the OWCP did not probe into the allegations linking MUP members to the crimes, thus failing to discharge its obligation to carry out an effective investigation in order to adequately investigate all allegations put forward.

Protection of witnesses

The testimony of the protected witness Zoran Rašković has been one of the most striking testimonies ever presented before the War Crimes Department. Not only did it contribute to determining the facts of the case, it also drew attention to one of the main problems besetting all war crime trials in Serbia - the inefficient protection of insider witnesses, i.e. of former or active members of security forces. Witness Zoran Rašković - (during the investigation phase, he was granted the status of protected witness; at the main trial, however, he decided of his own accord to testify under his real name) - repeatedly pinpointed the failings in the witness protection programme, and spoke about the threats he was receiving, including those by the very policemen responsible for protecting his security.[215] At the retrial, he said that his ordeal continued, and spoke about not being able to obtain a personal ID, which prevented him from living a normal life.[216] A comprehensive analysis of this issue can be found in the HLC's *Report on War Crimes Trials in Serbia in 2011*[217] and *Analysis of the Prosecution of War Crimes in Serbia*.[218]

213 Witnesses M.J., M.V. and Z.R., and the defendants Toplica Miladinović, Srećko Popović and Radoslav Brnović.
214 Transcript of the delivery of judgment of 11 February 2014.
215 Transcript of the main hearing held on 25 January 2012.
216 Transcript of the main hearing held on 23 November 2015.
217 Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2011* (Belgrade: HLC,2012), pp. 99, 100 and 101.
218 *Analysis of the Prosecution of War Crimes in Serbia 2004-2013.*

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

The Court of Appeal upheld the appeal lodged by the defendant Toplica Miladinović's lawyer, challenging the factual finding on the basis of which it was determined that Miladinović had given the order for attacking the civilians. According to the Court of Appeal, the court of first instance's finding that Miladinović had given the order in question was based on the evidence given by witnesses who had only indirect knowledge of the event, and on the war diary of the VJ 177th VTO, the authenticity of which the Court of Appeal assessed as disputable.

At the same time, the Court of Appeal found it indisputable that Miladinović's alleged order had been passed on by the late Nebojša Minić with the following words: "Guys, let's get ready, we're leaving in 10 minutes, it's the village of Ćuška, we need to drive some Germans out, torch some houses, tear up some documents, and do everything else that's necessary." Also, the Court of Appeal did not infer the alternative conclusion that, for example, Minić might himself have made up the wording of the order as he was leaving the meeting with Miladinović, and passed it on in that changed form. Nevertheless, the Court of Appeal challenged the content of the alleged order passed on in the above cited form, by stating: "It is unclear as to how the court of first instance became satisfied that this order had referred to the execution of the attacks on the ethnic Albanian civilian population in the said villages and their displacement, and why it ruled out the possibility that the order might have referred to a legitimate military operation directed against fighters of the opposite side in the armed conflict, or aimed at uncovering KLA members and disarming them."[219]

The above-cited statement shows that the Court of Appeal disregarded the finding of the court of first instance that the KLA had not been present in the said villages at the relevant time. Therefore its interpretation of the meaning of the said order is entirely ungrounded. Finally, the court's suggestion that torching houses or tearing up documents might be understood as a call for a legitimate military operation is nothing if not a biased interpretation of the factual findings, particularly in the light of the fact that a number of judgments have found so far that this was the actual *modus operandi* of the Serbian forces during the Kosovo war.

The Court of Appeal also contested the finding of the court of first instance that Toplica Miladinović had direct knowledge of the crimes, stationed as he was at the very entrance to the village of Ljubenić during the attack on this village. Two findings made by the Court of Appeal supported this disagreement with the earlier finding. Firstly, the statement of the witness who said that Miladinović was present was not corroborated by other evidence. Secondly, "none of the women, children and elderly people examined during the proceedings noticed that the defendant Miladinović was present at the village entrance, and they, being forced to leave the village, had had to pass through the village entrance; nor had they noticed that anyone with a rank higher than that of the late Minić participated in the attacks on the village […]".[220] The HLC holds that giving decisive weight to victims' ability to

219 Court of Appeal in Belgrade, decision no. Kž1 Kpo2 6/14 of 26 February 2015.
220 *Ibid.*

observe certain details, such as the presence of a person unknown to them at the village entrance or his rank insignia, at moments when they are struggling for their lives, is in effect an attempt to shift the burden of proof to the victims and thus traumatise them further, and yet another proof of the Court of Appeal's bias against the injured parties.

The Court of Appeal also found that as the court of first instance "failed to establish with absolute certainty the organisational structure of the 177th VTO based in Peć"[221], it remained uncertain whether it's Quick Reaction Platoon actually existed, whether Miladinović was its Commander, and whether he had the authority to order military actions".[222] The "uncertainties" found by the Court of Appeal are highly disputable. Firstly, because for determining Miladinović's criminal responsibility, it is completely irrelevant whether the order was issued to the Quick Reaction Platoon of the 177th VTO or to an armed group under a different name. The suggestion that the very existence of the Quick Reaction Platoon was not proved is misleading in that it could lead one to come to the incorrect conclusion that the crimes in Ljubenić, Ćuška, Pavljan and Zahać were not committed by official armed forces but some informal armed groups. And the defendants' affiliation with the official armed forces was proved beyond doubt during the first-instance proceedings. Whether or not Miladinović possessed the commanding authority and the authority to give orders is also irrelevant for determining his criminal responsibility, because "ordering" as a mode of criminal liability does not require that the order must be issued by a person acting in any official capacity.

221 *Ibid.*
222 *Ibid.*

IV. Ključ – Rejzovići Case[223]

CASE INFORMATION	
Current stage of the proceedings: first-instance proceedings	
Date of indictment: 1 February 2018.	
Trial commencement date: 19 April 2018.	
Prosecutor: Mioljub Vitorović	
Defendant: Željko Budimir	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Vinka Beraha-Nikićević (Chair) Judge Vladimir Duruz Judge Vera Vukotić
Number of defendants: 1 **Defendant's rank:** low **Number of victims:** 2 **Number of witnesses heard so far:** 2	**Number of trial days in the reporting period:** 3 **Number of witnesses heard in the reporting period:** 2 **Number of expert witnesses heard:** 0
Key developments in the reporting period: Main hearing	

223 *Ključ –Rejzovići* Trial reports and case documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc-rejzovici.html, accessed on 11 December 2018.

The course of the proceedings

Indictment

The indictment against Željko Budimir alleges as follows: on 21 November 1992 at around 23.00 hours, Budimir, Predrag Bajić and Mladenko Vrtunić,[224] armed with automatic rifles, a rifle dubbed "Pumparica", a pistol and a knife, broke into the house of injured party Ale Štrkonjić in Rejzovići, a settlement in the Ključ municipality, BiH, by smashing the glass on the front door. Ale Štrkonjić was at home with his wife Fatima Štrkonjić and mother-in-law Fata Koljić. In order to extract money from him, the attackers stabbed and slashed Ale Štrkonjić in the head, left forearm and left lower leg. He gave them 800 German marks. Dissatisfied with the amount of money, they demanded more. He told them that he had some money buried in the garden. The defendant and Bajić then took him to the garden, and the injured party dug out another 5,500 German marks and gave it to them. While they were counting the money, Ale Štrkonjić escaped. Afterwards, one of the attackers killed Fatima Štrkonjić by shooting her in the head, and then killed Fata Koljić too, by slitting her throat.[225]

Defendant's defence

The defendant maintained his innocence. He denied ever having seen the family of the injured party, claiming that he was not in Rejzovići at the relevant time but at his family's property in Sanica, located 18 kilometres from Ključ. His family was celebrating their Patron Saint's Day and their house was full of guests. In the evening, he said, he, a friend, and Milenko, soon-to-be his best man, walked for about 40 minutes from Sanica to the next village, to visit his girlfriend. In her house, they found her parents, her two sisters, an uncle and a few neighbours. Budimir proposed to her, after which he stayed the night at her house. They agreed that he would bring her to his house on 29 November 1992, which is when he went to Ključ for the first time after his father's death. After the wedding, he went to fight in the war in the Bihać area.[226]

Witnesses

Three trial days were held in the reporting period, on which three witnesses were examined. The witnesses, who were at the Cantonal Court in Bihać, testified and were questioned via video conferencing.

Witness/injured party Ale Štrkonjić maintained that the defendant was in his house on the relevant date, and that he cursed, insulted and beat him. When presented with a photographic line-up, he did

224 Predrag Bajić and Mladenko Vrtunić were finally convicted of the crime by the Cantonal Court in Bihać. Predrag Bajić (case no. 01 0 K 008800 14 K) received 13, and Mladenko Vrtunić (case no. 01 0 K 007438 13 K) 10 years in prison.

225 OWCP indictment KTO 2/18 of 1 February 2018, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2018-03/redigovana_budimir_zeljkodoc~0.pdf, accessed on 11 December 2018.

226 Transcript of the main hearing held on 19 April 2018.

not recognize the defendant as a perpetrator, even though he had previously recognized him when giving a statement at the Cantonal Court Bihać in 2010.[227]

Witness Mladen Vrtunić, who was finally convicted of this crime, denied his involvement in it, claiming he was somewhere else at the time. He claimed that his conviction was based on false witness testimonies and on a statement given by Predrag Bajić after concluding a plea agreement with the Prosecutor's Office in Bihać. Bajić subsequently altered his statement, and said before the Cantonal Court in Bihać that he and the defendant were not in the injured party's house on the relevant day.[228]

HLC Findings

Regional Cooperation

This case is a result of the cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. It was transferred to the OWCP by the Cantonal Court in Bihać, because the defendant, being a national and resident of Serbia, was out of reach of the BiH judicial authorities. Also, this was the first indictment the OWCP raised in 2018.

The proceedings were impossible to follow

The courtroom in which the main hearing takes place is not equipped with headphones for members of the audience. Headphones are only provided for members of the chamber and participants in the proceedings. As a result, is very difficult for the audience to follow the witnesses giving evidence via video conferencing. As this trial is open to the public, the court has a duty to provide headphones also to people in the audience and thus make it possible for them to hear clearly what is being said by witnesses who testify via video conference.

227 Transcript of the main hearing held on 20 June 2018.
228 Transcript of the main hearing held on 4 September 2018.

V. Lovas Case[229]

CASE INFORMATION	
Current stage of the proceedings: first-instance proceedings (retrial)	
Date of indictment: 28 November 2007	
Trial commencement date: 17 April 2008	
Prosecutor: Dušan Knežević	
Defendants: Milan Devčić, Željko Krnjajić, Darko Perić, Radovan Vlajković, Radisav Josipović, Jovan Dimitrijević, Saša Stojanović and Zoran Kosijer	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Zorana Trajković (Chair of the Chamber) Judge Mirjana Ilić Judge Dejan Terzić
Number of defendants: 8 **Defendants' rank:** low and medium **Number of victims:** 70 **Number of witnesses heard:** 193	**Number of trial days in the reporting period:** 7 **Number of witnesses heard in the reporting period:** 0
Key developments in the reporting period: Main hearing in retrial	

229 Higher Court in Belgrade, *Lovas* (K.Po2 1/14), available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/lovas.html, accessed on 28 November 2018.

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

The original indictment charged 14 defendants, members of various armed forces, with an attack against the civilian population in the Lovas area and in the village of Lovas (Croatia) in October and November 1991, and with the inhumane treatment, torture, physical abuse and killing of civilians, which resulted in the death of 69 civilians and in 12 being severely or lightly wounded.

The accused were: Ljuban Devetak, Milan Devčić and Milan Radojčić (members of the self-established local civilian-military government in Lovas); Željko Krnjajić (Tovarnik Police Station commander); Miodrag Dimitrijević, Darko Perić, Radovan Vlajković and Radisav Josipović (members of the Valjevo Territorial Defence Force, whose units served as part of the 2nd Proletarian Elite Motorized Brigade (2nd PGMBr) of the JNA; and Petronije Stevanović, Aleksandar Nikolaidis, Dragan Bačić, Zoran Kosijer, Jovan Dimitrijević and Saša Stojanović (members of the "Dušan Silni" [Dušan The Great] volunteer armed group).[230]

The amended indictment of 28 December 2011, reduced the number of civilians killed from the initial 69 to 44.[231]

Judgment at first instance

On 26 June 2012, the War Crimes Department of the Higher Court in Belgrade[232] judged all the defendants guilty of committing a war crime against the civilian population as co-perpetrators. They received sentences ranging from four to 20 years' imprisonment.[233] A comprehensive analysis of the first-instance judgment can be found in the HLC's *Report on War Crimes Trials in Serbia in 2012*.[234]

230 OWCP indictment KTRZ 7/07 of 28 November 2007, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2007_11_28_lat.pdf accessed on 28 November 2018.

231 Amended, more precise indictment KTRZ 7/07 of 28 December 2011.

232 Sitting as a panel composed of: Judge Olivera Anđelković (Chair), and Judges Tajana Vuković and Dragan Mirković (members).

233 Higher Court in Belgrade, judgment K.Po2 22/2010 of 26 June 2012.

234 *Report on War Crimes Trials in Serbia in 2012* (Belgrade, HLC 2013), pp. 53-63.

Judgment on appeal

On 9 December 2013, the Court of Appeal in Belgrade[235] reversed the judgment of the War Crime Department of the Higher Court in Belgrade on appeal, and sent the case back to the court of first instance for retrial and reconsideration.[236]

The Court of Appeal found that the trial court had failed to clearly indicate the grounds on which it based its finding of the defendants' guilt as co-perpetrators, and to specify which acts committed by each of the defendants constituted co-perpetration. It is noteworthy that the Court of Appeal found that the first-instance judgment had in effect convicted the defendants of command responsibility. However, instead of providing clear arguments for finding such a mode of accountability, the court of first instance opted to treat command responsibility as a mode of responsibility that fits within the overly broad definition of co-perpetration. This is something domestic courts often do. At the same time, as found by the Court of Appeal, the first-instance judgment did not establish or explain the link between the acts of higher ranking defendants and the acts of the immediate perpetrators and their consequences.

The HLC offered a detailed analysis of the judgment of the Court of Appeal in its *Report on War Crimes Trials in Serbia in 2013*.[237]

Retrial

The retrial[238] opened with a preparatory hearing on 4 March 2014 with another Chair of the Chamber, Judge Vinka Beraha-Nikićević, after the previous Chair, Judge Olivera Andjelković, had been appointed to the Court of Appeal. The defence lawyer for Ljuban Devetak informed the court that his client had suffered a massive stroke, so the court sought an expert opinion on his fitness to stand trial. The case against him was separated from the *Lovas* Case.

In separate proceedings conducted against Ljuban Devetak, a medical expert found that he was no longer able to participate in the trial, for which reason the court dismissed the indictment against him on 12 May 2014.[239]

On 28 May 2014, the Chair of the Chamber, Judge Vinka Beraha-Nikićević sought to step down from the proceedings, stating that it was not appropriate for her to hear the case, because she had sat on the pre-trial chamber which in 2008 had decided on an objection filed by the defendants against the original OWCP indictment. The President of the Higher Court ruled on 30 May 2014 to grant her request and assigned another judge to chair the chamber.[240]

235 Sitting as a chamber composed of: Judge Sonja Manojlović (Chair), and Judges Sretko Janković, Miodrag Majić, Omer Hadžiomerović and Vučko Mirčić (members).

236 War Crimes Department of the Court of Appeal in Belgrade, decision no. Kž1 Po2 3/13 of 9 December 2013, available online (in Serbian) at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-3-13.html, accessed on 28 November 2018.

237 Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2013* (Belgrade, HLC 2014) pp. 66-75.

238 Higher Court in Belgrade, retrial in *Lovas* (case no. K. Po2 1/14).

239 Higher Court in Belgrade, severed case against the defendant Ljuban Devetak (K.Po2 8/14).

240 Higher Court in Belgrade, decision no. VII Su no. 39/14-183 of 30 May 2014.

The main hearing in the retrial opened before a new chamber[241] on 2 September 2014, on a new, amended indictment.

In executing the instruction of the Court of Appeal to specify more precisely the criminal acts performed by each of the defendants charged of acting as co-perpetrators, the OWCP specified those actions more precisely in the amended indictment, without making any significant changes to other parts of the original indictment.[242]

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

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

The military expert was questioned once again. He stood by what he had in his previous testimony, adding that on the basis of the available documentation he had concluded that the JNA command structure was in complete disarray at the time, not only in Lovas, but in the whole area of responsibility of the 2nd Division. The Commander of the Division, Dušan Lončar, commanded all units, and was also under the obligation to control the implementation of all his orders, which he failed to do. The expert did not find information indicating that Dušan Lončar had ever been in Lovas. Following the incident in the minefield, he was supposed to make a report thereupon, which he did not do.[243]

The defendant Miodrag Dimitrijević hired a military expert consultant, who asserted his innocence and said that the defendant Dimitrijević did not possess command authority.[244]

Closing arguments were due to take place in January 2016. However, according to the Higher Court's Annual Work Schedule for 2016, the Chair of the Chamber, Judge Bojan Mišić, was transferred to the first-instance criminal department, and one more chamber member was also replaced, so the case was assigned to new judges again.

Because of changes to the chair and members of the chamber, the main hearing started anew on 2 March 2016. Over its course, the military expert Boško Antić was heard once again. He reversed his previous finding, saying that he found the attack on Lovas to be legitimate.[245]

The proceedings were discontinued against Milan Radojčić, who had died in the meantime.

241 Composed of Judge Bojan Mišić (Chair) and Judges Mirjana Ilić and Dragan Mirković (members).
242 Amended OWCP indictment KTRZ 7/07 of 2 September 2014.
243 Transcript of the main hearing held on 25 September 2015.
244 Transcript of the main hearing held on 2 July 2015.
245 Transcript of the main hearing held on 27 December 2016.

Overview of the proceedings in 2017

In 2017, nine trial days were scheduled, but only three held.

On 5 January 2017, the OWCP amended the indictment so as to charge 10 indictees. The reduction in the number of indictees resulted in the reduction in the number of victims to 32. The allegation that the attack on Lovas was carried out on the orders of Dušan Lončar, the Commander of the JNA 2nd PEMB, to which the Tovarnik Territorial Defence Force the and "Dušan Silni" volunteer unit were attached during the attack, was omitted from the amended indictment.[246]

The Acting Deputy Prosecutor was the first to present his closing arguments, followed by the attorney for the injured parties,[247] and the defence lawyers for Milan Devčić, Željko Krnjajić, Miodrag Dimitrijević,[248] Radovan Vlajković, Darko Perić, Radisav Josipović and Jovan Dimitrijević (in that order).[249]

On 17 July 2017, the defence lawyers for the defendants Milan Devčić, Željko Krnjajić, Miodrag Dimitrijević, Petronije Stevanović, Saša Jovanović, Zoran Kosijer and Radovan Vlajković presented a motion seeking that the court reject the amended indictment because it had not been amended and filed by an authorised prosecutor (it was amended on 5 January 2017, while the OWCP was without prosecutor or acting prosecutor, as from 1 January 2016 to end of May 2017). They also submitted that during that period the main hearings were held without the presence of an authorised prosecutor.[250] By the end of 2017 the court had yet to decide upon the motion.

Overview of the proceedings in 2018

Nine trial days were scheduled in 2018, but only four were held.

The proceedings were discontinued against Petronije Stevanović owing to his death. Since Miodrag Dimitrijević was no longer able to appear before the court for health reasons, the court decided to try his case separately.

On 14 June 2018, the Trial Chamber decided to open the main hearing anew. The decision came as a result of the Court of Appeal's position that deputy prosecutors were not authorised to act on behalf of the prosecution during the time that the OWCP was without prosecutor.[251]

246 OWCP indictment KT 7/07 of 5 January 2017.
247 Transcript of the main hearing held on 28 March 2017.
248 Transcript of the main hearing held on 10 May 2017.
249 Transcript of the main hearing held on 11 May 2017.
250 Transcript of the main hearing held on 17 July 2017.
251 Transcript of the main hearing held on 14 June 2018.

The deputy prosecutor assigned to the case read out the amended indictment, including the changes made as a result of the severance of the case against Miodrag Dimitrijević and the discontinuation of the proceedings against Petronije Stevanović. As a result of these amendments, the number of victims who were listed in the indictment as killed during the attack on Lovas was reduced to only 28.[252]

Having heard the evidence by the end of 2018, the court scheduled the closing arguments for January 2019.

HLC Findings

A series of delays and setbacks in the proceedings

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

The original OWCP indictment included 69 victims who had lost their lives, but the OWCP did not produce enough evidence to show how they had been killed. As during the investigation stage, the OWCP failed to meet its burden of proof to clarify the circumstances of their deaths and the responsibility of the defendants, and to produce evidence in that respect, the court, ex officio, summoned and questioned a large number of witnesses in order to do so.

In December 2011, in the third year of the trial, the OWCP amended the indictment to add precision and accuracy to the charges, and reduced the number of victims to 44. However, not even the amended indictment fully specified the way the civilians had been killed or the defendants' responsibility for the deaths of some of the victims. And that is why the court, in its judgment of 26 June 2012, could find the defendants guilty beyond doubt only for the killing of 41 victims.

The Chair of the Chamber, Judge Vinka Beraha-Nikičević, also played a part in delaying the proceedings, by requesting to step down five months after being given the case, although the grounds for her recusal existed and were known at the time she was assigned to this case.

Finally, the decision of the Court President, just prior to the closing arguments, to replace the Chair of the Chamber after eight years of proceedings can only be understood as a deliberate attempt to drag out the process. Especially in view of the fact that the Court President is required, when preparing the court's annual work schedule, to ensure that proceedings are conducted in a timely and cost-effective manner.[253]

252 *Ibid.*
253 Courts' Rules of Procedure (Official Gazette of the RS, no. 110/09, 70/11, 19/12 i 89/13), Article 46, paragraph 3.

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

Also, when the proceedings against Devetak were terminated, the OWCP in amending the indictment had to remove the names of all the victims linked to the charges against Devetak. The proceedings against the defendants Aleksandar Nikolaidis, Milan Radojčić, Zoran Bačić and Petronije Stevanović were also discontinued owing to their deaths, after which the OWCP had also to remove the names of the victims whose deaths were caused by their acts, thus further reducing the number of victims to 28. As a result of the excessive length of the proceedings and dismissal of the charges against Ljuban Devetak, the victims, their families and many witnesses from Lovas lost faith in the Serbian judiciary and no longer wanted to testify.

The defence motion seeking that the court reject the amended indictment filed in the absence of an authorised prosecutor was yet another reason to further delay to the proceedings. Instead of promptly deciding on the motion, the court simply adjourned the main hearing and submitted the entire case file to the OWCP.[254] This caused additional delays. At the next main hearing, the court read out the letter it had received from the OWCP, which stated as follows: "*We are sending back to you the entire case file, noting that the court has not decided on the motion made by some of the defence attorneys... Only after the court has decided this matter and submitted the decision to us will the OWCP decide on the course of action to be taken.*"[255] But not even after receiving this letter did the Chamber decide on the motion; instead it just decided to cancel the main hearing.[256]

The HLC is of the opinion that cancelling main hearings just because a court has failed to deliver a procedural decision it ought to have delivered is not acceptable, most certainly not in a case that has been going on for ten years.

Selective indictment

Absence of charges against/shielding of superior officers

Although it became evident during the proceedings that far more persons than those charged had been involved in the crimes set out in the indictment, the OWCP made no effort whatsoever to collect and collate evidence regarding their responsibility. The consequence of the OWCP's inactivity was that the final version of the indictment did not include the names of all the victims who had been

254 Transcript of the main hearing held on 17 July 2017.
255 Transcript of the main hearing held on 2 October 2017.
256 *Ibid.*

killed in the events described in it. And it was not disputed between the parties that a total of 70 civilians had been killed in Lovas in the period relevant to the indictment.[257]

These proceedings were marked by the OWCP's and Trial Chamber's profound divergence of opinion regarding the responsibility of high-ranking members of the JNA for the events in Lovas. In his closing statement, the Deputy War Crimes Prosecutor stated that during the proceedings, no evidence was presented that could give rise to a reasonable suspicion that "the events in Lovas were inspired, organised and carried out by persons at senior political, police or military levels; this conclusion applies also to command and other structures, including the 1st Proletarian Elite Motorised Division, 2nd Proletarian Elite Motorised Brigade and members of the Zone Headquarters of the Valjevo Territorial Defence".[258] The Chair of the Chamber, on the other hand, said the following words when pronouncing the judgment: "As regards the attack on Lovas, the way it was carried out and all the other events that happened during the attack, this Chamber holds to the belief that it is the command of the 2nd Brigade which bears the greatest share of responsibility for it."[259]

The Chamber's opinion seems completely reasonable if one takes into account the evidence presented during the proceedings. The evidence pointed to the responsibility of the Commander of the 2nd Brigade, Colonel Dušan Lončar, who, giving the orders to attack Lovas, said, among other things, that the village "must be cleansed of its hostile population." The "cleansing" resulted in the deaths of 22 civilians. When providing opinion evidence at the main hearing, the military expert stated that the above-mentioned part of the order was in breach of Article 13 of the Second Additional Protocol to the Geneva Conventions.[260] The expert consultant for the defendant Miodrag Dimitrijević also made reference to Lončar's responsibility. However, the evidence presented and the court's conclusions regarding this point notwithstanding, the OWCP did not prosecute Lončar, who issued the order, nor any members of the JNA who were senior to the perpetrators in the chain of command.

Because of the lack of initiative on the part of the OWCP, the HLC in November 2016 filed a criminal complaint against Dušan Lončar over the crimes in Lovas.[261] At the time of the publication of this report, the OWCP had not brought charges against him, although it has possessed evidence against him since the beginning of the criminal proceedings.

Indeed, the OWCP is, to the contrary, shielding more than ever before the former JNA and its officer Dušan Lončar from criminal prosecution. Its latest amended indictment in this case, which does not contain the allegation from the previous indictment that the attack on Lovas was ordered by Lončar, is a whitewash to protect Lončar and make sure that his involvement in the crime is not mentioned in the judgment.

257 Among them was, for instance, civilian M.L., who was never listed in the indictment, but died as a result of the artillery attack on Lovas carried out by the JNA on 10 October 1991. The attack was referred to in the original indictment, on page 14. The original indictment is available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2007_11_28_lat.pdf, accessed on 28 November 2018.

258 Transcript of the main hearing held on 24 April 2012.

259 Transcript of delivery of judgment on 26 June 2012.

260 Transcript of the main hearing held on 16 November 2011.

261 HLC press release 'Criminal Complaint for Crime in Lovas Committed in 1991', 3 November 2016.

Absence of sexual violence counts

The rapes that took place in Lovas were not charged in the indictment. The witnesses Vikica Filić,[262] Snežana Krizmanić[263] and Josip Sabljak.[264] said in their testimonies that rapes took place in Lovas in the relevant period, but the OWCP did not enquire into their allegations. Neither did the court. Furthermore, each time a witness mentioned rape, the Chamber would immediately divert the conversation away from the subject by asking the witness whether she had been beaten. When a witness misunderstood the request to provide further explanation, and said she would rather not talk about it, believing that the Chamber was referring to the rape, the Chamber explicitly stated the following: "We do not want you to go back to the issue of rape. We want to hear about beatings and whether you were mistreated, beaten?"[265]

Evidence of instances of rape in Lovas was presented by Croatia in the *Croatia v. Serbia* Case before the International Court of Justice, which concerned the application of the Convention on the Prevention and Punishment of the Crime of Genocide. However, this evidence was not sufficient for the court to adjudicate on this matter.[266]

Absence of forced displacement counts

Forced displacement of Croatian civilians was missing from the indictment too, even though many Lovas residents testified to it, including Đuro Filić,[267] Lovro Gerstner,[268] Vikica Filić,[269] Josip Sabljak,[270] Josip Balić[271] and others, including the Commander of the 2nd Detachment of the Pančevo Territorial Defence Force. On arriving at Lovas, he said, he saw a document being distributed to the Croatian residents of Lovas who were being forced out of Lovas. They were requested to sign this document, which stated that they should leave behind all their property to the Lovas municipal government. Petr Kypr, a witness in the *Vukovar Troika* Case tried by the ICTY, confirmed that there existed a plan to displace Croats from Lovas. Kypr was a member of the European Community Monitoring Mission at the time, and in that capacity visited Lovas on 16 October 1991.[272] When pronouncing its first judgment, the court also said that the OWCP ought to have dealt with the forced displacement of the Croatian population from Lovas.[273]

262 Transcript of the main hearing held on 27 March 2009.
263 Transcript of the main hearing held on 30 June 2009.
264 Transcript of the main hearing held on 27 November 2009.
265 Transcript of the main hearing held on 27 March 2009.
266 International Court of Justice, judgment in *Croatia v. Serbia* (case regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide, 3 February 2015, paras. 325-330).
267 Transcript of the main hearing held on 16 December 2008.
268 Transcript of the main hearing held on 23 February 2009.
269 Transcript of the main hearing held on 27 March 2009.
270 Transcript of the main hearing held on 27 November 2009.
271 Transcript of the main hearing held on 26 May 2011.
272 Transcript of the open session in the trial of the Vukovar Troika (IT-95-13) at the ICTY, 24 March 2006.
273 Transcript of the delivery of judgment, 26 June 2012.

Expert consultant

Lovas is the first war crime case in which an expert consultant has been used by a party. The use of an expert consultant was first introduced by the new ZKP.[274] As the ZKP defines it, an expert consultant is a person possessing expert knowledge in the field in which expert examination has been ordered. His/her role is to enable the party which hired him/her to discuss knowledgeably the opinions and findings of an expert witness, and thus help in the assessment of expert evidence.

In the case at hand, it was the defendant Miodrag Dimitrijević who hired an expert consultant. This consultant was a retired JNA colonel, with a Master's in Military Sciences and extensive practical experience. While he is indeed an expert in the relevant field, the opinions he provided were biased, and often too subjective. For instance, he assessed the testimony of a witness as "wilful manipulation".[275] Moreover, he shifted the blame for the incident in the minefield with which Dimitrijević is charged onto the defendant Perić, who had never been charged with it; nor was there any evidence implicating him in these events.[276] The expert consultant thus acted as another defence attorney for the defendant Miodrag Dimitrijević, which is something he ought not to have done. His testimony has yet to be assessed by the Trial Chamber.

Military expert's partiality

During his last testimony, the court-appointed military expert showed a partiality that should disqualify him from serving further as an independent expert witness in this case. Performing a complete volte-face from his previous opinion, he stated that on the basis of some new pieces of information he had obtained in the meantime from the defence attorneys through some "private channels", and "by searching the Internet" in order to verify certain items of information and ascertain certain facts, he had concluded that "the people accused here had nothing to do with the events in question".[277]

274 ZKP, Article 125.
275 Transcript of the main hearing held on 2 July 2015.
276 Transcript of the main hearing held on 24 September 2015.
277 Transcript of the main hearing held on 27 December 2016.

VI. Sanski Most – Lušci Palanka Case[278]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 3 April 2017
Trial commencement date: 12 July 2017
Prosecutor: Bruno Vekarić
Defendant: Milorad Jovanović
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Vinka Beraha-Nikićević (Chair of the Chamber) Judge Vladimir Duruz Judge Vera Vukotić

Number of defendants: 1 **Defendant's rank:** low **Number of victims:** 15 **Number of witnesses heard:** 7	**Number of trial days in the reporting period:** 6 **Number of witnesses heard in the reporting period:** 7 **Number of expert witnesses heard:** 0

Key developments in the reporting period:

The indictment was dismissed

The main hearing has been resumed

278 *Sanski Most – Lušci Palanka* trial reports and case documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/Sanski_Most_Lusci_Palanka.html, accessed on 11 December 2018.

The course of the proceedings

Indictment

The accused, Milorad Jovanović, at the time a reserve police officer serving in the Lušci Palanka Police Department – part of the Sanski Most Public Security Department of the Ministry of the Interior of Republika Srpska, is charged with a war crime against the civilian population. According to the indictment, Jovanović, his commander Slavko Vuković (now deceased), and several other unidentified police officers, forcibly removed and detained non-Serb civilians from the villages in the wider area of Sanski Most (BiH) during June and July 1992. The accused confined the civilians in the building of the "Simo Miljuš" Memorial Museum in Lušci Palanka. In order to extort from them information about weapons in their possession and the alleged organization of resistance to the Serbian army, the accused punched and kicked the confined civilians, stroke them with the buttstock of a rifle and other objects, tied them to a chair or a ceiling girder and then beat them heavily, forced them to cross themselves, crawl on the floor and kiss his boots. As a result of this torture, one civilian died.[279]

Defendant's defence

Taking the stand in his own defence, the accused denied having committed these acts. He admitted to having served at the police station in Lušci Palanka at the relevant time, as a reserve police officer of the Public Security Department in Sanski Most. He also admitted to having arrested Bosniak civilians, on the orders of his immediate superior, and to having hit one captive several times, but claimed that those hits were not such as to cause any suffering to him.[280]

Dismissal of the indictment

On 27 October 2017, the trial chamber ruled to dismiss the indictment, on the grounds that it had been filed by an unauthorised prosecutor.[281] Namely, the indictment was filed on 3 April 2017, during the time that the OWCP was without an acting prosecutor (between 1 January 2016 and 31 May 2017).

Overview of the proceedings in 2018

Continuation of the proceedings

The proceedings resumed in March 2018, after the court granted the motion moved by the new War Crimes Prosecutor seeking their continuation. The proceedings were resumed from the point where they had been interrupted, namely from the moment of presentation of evidence.[282]

279 OWCP indictment KTO 1/17 of 3 April 2017, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2018-03/optuznica_mjovanovic_engl_1.pdf, accessed on 11 December 2018.
280 Transcript of the main hearing held on 12 July 2017.
281 Transcript of the main hearing held on 27 October 2017.
282 Transcript of the main hearing held on 28 March 2018.

Four trial days were held in 2018, during which seven witnesses for the prosecution were questioned.

Witnesses' testimonies

Vahida Kugić and Sulejman Kaltak (family members of the injured parties), and Munira Ramić did not have first-hand knowledge of whether the accused had beaten Bosniak civilians confined in the "Simo Miljuš" Memorial Museum.[283] Witness Ejup Beširević, who lived in the village of Modra (in the municipality of Sanski Most) at the time, recounted how he had been taken with a group of local residents to the "Simo Miljuš" Memorial Museum in Lušci Palanka by police officers, among whom was the accused, who later beat him and another captive.[284] Witnesses Mesud Avdić, Sadmir Alibegović and Hajro Beširević also said that the accused had beaten them.[285] The accused admitted to having punched the witness Hajra Beširević three times and apologised to him for that, claiming he had just been following his commander's orders, adding that if he had not obeyed, he would have been deployed to the war zone.[286]

HLC Findings

Regional Cooperation

This case is another example of successful cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. Since the accused, who is a national and resident of the Republic of Serbia, was not available to the BiH judicial authorities, the Cantonal Prosecutor's Office in the Una-Sana Canton's capital Bihać transferred the case against Jovanović to the OWCP. The indictment against Jovanović was the first indictment brought by the OWCP in 2017.

Parts of the proceedings were impossible to follow

The courtroom in which the main hearing takes place is not equipped with headphones for members of the audience. Headphones are only provided for members of the chamber and participants in the proceedings. As a result, it was very difficult for the audience to hear the evidence given via video conferencing. As this trial is open to the public, the court has a duty to provide headphones also to people in the audience and thus make it possible for them to hear clearly what is being said by witnesses who testify via video conference.

283 *Ibid;* Transcript of the main hearing held on 9 May 2018.
284 Transcript of the main hearing held on 28 March 2018.
285 Transcript of the main hearing held on 20 September 2018.
286 Transcript of the main hearing held on 8 November 2018.

VII. Srebrenica Case[287]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 21 January 2016
Trial commencement date: 12 December 2016
Prosecutors: Mioljub Vitorović, Bruno Vekarić
Defendants: Nedeljko Milidragović, Milivoje Batinica, Aleksandar Dačević, Boro Miletić, Jovan Petrović, Dragomir Parović, Aleksa Golijanin and Vidosav Vasić
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Mirjana Ilić (Chair of the Chamber) Judge Zorana Trajković Judge Dejan Terzić

Number of defendants: 8	
Defendants' rank: low	**Number of trial days in the reporting period:** 11
Number of victims: 1,313	**Number of witnesses heard in the reporting period:** 11
Number of witnesses heard so far: 11	**Number of expert witnesses heard:** 0

Key developments in the reporting period:

The indictment was dismissed; the proceedings have been resumed

287 *Srebrenica – Kravica* trial reports and documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/srebrenica.html, accessed on 20 December 2018.

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

The defendants, at the time members of the Jahorina Training Centre of the Special Police Brigade of the MUP of the Republika Srpska, are accused of having killed at least 1,313 Bosniak civilians inside and in the immediate vicinity of a farm warehouse in the village of Kravica (in the municipality of Bratunac, BiH) on 14 July 1995.[288]

The accused are: Nedeljko Milidragović (commander of the 2nd Platoon which was part of the 1st Company of the Jahorina Training Centre); Milivoje Batinica, Aleksandar Dačević, Boro Miletić, Jovan Petrović and Dragomir Parović (members of the 2nd Platoon); and Aleksa Golijanin and Vidosav Vasić (members of the 1st Platoon of the 1st Company).

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

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

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

Trial

The trial, which was due to open in December 2016, was adjourned. Just as the trial was about to open, the defence lawyers argued that conditions had not been met for the trial to begin, because the court had failed to reveal the names of the witnesses, whose identity was protected, to the defendants and their lawyers. Without knowing the identity of the witnesses against them, they claimed, the defendants could not properly present their defence. The defence lawyers moved that the entire chamber be recused. This automatically halted the trial, because the motion had to be referred to the Court President for a ruling.[289]

288 OWCP indictment KTO no. 2/2015 of 21 January 2016, available online at http://www.tuzilastvorz.org.rs/en/cases/case-name-srebrenica--kravice and http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/kto_2_15_dopuna_kravica_engl.pdf, accessed on 20 December 2018.

289 Transcript of the main hearing held on 12 December 2017.

The Court President denied the motion. But the trial did not begin, this time because the Chair of the Chamber said that the chamber had not been given the identity of the protected witnesses either, and called for the Prosecutor to supply the chamber with this information.[290]

Overview of the proceedings in 2017

Of the 13 trial days scheduled to take place in 2017, only five actually took place. The main hearing had only just started when the defence attorney for the defendant Boro Miletić, Rajko Jelušić, submitted that the procedural requirements for conducting the main hearing had not been met because the former War Crimes Prosecutor was no longer in office and a new prosecutor or acting prosecutor had not been appointed. He pointed out that the deputy prosecutors handling the case do not have their own authorities. The source from which they derive their authority is the prosecutor they deputise for. As there was no prosecutor nor acting prosecutor, the deputy prosecutors were not authorised to act. Therefore Jelušić moved that the main hearing be postponed and that the Republic Public Prosecutor be asked to appoint an acting war crimes prosecutor.[291] He also sought that both deputy prosecutors be removed from the case, claiming that circumstances existed that gave rise to justifiable doubts as to their impartiality. This was because the deputies requested that certain persons who, by their own admission, were in the firing squad, be accorded the status of protected witnesses, despite the existence of a reasonable suspicion that these very persons were the perpetrators of the crime. These persons becoming witnesses, even though in no way could they have been witnesses, were thus put in a position to be influenced, especially bearing in mind that they were questioned outside the presence of the defendants and their attorneys, before the order to put unidentified persons under investigation was issued, with the deputies knowing which persons would be put under investigation. The attorney also challenged the results of the process whereby the protected witnesses had recognized the defendants in photographs. The other defence attorneys joined with Jelušić's motions.[292] The trial chamber dismissed the motion for cancelling the main hearing, stating that the procedural requirements had been met for the main hearing to open, as the deputy prosecutors present were authorised to act. It also denied the motion for the removal of the deputy prosecutors from the case, holding that the attorneys had failed to prove their partiality.[293]

Defendants' defence

The defendants Nedeljko Milidragović, Aleksa Golijanin, Vidosav Vasić and Aleksandar Dačević did not present their defence, invoking their right not to incriminate themselves.[294] The defendants Boro Miletić, Dragomir Parović and Jovan Petrović did not want to take the stand at the main hearing, stating that they had nothing to add to what they had already said when questioned by the OWCP; so the audio recordings of their questioning by the OWCP were played in the courtroom.

290 Transcript of the main hearing held on 13 December 2017.
291 Transcript of the main hearing held on 6 February 2017.
292 *Ibid.*
293 *Ibid.*
294 *Ibid.*

Boro Miletić's testimony was that he was a refugee from Croatia, when arrested in Belgrade on 29 June 1995 to be immediately transported to Mount Jahorina, where he was made a member of the police force of Republika Srpska. There were a lot of men at Jahorina who, just like him, had been forcibly brought there. Nedeljko Milidragović was the commander of his platoon. On 11 July they left Jahorina and came to a village on the bank of the River Drina whose name he did not remember. The next morning, the bus he was on stopped near a group of UNPROFOR soldiers who had surrendered. They got off the truck and walked all the way to the UNPROFOR base; he saw women and children around the base. Milidragović ordered them to search the area for escaping Muslims; they searched houses and the woods and found a boy; Milidragović handed the boy to a group of soldiers. The search lasted all day.[295] On the third day, i.e. 14 July, they were deployed on an asphalt road to watch for people wanting to give themselves up; but no one came there to surrender. In the two days he spent securing the road, he saw around 10 bus loads of captured Muslims. On the fourth day, his unit was on the move again; they came to a place, and stopped near some sort of plateau and a structure with a mesh fence around it; behind the mesh he saw women and children in large numbers, maybe a thousand; there were no men among them. The policemen were ordered to guard them and not let them escape through holes in the fence. A lot of buses and trucks arrived to take them away, they kept transporting them until dark. On the fifth day, his unit returned to Jahorina.[296]

In his testimony before the OWCP, the defendant Dragomir Parović said that on 19 or 20 June 1995, he was arrested in Belgrade and transported by the police to Jahorina, where he was told that he was assigned to the special police; he had no recollection of the exact date on which 100 police officers were transported from Jahorina to Bratunac. The next day, they were transported to the UNPROFOR base, and told that their task was to disarm members of UNPROFOR. After that, the defendant Milidragović ordered him and another man from the platoon to search the houses that stood near the base; they finished the search by two or three o'clock, after which they were ordered to move; they walked to a factory, where they saw civilians, a couple of thousands of them, mostly women and children, and just a few men; later that evening, the civilians were driven away. The next morning, the defendant Milidragović lined up his men and sent them on a task, which was to secure a section of the road and watch for persons surrendering. At one point Milidragović brought a 12-13 year-old boy, and ordered him to call his relatives to give themselves up; half an hour later, some Muslim civilians came and surrendered; they were loaded onto buses, in groups of 20-30; two groups of men surrendered that day. Parović went on to say that the boy Milidragović brought was with them the next day too, while they were searching the area; at one point Milidragović took him to a bush beside the road and a gunshot rang out. The next day they remained in position; an UNPROFOR transport vehicle came by and called out over a loud hailer in Serbian to the men to surrender, which many did, and they were mostly civilians; they were taken away in trucks. Milidragović and Golijanin then ordered their men to guard a group of 20-30 people who had surrendered, and he himself ordered the men to hand over the money they had on them; after that the men were marched to a house by the road, ordered to lie face down, next to one another. Milidragović signalled to him and another man whose name he does

295 Transcript of the main hearing held on 7 February 2017.
296 Transcript of the main hearing held on 13 April 2017.

not remember to shoot them; the other man shot first, discharging a burst of fire. Some of the men were still alive; Parović could not bring himself to shoot at them, so he shot the ground near them, not killing anyone. During the night, the wounded survivors cried out in pain, and other members of the unit ridiculed Parović and the other guy because of that. In the morning, Milidragović and Golijanin went to the wounded men, bursts of fire rang out, and the cries stopped. That was their last day in the area; they retired on foot, through the woods, on a beaten path made by Muslims surrendering over the previous days; buses picked them up and drove them to the school in which they were stationed, and from the school to Jahorina. Parović claimed that he and his platoon were not involved in the events that took place in the warehouse in Kravica.[297]

The defendant Jovan Petrović, in his testimony before the OWCP, said that in May or June 1995 he was forcibly taken from a village in the Pećinci municipality [Serbia] to Jahorina; he was forced to sign a contract to voluntarily join a police unit. Upon his arriving at Jahorina, he was assigned to the 3rd Platoon, whose commander was Milidragović. On 14 or 15 July 1995, his unit was assigned their first task – to go to Srebrenica; they arrived at Bjelovac by bus and slept in a school; they were waiting for the Zvornik Corps and General Mladic to arrive; their task was to capture Srebrenica. By bus, they reached Bratunac, and from there they walked to Potočari, where there found no one; the next day they moved into the area of the village of Sandići, where they secured a road to prevent the Muslims from crossing from one side of the road to another. Petrović went on to say that he heard Mladic say over a loud hailer: "Neighbours, surrender! Nothing bad will happen to you", after which he saw some people surrender. As regards the events in the warehouse in Kravica, he said he knew nothing about it because he was near Konjević Polje at the time, about 14 km from the warehouse; he heard "some stories" and a burst of shooting. He heard that 10 to 15 Muslims had been executed outside the warehouse and that two or three women had been raped.

As they were retreating through the woods, they came across two bodies. One body, he said, belonged to a man who had hung himself. He came to that conclusion from the suicide note they found in his pocket. The other man had been killed by his fellow Muslims in a fight over whether they should or should not surrender, Petrović said. About 100 men from the unit made their way through the woods to Konjević Polje, where they found 30 captured men. Petrović said he did not know who had captured them or what happened to them. His unit was transported back to Jahorina on buses.[298]

The defendant Milivoje Batinica denying having committed the crime he was charged with. He said that in 1992 he fled Sarajevo and came to Zrenjanin (Serbia). In 1995, he was arrested on a street in Zrenjanin and taken to the Republika Srpska MUP Special Police Training Centre at Jahorina and assigned to the 3rd Platoon, part of the 1st Company. His direct superior was Company Commander Tomislav Krstović. When asked if he had seen other defendants at Jahorina, he said he had only seen Nedeljko Milidragović and Aleksa Golijanin; the other defendants he did not know at the time. His unit consisted mostly of men, who, just like him, had been forcibly taken to Jahorina. They were

297 Transcript of the main hearing held on 31 May 2017.
298 *Ibid.*

treated as if they were traitors and deserters. On 11 or 12 July 1995, they were bussed from Jahorina to the village of Bjelovac, where they spent the night in a school building. The next day they went to Potočari. They came close to the UNPROFOR base but did not enter it. There were several thousand civilians around the base – mostly women, children and elderly people, with maybe roughly 10 middle-aged men among them. The civilians were terrified, but they were not forbidden to move around. His unit was tasked with keeping order - that is to say, protecting the civilians so that they were not harmed by anyone. He noticed the presence of the VRS in Potočari. While in Potočari, he saw buses coming and leaving, buses which he believed came to take away the civilians. At around I or 2 o'clock, his unit was ordered to go back to Bjelovac, so he did not know what happened later to the civilians. That evening or the next evening, they left Bjelovac and were deployed on the road linking Bratunac and Konjević Polje. They were ordered to ensure the safe passage of buses transporting women and children from Bratunac towards Konjević Polje, and further on to Tuzla. The section of the road they secured was curved, and there was a forest up the road; gunshots could be heard coming from all directions throughout the night. Just before dawn, the shooting stopped. That day, members of the Army of BiH began to surrender - some 20 or 30 surrendered. Some wore uniforms, some plain clothes, some were armed. They were picked up by a VRS truck. The soldiers in the truck kept calling to Muslims over a loud hailer to surrender. The members of his unit just guarded the men who had surrendered. Early that afternoon, they returned to Bjelovac. The next day they searched the forest towards Konjević Polje, looking for members of the Army of BiH who had not surrendered. He claimed that he had never been to Kravica, nor heard of the warehouse in Kravica before.[299]

Dismissal of the indictment

On 5 July 2017, the Court of Appeal in Belgrade ruled that the OWCP indictment in this case was to be dismissed, on finding indisputable the fact that at the time it was filed, on 21 January 2016, the OWCP was without a war crimes prosecutor or acting war crimes prosecutor,[300] as the term of office of the former war crimes prosecutor expired on 1 January 2016, and the new one did not take office until 31 May 2017. During that period, an acting war crimes prosecutor was not appointed either, contrary to the Law on Public Prosecution Service,[301] which stipulates this measure in order to facilitate the orderly functioning of a prosecutors' office. Therefore, deputy public prosecutors could not act on behalf of the prosecution nor file indictments during that period.

Continuation of the proceedings

After the indictment had been dismissed, the OWCP requested that the proceedings be resumed on the existing indictment, submitting that the request had to be granted because it was made by the authorised prosecutor, namely the new war crimes prosecutor who was already in office. The Higher Court in Belgrade denied the request, and ruled that the proceedings might be resumed only after the OWCP had filed a new indictment. The OWCP appealed against the ruling, and the Court of Appeal

299 Transcript of the main hearing held on 7 February 2017.
300 Court of Appeal in Belgrade, decision no. Kž2 Po2 7/17 of 5 July 2017.
301 Law on Public Prosecution Service, Article 36.

on 19 September 2017[302] reversed the ruling of the Higher Court and ruled that the proceedings be resumed upon the same indictment. The ruling of the Court of Appeal was based on its interpretation of the ZKP provision, which stipulates that criminal proceedings shall be resumed, at the request of the authorised prosecutor, when the reasons for dismissing an indictment cease to exist.[303] The indictment in this case was dismissed because it was not filed by the authorised prosecutor. However, since the request for the resumption of the criminal proceedings was filed by the authorised prosecutor, the Court of Appeal found that legal requirements for resuming the proceedings had been met, as the reasons for their interruption ceased to exist.

The criminal proceedings resumed with the re-opening of the trial. The indictment was read out, and all the defendants pleaded not guilty. In their opening statements, the deputy prosecutor and defence attorneys all stood by the points, allegations and proposals they had made at the preliminary hearing. Although the preliminary hearing was held during the period when the OWCP was without an authorised prosecutor, the court found that the records made at that hearing could be used at the trial, because their reading did not constitute a substantive violation of the criminal procedure provisions, and because these records were made outside the trial.

The chamber ruled that the records containing the defendant Milivoje Batinica's testimony in his own defence, and the records made at the main hearing concerning the audio recordings of the questioning of the defendants Miletić, Parović and Petrović at the OWCP that were played in the courtroom, were to be separated from the case file. The defence attorneys agreed that instead of playing the audio recordings of their questioning, transcripts of their statements should be shown on monitors in the courtroom. And this was done in 2018.[304]

Overview of the proceedings in 2018

13 trials days were scheduled to take place in 2018, but only six were actually held. 11 witnesses were examined during the year.

The most important of all the evidence heard was the evidence given by two protected witnesses who went by the pseudonyms "302" and "303". During their testimonies, the court cautioned people present that all the information they heard at the hearing must be kept secret.

Witness/injured party Saliha Osmanović recounted how she left Srebrenica in 1995 with her husband and son, and how they split apart in the place known as the "Kazani Pit". She went to Potočari, and her husband and son headed through a forest towards Tuzla. She has never seen them since.[305]

Two other witnesses questioned, Krsto Simić and Ostoja Stanojević, were drivers who were brought to Kravica to transport the corpses of killed civilians. They described in detail how the corpses were

302 Court of Appeal in Belgrade, decision of 19 September 2017.
303 ZKP, Article 417, paragraph 1, sub-paragraph 1.
304 Transcript of the main hearing held on 14 November 2017.
305 Transcript of the main hearing held on 25 September 2018.

transported first to a primary and later to a secondary grave, but said they did not know who had killed the people in Kravica.[306]

Witness Zoran Erić stated that on 11 July 1995 he was sent from Bratunac to the farm in Kravica to feed the farm animals kept in a cowshed behind the warehouse. From the shed he could not see what was going on in front of the warehouse, he said. On 13 July 1995 in the afternoon, he was in the shed when he heard someone shouting "Allahu Akbar", and then, "Let's strangle the Chetniks with our own bare hands!" Subsequently, he heard that four captives from the warehouse had attacked a guard, dragged him into a bush and killed him. After that, "massive shooting" broke out and explosions of hand grenades could be heard too. The shooting began during the day and lasted throughout the night, in the form of short bursts of automatic fire from multiple weapons. The warehouse was packed with people. The shooting stopped on 14 July before noon. Two or three hours later, the survivors were summoned over a loud hailer to come out of the warehouse. They were told that a water tank truck had arrived, as well as ambulances and buses, to take them away. After the call, he heard someone giving the order to fire three times with intervals between them, followed by shots coming from the road. The people who came out of the warehouse were killed. During the shooting he did not dare to leave the shed. When he got out, he saw many dead people in front of the warehouse - 200-300 bodies, he thought. By the roadside, he saw the bodies of many people who had been stabbed to death. He did not know how many people had been killed inside the warehouse because he did not enter it.[307]

Several members of the Republika Srpska MUP Special Police Brigade Training Centre at Jahorina, who appeared as witnesses, described their stay at Jahorina and their deployment in the Srebrenica area in 1995. They did not have any direct knowledge of the events in Kravica. Only later did they hear that "something had happened" there.[308]

The main hearing will continue in 2019 with examination of other witnesses.

HLC Findings

Irresponsible conduct of the trial court

The trial chamber deserves serious criticism for being ill-prepared for the beginning of the trial. By failing to reveal to the defendants and their lawyers the identity of the protected witnesses, which is something it ought to have done no later than 15 days before the commencement of the trial, as stipulated by the relevant provision of the ZKP,[309] the chamber violated the defendants' right to defence.

306 Transcript of the main hearing held on 26 September 2018.
307 *Ibid.*
308 Transcript of the main hearing held on 13 November 2018.
309 ZKP, Article 106, paragraph 3.

The Chair of the Chamber initially denied that the defendants' right to defence had been violated, saying, "we cannot interpret this provision so restrictively […] because it does not say 15 days before the opening of the main hearing […] and therefore, if it is properly interpreted, the defendants' right to defence has not been violated if 15 days before the main hearing at which the said evidence is presented they have been informed thereof."[310]

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

Not even after denying the motion for recusal did the Chair of the Chamber open the main hearing, although there were no formal obstacles to it. Instead, she said that the court did not know the identity of the protected witnesses either, because the OWCP had not supplied this information to it, and called for the OWCP to do so, and set a deadline within which the OWCP was to reveal this information to the defendants and their lawyers. [311] In doing so, the court indirectly admitted that it had made a mistake by not revealing their identity to the defendants and their lawyers before the main hearing.

Such conduct by the chamber was unprofessional and irresponsible, especially bearing in mind that this is one of the biggest and most important trials ever dealt with by the War Crimes Department, and one long-awaited. The HLC draws particular attention to the fact that the Protocol on Cooperation signed between the OWCO and the Prosecutor's Office of BiH stipulates that evidence and information pertaining to a case may be transferred to the prosecutors' office of the other party only with the consent of the victims concerned. In the present case, the victims gave their consent, showing their faith in the Serbian judiciary. Therefore, it is not surprising that they reacted to the way the court handled this case by saying that Serbia actually does not want to convict war criminals[312] and that its legal system is not functioning properly.

Questionable ruling of the Court of Appeal

The ruling of the Court of Appeal chamber that the proceedings in the *Srebrenica* Case could resume upon the very indictment this very chamber had previously dismissed was not adequately and carefully reasoned. Nor did the chamber provide grounds for its decision that it was not necessary that the OWCP file a new indictment. The Prosecutor advanced the argument that the ZKP[313] does not require the filing of a new indictment, but only stipulates that proceedings shall be resumed at the request of the authorized prosecutor, and the court granted this argument in its entirety. While it is true that filing of a new indictment is not expressly stated in the ZKP,[314] the Court of Appeal

310 Transcript of the main hearing held on 12 December 2016.
311 Transcript of the main hearing held on 13 December 2016.
312 *Blic* daily newspaper, 'Majke Srebrenice: Srbija ne želi da procesuira ratne zločince' [Mothers of Srebrenica: Serbia does not want to prosecute war criminals], 12 December 2016, available online (in Serbian) at http://www.blic.rs/vesti/drustvo/majke-srebrenice-srbija-ne-zeli-da-procesuira-odgovorne-za-ratne-zlocine/4xvmxx6, accessed on 18 January 2018.
313 ZKP, Article 417, paragraph 1, sub-paragraph 2.
314 *Ibid.*

nevertheless ought to have explained in detail its decision that no new indictment was necessary. This is because if the proceedings continue upon a previously dismissed indictment, it amounts to a de facto convalidation[315] of the indictment filed by an unauthorised prosecutor, which certainly requires a detailed explanation, as the ZKP does not allow for convalidation. The decision of the Court of Appeal created a legally untenable situation where two final and completely opposite rulings made by the same chamber exist side-by-side, both being valid - the ruling to dismiss the indictment and the ruling to resume the proceedings upon the very indictment that has been dismissed.

Inappropriate selection of charges

Despite the Srebrenica crime being classified by international and regional courts either as genocide,[316] or a crime against humanity,[317] the OWCP instead charged the accused with a war crime. The OWCP did the same thing in an earlier case, which also concerned killings that took place as part of the Srebrenica genocide – the case against Brana Gojković.[318]

The fact that the existence of the requisite "specific intent" in a genocide case is extremely hard to prove is used by the legal community to justify decisions not to bring charges of genocide. As regards the present case, the prosecutor would have to prove that the accused killed the captured men of Bosniak ethnicity with the specific intention of destroying, in whole or in part, Bosniaks as an ethnic group. The HLC on the other hand is of the opinion that instead of charging the defendants with a war crime, an offence that does not include the main elements present in the acts of the accused – their systematic character and their massive scale – other legal strategies could have been used to address this problem. More specifically, the OWCP could have charged them with genocide, but under accessory liability, as this mode of liability does not require the specific intention of destroying a group, in whole or part, to be proven, but only a contribution to the commission of the crime, and an awareness that the key perpetrators and planners of the crime harboured the specific intention of destroying a group.[319] This is exactly what the Court of BiH did in a very similar case, which also involved low-ranking members of the Republika Srpska Special Police who killed Bosniak men – in that instance, in aKravica warehouse -, when it convicted the defendants of genocide as accessories.[320]

Alternatively, the OWCP could have qualified the acts as a crime against humanity, which offence does incorporate the key characteristics of the acts of the accused - their being a part of a systematic, widespread attack directed against the civilian population. The OWCP has never charged anyone with a crime against humanity. The usual argument advanced by the legal community in support

315 Convalidation refers to making an invalid legal transaction valid.

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

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

318 Higher Court in Belgrade, judgment Spk.Po2. no. 1/2016 of 27 January 2016.

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

320 See Court of BiH judgment on appeal in *Jakovljević Slobodan et al. (Kravica)*, S1 1 K 014263 13 Krž (X-KRŽ-05/24) of 29 April 2014, available online at http://www.sudbih.gov.ba/predmet/2429/show, accessed on 2 February 2018.

of this unjustified practice is that charging crimes against humanity would breach the prohibition of the retroactive application of laws, as this offence was introduced into Serbia's national law only in January 2006, when the Criminal Code of the Republic of Serbia of 2005 came into effect.[321] The above argument is not tenable for several reasons. Firstly, the Constitution of Serbia provides that international law is applied directly to the Serbian legal system,[322] and crimes against humanity have been established in international law and prosecuted ever since the Nuremberg trials.[323] Secondly, the European Convention for the Protection of Human Rights and Fundamental Freedoms allows for exceptions to the principle of non-retroactivity,[324] if an act "at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."[325] The International Covenant on Civil and Political Rights also stipulates such exceptions.[326] Relying on the above-cited ECHR article, the European Court of Human Rights solved this OWCP "ambiguity" five years ago in the case of *Šimšić v. BiH*. In this case, the court ruled that BiH had not violated the principle of non-retroactivity by convicting Šimšić of a crime against humanity, although this crime, just like in Serbia, was not criminalized by the BiH's national law at the time it was committed.[327]

Since the OWCP was not required either by domestic or international law or by the relevant case law to categorise the acts committed by the defendants in this case as a war crime, it is safe to say that the OWCP treats the Srebrenica crime the same way the Serbian political leadership treats it – as if it were not genocide[328], and as if the crimes were not carried out as part of a systematic attack.[329]

Selective indictment

Yet again, the OWCP indicted only low-ranking individuals. Namely, the first and highest-ranking defendant in this case was a platoon commander at the time of the crimes. As early as 2010, the HLC filed a criminal complaint with the OWCP against several high-ranking members of the VRS over the Srebrenica genocide. The subjects of the complaint included, among other people: Petar Slapura, formerly a VRS Colonel and the Head of the Intelligence Administration of the VRS Main Staff; Milorad Pelemiš, Commander of the 10th Sabotage Unit of the VRS Main Staff, for whom

321 Criminal Code of the Republic of Serbia, Article 371. *(*Official Gazette of the RS no*s.* 85/2005, 88/2005, - corr. 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16.)

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

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

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

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

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

327 Judgment of the European Court of Human Rights in *Boban Šimšić v. Bosnia and Herzegovina*, available online (in Serbian) at http://www.mhrr.gov.ba/ured_zastupnika/novosti/default.aspx?id=2920&langTag=bs-BA, accessed on 20 December 2018.

328 Declaration of the National Assembly of the Republic of Serbia condemning the Srebrenica crime, 31 mart 2010, available online (in Serbian) at http://www.slobodnaevropa.org/a/Skupstina_Srbije_Deklaracij_Srebrenica/1998622.html accessed on 20 December 2018.

329 See, e.g., RTS, 'Nikolić se izvinio zbog Srebrenice' [Nikolić apologises for Srebrenica], 25 April 2013, available online (in Serbian) at http://www.rts.rs/page/stories/sr/story/9/politika/1312408/nikolic-se-izvinio-zbog-srebrenice.html, accessed on 20 December 2018.

an international wanted notice has been issued; and Dragomir Pećanac, a VRS Major and Deputy Commander of the Military Police of the Bratunac Light Brigade, which was part of the VRS Drina Corps. These people live in Serbia, move freely in public places, even receive media exposure,[330] and are therefore available to the state authorities.[331] In spite of that, none of them have been indicted so far.

Regional Cooperation

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

330 See, e.g., Milorad Pelemiš's interview for the "Goli život" talk-show in 2014, available online (in Serbian) at https://www.youtube.com/watch?v=BPQUlH78yhI accessed on 2 February 2018.

331 HLC press release, 'Criminal complaint against persons suspected of having committed a criminal act of genocide in Srebrenica', 16 August 2010, available online at http://www.hlc-rdc.org/?p=13072&lang=de, accessed on 20 December 2018.

VIII. Trnje Case[332]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 4 November 2013
Trial commencement date: 24 February 2015
Prosecutor: Mioljub Vitorović
Defendants: Pavle Gavrilović and Rajko Kozlina
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Mirjana Ilić (Chair of the Chamber) Judge Dejan Terzić Judge Zorana Trajković

Number of defendants: 2 **Defendants' rank:** medium and low **Number of victims:** 37 **Number of witnesses heard:** 33	**Number of trial days in the reporting period:** 8 **Number of witnesses heard in the reporting period:** 14 **Number of expert witnesses heard:** 1

Key developments in the reporting period:

Main hearing

332 *Trnje* Case trial reports and case documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/trnje.html., accessed on 12 December 2018.

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

The defendants, former members of the VJ 549th Motorised Brigade, are charged with involvement in killing at least 27 Albanian civilians, including 12 women and four children in the village of Trnje (in the municipality of Suva Reka, Kosovo), on 25 March 1999. Gavrilović, in his capacity as the Commander of the Logistics Battalion of the 549th MtBr, assembled his subordinate officers, including the defendant Kozlina, just before the attack on the village, and gave them the order that "no one should be left alive", pointing his hand in the direction of the village. The indictment further alleges that Kozlina, a sergeant and commander of a combat group at the time, acting pursuant to Gavrilović's order, killed Voci Maliqi by firing a shot from his automatic rifle into his back, after which he turned to the others saying, "This is how it should be done!" Kozlina is charged with killing 16 more civilians.[333]

Defendants' defence

Both defendants denied committing the crime they are charged with. Gavrilović claimed that his battalion had participated in a task on a larger scale, which included "blocking the territory in the area of the village of Trnje", but had never entered the village; nor had he issued the order referred to in the indictment. Kozlina said exactly the same thing when presenting his defence.[334]

Witnesses' testimonies

The court examined 18 witnesses and two medical experts during the presentation of evidence. Seven of the witnesses who appeared in court as witnesses/injured parties, recounted the attack on their village and the killings of their family members and other village residents.[335] They all described the moment when the military entered their village, but were not able to recognise the defendants as the persons who had been in Trnje on the relevant date.[336] A few of the witnesses said that police forces had also been present in the village on the day of the attack, and that some police officers took part in killing civilians. Even though one police officer who had participated in the crime was positively identified by several witnesses, he was not included in the indictment.[337]

None of the former members of the 549th VJ Motorised Brigade who gave evidence about the role of the defendants in the attack on Trnje implicated Pavle Gavrilović in the crime. At the same time, several of these witnesses said that it was Rajko Kozlina who killed the civilians. Witness Dejan

333 OWCP indictment no. KTO 7/2013 of 4 November 2013, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2013_11_04_eng.pdf, accessed on 12 December 2018.
334 Transcript of the main hearing held on 24 February 2015.
335 Transcript of the main hearing held on 27 October 2015; transcript of the main hearing held on 28 October 2015.
336 Transcript of the main hearing held on 27 October 2015, transcript of the main hearing held on 28 October 2015.
337 Transcript of the main hearing held on 27 October 2015.

Milošević, for instance, said that Kozlina took a 70-year-old man out a house and killed him in the VJrd by shooting him in the head, with several Albanians in the VJrd witnessing the act. As he was leaving the VJrd, the witness heard a burst of automatic gunfire. When he turned around, he saw all the civilians on the ground and Kozlina with his rifle pointed in their direction. This witness further said that they had found a group of 25-30 civilians sitting by the river, and the defendant Kozlina ordered the women from the group to get up and run. When the men tried to do the same, they were shot. The order to shoot these civilians was issued by Kozlina, according to Milošević.[338] Milošević's account of the killing of the old man and other civilians in the VJrd was corroborated by the witnesses Ervin Markišić[339] and Bojan Gajić,[340] also former members of the VJ 549th Motorized Brigade.

As the defendants were repeatedly absent from the main hearing, citing their poor health as an excuse for non-attendance, the court sought a medical opinion regarding their mental and physical fitness to stand trial. A court-appointed psychiatric expert, Dr Branko Mandić[341], found that both defendants were mentally fit to stand trial and that their cognitive abilities were not impaired by the hypertension they both suffered from. Another expert witness, Dr Vladan Marković, an internal medicine specialist,[342] confirmed that they were able to stand trial. Both expert witnesses based their findings solely on the medical documentation obtained from two military hospitals – the Military Medical Academy (VMA) in Belgrade and the Military Hospital in Niš. When asked by the Chair of the Chamber whether such frequent hospitalisations of the defendants were indeed necessary, the experts responded that "judging by this documentation [documentation of the military medical institutions]," they are indeed necessary.[343]

Overview of the proceedings in 2017

Of the seven hearings scheduled in 2917, only one took place, at which Božidar Delić, former Commander of the VJ 549th Motorized Brigade and Pavle Gavrilović's direct superior gave evidence.[344] Delić said that the logistics battalion was not a combat unit, but a unit tasked with "blocking the territory" along the Landovica-Trnje-Suva Reka line. It was "impossible", he said, that Gavrilović had ordered that "no one should be left alive", because such an order would be unlawful and would have been disobeyed by his soldiers. He also said that the "line of blockade" that the 549th MtBr was in charge of securing had never run through Trnje and soldiers were strictly forbidden to enter the village. Delić said that the protected witnesses who had testified against Pavle Gavrilović and Rajko Kozlina in the case against Slobodan Milošević before The Hague Tribunal had lied, describing them as criminals who had been paid to testify. He further said that it was actually Boris Tadić [former President of the Republic of Serbia] who had instituted the proceedings against him personally, with him as his intended target, and Gavrilović and Kozlina were merely "collateral damage".[345]

338 Transcript of the main hearing held on 7 June 2016.
339 *Ibid.*
340 Transcript of the main hearing held on 6 June 2016.
341 Transcript of the main hearing held on 20 May 2016.
342 *Ibid.*
343 *Ibid.*
344 Transcript of the main hearing held on 13 January 2017.
345 *Ibid.*

On 27 January 2017, principal defendant Pavle Gavrilović broke his left thigh bone, as a result of which he was unable to attend the trial for quite some time. The court sought expert opinions on his condition. Medical experts were appointed to evaluate, on the basis of the available medical documentation and through examination of the defendant, his ability to stand trial and follow the proceedings.[346]

Request to the Higher Court in Belgrade to speed up the proceedings

Request to speed up the proceedings filed with the Higher Court in Belgrade

As a result of the series of delays caused by the absence of the defendants, only nine trial days were held from the opening of the trial in February 2015 to September 2017. That is why the attorney for nine injured parties[347] filed a request with the Higher Court in Belgrade to speed up the case in relation to these parties.

The Higher Court in Belgrade on 27 September 2017 dismissed as inadmissible the request in relation to Nexhat Bytyqi, and as unfounded in relation to the remaining injured parties.[348] As regards Nexhat Bytyqi, the court explained that he was not authorised to file the request, as he had not filed a compensation claim in the course of the criminal proceedings. The court cited a provision of the Law on the Right to a Trial within a Reasonable Time, according to which the right to have one's case heard within a reasonable time applies only to those injured parties who claim compensation in the course of criminal proceedings.[349] When it comes to other injured parties, the court stated that the proceedings lasted longer than usual owing to some objective reasons, including the lawyers' strike that put all criminal cases on hold, the large number of witnesses, the limited number of courtrooms, the OWCP's and other bodies' failure to act upon the court's requests and letters. Particularly worrisome was the defendants' excused absence from court allegedly "supported by adequate medical documentation."[350]

Dissatisfied with the decision of the Higher Court, the injured parties lodged an appeal with the Court of Appeal. Even though the Higher Court stated that its ruling on inadmissibility of the request in respect of the injured party Nexhat Bytyqi was not subject to appeal, the appellant submitted that the appellate court ought to consider the merits of his appeal, because Nexhat Bytyqi's statement regarding his compensation claim had not been accurately referred to in the trial court's decision. The trial transcript clearly shows that Nexhat Bytyqi sought compensation both during the trial and before it, during the investigation.[351]

346 Transcript of the main hearing held on 13 October 2017.
347 Nexhat Bytyqi, Bekim Gashi, Arife Gashi, Gjyle Gashi, Milaim Gashi, Husein Gashi, Elizabete Krasniqi, Hamide Gashi, and Ilmi Gashi.
348 Higher Court in Belgrade, decision R4 K Po2 no. 1/2017 dismissing the motion to speed up the proceedings, 27 September 2017.
349 Law on the Right to a Trial within a Reasonable Time (Official Gazette of the RS no. 40/2015), Articles 2 and 8.
350 Higher Court in Belgrade, decision R4 K Po2 no. 1/2017 dismissing the request for speeding up the proceedings, 27 September 2017.
351 Transcript of the main hearing held on 18 January 2016.

The Court of Appeal upheld the arguments and opinions of the Higher Court, and on 27 October 2017 ruled to dismiss the appeal against the dismissal of the injured party's' request for speeding up criminal proceedings as unfounded.[352]

Constitutional Appeal

As the decision dismissing Nexhat Bytyqi's request for speeding up the procedure was not subject to review by the appellate court, he raised an appeal with the Constitutional Court on 17 October 2017, i.e. within the legally prescribed time limit of 30 days. In the appeal he submitted that the decision of the Higher Court had violated his constitutionally guaranteed right to a fair trial, including the reasonable time requirement,[353] and the right to an effective remedy.[354]

Other injured parties whose appeal was dismissed as unfounded by the Court of Appeal also took their case to the Constitutional Court, claiming a violation of their right to a fair trial, including the right to a trial within reasonable time,[355] and the right to an effective remedy.[356]

At the time of publication of this report, the Constitutional Court's has yet to rule on the appeals.

Overview of the proceedings in 2018

Out of the nine trial days scheduled for 2018, seven took place, at which 14 witnesses and one expert witness were examined.

Expert witness Dr Aleksandar Kojić, a specialist in orthopaedics and traumatology, found the defendant Pavle Gavrilović fit to stand trial, as his orthopaedic treatment had ended.[357]

Witness Radivoje Mirković, former member of the VJ 549th MtBr, testified that on a hill above the village of Trnje, the defendant Gavrilović assembled all senior officers, turned to the village and said, "No one should be left alive today"; the defendant Kozlina, who was Mirković's immediate superior, then took a group of 20 soldiers, and they headed towards the village; as they descended to the village, they came across an elderly man, whom Kozlina shot. On arriving at the village, Kozlina ordered the men to "go from house to house"; they ejected 10 to 15 civilians – men, women and children - from their houses and rounded them up in a VJrd, and ordered them to sit on the ground, following which Kozlina ordered his men to shoot them dead; among those who shot were Kozlina, the witness and several soldiers whose names he could not remember; after that they continued the house-to-house search; an elderly civilian was taken out of a house and Kozlina ordered the soldiers to shoot him, but they disobeyed, after which Kozlina killed him himself, saying "This is how it should be done!"; they set fire to the houses they had searched; as they moved

352 Court of Appeal in Belgrade, decision Rž k –Po2 1/17 of 27 October 2017 on the appeal against the dismissal of the request for speeding up the proceedings.
353 Article 32 of the RS Constitution and Article 6 of the ECHR.
354 Article 36 of the RS Constitution and Article 13 of the ECHR.
355 Article 32 of the RS Constitution and Article 6 of the ECHR.
356 Article 36 of the RS Constitution and Article 13 of the ECHR.
357 Transcript of the main hearing held on 17 January 2018.

through the village, they came to a little bridge over a creek, where they found a few women, children and three men; Lieutenant Jaćimović told the women and children to leave and the men to stay put; the men were subsequently shot dead; the witness did not know who had given the order to shoot them. During their operation in Trnje, the witness did not see any member of the KLA in the village nor anyone firing at the soldiers. After going back to Prizren, they returned to Trnje with two trucks to retrieve the bodies of the civilians who had been killed. The defendant Kozlina was with them. They found only a few bodies in a meadow, but the bodies of the civilians killed in the VJrd were no longer there, only pools of blood. They transported the bodies to a hill above Prizren and buried them there.[358]

Witness/injured party Voci Maliq said that on the relevant day he had been shot in the back as he went out to feed his cows; the shot had probably come from a hill above his house. His family members took him into the house. He did not see what was going on in the village that day, but knew he was the first to be shot.[359]

The remaining 12 witnesses, all former members of the VJ 549th MtBr, testified for the defence. They had no first-hand knowledge of the events in Trnje. One of them, Stojan Konjikovac, who was the Head of Operations and Training of the the VJ 549th MtBr at the time, said that he had never been in Trnje and that it was only after the war that he had learned of the killings. There were no KLA members in the village, therefore the Logistics Battalion had no reason to enter it, he said, especially because the KLA was not retreating in the direction of Trnje.[360]

Witness Miljan Veličković, who, in his capacity as the Head of Security was a member of the command staff of the VJ 549th MtBr at the time, only learned about the event in Trnje during the trial of Slobodan Milošević at the ICTY. Yet, he was willing to allow that the Logistics Battalion, which did not have its own security body, might have done something he was not informed of. On the other hand, he thought it most unlikely that 27 civilians could be killed in Trnje without anyone knowing about it.[361]

Other witnesses, comrades of the accused, claimed that at the relevant time the Logistics Battalion was stationed on a hill above Trnje, in which position they were blocking the line, and from where they returned to Prizren two or three days later without ever entering the village of Trnje.[362]

On 23 April 2018, the OWCP amended the indictment to include eight more victims – four killed and four wounded – thus increasing the number of deaths to 31 and the number of wounded to six. Also, the injured party Voci Maliq, who in the previous indictment had been listed among the dead, was now listed among the wounded, and the locations where the victims were killed or wounded were specified with greater precision.[363]

358 Transcript of the main hearing held on 20 March 2018.
359 Transcript of the main hearing held on 20 September 2018.
360 Transcript of the main hearing held on 17 January 2018.
361 *Ibid.*
362 Transcript of the main hearing held on 7 March 2018; transcript of the main hearing held on 20 March 2018; transcript of the main hearing held on 4 June 2018.
363 OWCP indictment KTO 7/2013 of 23 April 2018.

The presentation of evidence ended in November 2018. The presentation of the closing arguments is scheduled for January 2019.[364]

HLC Findings

OWCP's inaction

The indictment in this case was raised only in late 2013, 11 years after the information on the involvement of the two defendants in the crimes in Trnje had become available to the public, and five years after the HLC had filed a criminal complaint over the crime in Trnje (in 2008). In 2002, at the trial of Slobodan Milošević before the ICTY, protected witnesses designated as K41[365] and K32,[366] gave evidence which pointed to the defendants' responsibility for the crime in Trnje.

The prosecution's case was poorly prepared

Over the course of the proceedings it became evident that the indictment was poorly drafted. First, it did not include all the victims of the crime charged in it, while listing a living person amongst the dead. Also, the manner of death of the victims listed as killed was not supported by appropriate evidence, such as exhumation and autopsy reports in respect of the victims whose mortal remains had been found, and relevant registers of persons reported missing on 25 March 1999 in the area of the village of Trnje as regards those who were still missing. The Chair of the Chamber criticized the OWCP for these failures in October 2015, and rightly so, requiring it to amend the indictment and supply the evidence supporting its case.[367] It took the OWCP nearly three years to supply the evidence requested. It was only after the Chair of the Chamber had issued a warning to the deputy prosecutor in charge of the case in March 2018[368], that the OWCP amended the indictment in April 2018. The amended indictment includes more victims and specifies more precisely the locations where they were killed or wounded.[369]

Inefficient trial

In the nearly four years since the beginning of the trial, only nine trials days have been held[370], with 13 trial days and several preliminary hearings[371] being postponed, usually on account of the supposed ill health of the defendants. To justify their absences, the defendants have regularly produced medical

364 Transcript of the main hearing held on 29 November 2018.
365 Transcript of the testimony of protected witness K42 of 5 September 2002, transcript of the testimony of protected witness K42 of 6 September 2002.
366 Transcript of the testimony of protected witness K32 of 17 July 2002, transcript of the testimony of protected witness K-32 of 22 July 2002.
367 Transcript of the main hearing held on 28 October 2015.
368 Transcript of the main hearing held on 7 March 2018.
369 OWCP amended indictment KTO no. 7/2013 of 24 April 2018.
370 On 24 February and 27-28 October 2015; 18 January, 20 May, 6-7 June and 11 October 2016; and 13 January 2017.
371 Transcript of the main hearing held on 20 May 2016.

certificates confirming their inability to attend the trial, which were all issued by military medical institutions. The defendants were, without fail, hospitalised a day before or on the very day of the main hearing. This prompted the Chair of the Chamber to make the following observation: "It happens very often that he [Pavle Gavrilović] is admitted to a hospital and spends two or three days there before the hearing, and then his treatment ends right after the hearing has been postponed."[372] Because Rajko Kozlina was "obviously avoiding attendance at the trial," the OWCP moved in April 2016 that the court place him in detention.[373] Namely, the ZKP allows for detention to be ordered against a defendant if he is "clearly avoiding attendance at the trial".[374] The court dismissed the motion on the grounds that it was premature.[375] In October 2017, after yet another instance of non-attendance by Pavle Gavrilović, the OWCP requested that he be placed in detention, because "he was manifestly avoiding the trial, time and again aided and abetted by the medical institution in which he receives treatment"; but the court dismissed this request too, considering it unfounded.[376]

Because of their repeated absences from the hearings, the Chair of the Chamber sought an expert opinion about their state of health. But instead of examining the defendants themselves, the medical experts based their assessment solely on the documentation obtained from the very same military medical institutions that regularly issued medical certificates to both defendants. As a result, their opinion was that "judging by this documentation," the hospitalisations of the defendants were justified.[377] As Pavle Gavrilović's absence on medical grounds continued for six more months, for which he produced medical records issued by military-medical institutions, the court again ordered him to submit to a medical examination, and again dismissed the OWCP's motion for his detention.[378]

Request for speeding up the proceedings, injured parties' appeal and constitutional appeal

The fact that the High Court rejected the request of the injured party Nexhat Bytyqi for a speeding up of the proceedings, claiming that he was not a person authorised to make the request as he had not sought compensation during the criminal proceedings, is particularly worrying. Because it is an indisputable fact that Nexhat Bytyqi did seek compensation both during the investigation and while testifying at the trial. The court interpreted arbitrarily and to his disadvantage the content of the statements he gave during the trial and investigation. From the trial and investigation records it can be seen that he did seek compensation, but did not specify the amount of the award he would pursue. Hence, the court made a manifest error in assessing his statements, made arbitrary inferences regarding the facts of the case, and then arbitrarily applied the provisions of the Law on the Right to a Trial within a Reasonable Time, by concluding that the injured party was not a person entitled to file the request. This conclusion is not only incorrect, it also denies the injured party the right to appeal against such a decision and to try to prove it wrong before the court of second instance. If such

372 Transcript of the main hearing held on 25 February 2016.
373 Transcript of the main hearing held on 19 April 2016.
374 ZKP, Article 211, paragraph 1, sub-paragraph 1.
375 *Ibid*, p. 4.
376 Transcript of the main hearing held on 13 October 2017.
377 Transcript of the main hearing held on 20 May 2016.
378 Transcript of the main hearing held on 13 October 2017.

an approach by the Higher Court were accepted, it would mean that the court is given discretion to interpret the content of statements in such a way as it sees fit, dismiss a request for speeding up the proceedings on the basis of such an interpretation, and then not allow the requester to appeal against the decision - and do all these things in accordance with the law.

The injured party Nexhat Bytyqi, as a party to the proceedings, should have been allowed to have his case heard by two courts of instance in a situation where his right was to be decided upon. In this respect, he should have been allowed to take his case to the court of second instance in order to try to show that the grounds for the dismissal of his request cited by the court of first instance were incorrect.

The injured party's request obviously proved not to constitute an effective remedy. Next, he was denied another remedy, namely the right to appeal against the decision dismissing the request, and thus left without any recourse to protect his right to a trial within a reasonable time. Lodging a constitutional appeal was therefore the only course of action he could take in order to protect his rights.

Furthermore, when deciding on the appeals of all the injured parties, the Court of Appeal also violated their right to a fair trial, because it did not clearly specify on what grounds it found their appeals to be unfounded. The right to obtain a reasoned decision is one the basic rights of a party in the proceedings. It implies the obligation of the court to provide answers to the essential arguments put forth and issues raised by the parties to the proceedings. In many of its decisions, the Constitutional Court has made it clear that state authorities are under the obligation to state the reasons for their decisions[379], as has the European Court of Human Rights as well.[380] Besides stating that this was a complex case, in which findings of fact and adducing of evidence took quite a while, the court did not explain its decisions with regard to the allegations made by the appellants, in which they clearly pointed to the errors made by the trial court during the criminal proceedings. The appellants pointed out that the fact that the defendants regularly produced medical documentation issued by military medical institutions to prove that they were in ill-health is not questionable. But what is questionable is the fact that they seem to suffer health problems only several days prior to a hearing, and that their symptoms disappear once the hearing is postponed, as was observed also by the Chair of the Chamber.[381]

The appellants also submitted that the medical documentation produced by the defendants was insufficient justification for not holding 11 of the 20 hearings scheduled. Given the circumstances, hearings could have been scheduled to take place at shorter intervals or the chamber could have taken other legal steps to secure the attendance of the defendants in court. Placing them in detention is one such step that could effectively secure their attendance in court. The appellants also stated

379 See decisions Už-2119/2015 of 1 December 2016, Už-1540/2014 of 24 November 2016, Už 7975/2014 of 15 September 2016, and Už -485/2008 of 15 July 2010.

380 See ECHR judgments in: *Ruiz Torija v. Spain,* 9 December 1994; *Helle v. Finland* of 19 December 1997; *Georgiadis v. Greece,* of 29 May 1997; *Van der Hurk v. The Netherlands* of 19 April 1994; and *Kuznetsov and others v. Russia* of 11 January 2007.

381 Transcript of the main hearing held on 25 February 2016.

that there exist medical institutions in detention units equipped to monitor the state of health of the defendants. The court did not accept any of these positions, nor did it set out the reasons for finding them unfounded, despite being under a legal obligation to do so.[382]

The frequent postponement of hearings, coupled with the court's failure to make the right decision regarding the request for speeding up the proceedings, negate the whole point of judicial proceedings, while allowing the defendants to effectively evade their legal obligation to appear in court and stand trial.

Denying protection to the injured parties in a war crimes case that has been ongoing for five whole years, thus compelling them to assert their right to a fair trial before the Constitutional Court, is highly unacceptable.

Defendants' status in the Army of Serbia

At the time of the indictment, both defendants were serving members of the AoS, and Rajko Kozlina is almost certainly still employed by the AoS, despite the fact that he is standing trial for a war crime against civilians. Pavle Gavrilović has retired in the meantime.

The HLC urged the then Chief of the AoS General Staff, Ljubiša Diković, to suspend Gavrilović and Kozlina from military service for the duration of the proceedings, under the Law on the Serbian Armed Forces. This Law stipulates that a member of the professional military personnel may be removed from duty if he has been charged with an offence "of such a nature that it would be harmful to the interests of the service that such an individual should remain on duty".[383] At the time of publication of this report, no reply had been received from the General Staff.

The HLC therefore addressed the Ministry of Defence (MoD), under the Law on Free Access to Information of Public Interest, enquiring whether or not Kozlina and Gavrilović were still serving members of the AoS. The Ministry denied the request on the grounds that the information sought was classified as being personal information and information "relevant for the defence of the state." The HLC complained to the Commissioner for Information of Public Importance against the MoD's decision. After examining the complaint, the Commissioner dismissed the reasons for non-disclosure given by the MoD and ordered it to provide the HLC with the information requested. After the MoD failed to comply with this order, the Commissioner issued two more decisions between April and June 2016 concerning this matter, imposing several fines on the Ministry, which totalled RSD 200,000. As the MoD failed to give effect to the Commissioner's decisions even after the fines, on 18 June 2016 the Commissioner turned to the Government of the Republic of Serbia, requesting it to compel the MoD to comply with his decisions. At the time of publication of this report, the Government had not taken any action with regard to the Commissioner's request.

382 Court of Appeal in Belgrade, decision Rž k Po2 1/17 of 27 October 2017 regarding the dismissal of the request for speeding up the proceedings.

383 Law on the Serbian Armed Forces (Official Gazette of the Republic of Serbia, nos. 116/2007, 88/2007, 101/2010 - other law, 10/2015 and 88/2015 – Decision of the Constitutional Court), Article 77.

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

IX. Bosanska Krupa II Case[384]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 26 December 2017
Trial commencement date: 7 June 2018
Prosecutor: Bruno Vekarić
Defendants: Joja Plavanjac and Zdravko Narančić
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Mirjana Ilić (Chair of the Chamber) Judge Zorana Trajković Judge Dejan Terzić

Number of defendants: 2	
Defendants' rank: low	**Number of trial days in the reporting period:** 3
Number of victims: 11	**Number of witnesses heard during the reporting period:** 8
Number of witnesses heard: 8	**Number of experts heard:** 0

Key developments in the reporting period:

Main hearing

384 *Bosanska Krupa II* trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/bosanska_krupa_II.html, accessed on 11 December 2018.

The course of the proceedings

Joja Plavanjac is charged with murdering 11 Bosniak civilians in the first half of August of 1992 in the Petar Kočić elementary school in Bosanska Krupa (BiH). Zdravko Narančić is charged with aiding and abetting in the commission of the crime. According to the indictment, Zdravko Narančić, a military policeman with the 11th Krupa Light Infantry Brigade of the VRS at the time, was a duty guard at a prison set up in the Petar Kočić elementary school. He let Joja Plavanjac, a VRS soldier, enter the prison armed with an automatic rifle. Plavanjac was looking for Predrag Praštalo, a man who had killed his mother several days before. Praštalo had already been transferred to the detention facility in Banja Luka. After Narančić unlocked and opened the door to a room in which a group of Bosniak members of the "Joks" group were confined, Plavanjac fired on them with his machine gun, killing 10, namely: Rasim Kaltak, Nezir Kaltak, Enes Kaltak, Emsud Kaltak, Ferid Kaltak, Fadil Alijagić, Edina Alijagić, Mirsad Omić, Rasim Nasić and Ismet Ćehajić. Narančić then unlocked the door to another room and called for Tofik Sedić to come out. After Sedić came out, Plavanjac took him to the gymnasium, where he shot him dead with his machine gun.[385]

Defendants' defence

Both defendants denied committing the crimes they were charged with. Joja Plavanjac claimed it was not him but his father, Lazo Plavanjac (now deceased), who had killed the men. He explained that a VRS soldier, Predrag Praštalo, killed his mother on 31 July 1992, after which his father visited him in Krupa on 3 August 1992 and insisted that he should drive him to Petar Kočić elementary school in Bosanska Krupa, where he was told Praštalo was detained. Both he and his father were armed. When they arrived at the school, which served as a prison, Narančić, who was his subordinate, let them in and explained that Praštalo had been transferred to Banja Luka. But the father nonetheless insisted that he should unlock the doors to the rooms holding Bosniak detainees, to see for himself that Praštalo was not there. When Narančić opened the door to one of the rooms, the father recognized Tofik Sedić amongst the detainees in the room and talked to him. Meanwhile, Plavanjac and Narančić went to an office so Plavanjac could check the duty officers' log and make sure that Praštalo had indeed been transferred to Banja Luka. While in the office, they heard a shot, dashed out of the office and saw Tofik Sedić dead on the floor. Plavanjac and Narančić then returned to the office to check the logs. Soon afterwards, they heard more shots, ran back to Plavanjac's father and saw that he had shot several prisoners in a room. Plavanjac could not explain how his father had unlocked the door to the room. Narančić grabbed Plavanjac's father to prevent him from shooting again and pushed him out of the school. After that, father and son left.[386]

Zdravko Narančić said he was the officer of the day guarding the prison on the relevant day. In the afternoon, Joja Plavanjac, who was his superior, came to the prison with his father. They were looking for Praštalo – the man who had killed Joja Plavanjac's mother several days before. He told them

385 OWCP indictment KTO 4/17 of 26 December 2017, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2018-03/kto_4_17_latinica~3.pdf, accessed on 8 January 2019.

386 Transcript of the main hearing held on 7 June 2018.

that Praštalo had been taken to Banja Luka, and opened a door so they could see for themselves that Praštalo was no longer there. The father of Joja Plavanjac recognised Tofik Sedić amongst the detainees in the room and started a conversation with him. Narančić then went with Joja Plavanjac to an office in order for Plavanjac to see the duty officers' log in which the information on Praštalo' transfer was recorded. While in the office, Narančić heard two shots. He saw Lazo Plavanjac walk past the office, after which he heard more shots. Both men ran out of the office to see what was going on. Narančić pushed Lazo and Joja out of the school and went to check on the men Lazo had shot. Some of them were still alive. He went to the command right away to report the incident.[387]

Witnesses' testimonies

Witnesses/injured parties Asim Nasić, Mirela Rekić, Osma Alijagić, Fatima Kaltak and Safija Kaltak, were questioned via video-conference with the Cantonal Court in Bihać. They did not have direct knowledge of the event. Due to poor sound quality, their testimonies were virtually impossible to follow.[388]

Duško Jakšić and Zdravko Marčeta, both ex-members of the VRS, did not have direct knowledge of the event either. They said they had heard that the late Lazo Plavanjac, father of the defendant Joja Plavanjac, had been involved in the killings of detainees in Petar Kočić elementary school. It should be noted that these two witnesses had made no mention of the father of Joja Plavanjac while testifying earlier before the competent judicial authorities in BiH.[389]

HLC Findings

Regional Cooperation

This case is yet another example of effective cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. The case was transferred to the OWCP by the Court of Bosnia and Herzegovina because the defendants, who are citizens and residents of Serbia, were unavailable to the BiH judicial authorities.

Some segments of the proceedings were impossible to follow

The courtroom in which the trial takes place is not equipped with headphones for members of the audience. Headphones are only provided for members of the chamber and participants in the proceedings. The poor sound quality made it very difficult for the audience to follow the witnesses giving evidence via video-conference. The HLC notes that the court has a duty to provide headphones to members of the audience also, and thus make it possible for them to hear clearly what is being said by witnesses who testify via video-conference.

387 *Ibid.*
388 Transcript of the main hearing held on 3 October 2018.
389 Transcript of the main hearing held on 25 December 2018.

X. Bosanski Petrovac – Gaj Case[390]

CASE INFORMATION	
Current stage of the proceedings: first-instance proceedings	
Date of indictment: 10 October 2014	
Trial commencement date: 15 June 2015	
Prosecutor: Mioljub Vitorović	
Defendant: Milan Dragišić	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Vladimir Duruz (Chair of the Chamber) Judge Vera Vukotić Judge Vinka Beraha-Nikićević
Number of defendants: 1 **Defendant's rank:** low – no rank **Number of victims:** 5 **Number of witnesses heard so far:** 26	**Number of trial days in the reporting period:** 5 **Number of witnesses heard in the reporting period:** 6
Key developments in the reporting period: Main hearing	

390 *Bosanski Petrovac – Gaj* trial reports and documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/bosanski_petrovac_gaj.html, accessed on 11 December 2018.

The course of the proceedings

Overview of proceedings up to 2017

Indictment

As alleged in the indictment, Milan Dragišić, a member of the VRS, killed three Bosniak civilians and injured two, in the Bosanski Petrovac Gaj district (BiH), on 20 September 1992. After the body of his brother Dragan Dragišić, who died on the battlefield, had been brought back home, Dragišić armed himself with a machine gun, went out into the street shouting obscenities at his Bosniak neighbours in the street about their "Turkish and Muslim mothers", and shot several of them.[391]

Defendant's defence

While testifying on his own behalf, the defendant said he did not feel guilty. After the body of his brother had been brought in, he took a loaded machine gun from the trunk of the car. Then he heard a burst of fire, but could not remember what happened. He was "out of his mind" and "everything had turned black" before his eyes, from the moment he discovered that the body of his deceased brother had been completely mutilated. That is why, he said, he did not know if he had killed his neighbours.[392]

Witnesses' testimonies

Injured party Muhamed Kavaz recounted how the defendant wounded him and killed his father Asim. The Kavazes, who lived next door to the defendant, when they heard crying and wailing from the defendant's house, went out to see what was going on. The defendant came out into the street and shot at them.[393] Witness Branko Srdić, an eyewitness to the incident, confirmed that the defendant killed Asim Kavaz.[394]

Witnesses Mirko Velaga and Edin Bašić were not eyewitnesses to the event, but their indirect knowledge corroborated the account of the injured party Muhamed Kavaz about the murder of his father, and that the defendant, after killing Asim Kavaz, was moving around Gaj shooting at Bosniak civilians.[395]

Milorad Radošević, who was present at the scene when the bodies of killed combatants were brought to Bosanski Petrovac, said that he saw the defendant amongst the people gathered on the street. He was wailing and screaming over the death of his brother, with his friends and relatives holding him and eventually pushing him, with great difficulty, into a car. Željko Kuburić and Duško Karanović,

391 OWCP indictment no. KTO 7/14 of 10 October 2014, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2014_10_10_lat.pdf, accessed on 11 December 2018.
392 Transcript of the main hearing held on 15 June 2015.
393 Transcript of the main hearing held on 14 July 2015.
394 Transcript of the main hearing held on 18 November 2015.
395 Transcript of the main hearing held on 8 October 2015.

who went over to the Dragišić house to offer them their condolences, said that the defendant seemed disoriented and abstracted and completely unaware of their presence.[396]

Overview of the proceedings in 2017

Out of the seven hearings scheduled in 2017, only one took place, during which the court heard two defence witnesses. Hearings were postponed either due to the non-attendance of witnesses (in five instances) or the defendant, who was hospitalised at the time.

Defence witness Milorad Dragišić, the brother of the defendant, said that he had not witnessed the incident. As soon as he heard about the death of their brother, he hurried home. Near the house he saw the body of Asim Kavaz, a neighbour. He was told by friends and relatives that the defendant had killed him and wounded Muhamed Kavaz, the son of Asim's, and then headed into the town with a machine gun. The witness ran after his brother and caught up with him. Aided by some friends, he managed to restrain him and bring him back home. His brother was devastated by the horrible sight of the massacred body of their brother, the witness said. He seemed completely numb. The witness thinks that the defendant's capacity was diminished at the time he killed his neighbour Asim, that he did not realize what he was doing and whom he had shot, as the Dragišićes had always got on well with the Kavazovs. The witness was told that three more persons had been killed that day near a hotel in town, but he was convinced that his brother had nothing to do with that, because he had been caught and brought back home before arriving in town.[397]

Jela Dragišić, the wife of the defendant's brother, also testified for the defence. She said that she was in the VJrd of their house with her mother-in-law when the defendant came to tell them that Dragan Dragišić had perished. "Complete pandemonium broke out", said the witness. She saw their neighbours Asim and Muhamed Kavaz walk across their VJrd towards their house, heard shots, but did not see who had shot whom. The two families had a friendly relationship with each other, so there was no call for anyone to kill anyone, she concluded.[398]

Overview of the proceedings in 2018

Seven hearings were scheduled and four held in 2018, during which five witnesses were heard.

Three witnesses for the defence, namely Nenad Dragišić, a relative of the defendant, Brankica Dragišić, the wife of the defendant, and Drena Latinović, a neighbour of the defendant, all said that they had no direct knowledge of the wounding and killing of the Bosniak civilians. As they said, the defendant seemed completely disoriented.[399]

396 Transcript of the main hearing held on 15 September 2016.
397 Transcript of the main hearing held on 21 June 2017.
398 *Ibid.*
399 Transcripts of the main hearings held on 8 March 2018 and 10 September 2018.

Semira Mešić Pašalić, expert in forensic medicine and pathology, said that she had provided her opinion to the Cantonal Prosecutor's Office in Bihać on the injuries sustained by the injured parties Muhamed Kavaz, Elvir Zajkić and Safet Terzić. However, at the time she provided this opinion, she was not listed on the expert witness register, because, as she explained, she was very busy working on exhumations at the time, and did not have time to register.[400]

After hearing the witnesses for the defence, the court sought a psychiatric opinion about the defendant's mental state at the time of the commission of the crime. Also, the court ordered a medical examination of the injuries sustained by the injured parties, since the opinion provided by Semira Mešić Pašalić could not be admitted as evidence because she was not a registered expert witness.

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

HLC Findings

Regional Cooperation

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

Inadmissible expert opinion

The Cantonal Prosecutor's Office in Bihać committed a serious error by admitting as evidence the opinion of an expert not listed on the register of expert witnesses. This act sullied the reputation of the prosecutor's office and caused delay in the proceedings against Dragišić. After the hearings had to be postponed several times due to the expert's alleged ill health, it turned out that she was not a registered expert witness. As a result, another expert witness had to be called to take her place.

400 Transcript of the main hearing held on 20 January 2018.

First-instance judgments

I. Bosanska Krupa Case[401]

CASE INFORMATION
Current stage of the proceedings: first-instance proceedings
Date of indictment: 26 May 2016
Trial commencement date: 14 October 2016
Prosecutor: Miodrag Vitorović
Defendant: Ranka Tomić
Criminal offence charged: crime against prisoners of war under Article 144 of the Criminal Code of the FRY

Chamber	Judge Vinka Beraha Nikićević (Chair of the Chamber) Judge Vera Vukotić Judge Vladimir Duruz

Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 11
Number of victims: 1	**Number of witnesses heard in the reporting period:** 10
Number of witnesses heard so far: 10	

Key developments in the reporting period:

Handing down of a first-instance judgment

401 *Bosanska Krupa* Case, trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/bosanska_krupa.html, accessed on 29 January 2019

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

According to the indictment,[402] Ranka Tomić, who was the captain of the "Women's Front – Petrovac" unit (which was part of the Petrovac Brigade of the Army of Republika Srpska (VRS)), participated in the torture, inhumane treatment, infliction of severe suffering and injuries to the bodily integrity and, later, the killing of a prisoner of war, Karmena Kamenčić, a nurse in the 5th Corps of the Army of BiH, in mid-July 1992. When members of the "Women's Front – Petrovac" unit brought the captured nurse to a vale in the village of Radić (in the municipality of Bosanska Krupa, BiH), followed by a crowd of people, the defendant ordered the victim to undress and crawl on the ground naked and then dig her own grave; she also put blackthorn twigs between her legs. After that, the defendant, together with other members of the "Women's Front – Petrovac", approached the victim, hit her with sticks, cut off her hair with a knife, carved a cross on her back, cut a part of her ear, pushed her head into cow dung, hit her posterior with a shovel, and made her sing Serbian songs. Next, they took the victim and the underage Veselko Đukić to another hollow nearby, where they again ordered the victim to dig her grave. Since the victim was no longer able to do it, the underage Veselko Đukić finished the digging. The victim was ordered to lie on her back in the hole, after which Veselko Đukić killed her with between 5 and 7 shots from an automatic rifle.[403]

Defendant's defence

While taking the stand in her own defence, Ranka Tomić denied having committed the acts, claiming that she was in Belgrade at the relevant time. She explained that in late 1991 she was transferred to the Knin Corps at the orders of the Military Academy in Belgrade, to be later transferred to Medački džep and Gračac, where she served as the commander of a female artillery unit, with Sovilj as her commander. From Gračac she was transferred to Bosanski Petrovac by an order of 21 April 1992, for a training organised for female volunteers comprising the so-called Infantry Platoon. She said that the allegation that the "Women's Front – Petrovac" existed in 1992 was incorrect, claiming that it was only formed in 1994. She further said that the information that she held the rank of captain was also incorrect, because at the time of the events described in the indictment she was a lieutenant and was only later promoted to the rank of captain. The training lasted two weeks, after which she returned to Gračac. With the women who participated in the training she was sent to Oštrelj in May 1992 for additional training, after which she attended a first aid training in Kupres, which lasted until the end of June 1992. She returned to Petrovac on 28 or 29 June 1992, and immediately afterwards went to Gračac. In Gračac she found out that commander Sovilj had been killed, and went to Petrovac to help

402 OWCP indictment KTO no. 05/2016 of 26 May 2016.

403 The Office of the War Crimes Prosecutor took over this case from the Cantonal Court in Bihać under the Law on International Legal Assistance in Criminal Matters and the Agreement on Mutual Legal Assistance in civil and criminal matters between the RS and BIH.

in the organisation of his funeral, which took place on 7 July 1992. After attending the funeral, she immediately went to Gračac with a driver and two female friends. From Gračac she went straight to Belgrade on 9 July 1992 and the next day she went to the Military Academy to report to her unit. She said she knew Bora Kuburić and Radmila Banjac[404] – she met them in April 1992 at a training course. She claimed that Kuburić and Banjac testified against her because they were talked or coerced into it.[405]

Overview of the proceedings in 2017

Five trial days were held in 2017, during which seven witness were examined.

Marinko Kerkez, an eyewitness to the incident, described Karmen Kamenčić as "a nice young woman with curly hair" who was captured and taken to the primary school in Radići. From there, members of the "Women's Front – Petrovac" took her to a vale, encircled her and made her take off her clothes, piece by piece, until she was completely naked. To the witness, it all looked like a strip game. Bora Kuburić, a member of the "Women's Front – Petrovac", cut off the victim's hair with a knife, carved a cross on her back and cut her ear. A woman they called "Captain Rada" [Ranka Tomić] then made her perform prostrations as in Muslim prayer, and pushed her head into some cow dung, while other women beat her and she herself hit her posterior with a shovel. They broke her chain necklace and made her dig her own grave. The witness identified Bora, Rada, "Captain Rada" and a certain Lj. as the women who beat the victim. They stuck blackthorn twigs between her legs. Then "Captain Rada" ordered her to dress and the women took her to another, nearby hollow. They again ordered her to dig a grave for herself but she was too weak to do it, so the underage Veselko dug it. She was ordered to lie in the grave, after which Veselko fired 6 or 7 shots at her from an automatic rifle. The whole event was witnessed by a crowd of some 100 people who just looked on without trying to stop it. "Captain Rada" was the boss, no one dared to oppose her. Describing "Captain Rada", the witness said she was a big woman with black hair, armed, and in a camouflage uniform. She held the rank of captain and wore her rank patch in a pocket. When presented with a photograph of the defendant from the case file, the witness expressly stated that "Captain Rada", when he saw her for the first time, looked exactly like the woman in the photograph.[406]

Witness Veselko Đukić, also an eyewitness to the event, said that he saw the victim when she was brought to the village, after which the women from the VRS took her to a hollow. A large crowd that had gathered in the village, comprised of soldiers and local residents, including the witness, followed the women to the hollow to see what would happen. A woman whom the other women soldiers called "Captain Rada" ordered the victim, who was wounded in the leg, to strip naked, then hit her back with a shovel and made her crawl in dung while sticking thorns between her legs. According to the witness,

404 Bora Kuburić and Radmila Banjac were finally convicted of this crime by the Cantonal Court in Bihać and sentenced each to three-and-a-half years in prison. Casa information available online at http://warcrimesmap.ba/case/kuburi%C4%87-and-banjac-bora-kuburi%C4%87-and-radmila-banjac, accessed on 11 January 2019.

405 Transcript of the main hearing held on 14 October 2016.

406 Transcript of the main hearing held on 26 January 2017.

"Captain Rada" had short black hair and wore a camouflage uniform with a captain's insignia on the chest. 10 other uniformed women also hit and pushed the victim. One of them, Bora Kuburić, carved a cross on her back with a knife, and another one, Radmila Banjac, cut her ear. The witness said that "Captain Rada" was the commander of all the uniformed women. After beating the victim, they made her dig her own grave. Then a soldier came along who, so the witness heard, had captured the victim, and took her to another hollow located nearby and killed her with multiple shots as she lay in a grave that had already been dug.[407]

Bora Kuburić, who had been convicted of this crime by the Cantonal Court in Bihać, testified as a witness. She denied having seen the defendant on the day of the crime. When asked to explain the discrepancies between her statement given to the competent authorities in BiH and the statement given at the trial in Belgrade, she said that she had signed the record with her statement given to the BiH authorities without knowing what it was.[408]

Three defence witnesses were questioned, none of whom had direct knowledge of the event in question but claimed that the defendant was not called "Rada" by anyone, and that at the time of the crime she was not a captain but a lieutenant.[409]

Dismissal of the indictment

On 9 October 2017, the Trial Chamber ruled to dismiss the indictment on the grounds that it was not filed by an authorised prosecutor.[410] According to the CrPC, the Trial Chamber will dismiss an indictment during the course of a trial if it finds that the proceedings are being conducted without a request from an authorised prosecutor.[411] The term of office of the former war crimes prosecutor expired on 1 January 2016, and the new prosecutor did not take office until 31 May 2017. During that period, the OWCP was without a war crimes prosecutor or acting war crimes prosecutor. As the indictment against the defendant was filed on 26 May 2016, it was considered to be filed by an unauthorised prosecutor.

Resumption of the trial

After the new war crimes prosecutor took office, the OWCP moved that the criminal proceedings be resumed. On 23 November 2017, the trial chamber ruled to resume the proceedings upon the same indictment.

407 Transcript of the main hearing held on 8 September 2017.
408 Transcript of the main hearing held on 15 December 2017.
409 Transcripts of the main hearings held on 23 November and 15 December 2017.
410 Transcript of the main hearing held on 9 October 2017.
411 ZKP, Article 416, paragraph 1, sub-paragraph 2.

Overview of the proceedings in 2018

During the six trial days held in 2018 three witnesses were examined. Two witnesses who testified for the defence confirmed that the defendant was with them at the funeral of Commander Sovilj in the summer of 1992.[412]

First instance judgment

On 26 December 2018, the Higher Court in Belgrade judged Ranka Tomić guilty and sentenced her to five years' imprisonment.

The court found that members of the Petrovac Brigade of the VRS captured Karmena Kamenčić, a nurse in the 5th Corps of the Army of Bosnia and Herzegovina, in the area of Radić (in the municipality of Bosanska Krupa), and then handed her over to the "Petrovac Women's Front" unit.

Members of this unit took Karmena Kamenčić to a hollow in Radić. Ranka Tomić ordered the prisoner to strip naked, crawl on the ground and to dig her own grave, as Tomić pushed blackthorn twigs between her legs. The defendant and other members of the "Women's Front – Petrovac" then approached the victim. The defendant beat her with a stick all over her body and other women cut off her hair with a knife, carved a cross on her back and cut the lower part of her ear, pushed her head into cow dung, all the while beating her with a shovel on the posterior and making her sing Serbian songs. After that, members of the "Petrovac Women's Front" and Veselko Đukić, who was underage at the time, took the victim to a nearby hollow, where they again ordered her to dig her grave; as she was no longer able to do it, Veselko Đukić finished the digging. The victim was then forced to lie on her back in the grave, after which Veselko Đukić killed her with 5 to 7 shots from an automatic rifle.

Tomić's defence was assessed by the court as implausible and calculated to have her acquitted of criminal responsibility. The defendant maintained that she knew nothing about the crime and that she was somewhere else at the time it was committed. But her defence was rebutted by a number of witnesses who confirmed having seen her at the scene at the time of the crime and recognised her at the trial.

In determining the sentence, the court regarded the severity of the crime, the fact that the defendant, being a commanding officer, was aware of her responsibility, and her influence on other members of the unit, as aggravating circumstances. The absence of previous convictions was a factor taken into account for mitigation.[413]

412 Transcript of the main hearing held on 15 January 2018.
413 Transcript of the delivery of judgment, 26 December 2018.

HLC Findings

Regional Cooperation

This case is a good example of effective cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. The Prosecutor's Office of BiH referred this case to the OWCP because the defendant, being a national and resident of Serbia, was out of reach of the BiH judicial authorities.

Incomplete indictment delivered to the HLC

Invoking the Law of Free Access to Information of Public Importance, the HLC requested from the OWCP access to the indictment against Ranka Tomić. The OWCP delivered an incomplete version of the indictment, with some important information, such as the names of other co-perpetrators, the names of witnesses, and the evidence offered to prove the decisive facts, having been left out it. Withholding the said information was unwarranted and needlessly hampered the following of the proceedings. This case was transferred to the OWCP by the Cantonal Court in Bihać, after other co-perpetrators had been tried for this crime. The trial was widely reported in the press,[414] including the names of the co-perpetrators and witnesses. Therefore there was no reason whatsoever for the OWCP to deliver an incomplete indictment to the HLC and thus violate the provisions of the Law on Free Access to Information of Public Importance.

Decision on the sentence

The HLC considers that the five-year sentence passed on the defendant is unduly lenient, bearing in mind the manner in which the criminal act was committed. At the time she was murdered, Karmena Kamenčić was barely 18 years old, and wounded. Before being killed, she was subjected to extremely humiliating and inhumane treatment in front of a large crowd - a treatment that the defendant, being in charge of the unit, could have prevented. But she did not. Instead, she took an active part in torturing the victim. With such a lenient sentence, i.e. the statutory minimum sentence for this type of crime, the purpose of punishment can hardly be said to have been achieved.

414 Justice Report, *Kuburić and Banjac* Case report, April 2014-February 2015, available online at http://www.justice-report.com/en/cases/kuburic-and-banjac-news-analysis-and-opinion, accessed on 11 January 2019; Slobodna Evropa, 4 October 2015 "Nakon dvije decenije pronađeno tijelo Karmen Kamenčić" [After two decades Karmen Kamenčić's body is found], available online (in Bosnian) at http://www.slobodnaevropa.org/a/plp-nakon-dvije-decenije-pronadjeno-tijelo-karmen-kamencic/27287320.html, accessed on 11 January 2018.

II. Ključ-Kamičak Case[415]

CASE INFORMATION	
Current stage of the proceedings: appeals proceedings	
Date of indictment: 26 May 2016	
Trial commencement date: 8 September 2016	
Prosecutor: Dušan Knežević	
Defendants: Dragan Bajić and Marko Pauković	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Vera Vukotić (Chair of the Chamber) Judge Vinka Beraha-Nikićević Judge Vladimir Duruz
Number of defendants: 2 **Defendants' rank:** low **Number of victims:** 5 **Number of witnesses heard so far:** 4	**Number of trial days in the reporting period:** 6 **Number of witnesses heard in the reporting period:** 2 **Number of expert witnesses heard in the reporting period**: 1
Key developments in the reporting period: Handing down of a first-instance judgment following retrial	

415 *Ključ-Kamičak* Case, trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc-kamicak.html, accessed on 29 January 2019

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

The defendants, Dragan Bajić[416] and Marko Pauković,[417] in their capacity as military policemen of the VRS Sana Brigade, are charged with killing Hasan Rahić on the outside staircase of Minka Jusić's house in the village of Kamičak (in the municipality of Ključ, BiH) on 10 October 1992, by firing multiple shots at him with their automatic rifles, after which they left the scene. Shortly afterwards, they came back to Minka Jusić's house, stormed their way inside and fired multiple shots at the persons they found in the house, killing Minka Jusić, Munira Hotić, Džemila Behar, and Safeta Behar, a minor.[418]

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

Defendant's defence

Both defendants denied having committed the offence of which they are accused. Dragan Bajić[419] claimed that at the time relevant to the indictment he was on sick leave, after being wounded on the battlefield at Gradačac on 13 August 1992. Marko Pauković said that the case against them was "fabricated by the BiH judiciary", adding that he had heard that all members of his unit were listed as war criminals.[420]

Witnesses' testimonies

Witness Emsud Behar was in Muharem Behar's house in Kamičak at the relevant time. From a window he saw the defendants enter Minka Jusić's house, after which he heard bursts of automatic gunfire coming from the house. The next day he went to Minka's house and saw the dead body of Hasan Rahić lying on a stair landing. The men who took the victims' bodies out of the house told him that Munira Hotić, Džemila and Safeta Behar, and Minka Jusić had been killed in the house. Behar said that at the time of the murder, Refik Hotić was also in the house, hiding behind a door. Hotić later said that it was the defendants who had killed the victims.[421]

416 OWCP indictment KTO no. 6/16 of 26 May 2016, available online (in Serbian) at http://www.tuzilastvorz.org.rs/sr/predmeti/optu%C5%BEnice, accessed on 10 January 2019.
417 OWCP indictment KTO no. 7/16 of 26 May 2016, available online (in Serbian) at http://www.tuzilastvorz.org.rs/sr/predmeti/optu%C5%BEnice, accessed on 10 January 2019.
418 The Prosecutor's Office of BiH transferred this case to the OWCP, because the defendant, being a national and resident of Serbia, was out of reach of the BiH judicial authorities.
419 Transcript of the main hearing held on 8 September 2016.
420 *Ibid.*
421 Transcript of the main hearing held on 24 October 2016.

Witness Duško Vidović also served as a VRS military policeman and frequently patrolled the village with the defendants for routine checks. Usually, the defendants patrolled the village in the company of Nenad Kaurin, also a military policeman. The witness did not know the victims, but was present during the crime scene investigation. Following the murder of the civilians, the defendants and Nenad Kaurin arrested two fighters, who fought under the command of "a certain Čeda", on the suspicion of having committed the murder in question. The witness heard villagers say that it was "Čeda's soldiers" who had killed the civilians.[422]

Overview of the proceedings in 2017

The evidence presentation continued into 2017. Two witnesses were examined, Sabiha Hotić and Nesiha Lović, who did not see the incident but only heard about it from fellow villagers.[423]

Dismissal of the indictment

On 13 October 2017, the Trial Chamber issued a ruling dismissing the indictment on the grounds that it was not filed by an authorised prosecutor.[424] According to the CrPC, the Trial Chamber will dismiss an indictment during the course of a trial if it finds that the proceedings are being conducted without a request from an authorised prosecutor.[425] The term of office of the former war crimes prosecutor expired on 1 January 2016, and the new one did not take office until 31 May 2017. During that period, the OWCP was without a war crimes prosecutor or acting war crimes prosecutor. As the indictments against the defendants were filed on 26 May 2016 and 28 June 2016 (amended and consolidated indictments), they were deemed to be filed by an unauthorised prosecutor.

Resumption of the trial

After the new war crimes prosecutor took office, the OWCP filed a motion seeking that the criminal proceedings be resumed. On 22 November 2017, the trial chamber ruled that the criminal proceedings upon OWCP indictment KTO 6/16 against Dragan Bajić and OWCP indictment KTO 7/16 against Marko Pauković, who had both fled on 26 May 2016, be continued from the point in the presentation of evidence where they had been interrupted.[426]

The court continued hearing the evidence by examining medical expert Branko Aleksandrić. The expert said that his finding was based upon the documents contained in the case file, namely, the crime scene investigation report and the autopsy report made after the exhumation of the mortal remains of the victims, which he assessed as too short, offering insufficient information, and imprecise. The expert said that all the victims died as a result of injuries caused by gunshot wounds and that they

422 Transcript of the main hearing held on 2 December 2016.
423 Transcript of the main hearing held on 27 January 2017.
424 Transcript of the main hearing held on 13 October 2017.
425 CrPC, Article 416, paragraph 1, sub-paragraph 2.
426 Transcript of the main hearing held on 22 November 2017.

had died at the location where their bodies were found, although allowing for the possibility that they might well have been killed at another location.[427]

Expert consultant of the defendants

Professor Zoran Stanković, MD-PhD, expert consultant to the defendants in medical matters, was present during the examination of the expert witness. He challenged the expert witness finding in the part relating to the cause of the wounds found on the victims' bodies. Stanković argued that on the basis of the insufficient details provided in the autopsy report it was not possible to determine that the injuries were most likely caused by gunshot wounds, as stated in the expert witness's finding, but only that they were probably caused by gunshot wounds.

Ključ-Kamičak is only the second war crime case ever (the first was *Lovas*) in which a party has hired an expert consultant. The use of an expert consultant was provided for by the latest CrPC, which came into force on 15 January 2012.[428]

First-instance judgment

On 25 December 2017, the Trial Chamber handed down a judgment of acquittal in respect of both defendants for lack of evidence. The court assessed the testimonies of key witnesses for the prosecution as contradictory, illogical and not true to life and, at the same time, contrary to other evidence adduced. Further, the court noted that not a single witness actually saw the incident. Moreover, the documentation the OWCP relied upon contained facts that contradicted the factual allegations set forth in the indictment. For instance, the report on the crime scene investigation that was carried out following the murder of the civilians in Kamičak states that the murders took place in the house of Hasan Kazić, whereas the indictment states the house of Minka Jusić as the scene of the murders. Furthermore, the report on the autopsy, which was carried out on a later date, states that the bodies belonged to civilians murdered in the summer of 1992 by Serbian paramilitary units; however, the indictment states that the defendants were members of the VRS military police. Also, all the evidence offered by the prosecution was merely circumstantial. For all these reasons, the court applied the principle of *in dubio pro reo,* and in the absence of evidence ruled in favour of the defendants.[429]

427 *Ibid.*
428 Transcript of the main hearing held on 2 July 2015.
429 Higher Court in Belgrade, judgment K.Po2 no. 6/17 of 25 December 2017.

Overview of the proceedings in 2018

Judgment on the appeal

On 1 June 2018, the Court of Appeal in Belgrade[430] quashed the first-instance judgment on the appeal and remanded the case to the court of first instance for reconsideration. The court found that the first-instance judgment contained flaws that constituted a substantial violation of the criminal procedure provisions. In the statement of reasons for the judgment, the court failed to clearly indicate the reasons upon which it based its finding that there was no solid evidence to prove that the defendants committed the crime. The analysis of witnesses' testimonies that the trial chamber had provided in the judgment, according to which their testimonies were assessed as illogical and contradictory, was incomplete, as the court had failed to state the reasons for finding them unacceptable.[431]

Retrial

The retrial commenced in September 2018. Five trial days were held and one witness was examined in 2018.

This was Nedeljko Tepić, member of the Ključ police department, which conducted the crime scene investigation in the village of Kamičak in October 1992. Tepić said that he could not remember any details of the investigation. He added that by the time he left Ključ in 1995, the police were not able to link anyone to this crime.[432]

First instance judgment following retrial

On 27 December 2018, the court of first instance again ruled to acquit the defendants for lack of evidence. Explaining its decision, the court stated that no new facts had emerged during the retrial. Following the orders of the Court of Appeal, the Trial Chamber tried to clarify the facts regarding the crime scene investigation in Kamičak, but only managed to get hold of one member of the team which conducted it. However, because of the length of time which had passed since the incident, the man could not remember any details of the investigation.

The court assessed the evidence given by key prosecution witnesses as unpersuasive and contradictory and did not accept it as true, not least because it contradicted the material evidence. Witness Esma Behar, for instance, said that she had seen and recognised the defendants from a distance of 50 metres, under dark and heavy rain, in a village without electricity. The witnesses Bajro Behar and Emsud Behar said the same thing. Emsud Behar testified that he, Esma Behar and Dursum Hotić had seen the defendants from the house of witness Esma Behar. Witness Refik Hotić claimed to have been in the house of Minka Jusić at the time of the murders, hiding in another room, and to have recognised

430 Sitting as a Chamber composed of Judges Siniša Važić (Chair), Miodrag Majić, Omer Hadžiomerović, Dragan Ćesarević and Nada Hadži Perić.
431 Court of Appeal in Belgrade, ruling Kž1 Po2 1/18 of 1 June 2018.
432 Transcript of the main hearing held on 15 November 2018.

the voices of the defendants. The defendants, he said, had killed his wife, who had been in the room with the other civilians killed. Witness Emsud Behar seemed pretty unsure when giving evidence. He did not remember participating in the process of identification of the defendants in 2012, but at the same claimed to remember the details of an event that had occurred in 1992. Also, he claimed to have recognised the defendants on the relevant night despite adverse weather conditions; however, while in the courtroom, he told the defence lawyer for Dragan Bajic, "You know what you have done," mistaking him for a defendant. Therefore the court assessed this witness as being untrustworthy. The court did not believe witness Refik Hotić either, because his testimony contradicted the material evidence and seemed illogical. This witness claimed to be literate but signed all his statements with a fingerprint in place of a signature. He said that the house in which the civilians had been killed was "blood-soaked", and that "there were bullets all around the place"; however, the crime scene investigation report states that no bullet marks were found in the room, nor bullet casings. It is impossible to explain the absence of a single bullet mark or hole in the walls or furniture, nor of cartridges, in a room where burst of shots were fired. Also, the witness's statement that, following the shooting, he had remained seated in the next room for three more hours, and that, before leaving the house, he had not gone to see the persons who had been shot, including his own wife, nor check for survivors, did not make any sense, according to the court.

Given all the above and the absence of evidence, the Chamber ruled in favour of the accused.[433]

HLC Findings

Fictitious increase in the number of indictments

The OWCP issued two separate indictments on the same day against Dragan Bajić and Marko Pauković, even though they had been identified as co-perpetrators in both indictments. Immediately afterwards, the OWCP moved that the cases against these defendants be merged and tried as one single case, and amended the original indictments for that purpose just two days after issuing them. By bringing more indictments than actually necessary, the OWCP attempted to make itself appear more efficient that it actually is.

Unsubstantiated indictment

The indictment in this case goes to show that, by filing a large number of indictments, even when there is no valid evidence to support them, the OWCP pretends to be working to bring war crime perpetrators to justice.

The OWCP should focus on increasing its real instead of apparent efficiency, by properly preparing its indictments and producing hard evidence in support of its cases before filing them. This would stop the waste of the material and human resources of the OWCP and the court, and prevent

433 Transcript of the delivery of judgment, 27 December 2018.

acquittals for lack of evidence. Unsubstantiated indictments which inevitably result in acquittals dash victims' hopes for justice and further increase their suffering. By filing them, the OWCP undermines cooperation between the war crimes prosecutor's offices in the region and acts contrary to the declared determination of the Government of the Republic of Serbia to hold accountable all those who committed crimes during the wars of the 1990s.

Incomplete indictments posted on the OWCP website

The indictments against Dragan Bajić and Marko Pauković that the OWCP has published on its website are incomplete.[434] More specifically, the entire statement of reasons sections have been removed from them, which renders any analysis of the indictment impossible and makes it difficult for anyone to follow the proceedings in this case. Publishing incomplete versions of indictments is a way to hide from the public the fact that they are not backed up by solid evidence.

434 OWCP indictments KTO no. 6/16 7/16, both dated 26 May 2016, available online (in Serbian) at http://www.tuzilastvorz.org.rs/sr/predmeti/optu%C5%BEnice, accessed on 5 January 2019.

III. Ključ-Šljivari Case[435]

CASE INFORMATION	
Current stage of the proceedings: first-instance proceedings	
Date of indictment: 5 April 2016	
Trial commencement date: 21 October 2016	
Prosecutor: Milan Petrović	
Defendant: Milanko Dević	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Zorana Trajković (Chair of the Chamber) Judge Mirjana Ilić Judge Dejan Terzić
Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 3
Number of victims: 1	**Number of witnesses heard in the reporting period:** 8
Number of witnesses heard so far: 16	
Key developments in the reporting period Handing down of a first instance judgment	

435 *Ključ-Šljivari* Case, trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc_sljivari.html, accessed on 29 January 2019

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

As alleged in the indictment, in the second half of July 1992**,** the defendant, Milanko Dević,[436] a VRS soldier at the time, Bogdan Šobot[437], and another unidentified VRS fighter arrived at the house of Ismet Šljivar in the hamlet of Šljivari (Donja Sanica, the municipality of Ključ, BiH) armed and in uniform; the defendant took Šljivar out of his house at gunpoint, took him to the place called "Božin mlin" [Boža's Mill] on the River Sanica, where the three men killed him with multiple shots and then threw his body into the river.[438]

Defendant's defence

The defendant denied having committed the crime, claiming that he was in Donja Sanica at the relevant time. He also denied having known Ismet Šljivar.[439]

Witnesses' testimonies

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

The witnesses Safet Šljivar and Rasema Šljivar[440] saw some soldiers take Šljivar away, but could not say for sure who the soldiers were. The witnesses Semir Šljivar, Šemsa Šljivar and Abaz Bašić,[441] who also saw Ismet Šljivar being taken away, did recognise the defendant as one of the soldiers who had taken him to "Božin mlin". They said that next they heard shots coming from the direction of the mill, after which Ismet Šljivar disappeared.

Witness Siniša Obradović[442] said he had no direct knowledge of the event, even though at one point he too had been charged, along with Bogdan Šobot, for the murder of Ismet Šljivar, in the proceedings conducted in BiH.

436 OWCP indictment KTO no. 3/16 of 5 April 2016, available online (in Serbian) at http://www.tuzilastvorz.org.rs/sr/predmeti/optu%C5%BEnice/page:2, accessed on 10 January 2019.
437 Bogdan Šobot was convicted of this crime by the Cantonal Court in Bihać (judgment 01 0 K 011055 16 K of 10 February 2017) and sentenced to eight years in prison. The Supreme Court of BiH reduced his sentence to six years on appeal (judgment 01 K 011055 17 Kž of 13 March 2018).
438 This case was transferred to the OWCP by the Cantonal Court in Bihać under the Law on International Legal Assistance in Criminal Matters, on the grounds that Milanko Dević is a citizen and resident of the Republic of Serbia.
439 Transcript of the main hearing held on 21 October 2016.
440 Transcript of the main hearing held on 1 December 2016.
441 *Ibid.*
442 Transcript of the main hearing held on 21 October 2016.

Overview of the proceedings in 2017

Eight witnesses were heard in 2017. Witness Emir Šljivar said that he saw three soldiers take Ismet Šljivar away, and identified the defendant as one of them.[443] The remaining witnesses had no direct knowledge of the incident. However, one of them, Senad Velić, said that his uncle (now deceased), Fahrudin Velić, told him that he saw the body of Ismet Šljivar in the River Sanica at the relevant time. He also said that three men were with him at the time, but they were subsequently killed in the war. Witness Vladimir Mačkić, who was the defendant's superior during the war, said that at the relevant time, i.e. July 1992, his unit was positioned near Gornji Vakuf, where he spent 24 hours a day with the defendant. He added that the defendant did not take any leave in July 1992, but only later, in September of the same year.[444]

Overview of the proceedings in 2018

Six trial days were held during 2018, during which two witnesses were heard.

On 11 January 2018, the Trial Chamber ruled to start the proceedings anew. Explaining the ruling, the Chair of the Chamber said that it was based on the view adopted by the Court of Appeal with respect to several war crimes cases, according to which deputy war crimes prosecutors were not authorised to take any actions in war crimes cases during the period when the OWCP was without an authorised war crimes prosecutor, i.e. from 1 January 2016 to 31 May 2017. As the trial of this case commenced during that period, the chamber ruled pursuant to the Court of Appeal's view on this matter.[445]

Nevertheless, the indictment was not dismissed, even though it was filed in the very same period (on 5 April 2016) when the OWCP was without an authorised war crimes prosecutor.

Witness Radenko Škavić said that he had no direct knowledge of the incident.[446] The other witness, Bogdan Šobot, who was questioned twice, said during the first questioning that he knew nothing about the incident, which was odd, because he had been convicted finally of involvement in this very crime by the Cantonal Court in Bihać.[447] During the second questioning, he refused to communicate with the court, repeating that he had been condemned to six years in jail "for nothing".[448]

First-instance judgment

On 1 November 2018, the Higher Court in Belgrade judged the defendant guilty and sentenced him to seven years' imprisonment.

443 Transcript of the main hearing held on 11 January 2017.
444 Transcript of the main hearing held on 18 May 2017.
445 Transcript of the main hearing held on 11 January 2018.
446 Transcript of the main hearing held on 19 February 2018.
447 *Ibid.*
448 Transcript of the main hearing held on 28 September 2018.

The court found the following: the defendant, together with Bogdan Šobot (who had been finally convicted of the crime which is the subject of the present case) and an unidentified VRS soldier, arrived at the house of Ismet Šljivar in the hamlet of Šljivari; the three soldiers took Ismet Šljivar out of his house at gunpoint and then took him to a site near "Božin mlin", where they shot him dead with automatic weapons, after which they threw his body into the River Sanica. The finding of the facts was based upon the testimonies of several witnesses who had provided detailed accounts of the events surrounding the murder and identified the soldiers who took Ismet Šljivar away, saying it was the defendant and two other soldiers. The witnesses also testified that they had heard gunshots from the site the victim had been taken to. Witness Senad Velić stated that his uncle (now deceased), Fahrudin Velić, told him that he had seen the corpse of Ismet Šljivar in the River Sanica.

The defence presented by Milanko Dević, including his alibi, was evaluated by the court as implausible and an attempt to escape criminal liability. The court believed the testimonies of several witnesses who confirmed that they had seen him at the relevant time in the hamlet of Šljivari.

The court found Dević guilty as a co-perpetrator in the crime, because he, Bogdan Šobot and another unidentified soldier arrived at the hamlet of Šljivari with the intention of committing the act. There existed a tacit common plan between them to kill Ismet Šljivar.

In determining the sentence, the fact that the victim was taking care of his sick wife when he was taken away was taken as an aggravating circumstance. The absence of prior convictions and his being the father of three were regarded as mitigating circumstances for the defendant.[449]

HLC Findings

Regional Cooperation

This case is yet another example of effective cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. The case was referred to the OWCP by the Court of Bosnia and Herzegovina because the defendant, who holds Serbian citizenship and permanent residency in Serbia, was unavailable to the BiH judicial authorities.

Incomplete indictment delivered to the HLC

The HLC requested the OWCP to supply it with the indictment against Milanko Dević, pursuant to the Law on Free Access to Information of Public Importance. The indictment delivered was incomplete,[450] with the greater part of the statement of reasons section having been removed. Without having the

449 Higher Court in Belgrade, judgment KPo2 2/18 of 13 November 2018.

450 OWCP indictment KTO no. 3/16 of 5 April 2016, available online at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Optuznica_Kljuc-Sljivari_05.04.2016..pdf, accessed on 13 January 2018.

complete indictments, it was impossible to analyse its quality and difficult to follow the proceedings in this case.

The proper understanding of co-perpetration

The judgment in this case is a good example of the proper application of the concept of co-perpetration, as a form of participation in the commission of a criminal offence. In order to establish the mode of participation of the defendant in the commission of the crime, the court thoroughly examined all the circumstances surrounding the crime, including the absence of any armed actions in the hamlet of Šljivari and its immediate surroundings, and the fact that there was no real necessity for the defendant to come to Šljivari with the other co-perpetrators. On the basis of this examination, the court arrived at the conclusion that the defendant acted as a co-perpetrator, pursuant to a shared and unspoken understanding between the three men to kill the victim. In war crimes cases where crimes are often committed jointly by several persons, it is only through a comprehensive assessment of all circumstances of the crime that co-perpetration can be proved to have existed. If a court focussed solely on the acts of each of the defendants without considering the wider context of an event, it would lead to perpetrators being wrongfully acquitted, especially in cases involving mass crimes committed by a large number of perpetrators.

First instance proceedings before a court of general jurisdiction

I. Grupa Pauk [Spider Group] Case

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

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

Milorad Pelemiš and Rade Petrović are charged with killing two unknown Kosovo Albanians[451] in mid-May 1999 near Dečani/Deçan (Kosovo), on Petrušić's orders. Additionally, Jugoslav Petrušić, Milorad Pelemiš, Branko Vlačo and Rade Petrović are charged with forcing two unidentified Kosovo Albanians with death threats to give them 20,000 German marks in early May 1999.

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

Defendants' defence

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

First trial at first instance

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

On 13 November 2000, the District Court handed down a judgment, acquitting the defendants of the counts of murdering Idrizi and Neziri, and of espionage. The defendants Petrušić, Pelemiš, Vlačo and Petrović were found guilty of an act of extortion, and the defendants Pelemiš and Orašanin of illegal possession of firearms and ammunition. Petrušić, Vlačo, Petrović and Orašanin were sentenced to one year in prison, and Pelemiš to a year and a half in prison.[452]

Judgment on appeal

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

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451 Indictment of the Office of the District Public Prosecutor in Belgrade no. KT 640/99 of 4 May 2000, available online (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 12 December 2018.

452 District Court in Belgrade, judgment in *Grupa Pauk* (K-no. 192/2000), 13 November 2000, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Prvostepena_presuda_13.11.2000.pdf, accessed on 22 January 2019.

Conflict of jurisdiction

On receiving the case, the District Court in Belgrade declined jurisdiction and referred it to the Military Court as the court that had subject-matter jurisdiction over espionage.[453] The Military Court too declined jurisdiction, considering that the matter was within the jurisdiction of the District Court in Belgrade, and asked the Federal Court to resolve the conflict of jurisdiction between the courts. [454] After the coming into force of the Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutor's Offices and the Military Attorney on 1 January 2005, the case was sent back to the Military Department of the District Court in Belgrade.

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

Right after opening the retrial, the Higher Court in Belgrade ruled to discontinue it on account of insufficient evidence. The case was returned to the competent investigative judge of the Higher Court in Belgrade, in order for him to perform some additional investigative actions.

Up until 2017, the court re-heard former members of the military and police as witnesses, none of whom said anything that might incriminate the defendants. Nataša Kandić was also questioned as a witness. She learned of the events in question indirectly, while doing some research. Kandić said that the brothers Mirsad and Sadik Nimonaj had told her that while being held in custody, 20,000 German marks were demanded of them in exchange for their release. They also said that they had been threatened with death if they testified at the trial.

Overview of the proceedings in 2017

Examination of witnesses continued in 2017. Former members of the police and military, who had testified in the earlier first-instance proceedings, were heard again. None of them implicated the defendants in the crime. The witnesses living in Kosovo failed to appear in court, and the court had no information on whether they had been properly summoned through EULEX.

Severance of charges

After the court heard all of the evidence in relation to espionage and illegal possession of firearms and ammunition counts, it decided on 22 May 2017 to separate from the case the counts relating to the murder of Rahman Idrizi and Hamid Neziri, and to the extortion of 20,000 DM from Mirsat and Sadik Nimonaj.

453 District Court in Belgrade, decision no. KV. 1272/02 of 8 July 2002.
454 Military Court in Belgrade, proposal no. Kv.no. 26/03 of 13 March 2003.

First instance judgment upon retrial on charges of espionage and illegal possession of firearms and ammunition

On 16 June 2017, the Higher Court in Belgrade handed down a judgment, acquitting Jugoslav Petrušić, Milorad Pelemiš, Slobodan Orašanin, Rade Petrović and Branko Vlačo of charges of espionage. As regards the illegal possession of firearms and ammunition with which Pelemiš and Orašanin were also charged, this charge was dismissed on the grounds that the absolute time limit for the prosecution of the offence had passed.

Explaining the acquittal of the defendants of espionage charges, the Chair of the Chamber said that, from the evidence presented, the court could not establish that the defendants had committed espionage; the court had only established that the defendant Jugoslav Petrušić worked for a French intelligence agency and that upon coming to Serbia he tried to get in touch with civilian and military services; none of the witnesses examined had said that Petrušić had done anything to harm the interests of the country or take control of the other defendants. Giving reasons for the decision to dismiss the charge of illegal possession of firearms and ammunition in respect of Pelemiš and Orašanin, the Chair of the Chamber said that over the course of the proceedings the laws relating to this offence had been amended several times, and that the court applied the one that was most favourable to the defendants, under which the objective time limit for the prosecution of the offence had passed.[455]

Overview of the proceedings in 2018

Judgement on appeal following retrial on charges of espionage and illegal possession of firearms

The Court of Appeal in Belgrade, upon considering the appeal filed by the Prosecution against the first-instance judgement in the retrial, on 21 March 2018 dismissed the appeal in its entirety as groundless and upheld the first-instance judgement.[456]

Trial on murder and extortion charges

In 2018 the court continued to examine the defence witnesses, former members of the VJ 125th MtBr. They confirmed that there had existed a facility in Dečani, where people brought from the area were confined and then moved to Priština, but they did not know if the defendants had entered the facility or if some of the persons confined there had been injured or subject to mistreatment.

455 Higher Court in Belgrade, judgment K.no. 398/10 of 16 June 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/12/Prvostepena_presuda_u_ponovljenom_razdvojenom_postupku_16.06.2017..pdf, accessed on 22 January 2019.

456 Court of Appeal in Belgrade, judgment Kž1 10/2018 of 21 March 2018, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/12/Drugostepena_presuda_u_ponovljenom_razdvojenom_postupku_21 March 2018..pdf, accessed on 22 January 2019.

HLC Findings

Incorrect legal qualification of the crime

Bearing in mind that there existed an armed conflict in the territory of Kosovo during the time relevant to the indictment, that the defendants were members of a party to the conflict, namely the VJ, and specifically its 125th Motorised Brigade, and that the victims were Albanian civilians, the acts of the defendants had all the characteristics necessary to qualify as a war crime against civilians. Therefore, the defendants should have been charged with that offence. Also, it is quite unclear why the OWCP declined jurisdiction of the case.

Leaving aside the failure to select the appropriate criminal charges, the indictment issued by the Office of the District Prosecutor was vague and unsubstantiated. As regards the espionage charges, the Prosecution did not specify which acts of the defendants it considered constituted espionage. As regards the extortion and murder charges, the identity of the four victims was not established in the indictment, so it had to be established in the course of the proceedings. Moreover, at the moment of raising the indictment, the Prosecution did not possess evidence to support their case, but only the evidence to prove illegal possession of firearms and ammunition.

Unduly prolonged proceedings

The fact that the proceedings in this case have been going on for more than 18 years, owing to delays caused by numerous procedural issues raised during their course, clearly manifests the lack of will and capacity of the relevant institutions to finalize it.

Jugoslav Petrušić claimed violation of his right to a fair trial. On 20 April 2016, the Higher Court in Belgrade issued a decision finding that his right to a fair trial had indeed been violated.[457]

457 Higher Court in Belgrade, ruling no. P4 K.no. 19/16 of 20 April 2016.

Appellate proceedings before the War Crimes Department of the Court of Appeal in Belgrade

I. Skočić Case[458]

CASE INFORMATION	
Current stage of the proceedings: appellate proceedings	
Date of indictment: 30 April 2010	
Trial commencement date: 14 September 2010	
Prosecutor: Milan Petrović	
Defendants: Damir Bogdanović, Zoran Đurđević, Zoran Alić, Đorđe Šević, Tomislav Gavrić and Dragana Đekić	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Siniša Važić (Chair of the Chamber) Judge Sretko Janković Judge Nada Hadžiperić Judge Omer Hadžiomerović Judge Miodrag Majić
Number of defendants: 6 **Defendants' rank:** low - no rank **Number of victims:** 32 **Number of witnesses heard:** 46	**Number of trial days in the reporting period:** 1 **Number of witnesses heard in the reporting period:** 1
Key developments in the reporting period: Hearing in appellate proceedings	

458 *Skočić* Case, trial reports and case documents available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/skocici.html, accessed on 29 January 2019

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

According to the indictment, the defendants, who were all members of the paramilitary unit "Sima's Chetniks" at the time, on 12 July 1992 destroyed with explosives a mosque in the village of Skočić (municipality of Zvornik, BiH). Next, they assembled in a house Roma residents of the village, including children, women and elderly men, robbed them of all their valuables, beat them and killed one man; they ordered a grandfather and his grandson to undress and perform oral sex on each other, after which the defendant Sima Bogdanović cut off the grandson's penis with a knife; they repeatedly raped the victims "Alpha", "Beta" and "Gamma", two of whom were minors, after which the defendant Sima Bogdanović pulled out two of "Alpha's" gold teeth with a pair of pliers. The indictment further alleges that the defendants then took all the assembled people to the village of Malešić on a truck; in Malešić, they separated "Alpha", "Beta" and "Gamma" from the group; then they drove the rest of the group to a pit in the place known as Hamzići, near the village of Šetići, where they took them one by one from the vehicle and killed them with knives or firearms, after which they threw their corpses into the pit. 22 civilians were killed, and an eight-year-old boy, Zijo Ribić, was injured on that occasion. The victims "Alpha", "Beta" and "Gamma" were forcibly confined in Malešić, and then taken by the defendants to the villages of Klis, Petkovci and Drinjača, where they were forced to do housework, beaten, raped, and otherwise sexually tortured until January 1993.[459]

After an additional three members of Sima Bogdanović's paramilitary unit involved in the crime had been identified, the OWCP brought two new indictments for the crime in Skočić: against Zoran Alić[460], on 23 February 2011, and against Zoran Đurđević and Dragana Đekić[461], in December 2011. Charges against all the defendants were joined into one single indictment on 4 December 2012 and all the defendants were tried together.[462]

As the defendant Sima Bogdanović had died in August 2012, the criminal proceedings against him were discontinued.[463]

459 OWCP indictment KTRZ 7/08 of 30 April 2010.

460 OWCP indictment KTRZ np. 11/10 of 23 February 2011, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2011_02_23_lat.pdf, accessed on 9 January 2019.

461 OWCP indictment no. KTRZ 11/11 of 22 December 2011.

462 OWCP indictment no. KTRZ 7/08 of 4 December 2012, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2016-05/o_2012_12_04_lat.pdf, accessed on 9 January 2019.

463 Higher Court in Belgrade, ruling no. K-Po2-no. 42/2010 of 3 September 2012.

First-instance judgment

The War Crimes Department of the Higher Court in Belgrade[464] handed down a judgment on 22 February 2013, finding the defendants guilty and sentencing them as follows: Zoran Stojanović and Zoran Đurđević each to 20 years in prison, Zoran Alić and Tomislav Gavrić each to 10 years in prison, Dragana Đekić to five years and Damir Bogdanović to two years in prison. Đorđe Šević, who had been convicted of a war crime in another case,[465] was sentenced to five years and concurrently to 15 years.[466] As regards the defendant Stojanović, who, according to the indictment, forced the victims Muhamed Aganović and Esad Aganović (a grandfather and his grandson) to undress and perform oral sex on each other, the court found that the prosecution failed to prove him guilty of inhumane treatment and outrage on personal dignity. The defendant Đorđe Šević was acquitted of charges of raping the victims "Alpha" and "Beta" and taking part in the killings at Hamzići, because they were not proven during the proceedings.

A comprehensive analysis of the first-instance judgment in this case is provided in the HLC's *Report on War Crimes Trials in Serbia in 2013*.[467]

Judgment on appeal

On 14 May 2014, the War Crimes Chamber of the Court of Appeal in Belgrade[468] dismissed as ill-founded the appeal of the OWCP against the first-instance judgment, discontinued the proceedings against Zoran Stojanović who had died in the meantime, quashed the first-instance judgment in respect of the other defendants, and sent the case back to the court of first instance for retrial.[469]

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

The appellate court assessed as particularly unacceptable the court of first instance's understanding of co-perpetration, as a form of participation of the defendants in the commission of the crime. In the Court of Appeal's view, the operative part of the first-instance judgment failed to set out the particular actions taken by the defendants, which actions needed to be closely related to the commission of the crime. The Court of Appeal disagreed with the conclusion of the court of first instance that the defendants' failure to oppose the commission of the crime and not protecting or helping any of the victims showed that they agreed with the crime. If this opinion were correct, the Court of Appeal reasoned, the mere presence at

464 Sitting as a Chamber composed of: Judge Rastko Popović (Chair), and Judges Vinka Beraha-Nikićević and Snežana Garotić Nikolić (members).

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

466 Higher Court in Belgrade, judgment in *Skočić* (K.Po2 42/2010) of 22 February 2013.

467 *Report on War Crimes Trials in Serbia in 2012*, (Belgrade, HLC 2013), pp. 53-63.

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

469 Court of Appeal in Belgrade, judgment in *Skočić* (Kž1 Po2 6/13) of 14 May 2014.

the scene of a member of a unit and his inaction could in itself amount to a war crime.

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

Finally, the Court of Appeal held that the decision to impose maximum punishments on the defendants Zoran Alić and Dragana Đekić had not been sufficiently reasoned. At the time of the crime, Alić and Đekić were minors and as such subject to the Law on Juvenile Offenders and the Protection of Juveniles under the Criminal Justice System. This law prescribes five years' imprisonment as the maximum punishment for juvenile offenders; a sentence of up to 10 years may be imposed on a juvenile offender, but only for offences carrying a statutory punishment of twenty years' imprisonment or more.[470] Since they were sentenced to maximum prison terms, the Court of Appeal held that the court of first instance had a duty to provide detailed reasons for so deciding.

Retrial

The retrial, which commenced on 2 September 2014, ended in 16 June 2015 with the acquittal of all the defendants. Explaining its reasons for so deciding, the court stated that there was no evidence to prove that the defendants had committed the crime they were charged with.[471]

The OWCP appealed against the judgment. After considering the appeal, the Court of Appeal established that the events in the villages of Malešić, Petkovci and Drinjača (in the municipality of Zvornik, BiH), with which some of the defendants were charged, had not been fully clarified at the retrial. The Court therefore decided to reopen the main hearing in order to obtain the testimonies of the protected witnesses "Alpha", "Beta" and "Gamma", which it considered necessary for clarifying the events at issue. At the main hearing held on 27 April 2016, the court examined the protected witness "Alpha".

Overview of the proceedings in 2017

Only one hearing was held in 2017, during which the protected witness "Gamma" was examined. The public was excluded during her testimony.

Overview of the proceedings in 2018

Two main hearings were held before the Court of Appeal in 2018, during which the statement of the protected witness "Beta" was read in the courtroom.

On 28 March 2018, the Court of Appeal in Belgrade handed down a judgment. The court upheld the acquittals of Damir Bogdanović, Đorđe Šević and Dragana Đekić. It also upheld the acquittals of Zoran Alić and Zoran Đurđević in respect of the events that took place in Skočić, the place known

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

471 Higher Court in Belgrade, judgment in the retrial of the *Skočić* Case (K Po2 11/14) of 16 June 2015.

as Hamzići in the village of Šetići, and in Klisa, Petkovci and Drinjača. Tomislav Gavrić's acquittal of the charges relating to the events in Klisa, Petkovci and Drinjača was also upheld. The court reversed the acquittal of Zoran Alić, Tomislav Gavrić and Zoran Đurđević on charges of inhumane treatment, outrage on personal dignity, sexual humiliation and rape of the protected witnesses in the village of Malešić, and sentenced Zoran Alić to six years and Zoran Đurđević and Tomislav Gavrić each to ten years in prison.[472]

HLC Findings

Excessive length of proceedings

The trial commenced in 2010 without resulting in a final judgment even eight years later. As the ZKP allows appeals against a second-instance judgment's segment reversing an acquittal at first instance and finding the defendants guilty, this case is certainly not over yet.[473] By the end of 2018, the Court of Appeal had yet to rule on the appeals of Alić, Đurđević and Gavrić. This just goes to show that the Serbian courts' practice of conducting unduly prolonged proceedings in complex war crimes cases has continued.

Inadequate protection of sexual violence victims

The first-instance proceedings were marked by the harrowing testimonies of all the victims, and also the additional serious emotional distress suffered by the witnesses "Alpha", "Beta" and "Gamma" as a result of the inappropriate behaviour of the defendants, who heckled them in a vulgar manner and asked them questions intended to disparage and traumatize them further. Despite being required by law to protect the witnesses' integrity, the Chair of the Chamber did not discipline the defendants, but only gave them informal verbal warnings.

Also, the much-needed psychological support for witnesses was altogether lacking throughout the proceedings, because the Higher Court War Crimes Department's Service for the Support and Assistance to Victims does not have a psychologist, and its staff working with witnesses is not trained to deal with sexual violence victims.[474]

The court of first instance is not sufficiently familiar with the established practice and standard of proof for inhumane treatment

In its judgment following the retrial, the court of first instance found that it was not proven that the

472 Summary of the Court of Appeal's judgement Kž1 Po2 5/15 of 28 March 2018 is available online (in Serbian) at http://www.bg.ap.sud.rs/cr/articles/sluzba-za-odnose-sa-javnoscu/aktuelni-predmeti/ratni-zlocini/rz-donete-odluke/, accessed on 9 January 2019.

473 ZKP, Article 463.

474 More on the support provided to victims and witnesses at the War Crimes Department of the Higher Court can be found in: HLC, *Ten years of war crimes prosecution in Serbia – Contours of justice (analysis of war crimes prosecution 2004-2013)*, 2014, pp. 54-61.

defendants' forcing of the protected witnesses "Alpha", "Beta" and "Gamma" to wash their clothes, prepare their food and do the cleaning for them, constituted inhumane treatment. In the court's view, these actions of the defendants could not be considered inhumane treatment, because it was not proven that they constituted an outrage on personal dignity and caused severe physical and mental suffering and "resulted in the severe humiliation and degradation" of the victims.[475] Moreover, as regards the victims' captivity in Malešić, the court particularly emphasised that its conclusion on the non-existence of inhumane treatment was based on the fact that the victims themselves also ate the food that they prepared, and enjoyed the washed clothes and cleaned house.[476]

The above-cited finding shows that the court completely ignored the context of the events in question – that the victims were held captive, raped and otherwise physically abused on a daily basis, with the thought all the time in their minds that their captors had killed their loved ones. Also, the finding is at odds with the testimony of the witness Senija Bećirević, which the court accepted as true. This witness expressly stated that the protected witnesses "Alpha", "Beta" and "Gamma" were forced to clean and cook: "You had to clean and wash, or you'd be beaten."[477]

Moreover, in its judgment the court vaguely cited "the ICTY position" on inhumane treatment, while drastically departing from ICTY practice and the practice of other bodies when it comes to proving inhumane treatment.[478] The judgment says: "In the opinion of this court, not every action committed against the victims […] amounts to inhumane treatment; it is necessary that the actions […] caused severe mental suffering."

This statement shows that the court not only understates the suffering of the victims, but also disregards the standards set by the ICTY. As noted by the ICTY, "an outrage upon personal dignity […] does not have to directly jeopardize the victim's physical or mental well-being; it is enough to cause the real and permanent suffering which stems from humiliation or ridicule."[479] The International Committee of the Red Cross (ICRC) explains the meaning of inhumane treatment as follows: "It does not necessarily mean conduct which is an attack on physical integrity or health […] Certain measures like separation of civilians from the outside world, especially their families […], should be considered inhumane treatment."[480]

In the cases involving inhumane treatment, the ECtHR emphasised that the "level of suffering" is assessed on the basis of "all the circumstances of the case, such as the duration of the mistreatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."[481] The ECtHR also held: "With respect to a person deprived of his liberty, any recourse to physical force

475 Higher Court in Belgrade, judgment in the retrial of the *Skočić* Case (K Po2 11/14) of 16 June 2015, p. 42.
476 *Ibid*, p. 55.
477 Transcript of the main hearing held on 19 March 2015, p. 13.
478 Higher Court in Belgrade, judgment in the retrial of the *Skočić* Case (K Po2 11/14) of 16 June 2015, p. 42.
479 *The Prosecutor v. Zlatko Aleksovski* (IT -95-14/1-T), Trial Judgment, 25 June 1999, para. 56.
480 ICRC Commentary on the III Geneva Convention, para. 627; ICRC Commentary on the II Geneva Convention, para. 268; *The Prosecutor v. Mucić et al.* (IT-96-21), Trial Judgment, paras. 521-522.
481 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).

which has not been made strictly necessary by his own conduct diminishes human dignity."[482]

Finally, confinement of women in private houses and other premises for sexual exploitation and housework was not a rare occurrence during the war in BiH. In some cases, the ICTY and the Court of BiH[483] considered that such actions constituted not only inhumane treatment but also enslavement as a crime against humanity. The ICTY maintained the following position: "Indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement […] Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."[484]

In its judgment following the retrial, the Court of Appeal rectified this error and judged three of the defendants guilty of inhumane treatment of the injured parties/protected witnesses "Alpha", "Beta" and "Gamma".

The acute problem with co-perpetration

By its judgment in this case, the Court of Appeal has further tightened the standards of proof for co-perpetration in war crimes cases. The court upheld the court of first instance's finding that "the presence of the accused Zoran Alić near the scene of the crime at the time of the crime cannot in itself be considered evidence of his providing a substantial contribution to the commission of the murder", and that "it has not been proved that the defendant was aware of participating in a joint commission of the offence, nor that he accepted his role in the commission of the crime and agreed with the acts performed by other members of his unit, all these with the intent to further the commission of the crime".[485]

In the HLC's view, the above-cited conclusion is wrong. The defendant Alić himself said that he, along with other members of his unit, was on the truck transporting the victims from Skočić to Hamzići. As the truck approached the pit that had been dug in Hamzići, Stojanović (now deceased) passed on to him the order of Sima Bogdanović (now deceased) that he and other (unidentified) members of the unit should climb out of the truck and remain at a distance of some 10 to 15 metres. Alić protested, saying there was no need to keep guard, because there were only Serbs in the area; but he obeyed the order nevertheless. His conduct - more specifically, the fact that he understood that he had been ordered to keep guard - shows that he had the awareness of participating in a joint commission of the offence. He obeyed the order, climbed out of the truck and kept standing where he was ordered to stand. Guard was mounted in order to keep the killings of the Roma secret from both Roma and Serbs. That fact that the defendants did not leave the body of the killed Arif Nuhanović in Skočić, where there were only Serbs at the time, but loaded it onto the truck to remove it, proves that the above conclusion is correct. When they came to Malešić, a Serb-inhabited village where "Sima's Chetniks"

482 ECtHR, *Ribitsch v. Austria,* 21 EHRR 573, 1996, para. 38.
483 See, the Court of BiH: second-instance judgment in *Samardžić*; first-instance and second-instance judgments in *Janković*; first-instance and second-instance judgments in *Kujundžić*.
484 ICTY, Trial Judgment in *The Prosecutor v. Kunarac et al.*, para. 542.
485 Court of Appeal in Belgrade, Kž1 Po2/15 of 28 March 2018.

were stationed at the time, they did not kill any Roma there, but just left the protected witnesses behind and continued on, killing the victims at night, in a secret place in an uninhabited area.

That Alić did accept his role in the commission of crime and agreed with the acts of other members of his unit is corroborated by the following facts: Alić was in Skočić, where he witnessed the events; he did not, like some other members of his unit, get off the truck in Malešić, but continued on the truck to the place where the civilians were shot. Also, he remained in the unit after the killings, and raped, beat and humiliated protected witnesses in Malešić, for which acts he was convicted by the Court of Appeal.

The Court of Appeal failed to take into consideration the method of operation of "Sima's Chetniks". The unit existed for quite some time, during which its members committed a series of crimes. They were a close-knit group that operated on the basis of a division of tasks among its members. Each member had a role in the pursuance of the common goal. Alić was with the unit for a long time, as of May 1992. Before the events in Skočić, three girls had been held captive by unit members and treated the same way as the protected witnesses in this case. All this indicates that the unit had its established method of operation, and Skočić was just another in a series of their crimes. Its members were free to leave the unit whenever they wanted. The defendants Zoran Stojanović, Dragana Đekić and Đorđe Šević were among those who left. This means that those who stayed did so of their own free will, and because they agreed with what the group was doing.

Alić's approval of the overt acts of the others in relation to the rapes of the injured parties was found by the Court of Appeal to amount to co-perpetration. Therefore its failure to reach the same finding when it came to Alić's conduct with respect to the killings of the civilians is all the more baffling.

If this standard of proof for co-perpetration were accepted in court practice for dealing with war crimes, it could create serious problems with proving this mode of accountability in complex cases. Namely, it would require the OWCP to prove every criminal action taken by each member of a group which operated for a long time in an area and committed a series of crimes, and also to prove the existence of the requisite mental element in each of the actions.

The Court of Appeal ought to have considered co-perpetration from a broader perspective and taken into account the overall method of operation of "Sima's Chetniks", and, on the basis of that, assess the mental attitudes of its members towards the acts performed by the unit, and their individual acts within the division of tasks.

Assessment of aggravating factors and length of sentence

The Court of Appeal deserves serious criticism for the way it assessed the aggravating circumstances in respect of the defendant Zoran Đurđević. In sentencing Đurđević, the court did not even mention, let alone take into consideration, the fact that he had already been convicted of an offence of the same type. Namely, he was sentenced to 13 years in prison for a war crime against the civilian population that involved rape and sexual abuse, which he committed in Bijeljina just one month prior to the

events in Skočić.[486]

Hence, the 10-year prison sentenced passed on Zoran Đurđević was unduly lenient. Having already been sentenced to 13 years in prison for basically the same crime, it was only appropriate that he receive a harsher sentence for repeating the crime, involving the same acts as those he had been convicted of, particularly given that he had raped one victim several times, and that both victims he had subjected to sexual humiliation were minors (13 and 15 years old).

486 Higher Court in Belgrade, judgment K.Po2 no. 7/2011 of 4 April 2012, upheld by the Court of Appeal in Belgrade judgment Kž1 Po2 6/12 of 25 February 2013.

Cases in which plea agreements where concluded

I. Caparde Case[487]

CASE INFORMATION	
Current stage of the proceedings: ended with a final judgment	
Date of indictment: 26 December 2017	
Prosecutor: Bruno Vekarić	
Judge: Milan Dilparić, Judge for the preliminary proceedings	
Defendant: Dragan Maksimović	
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY	
Number of defendants: 1 **Defendant's rank:** low – no rank **Number of witnesses heard:** 0	**Number of trial days in the reporting period:** 2 **Number of witnesses heard in the reporting period:** 0
Key developments in the reporting period: Judgment by which the court accepted the plea agreement reached between the defendant and the OWCP	

487 *Caparde* Case is available online at http://www.hlc-rdc.org/Transkripti/caparde.html, accessed on 17 September 2018.

The course of the proceedings

Indictment

Dragan Maksimović, a former member of the Reconnaissance Unit of the First Birčan Brigade of the VRS, also known as the "Šekovac Guard", was charged in an OWCP indictment[488] of 26 December 2017 with killing five Bosniak civilians in the village of Caparde (in the municipality of Kalesija, BiH) on 16 June 1992. The indictment alleges that Maksimović entered the house of Muhamed Bećirović and killed Senada Bećirović, her underage daughter Sanda Bećirović, Nezira Bećirović and her two sons (both minors) Rahman and Denis Bećirović.

Judgment

On 6 June 2018, the Higher Court in Belgrade handed down a judgment by which it accepted the agreement reached between the defendant and the OWCP[489] upon the defendant's plea of guilty to the criminal offence of a war crime against the civilian population, and sentenced the defendant to six years and two months in prison.

This plea agreement was the fourth to be concluded in war crimes cases.[490]

HLC Findings

Unreasoned judgment

The court failed to indicate the grounds on which it based its decision to accept the plea agreement entered between the defendant and the OWCP. Instead, the court just enumerated the ZKP Articles on the basis of which it found that the agreement contained all the necessary elements prescribed by law, that all legal conditions had been met in respect of the evidence attached to the agreement, that the punishment was consistent with the provisions of the Criminal Code, and that there existed no legal impediments to the conclusion of the plea agreement. It should be noted that this Court makes a practice of not providing the reasons for its decisions confirming plea agreements in war crimes cases.[491]

488 OWCP indictment KTO no. 3/17 of 26 December 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/04/Optuznica_26.12.2017..pdf, accessed on 17 September 2018.

489 Higher Court in Belgrade, judgment in *Caparde* (K.Po2 no. 10/17, Spk.Po2 no. 1/2018), 6 June 2018, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/08/Presuda_o_potvr%C4%91ivanju_SPK.pdf, accessed on 19 September 2018.

490 The plea agreement with Milan Škrbić in 2013 was the first to be conluded by the OWCP in a war crime case. The second was with Marko Crevar in 2015, the third with Brana Gojković in 2016. Earlier agreements were concluded with persons accused of harbouring Hague indictees.

491 See: Higher Court in Belgrade judgment SPK P02 2/13 of 13 September 2013, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/SR-Beograd-opt.Milan_Skrbic-13.09.2013.F89753.pdf, accessed on 26 October 2016; Higher Court in Belgrade judgment SPK Po2 1/15 of 18 February 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_15-18.02.2015.pdf, accessed on 26 October 2016; and Higher Court in Belgrade judgment SPK –Po2 no. 1/2016 of 27 January 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Spk_Po2_1-16_opt_Gojkovic_Brano.pdf, accessed on 19 September 2018.

Unreasoned sentencing decision

The Higher Court sentenced Dragan Maksimović to six years and two months in prison. According to the ZKP, a court will accept a plea agreement if it determines that the penalty proposed by the agreement is in line with the Criminal Code. However, nowhere in the decision accepting the agreement did the Court set out on what basis it had found that the prison term proposed in the agreement was in line with the Criminal Code. As the minimum sentence prescribed for a war crime is five years' imprisonment, the court's decision is indeed *in line with the Criminal Code* – formally, at least. Nevertheless, the court should have explained its decision, especially given the severity of the crime - five civilians were murdered, including two women, and three children aged three, four and six. Since killing children is a particularly aggravating circumstance, the court ought to have explained why it accepted a sentence to incarceration of six year and two months, which is just slightly higher than the mandatory minimum sentence prescribed for the crime.

The ZKP further stipulates that the judgment should be "partially reasoned" i.e. it should "provide the reasons guiding the court to accept the agreement".[492] Also, since when deciding on a plea agreement, the court is required by the ZKP to determine if the penalty proposed in the agreement is in accordance with the law, it should have, at least partially, explained its decision on sentencing.

Finally, the ZKP does not stipulate that the court should omit entirely the rationale from its judgments, but just suggests that it does not need to provide it in certain circumstances. As the case at hand concerns a war crime involving the killing of children that the public know nothing about, and given the numerous ambiguities that emerge when it comes to the application of the plea agreement institution, the court should have chosen not to take an easy road in this situation.

Excessive anonymisation

The HLC requested and obtained from the Higher Court in Belgrade its judgment by which the plea agreement in the *Caparde* Case was accepted. However, the version supplied was anonymised to the extent that the names of all victims and injured party were redacted. In so doing, the court showed that the anonymisation process is conducted in an arbitrary fashion and in disregard of the Law on Personal Data Protection, which stipulates that data already accessible to the general public are not to be anonymised. The data in question had been made accessible to the public, as the indictment[493] listing the names of the victims and the injured party had been posted on the OWCP before the handing down of the judgment.

492 ZKP, Article 429, paragraph 3, sub-paragraph 2.

493 OWCP indictment KTO no. 3/17 of 26 December 2017, available online (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__sr/2018-03/kto_3_17_latinica.pdf, accessed on 18 September 2018.

Cases in which criminal proceedings have been discontinued

I. Doboj Case[494]

CASE INFORMATION
Current stage of the proceedings: proceedings have been discontinued
Date of indictment: 21 March 2016
Trial commencement date: 14 July 2016
Prosecutor: Milan Petrović
Defendant: Dušan Vuković
Criminal offence charged: war crime against the civilian population under Article 142 of the Criminal Code of the FRY

Chamber	Judge Vinka Beraha-Nikićević (Chair of the Chamber) Judge Vera Vukotić Judge Vladimir Duruz

Number of defendants: 1 **Defendant's rank:** low **Number of victims:** 14 **Number of witnesses heard:** 7	**Number of trial days in the reporting period: 6** **Number of witnesses heard in the reporting period:** 4 **Number of expert witnesses heard** : 1

Key developments in the reporting period:

Discontinuance of the criminal proceedings

494 *Doboj* Case trial reports and case documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/doboj.html, accessed on 15 September 2018.

The course of the proceedings

Overview of the proceedings up to 2017

Indictment

According to the indictment,[495] the defendant, Dušan Vuković, in his capacity as a guard at the District Prison in Doboj (BiH), physically abused several detainees in the period from May 1992 to March 1993, and a detainee died as a result of the abuse. Further, the defendant allowed members of the Army of Republika Srpska and the "Crvene beretke" [Red Berets] unit to enter prison cells and abuse detainees. The indictment further alleges that a detainee was taken away from the prison; while he was being taken away, a "Red Berets" member told him to say goodbye to the other detainees, as he would never see them again. This detainee has been missing ever since.[496]

Defendant's defence

The defendant denied having committed the crime. He admitted to having served as a guard at the District Prison in Doboj, but denied having tortured any detainee. He also denied having been authorised to let third persons into the prison. He admitted that at a certain period "Red Berets" members did enter the prison, but only by requesting guards at gunpoint to let them do so, after which they would physically abuse detainees. According to the defendant, each visit by the "Red Berets" was recorded and reported to the prison warden, and they never came to the prison while he was on duty, which can be verified in the prison records. As regards the death of a detainee, the defendant said the police had investigated it and found that the prison guards were not guilty of it.[497]

Witnesses' testimonies

Mustafa Kovačević, who was detained at the District Prison at the time, gave a testimony that incriminated the defendant. He said that the defendant, who was nicknamed "Vuk" [The Wolf], was infamous for beating everyone he could get his hands on. He was also the "captain" of a group of guards who beat detainees, comprising certain persons with the names of Staniša, Ninković, and Njegoš, who came from Montenegro. The witness saw the defendant beat detainee Fadil Ahmić. He heard detainee Marko Kikić being taken out of his cell at night. This detainee subsequently died in the prison.[498]

495 OWCP indictment KTO no. 2/16 of 21 March 2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Optuznica_Doboj.pdf, accessed on 15 September 2018.

496 This case was referred to the OWCP by the District Court in Doboj pursuant to the Serbia's Law on International Legal Assistance in Criminal Matters, because Dušan Vuković is a citizen and resident of the Republic of Serbia.

497 Trial report of 14 July 2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Doboj_-_Izvestaj_sa_sudjenja_14.07.2016.pdf, accessed on 15 September 2018.

498 Trial report of 11 October 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/2._Doboj_-_Izvestaj_sa_sudjenja_11.10.2016..pdf, accessed on 15 September 2018.

The evidence given by Suljo Mehić also incriminated the defendant. Mehić, a pre-war policeman, shared a cell with another policeman, and clearly recalled the events on 28 May 1992, when members of the "Red Berets" came to the prison. The defendant unlocked the door to his cell and told the "Red Berets" that two policemen were inside it. Four members of the "Red Berets" in camouflage uniforms then entered the cell and immediately set upon them with batons.[499]

Overview of the proceedings in 2017

Five main hearings were held in 2017, during which four witnesses and a medical expert were examined.

All four witnesses examined were detainees in the District Prison in Doboj at the relevant time. Witness Esef Hidić[500] had no direct knowledge of the incidents. The other three witnesses, namely Hasib Muratović, Mustafa Nuhićić and Murat Husaković, claimed to have seen the defendant beat one detainee after taking him out of a cell.[501] The detainee subsequently died.[502]

Medical expert Sabiha Silajdžić Brkić testified having found mechanical injuries on the victim's head while examining his mortal remains in 2005.[503]

Dismissal of the indictment

On 30 October 2017, the trial chamber issued a decision dismissing the indictment on the grounds that it was not filed by an authorised prosecutor. The dismissed indictment was filed on 21 March 2016, in the time period during which the OWCP was without a war crimes prosecutor.[504]

Overview of the proceedings in 2018

Resumption of the proceedings

At the request of the newly-appointed War Crimes Prosecutor, the criminal proceedings resumed in March 2018, from the point in the presentation of evidence where they had been interrupted.[505]

499 Trial report of 23 November 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/4._Doboj_-_Izvestaj_sa_sudjenja_23.11.2016.pdf, accessed on 15 September 2018.

500 Trial report of 26 January 2017 is available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Doboj_-_Izvestaj_sa_sudjenja_26.01.2017..pdf, accessed on 16 September 2018.

501 Trial report of 1 June 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Doboj_-_Izvestaj_sa_sudjenja_01.06.2017..pdf, accessed on 16 September 2018.

502 *Ibid*.

503 Trial report of 11 July 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Doboj_-_Izvestaj_sa_sudjenja_11.07.2017..pdf, accessed on 16 September 2018.

504 Trial report of 30 October 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/9._Doboj_-_Izvestaj_sa_sudjenja_30.10.2017..pdf, accessed on 15 October 2018.

505 Trial report of 14 March 2018, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/04/Doboj_-_Izvestaj_sa_sudjenja_14 March 2018..pdf, accessed on 15 October 2018.

Discontinuance of the proceedings

The criminal proceedings against Dušan Vuković were discontinued in May 2018 owing to his death.

HLC Findings

Armed conflict categorisation

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

In this particular case, great care should have been exercised in order to choose the appropriate type of armed conflict. Furthermore, the choice made ought to have been thoroughly explained, as it contradicted the indictment, which states that armed forces of a state other than BiH, namely the "Red Berets" unit, a unit of the Serbian State Security Department, operated in Doboj during the period covered by the indictment.[506]

Selective indictment

The OWCP indictment did not charge any of the members of the "Red Berets", despite the existence of publicly available evidence implicating them in the crimes charged in the indictment. Such evidence is set out in the ICTY Trial Judgment in the case of Stanišić and Simatović, with the description of abuses committed by "Red Berets" in the District Prison in Doboj. The ICTY judgment also specifically identified Radojica Božović as one of the unit commanders involved in the mistreatment of Doboj Prison detainees.[507]

In addition to the events set out in the OWCP indictment, "Red Berets" members Slobodan Karagić and Davor Subotić were found by the Trial Chamber of the ICTY to have taken 10 detainees out of the District Prison in Doboj on 24 May 1992, after which all traces of these men were lost. Many other crimes committed by the "Red Berets" in the Doboj area were also documented by the ICTY.[508]

506 See, e.g., ICTY, Trial Judgment in *Stanišić and Simatović*, para. 1421.
507 *Ibid*, paras. 775; 755-757.
508 *Ibid*, para. 777. In February 2016, the trial of Slobodan Karagić commenced before the Court of BiH. Karagić is indicted for a crime against humanity. The charges include the events in the District Prison in Doboj.

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

Regional Cooperation

This case is also a result of successful regional cooperation between Serbia and Bosnia and Herzegovina in prosecuting war crimes, which has intensified since the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. As the defendant, a citizen and resident of the Republic of Serbia, was not available for trial in the BiH, the District Court in Doboj referred the case against him to the OWCP.

Incomplete indictments delivered to the HLC

Pursuant to the Law on Free Access to Information of Public Importance, the HLC requested the OWCP to supply it with the indictment against Dušan Vuković. The OWCP granted the request, but the indictment supplied to the HLC was incomplete,[509] with the entire statement of reasons having been removed from it. Without having the complete indictment, it is difficult to assess its quality or follow the proceedings in this case. Bearing in mind that by the time the HLC had requested access to the indictment it had already been confirmed, and that that the trial is in open court, there can be no justification for delivering an incomplete version of the indictment.

509 OWCP indictment KTO no. 2/16 of 21 March 2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Optuznica_Doboj.pdf, accessed on 16 October 2018.

Final judgments in cases before the War Crimes Departments

I. Gradiška Case[510]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 8 April 2014	
Trial commencement date: 6 March 2015	
Prosecutor: Snežana Stanojković	
Defendant: Goran Šinik	
Criminal offence for which defendant was charged: war crime against a civilian population under Article 142 of the Criminal Code of the FRY	
Court of Appeal Chamber	Judge Siniša Važić (Chair of the Chamber) Judge Omer Hadžiomerović Judge Miodrag Majić Judge Nada Hadži-Perić Judge Dragan Ćesarević
Number of defendants: 1 **Defendant's rank:** low - no rank **Number of victims:** 1 **Number of witnesses heard**: 11	**Number of trial days in the reporting period:** 1 **Number of witnesses heard in the reporting period: /**
Key events in the reporting period: Handing down of a final judgment	

510 *Gradiška* case trial reports and documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/gradiska.html, accessed on 17 September 2018.

Course of the proceedings

Overview of the proceedings up to 2017

Indictment

The defendant, Goran Šinik, former VRS member, was charged with killing, in an undetermined manner, Croatian civilian Marijan Vištica, near the municipal landfill in the hamlet of Bok Jankovac (in the municipality of Gradiška, BiH), on 2 September 1992. The indictment alleges that late that afternoon, in Gradiška, the defendant took Marijan Vištica off a bus travelling from Gradiška to Croatia and shoved him into a car that was parked in the immediate vicinity. Nebojša Prčić was at the wheel of the car and Predrag Sladojević was sitting in the front passenger seat. After that, they drove to Bok Jankovac and stopped near the municipal landfill on the banks of the River Sava. The defendant and Vištica climbed out of the car, and Prčić and Sladojević drove back to Gradiška.[511]

The mortal remains of Marijan Vištić have never been found.

Defence

Goran Šinik denied having committed the crime with which he is charged, claiming that on the relevant day he was not in Gradiška, but somewhere else, together with the military unit he belonged to. Šinik also denied having known the late Vištica.[512]

Witnesses

The wife of Marijan Vištica, Anica Vištica, said that on the relevant day she and her husband intended to leave Gradiška with their daughters and go to Croatia. When they approached the bus they were planning to take, she saw the defendant and two other persons in uniforms standing next to the bus, "like hawks on the lookout for prey".[513] She recognised the defendant, because he used to come to their flat and threaten them. After the Šiniks had boarded the bus, someone called on his husband to get off the bus. Anica has never seen her husband since. She did not see the defendant get on the bus.

Prosecution witness Nebojša Prčić confirmed that he drove the defendant and one more man, whom he later discovered was the deceased Vištica, to a brickVJrd located a kilometre and a half from Gradiška, and right after that returned to Gradiška with Sladojević.[514] Another prosecution witness, Nikola Kolar, confirmed that the defendant came to the bus carrying the civilians who intended to

511 OWCP indictment no. KTO 3/13, of 8 April 2014, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Optuznica_08_04_2014.pdf, accessed on 17 September 2018.

512 Trial transcript of 18 June 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/18.06.2015..pdf, accessed on 18 September 2018.

513 Transcript of the main hearing of 13 July 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/13.07.2015..pdf, accessed 18 January 2018.

514 Transcript of the main hearing of 25 September 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/25.09.2015..pdf, accessed on 18 September 2018.

leave Gradiška, and called on the late Vištica to step out of the bus. The defendant and Vištica then got into a car in which Nebojša Prčić and Predrag Sladojević were sitting, and the car "drove away."[515]

Witness Đorđe Raca said that Ranko Račić (now deceased) once told him that the body of Marijan Vištica was lying in a place on the bank of the River Sava. Raca went to that place together with Nikola Maljčić, Borislav Balta and Slavko Radonjić, where they saw, from a distance of some 30 metres, a male corpse lying prone. The witness did not walk up to the corpse. He said that did not know Marijan Vištica.[516]

First instance judgment

On 13 October 2016, the Higher Court in Belgrade[517] acquitted Goran Šinik,[518] finding that the OWCP had failed to prove that he killed the victim. The defendant denied committing the crime, and the mere fact that he, together with Sladojević and Prčić, drove the victim to Bok Jankovac was not by itself sufficient for the court to find that the defendant actually killed him. The court did not believe the evidence given by the late Račić, who was the only person to claim that he recognized the body of the victim, because his evidence was at odds with the evidence given by other witnesses. Račić said that the witnesses Raca, Balta, Radonjić and Maljčić, who were with him at the time, had also seen the body. Raca, however, said that what he had seen was the body of a man unknown to him lying prone. Other witnesses mentioned by Račić denied having been present at the scene when the body was discovered. Also, the witnesses Sladojević and Prčić denied that the defendant had ever showed any aggressive behaviour towards the victim that would indicate that he intended to kill him.[519]

Overview of the proceedings in 2017

Judgment on appeal

On 22 February 2017, the Court of Appeal in Belgrade[520] dismissed all counts of the appeal filed by the OWCP as unfounded, and upheld the judgment of acquittal of the Higher Court in Belgrade.[521] Explaining its decision, the court stated that the OWCP was obliged to prove that the defendant killed the victim, Marijan Vištica. In the absence of direct evidence, the OWCP relied on circumstantial

515 Transcript of the main hearing of 16 November 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/16.11.2015..pdf, accessed on 18 September 2018.

516 Transcript of the main hearing of 13 April 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/13.04.2016..pdf, accessed on 18 September 2018.

517 Composed of Judge Vladimir Duruz, (Chair of the Chamber) and Judges Vinka Beraha Nikićević and Vera Vukotić (members).

518 First instance judgment of the Higher Court in Belgrade in *Gradiška* (K.Po2 6/2014) of 13 October2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/12/Prvostepena_presuda_13.10.2016..pdf, accessed on 18 September 2018.

519 Transcript of the pronouncement of the judgment on 13 October2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/13.10.2016..pdf, accessed on 18 September 2018.

520 Sitting as a chamber comprising Judge Siniša Važić (Chair of the Chamber), and Judges Omer Hadžiomerović, Miodrag Majić, Nada Hadži-Perić and Dragan Ćesarević (members).

521 Court of Appeal in Belgrade, judgment Kž1 Po2 5/16 of 22 February 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/Drugostepena_presuda.pdf, accessed on 18 September 2018.

evidence to prove this decisive fact, but the Court of Appeal did not accept that. The court required that the pieces of circumstantial evidence the prosecution case was built on be logically connected in such a way as to exclude any possibility of drawing more than one reasonable inference and that they themselves be established beyond a reasonable doubt. The court assessed that the OWCP had proven that there was a reasonable doubt that the defendant killed Marijan Vištica but had failed to prove its case with certainty, as the evidence presented did not point to the defendant's guilt as the only reasonably inferable conclusion. As the evidence presented did not exclude drawing other, different conclusions, the Court of Appeal found that the court of first instance had rightly applied the principle "when in doubt, in favour of the defendant" to the case at hand and acquitted the defendant.[522]

HLC findings

Flawed indictment

The OWCP did not provide sufficient factual allegations in its indictment, and factual allegations are the key element of any indictment.[523] Namely, neither from the factual description of the offence with which the defendant was charged nor from the statement of reasons for the indictment was it possible to determine the exact time of the crime, or how it was committed, or to establish a causal relation between the defendant's acts and the death of the victim. The inadequacy of the factual allegations was caused by the lack of evidence. A detailed analysis of this indictment may be found in the HLC's *Report on War Crimes Trials in Serbia during 2014 and 2015*.[524]

This was just one of the many deficient OWCP indictments which resulted in acquittals.[525] This suggests that the OWCP is lacking a clear strategy for prosecuting war crimes, and that by bringing as many indictments as possible, including even unfounded ones, it is making apretence of successfully performing its duty. In so doing, the OWCP is not only unduly wasting its time and resources, but also exposing the victims and their families to further trauma.

Acquittals

The acquittals came as a logical consequence of the flawed indictment. Goran Šinik was charged with "killing Marijan Vištica in an undetermined manner". In order for the court to find the defendant guilty, the OWCP had to prove a causal connection between the defendant's acts and the death of the victim. However, the OWCP did not produce solid evidence but based the indictment on several pieces of circumstantial evidence, none of which was capable of proving the defendant's guilt. The only facts proven beyond doubt were that the defendant took the victim off a bus that was about to

522 *Ibid.*
523 ZKP, Article 332, paragraph 2.
524 For a detailed analysis of the judgment, see: Humanitarian Law Center, *Report on War Crimes Trials in Serbia during 2014 and 2015* (Belgrade, HLC, 2016), pp.46-49, available online at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 18 September 2018.
525 Final judgments of acquittal in the cases of *Tenja II*, *Čelebići*, *Luka Camp*, *Prizren* and *Sanski Most.*

depart from Gradiška and then took him to Bok Jankovac. One of the witnesses, the now deceased Račić, said that he saw the victim's body on the bank of the River Sava, but his account was not corroborated by testimonies of other witnesses. The victim's body has not been found, therefore there is no evidence about how and when he died. As only one witness said that he had seen the body on the bank of the River Sava, the place of the victim's death also remained unproven. The fact that the victim was last seen alive in Bok Jankovac, in the company of the defendant, gave grounds for suspecting that the defendant may have been involved in his death, but did not constitute sufficient or irrefutable proof that he actually killed him. That being the case, the court had no other option but to deliver a judgment of acquittal.

II. Bosanski Petrovac Case[526]

CASE INFORMATION
Stage of the proceedings: final judgment delivered
Date of indictment: 6 August 2012
Trial commencement date: 13 November 2012
Defendants: Neđeljko Sovilj and Rajko Vekić
Prosecutor: Snežana Stanojković
Criminal offence for which defendants were charged: war crime against a civilian population under Article 142 of the Criminal Code of the FRY

Appeals Chamber	Judge Miodrag Majić (Chair of the Chamber) Judge Siniša Važić Judge Sretko Janković Judge Omer Hadžiomerović Judge Nada Hadži-Perić

Number of defendants: 2	
Defendants' ranks: low – no rank	**Number of trial days in the reporting period:** 1
Number of victims: 1	**Number of witnesses heard in the reporting period:** /
Number of witnesses heard: 13	

Key events in the reporting period:
Handing down of a final judgment

526 *Bosanski Petrovac* case trial reports and case documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/bosanski_petrovac.html, accessed on 19 September 2018.

Course of the proceedings

Overview of the proceedings up to 2017

Indictment

The defendants, members of the VRS at the time, were charged with killing civilian Mehmed Hrkić on 21 December 1992. The defendants stopped civilians Mile Vukelić and Mehmed Hrkić near the hamlet of Jazbine (in the Bosanski Petrovac municipality, BiH), ordered Vukelić to continue on his way, and took Hrkić into the nearby forest known as "Osoje" and killed him there, by firing at least three shots.[527]

Defence

The accused denied having committed the offence, claiming that on the relevant day they did see Mile Vukelić and Mehmed Hrkić, but only exchanged hellos with them and continued on their way.[528]

First instance judgment

On 11 March 2013, the Higher Court[529] passed a judgment of conviction, sentencing each of the accused to eight years' imprisonment. The judgment confirmed all the counts of the indictment.[530]

Judgment on appeal

On 4 November 2013, the Court of Appeal in Belgrade[531] granted the Defence's grounds for appeal, set aside the first instance judgment and sent the case back to the first instance court for retrial.[532] The Court of Appeal held that the first instance court had failed to provide clear conclusions with regard to some decisive facts. The first instance court's finding of fact were based on the testimonies of witnesses Jelka Plećaš and Mile Vukelić (who testified via a video-conference with the Court of BiH) and on an autopsy report. The Court of Appeal directed that witness Mile Vukelić be examined again, this time in the courtroom, preferably at the main hearing, and confronted with the defendants. Also,

527 OWCP indictment KTO 3/12 of 6 August 2012, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/11/Optuznica-Sovilj-i-Vekic.pdf, accessed on 19 September 2018. This case was referred to the OWCO by the Cantonal Court in Bihać pursuant to the Law on International Legal Assistance in Criminal Matters.

528 Transcript of the main hearing held on 13 November 2012, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/08/bosanski_petrovac_13_11_2012.pdf, accessed on 12 October 2018.

529 Sitting in a panel comprising Judges Dragan Mirković (Chair of the Chamber) and Judges Vinka Beraha Nikićević and Snežana Nikolić Garotić (members).

530 Judgment of the Higher Court in Belgrade in *Bosanski Petrovac* Case (K.Po2 6/12) of 11 March 2013, available online (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 19 September 2018.

531 Sitting in a chamber comprising Judge Siniša Važić (Chair of the Chamber) and Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Miodrag Majić (members).

532 Decision of the Court of Appeal in Belgrade Kž1 Po2 5/13, 4 November 2013, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/bosanski_petrovac_drugostepena_odluka.pdf, accessed on 19 September 2018.

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

Retrial at first instance

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

Over the course of 2015, the court heard ballistics and medical experts, who were requested to determine how the wounds of the victim Hrkić had been produced and what caused them, and also the cause of his death. However, the experts testified that on the basis on the available documents – a crime scene report and an autopsy report, which the experts assessed as insufficiently detailed, superficial and unprofessional – it was not possible to determine how the victim's wounds were produced or the cause of his death. None of the following facts could be determined: whether one or more bullets had produced his wounds, whether the wounds were penetrating or perforating, or whether they were caused by individual or automatic fire.[533]

The witnesses Jelka Plećaš and Mile Vukelić were examined again.[534] In his previous testimony, witness Mile Vukelić had said as follows: on the relevant date, he left the house of the Plećaš family and headed home, together with Mehmed Hrkić; on their way home, the two men crossed paths with the defendants, who were armed; the defendants stopped them, then ordered him to continue on home, but kept Hrkić, saying they wanted a word with him; two hours later, the defendants came to Vukelić's house and said to him that they had killed Hrkić. Witness Vukelić also said that a neighbour, whose name he did not reveal, told him he knew who had killed Mehmed, and that Jelka Plećaš told him that the defendants boasted around the village about having killed Hrkić. When questioned again at the retrial, this witness revealed that the neighbour's name was Milorad Kolundžija.[535]

Witness Jelka Plećaš repeated what she had said in her prior testimony: on the relevant day Mile Vukelić was not armed and he had left her house together with Mehmed Hrkić. Soon after they had left, she received a phone call from her mother-in-law, who told her that she had heard a shot and Hrkić crying for help and screaming, "No, let me go!" After that, the witness herself heard two shots. When testifying for the second time, she denied having told Vukelić that rumours had circulated around the village that the accused had killed Mehmed Hrkić.[536]

533 Transcript of the main hearing of 27 January 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/27.01.2015.pdf, accessed on 19 September 2018.
534 Transcript of the main hearing of 3 April 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/30.04.2015.pdf, accessed on 19 September 2018.
535 *Ibid.*
536 *Ibid.*

Mahmut Hrkić, the son of the killed Mehmed, was also questioned, but he did not have any direct knowledge of how his father had died.[537] Also questioned was witness Milorad Kolundžija, the man who Vukelić claimed had told him he knew who had killed Mehmed. Kolundžija's testimony contradicted what the key witness for the Prosecution, Mile Vukelić, had said about him – that he knew something about Mehmed Hrkić's murder.[538]

A controversy about the time of the death of Zoran Škorić, whose death is taken to be the motive behind Hrkić's murder, was resolved at the retrial. Škorić's birth certificate states 28 January 1993 as the date of his death, whereas his headstone has 1992 as his year of death. So the court called on Škorić's sister[539] to testify on this point. She said that her brother died in December 1992 and was buried by the end of that month.

Judgment upon retrial at first instance

On 30 June 2016, the Higher Court in Belgrade, following a retrial, found the defendants, Neđeljko Sovilj and Rajko Vekić, guilty, as co-perpetrators, of the criminal offence of a war crime against a civilian population and re-sentenced them each to eight years in prison.[540] The court did not accept their defence, finding it to be an attempt to escape criminal responsibility, for all the reasons stated in the prior judgment.[541]

At the retrial, the court once again believed Mile Vukelić and accepted all his accounts, which were corroborated by other evidence presented during the retrial, notably the evidence given by witness Jelka Plećaš, information concerning the time of death of Zoran Škorić, and a medical expert's findings.

Overview of the proceedings during 2017

On 27 March 2017, the Court of Appeal[542] reversed the first instance judgment and acquitted the defendants for lack of evidence. Explaining its decision, the court stated that only witness Mile Vukelić, who was not an eye-witness, incriminated the defendants, but his evidence was insufficiently clear, insufficiently persuasive and logically flawed, and was not corroborated by evidence given by other witnesses in relation to the decisive facts.[543]

537 *Ibid.*

538 Transcript of the main hearing of 25 November 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/08/1._Transkript_od_25.11.2015._godine.pdf, accessed on 19 September 2018.

539 Transcript of the main hearing of 30 June 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/08/4._Transkript_od_30.06.2016._godine.pdf, accessed on 19 September 2018.

540 Higher Court in Belgrade, judgment K.Po2 12/13 of 30 June 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/08/Prvostepena_presuda_u_ponovljenom_postupku_30.06.2016..pdf, accessed on 24 January 2018.

541 See *Report on War Crimes Trials in Serbia in 2013* (Belgrade: HLC, 2014), available online at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-onwar-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 12 February 2018.

542 Sitting in a chamber comprising Judge Miodrag Majić (Chair of the Chamber), and Judges Siniša Važić, Sretko Janković, Omer Hadžiomerović and Nada Hadži-Perić (members).

543 Court of Appeal in Belgrade, judgment Kž1 Po2 no. 12/13 of 27 March 2017, available online (in Serbian) at http://www.hlc-rdc.org/wpcontent/uploads/2017/08/Prvostepena_presuda_u_ponovljenom_postupku_30.06.2016..pdf, accessed on 19 September 2018.

HLC Findings

Flawed first instance proceedings

The first instance proceedings in this case were flawed in many respects. A few important facts, such as the existence of an armed conflict during the period relevant to the indictment, the fact that the defendants were fighters for a party to the armed conflict, their mental capacity, and the fact that the victim was a civilian, were not disputed between the parties at the preliminary hearing. In addition, the defendants did not deny seeing the victim on the day in question, nor that he was in the company of a witness (Mile Vukelić), but claimed that they had just said hello and walked past them. Hence the only fact at issue was whether or not the defendants killed Mehmed Hrkić. Nevertheless, the court of first instance failed to provide clear conclusions with respect to decisive facts, one of them being the motive for the crime. Furthermore, some of the reasons underlying the court's judgment proved to be unacceptable. For example, it was only on the basis of the witness Jelka Plećaš' testimony that her mother-in-law had heard Mehmed cry out, "No, let me go!" (the verb "let" was used in plural form - "Ne, pustite me!"), that the court drew the inference that more than one person were with the victim at the time of his death, that these persons shot him dead, and these people were the defendants. As regards the motive, the court's inference that the possible motive for this crime could be revenge was based on a segment of the testimony of witness Vukelić, in which it was said that the defendants were enraged by the death of their coeval Zoran Škorić, who had been killed a couple of days before the critical event. The court had believed his account without verification. During the appeals proceedings, the defence produced evidence that Zoran Škorić had been killed after the criminal act charged in the indictment had taken place. All this amounted to an incomplete finding of fact, for which reason the Court of Appeal rightly quashed the first instance judgment and ordered a retrial. A detailed analysis of the first instance judgment in this case can be found in the HLC's *Report on War Crimes Trials in Serbia in 2013*.[544]

Unpersuasive evidence offered by the OWCP

At the retrial, the court of first instance followed the instructions of the Court of Appeal and again heard the witnesses Mile Vukelić and Jelka Plećaš and confronted them. The opinions of a ballistics expert and a medical expert were obtained, and Milorad Kolundžija, whom witness Mile Vukelić had mentioned in his testimony, was examined as a witness. The retrial raised reasonable doubts as to whether the evidence presented by the OWCP was compelling enough for the court to establish beyond reasonable doubt that the defendants had committed the offence with which they were charged. The testimony of the key prosecution witness, Mile Vukelić, upon which the first instance judgment was largely based, was discredited by the detailed testimonies of the witnesses Jelka Plećaš and Milorad Kolundžija. Witness Jelka Plećaš categorically denied the allegations of witness Vukelić that she and her husband had told him there was a rumour in the village that the defendants had killed Hrkić. Witness Kolundžija, who Vukelić claimed had told him he knew that the defendants

544 See in *Report on War Crimes Trials in Serbia in 2013*, pp. 50-53.

had killed the victim[545], denied it. Kolundžija said that it was the witness Vukelić himself who told him he would suggest him as a witness, as he himself allegedly was charged with the murder of Hrkić.[546] The findings of a medical expert and a ballistics expert did not confirm the allegations in the indictment that the defendants had fired at least three shots at the victim thus causing his lethal wounds, as it was impossible for the experts to determine how the wounds were produced or what the cause of the victim's death was. The death of Zoran Škorić, which was taken to be the motive for the murder, was not explained thoroughly enough to be considered as the motive. A mere temporal coincidence between the two events does not suffice to prove beyond reasonable doubt that one event was motivated by the other.

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

The HLC could not analyse the first instance judgment because it was denied access to it until after the final judgment was rendered. Namely, the Higher Court refused to make its judgment publicly available, stating that the case was under appeal and the decision of the Court of Appeal was still pending. However, the Higher Court does have the judgment in electronic format, so it is obvious that the reason given by the Court does not hold water and that it was merely used as a pretext to avoid its obligations under the Law on Free Access to Information of Public Importance. The court's refusal to disclose its judgment directly defies the opinion of the Commissioner for Information of Public Importance regarding public access to non-final judgments of the Higher Court. Specifically, the Commissioner had previously declared the Higher Court's refusal to provide the HLC with its non-final judgment unlawful.[547]

545 Transcript of the main hearing of 3 April 2015, p. 16, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/30.04.2015.pdf, accessed on 5 January 2018.

546 Trial report of 25 November 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Bosanski_Petrovac-Ponovljeni_postupak-Izvestaj_sa_sudjenja_25.11.2015.pdf, accessed on 5 January 2018.

547 Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-00625/2012-03 of 14 October2013.

III. Ovčara Case[548]

CASE INFORMATION
Stage of the proceedings: final judgment delivered
Date of indictment: 4 December 2003
Trial commencement date: 9 March 2004
Prosecutor: Dušan Knežević
Criminal offence for which defendants were charged: war crime against prisoners of war under Article 144 of the Criminal Code of the FRY
Defendants: Miroljub Vujović, Ivan Atanasijević, Stanko Vujanović, Milan Lančužanin, Jovica Perić, Milan Vojnović, Predrag Milojević, Goran Mugoša, Miroslav Đanković, Predrag Dragović, Nada Kalaba and Saša Radak.

Appeals Chamber	Judge Sretko Janković (presiding) Judge Dragan Ćesarević Judge Nada Hadži-Perić Judge Omer Hadžiomerović Judge Miodrag Majić

Number of defendants: 12 **Defendants' ranks:** low and medium **Number of victims:** 200 **Number of witnesses examined:** 120	**Number of trial days in the reporting period: 5** **Number of witnesses examined in the reporting period:** /

Key events in the reporting period:
Handing down of a final judgment

548 *Ovčara* case trial reports and documents are available online (in Serbian) at http://www.hlc-rdc.org/Transkripti/ovcara.html, accessed on 2 February 2018.

Course of the proceedings

Overview of the proceedings up to 2017

Indictment

The first indictment in respect of the crime in Ovčara was brought on 4 December 2003, against eight defendants - Miroljub Vujović, Stanko Vujanović, Jovica Perić, Mirko Vojinović, Ivan Atanasijević, Spasoje Petković, Predrag Madžarac and Milan Vojnović.[549]

On 24 May 2004, 11 more individuals were charged in respect of the same offence, namely Milan Lančužanin, Marko Ljuboja, Predrag Milojević, Božo Latinović, Vujo Zlatar, Goran Mugoša, Đorđe Šošić, Miroslav Đanković, Slobodan Katić, Nada Kalaba and Milan Bulić.[550] Three more individuals were subsequently separately charged with the same crime: Predrag Dragović on 26 May 2004,[551] Saša Radak on 13 April 2005,[552] and Milorad Pejić on 8 April 2008.[553]

The defendants, at the time members of the Territorial Defence Force or "Leva supoderica" Volunteer Unit attached to the JNA, were charged with killing 200 prisoners of war at the Ovčara farm on 20 and 21 November 1991. Before being killed, the victims, who after sheltering in the Vukovar hospital had surrendered to the JNA, were physically abused and subjected to other forms of inhumane treatment.[554]

549 OWCP indictment KTRZ no. 3/03 of 4 December 2003, available online (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 21 September 2018.

550 OWCP indictment KTRZ no. 4/03 of 24 May 2004, available online (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 21 September 2018.

551 OWCP indictment KTRZ no. 4/04 of 26 May 2004, available online (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 21 September 2018.

552 OWCP indictment KRTZ 4/03 of 13 April 2005, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2005_04_13_eng.pdf, accessed on 21 September 2018.

553 OWCP indictment of 8 April 2008, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2008_04_08_eng.pdf, accessed on 21 September 2018.

554 OWCP indictment KTRZ no. 4/03 od 24 May 2004, available online (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 21 September 2018; OWCP indictment KTRZ no. 4/04 of 26 May 2004, available online (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-PREDRAG_DRAGOVIC-26.05.2004.pdf, accessed on 26 January 2017; OWCP indictment KTRZ 3/03 of 4 December 2003, available online (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 21 September 2018.

The proceedings against Mirko Vojinović were terminated after his death in 2004. The defendants Spasoje Petković and Božo Latinović were awarded the status of "witness/justice collaborator". The proceedings against Milan Bulić were severed and completed separately owing to his illness. Defendant Milan Bulić was finally sentenced to two years in prison.[555]

For these reasons, the OWCP on 16 September 2005 issued an amended, more precise indictment against a total of 16 individuals: Miroljub Vujović, Stanko Vujanović, Jovica Perić, Ivan Atanasijević, Predrag Madžarac, Milan Vojnović, Milan Lančužanin, Marko Ljuboja, Predrag Milojević, Vujo Zlatar, Goran Mugoša, Đorđe Šošić, Miroslav Đanković, Slobodan Katić, Nada Kalaba and Predrag Dragović.[556]

First trial (2005-2006)

On 12 December 2005, the District Court in Belgrade[557] sentenced eight of the defendants – Miroljub Vujović, Stanko Vujanović, Milan Lančužanin, Predrag Milojević, Predrag Dragović, Ivan Atanasijević, Đorđe Šošić and Miroslav Đanković – each to 20 years in prison, three of the defendants – Vujo Zlatar, Jovica Perić and Milan Vojnović – to 15 years in prison, Predrag Madžarac to 12 years, Goran Mugoša to five years, and Nada Kalaba to nine years in prison. The defendants Marko Ljuboja and Slobodan Katić were acquitted of all charges.[558] On 18 October 2006, the Supreme Court of Serbia[559] quashed this judgment and send the case back to the court of first instance for new proceedings.[560]

Second trial (2009-2010)

At the retrial, which was conducted by a new chamber,[561] the cases against Saša Radak[562] and Milorad Pejić[563], who were subsequently indicted for the same crime, were merged with the cases against the 16 defendants to form a single case against 18 defendants. On 12 March 2009, the Court sentenced seven of the defendants – Miroljub Vujović, Stanko Vujanović, Ivan Atanasijević, Predrag Milojević, Đorđe Šošić, Miroslav Đanković and Saša Radak – to 20 years in prison, defendant Milan Vojnović to

555 Supreme Court of Serbia, judgment *Kž I r.z. 2/06 of 9 February 2006.*

556 OWCP indictment KRTZ 3/03 of 16 September 2005, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2005_09_16_eng.pdf, accessed on 21 September 2018.

557 Sitting in a chamber comprising Judge Vesko Krstajić (Chair of the Chamber), and Judges Gordana Božilović Petrović and Vinka Beraha Nikićević.

558 District Court in Belgrade, judgment K.V. 1/2003 of 12 December 2005, available online (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 21 September 2018.

559 Sitting in a chamber comprising Judge Janko Lazarević, (Chair of the Chamber), and Judges Nikola Latinović, Slobodan Gazivoda, Dragomir Milojević and Sonja Manojlović (members).

560 Supreme Court of Serbia ruling Kž. I. R.z. 1/06 of 18 October2006, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/SR-BEOGRAD-OVcARA-18.10.2006..pdf, accessed on 21 September 2018.

561 Composed of Judge Vesko Krstajić (Chair of the Chamber), and Judges Vinka Beraha Nikićević and Snežana Nikolić Garotić (members).

562 OWCP indictment KTRZ 4/03 of 13 April 2005, available online at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2005_04_13_eng.pdf, accessed on 21 September 2018.

563 OWCP indictment no. KTRZ 4/03 of 8 April 2005, available online 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 21 September 2018.

15 years, Jovica Perić to 13 years, Nada Kalaba to nine years, Milan Lančužanin to six years and Goran Mugoša and Predrag Dragović each to five years in prison. Five of the defendants – Marko Ljuboja, Slobodan Katić, Predrag Madžarac, Vujo Zlatar and Milorad Pejić – were acquitted.[564]

Both parties appealed against the judgment. Having heard the appeals, the Court of Appeal in Belgrade[565] handed down its judgment on 23 June 2010, which reversed Nada Kalaba and Ivan Atanasijević's sentences, by increasing Kalaba's sentence to 11 years and reducing Atanasijević's sentence to 15 years.[566]

Constitutional appeal by Saša Radak

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

Decision of the Constitutional Court of Serbia

On 12 December 2013, the Constitutional Court of Serbia[567] accepted Radak's appeal against the decision of the Court of Appeal in Belgrade.[568] The court found that the decision of the Court of Appeal violated Saša Radak's right to have a fair trial i.e. the right to have his case decided upon by an impartial court, because Judge Siniša Važić had sat on the Court of Appeal Chamber which affirmed Radak's conviction. Judge Važić was President of the District Court in Belgrade and had ruled on motions seeking disqualification of judges hearing the *Ovčara* Case; and at the same time, he had presided over the pre-trial chamber of the same court, and acting in this capacity, taken part in making the decision to award the status of "witness/justice collaborator" to the defendant Petković, and the decision to extend custody to all defendants, including Radak. In the opinion of the Court of Appeal, Judge Važić's engagement in several capacities in the first instance proceedings and the

564 District Court in Belgrade judgment no. K.V. 4/06 of 12 March 2009, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/PRESUDA_Ovcara_prvostepena_u_ponovljenom_postupku.pdf, accessed on 21 September 2018.

565 Panel comprising Judge Siniša Važić (Chair of the Chamber), and Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Miodrag Majić (members).

566 Court of Appeal in Belgrade judgment Kž1 K.Po2 1/2010 of 23 June 2010, available online (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 21 September 2018.

567 Sitting in a chamber comprising Judges Dragiša B. Slijepčević (Chair of the Chamber), Olivera Vučić, Marija Draškić, Bratislav Đokić, Goran Ilić, Agneš Kartag-Odri, Katarina Manojlović-Andrić, Milan Marković, Bosa Nenadić, Dragan Stojanović, Sabahudin Tahirović, Tomislav Stojković and Predrag Ćetković (members).

568 Constitutional Court ruling no. Už -4451/2010 of 12 December 2013 (published in the Official Gazette of the RS issue no. 54/2014), available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/ODLUKA_Ustavnog_suda_po_zalbi_Sase_Radaka.pdf, accessed on 28 December 2017.

decisions he made at that time were circumstances that raised doubts as to his impartiality when serving as the President of the Chamber hearing the appeals in that very case.

So the Constitutional Court directed the Court of Appeal to reconsider Radak's appeal against the first instance judgment of the District Court in Belgrade, emphasizing that this decision had a legal effect in respect to all the other defendants as well. A detailed analysis of the Constitutional Court's decision can be found in the HLC's *Report on war crimes trials in Serbia in 2013*.[569]

Requests for the protection of legality

Following the decision of the Constitutional Court, the Defence Attorneys of Miroslav Đanković,

Miroljub Vujović, Stanko Vujanović, Nada Kalaba, Đorđe Šošić, Predrag Milojević, Saša Radak, Milan Vojnović, Predrag Dragović and Milan Lančužanin filed requests for the protection of legality with the Supreme Court of Cassation on the grounds of violation of their clients' right to an impartial trial.

On 19 June 2014, the Supreme Court of Cassation[570] ruled to accept the requests as well-founded and to set aside the final judgment of conviction by the Court of Appeal in Belgrade, and sent the case back to the Court of Appeal for re-consideration.[571] Moreover, the court also decided that its ruling applied also to the defendants Ivan Atanasijević, Jovica Perić and Goran Mugoša, whose attorneys never lodged a request for the protection of legality.[572]

Repeated appeals proceedings

On 1 December 2014, the Court of Appeal[573] re-opened the appeals proceedings and decided to re-open the hearing process as well. At the hearings, which began on 15 June 2015, the defendants again presented their defence, after which four witnesses were examined, including two "witnesses/justice collaborators".[574]

No hearings were held in 2016 because the Court of Appeal did not obtain from the ICTY Residual Mechanism the record of the examination of witness P022 which it had requested. Witness P022 appeared in the *Ovčara* Case as "witness/justice collaborator 1". It was the Defence Attorneys who

569 For more on this see: *Report on War Crimes Trials in Serbia in 2013* (Belgrade: HLC, 2014), pp. 85-89, available online at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-onwar-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 21 September 2018.

570 Sitting in a chamber comprising Judges Dragiša Đorđević (Chair of the Chamber), Zoran Tatalović, Radmila Dičić-Dragičević, Maja Kovačević-Tomić and Predrag Gligorijević (members).

571 Supreme Court of Cassation, judgment no. K33 PZ 2/2014 of 19 June 2014, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Presuda_Vrhovnog_Kasacionog_suda_19_06_2014-.pdf, accessed on 21 September 2018.

572 Article 489, paragraph 2 of the ZKP stipulates that if it finds that the reasons why it has decided in favour of the defendant also exist in respect of co-defendants who did not lodge a request for the protection of legality, the Supreme Court of Cassation shall act ex officio as if such requests did exist.

573 Sitting in a panel comprising Judges Sretko Janković (Chair of the Chamber), Sonja Manojlović, Nada Hadži-Perić, Omer Hadžiomerović and Miodrag Majić.

574 Trial report of 15 June 2015, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/1.Ovcara-Izvestaj_sa_sudjenja_15.06.2015.pdf, accessed on 21 September 2018.

insisted that this document should be obtained.[575] In the meantime, defendant Ivan Atanasijević changed his name again by changing it back to his old name of "Ivica Husnik".[576]

Overview of the proceedings during 2017

During April 2017, the trial continued before the Court of Appeal, with the defence insisting that conditions had not been met for the trial to proceed because of the absence of the authorised prosecutor (a new war crimes prosecutor had not yet been appointed). In such circumstances, the Law on Public Prosecution Service required that an acting prosecutor be appointed.[577] Only if there was an acting prosecutor could the deputy prosecutor assigned to the case be regarded as the authorised prosecutor and act as such in the proceedings. The defence therefore requested to see a document showing what kind of powers were granted to Milan Petrović, First Deputy War Crimes Prosecutor, who at the time was the head of the OWCP, expressing doubts as to whether Petrović's appointment was made in accordance with the law.[578]

At the request of the Court, the OWCP supplied a document issued in 2014 by which the then War Crimes Prosecutor, Vladimir Vukčević, designated Milan Petrović as his First Deputy. The defence asserted that Deputy Petrović was not an Acting War Crimes Prosecutor within the meaning of the Law on the Public Prosecution Service, because an Acting War Crimes Prosecutor may only be appointed by the Republic's Public Prosecutor. Therefore the court requested from the Office of the Republic's Public Prosecutor information as to whether there existed a document on the appointment of an Acting War Crimes Prosecutor. As the request remained without a response, the chamber postponed the trial to an undecided date, because without a response from the Office of the Republic Public Prosecutor, it was impossible for the chamber to decide on the question of whether the conditions had been met for conducting the trial.[579]

In September 2017, the trial had to begin anew[580], owing to a change in the composition of the chamber[581], and was completed with closing arguments from the parties. In his closing argument, the Acting Prosecutor said that no new information had been put in front of the court of second instance during the repeated appeals proceedings, and therefore proposed that the defendants be judged guilty and sentenced to the same terms as they received from the Court of Appeal.[582]

575 Trial report of 11 May 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/7.Ovcara-Izvestaj_sa_sudjenja11.05.2016.pdf, accessed on 21 September 2018.

576 Defendant Ivica Husnik changed his name to Ivan Atanasijević in 1992.

577 The Law on the Public Prosecution Service (Official Gazette of the RS, nos. 116/2008, 104/2009, 101/2010 and 78/2011 – other law, 101/2011, 38/2012 – CC decision, 121/2012, 101/2013, 111/2014 – CC decision 117/2014, 106/2015 and 63/2016 – CC decision), Article 36.

578 Trial report of 18 April 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/04/8._Ovcara_-_Izvestaj_sa_sudjenja_18.04.2017..pdf, accessed on 21 September 2018.

579 Trial report of 19 April 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/04/9._Ovcara_-_Izvestaj_sa_sudjenja_19.04.2017..pdf, accessed on 20 January 2018.

580 Trial report of 18 Septembe 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/09/10._Ovcara_-_Izvestaj_sa_sudjenja_18.09.2017..pdf, accessed on 20 January 2018.

581 Chamber member Judge Sonja Manojlović had retired in the meantime and was replaced by Judge Dragan Ćesarević.

582 Trial report of 19 September 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/10/11._Ovcara_-_Izvestaj_sa_sudjenja_19.09.2017..pdf, accessed on 21 September 2018.

Defendant Đorđe Šošić died in the course of the trial, and the proceedings against him were terminated.[583]

Second judgment on appeal

On 24 November 2017, the Court of Appeal handed down a judgment upholding the first instance judgment (the judgment of the Higher Court in Belgrade of 12 March 2009) with respect to Miroljub Vujović, Stanko Vujanović and Predrag Milojević (who had each been sentenced to 20 years in prison) and Goran Mugoša (who had been sentenced to five years in prison). The sentences imposed by the first instance court on Miroslav Đanković, Saša Radak and Ivan Atanasijević (20 years in prison) were decreased as follows: Atanasijević was now sentenced to 15 years, and Đanković and Radak each to five years in prison. Defendant Nada Kalaba had her sentence increased from the original nine to 11 years. Milan Vojnović (who had been sentenced by the court of first instance to 15 years in prison), Jovica Perić (who had been sentenced by the court of first instance to 13 years in prison), Milan Lančužanin (who had been sentenced by the court of first instance to six years in prison), and Predrag Dragović (who had been sentenced by the court of first instance to five years in prison) were all acquitted.[584]

This judgment represents a stark departure from the previous Court of Appeal's judgment of 2010, which was based on the very same set of evidence. By this second judgment, the court acquitted four defendants, including those who had previously been sentenced to as much as 15 and 13 years (Vojnović and Perić respectively), and drastically reduced the sentences on two defendants, Đanković and Radak, from the original maximum sentence of 20 years in prison to a mere five years.

Giving the reasons for its decision, the Court of Appeal stated that the part of the indictment relating to Jovica Perić, Milan Vojnović, Milan Lančužanin and Predrag Dragović was based on insufficient evidence. At the same time, the indictment failed to provide sufficient evidence to prove some of the acts Miroslav Đanković and Saša Radak were accused of. Namely, the OWCP based its indictment largely on the testimonies of "witness/justice collaborator 1" and "witness/justice collaborator 2", which testimonies were at odds with each other, and on the statement given by defendant Jovica Perić to the police. Bearing in mind that the "witnesses/justice collaborators" were directly involved in the killings of prisoners of war, that escaping criminal prosecution was the main reason why they had decided to become justice collaborators, and that the neuropsychiatric expert found a vengeful streak in "witness/justice collaborator 1", their testimonies were assessed with great caution by the court. The court "had to set certain standards", one of them being that a testimony from one "witness/justice collaborator" is insufficient without any other evidence corroborating it, such as a testimony from another "witness/justice collaborator", to prove the participation of any of the defendants in

583 Court of Appeal In Belgrade, decision Kž1 Po2 no. 2/14 of 17 February 2017.

584 Court of Appeal in Belgrade, judgment Kž1 Po2 -2/2014 of 24 November 2017, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Druga_drugostepena_presuda_24.11.2017..pdf, accessed on 21 September 2018.

the commission of a crime.[585] Applying the rule "when in doubt, rule in favour of the defendant", the court acquitted Milan Vojnović, Jovica Perić, Milan Lančužanin and Predrag Dragović, because their previous convictions were based on one single testimony.[586] Lančužanin's conviction was based on the evidence given by "witness/justice collaborator 1", Dragović's conviction on the evidence given by "witness/justice collaborator 2", and Perić's and Vojnović's convictions on defendant Perić's statement to the police. Applying the same rule, the Court did not take into account some criminal actions performed by Đanković and Radak,[587] such as their participation in the execution of prisoners of war, because only "witness/justice collaborator 1" had implicated them in that. Instead, the Court found Đanković and Radak guilty solely of beating the prisoners of war who were made to run between two rows of men at Ovčara, as their involvement in that act was confirmed by both witnesses/justice collaborators, and reduced their sentences accordingly.

HLC findings

Second final judgment – 14 years since the commencement of proceedings

Three years after the final judgment had been delivered in this most complex case ever dealt with by the domestic judiciary, the Constitutional Court set aside this judgment, not because a judge hearing the case was shown to be biased, but because of "the existence of a reasonable and justified doubt as to [his] impartiality".[588] Therefore, the Supreme Court of Cassation could not but grant the requests for the protection of legality, and set aside the final judgments of the Court of Appeal, since one of the legal requirements for granting a request for the protection of legality – violation of a defendant's right guaranteed by the Constitution - was found to have been met.[589]

This case, transferred from the ICTY, is the first and most complex war crime case to come before a Serbian court. The incompetence or unwillingness of the domestic judiciary to resolve this case over a period of 14 years, and 25 years after the crime had been committed, is a paradigm of war crimes cases in Serbia: complex cases involving many victims, such as *Ovčara*, *Ćuška*, *Lovas*, and *Skočić*, are protracted owing to all sorts of procedural issues, and disappear from the public eye over time. The families of victims, who reluctantly placed their trust in the Serbian judiciary, have all that time been in limbo, without information about what has happened to their loved ones and who was responsible for the crimes committed against them.

585 *Ibid*, p. 29.
586 *Ibid*, pp. 50-52.
587 *Ibid*, pp. 43-46
588 For more details see: *Report on War Crimes Trials in Serbia in 2013* (Belgrade: HLC, 2014), pp. 85-89, available online at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-onwar-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 21 September 2018.
589 ZKP, Article 485, paragraph 1, sub-paragraph 3.

Only low-ranking perpetrators have been prosecuted

So far, only direct perpetrators have been prosecuted domestically over the Ovčara crime. In other proceedings conducted in Serbia and before the ICTY, facts have been established which point to the responsibility of a large number of JNA officials for this crime. This was underlined also by Veselin Šljivančanin, who was convicted of the events in Ovčara before the ICTY. In his appeal to this court, Šljivančanin stated that officers were present at Ovčara "who had the material ability and were in a better position than him to take measures to stop the mistreatment of the prisoners of war," referring to Lieutenant-Colonel Milorad Vojnović, Lieutenant-Colonel Miodrag Panić, Captain Dragan Vezmarović and Captain Dragi Vukosavljević.[590]

Court of Appeal's evidence assessment standards

In the second instance judgment of 2017, the Court of Appeal in Belgrade starkly departed from its previous judgment of 2010, which was based upon the very same set of evidence. The reason for the departure is, as stated in the judgment, that the court "had to set certain standards of proof with respect to some facts at issue"[591], and not base its finding of guilt in respect of the defendants solely on the testimony of one single witness, but require that the testimony be corroborated by other evidence or at least one more testimony. This standard is not a new invention but a well-established and decade-long practice. Namely, domestic legislation does not exclude the possibility of finding a defendant guilty of a crime solely on the basis on one witness's testimony. To be the evidence on which the court may base its finding of guilt in a criminal case, a testimony must fulfil certain requirements: it must be clear, persuasive, precise and unchanged, supported by many details which make it possible to sift out those which are experienced first-hand from those which may be the product of imagination. Additionally, the testimony must be largely verifiable, which means that its veracity can be tested by reference to the other, even indirect, evidence presented. If the evidence does not meet the said requirements, a judgment of guilt may not be based upon it. The Court of Appeal must have known that in 2010, when it passed its previous second instance judgment in this case, so citing this standard now can be understood as the court's admission that it acted negligently and irresponsibly when passing its previous judgment, the judgment that caused delays in the proceedings and an unnecessary waste of human and material resources.

590 ICTY Appeal Chamber Judgment in *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin* (IT-95-13/1-A), 5 May 2009, para. 197, available online at http://www.icty.org/x/cases/mrksic/acjug/bcs/090505.pdf, accessed on 21 September 2018.

591 Court of Appeal in Belgrade, judgment Kž1 Po2 -2/2014 of 24 November 2017, p. 28, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2018/02/Druga_drugostepena_presuda_24.11.2017..pdf, accessed on 21 September 2018.

Proceedings on requests for recognition and enforcement of foreign judgments in war crimes cases

I. Novak Đukić – Tuzla's "Kapija" Case[592]

CASE INFORMATION	
Stage of the proceedings: request for recognition and enforcement of a judgment	
Trial commencement date: 26 February 2016	
Prosecutor: Mioljub Vitorović	
Convict: Novak Đukić	
Criminal offence for which defendant was charged: war crime against a civilian population under Article 142 of the Criminal Code of the FRY	
Chamber	Judge Vinka Beraha-Nikićević (presiding) Judge Vladimir Duruz Judge Vera Vukotić
Number of convicts: 1 **Convict's rank:** high **Number of victims:** 71 **Number of witnesses examined:** /	**Number of trial days in the reporting period:** 1 **Number of witnesses examined in the reporting period:** /
Key events in the reporting period: The proceedings for recognition and enforcement of a final judgment of the Court of Bosnia and Herzegovina were under way	

592 See the *Novak Đukić* Case on the website of the Court of Bosnia and Herzegovina at http://www.sudbih.gov.ba/predmet/2472/show, accessed on 21 September 2018.

Course of the proceedings

First instance judgments of the Court of BiH

On 12 June 2009, the Court of Bosnia and Herzegovina[593] sentenced Novak Đukić to a lengthy prison term of 25 years for a war crime against the civilian population under Article 173 of the Criminal Code of Bosnia and Herzegovina. Đukić, in his capacity as the Commander of the Ozren Tactical Group of the VRS, was found guilty of having ordered the artillery platoon under his command to shell the town of Tuzla on 25 May 1995, despite the fact that Tuzla had been declared a "safe area" by UN Resolution 824 of 6 May 1993. One artillery projectile hit Tuzla's central area known as "Kapija" [The Gate], killing 71 people, most of whom were in their twenties, and wounding over 100.

Second instance judgment of the Court of BiH

The Appeals Chamber of the War Crimes Division of the Court of BiH on 6 April 2010 upheld the first instance judgment, following which Novak Đukić began serving his prison sentence in BiH.[594]

Decision of the Constitutional Court of BiH

Đukić lodged an appeal with the Constitutional Court of BiH, asserting that the judgment of the first instance court had violated his rights guaranteed by the Constitution and the European Convention on Human Rights, which prohibit the retroactive application of the law. Namely, Đukić was tried under the Criminal Code of BiH, instead of the Criminal Law of the SFRY, which was in effect at the time of the commission of the crime in 1995.

The Constitutional Court of BiH granted his grounds of appeal and issued a decision on 23 January 2014, by which it quashed the second instance judgment and ordered the Court of BiH to hand down a new judgment.[595]

As the Constitutional Court had quashed the final and binding judgment passed on Đukić, legal grounds for his serving the sentence ceased to exist, so the Court of BiH on 14 February 2014 issued a decision to release him.

Second instance decision of the Court of BiH upon retrial

On 11 April 2014, the Court of BiH reduced his sentence by five years upon retrial, in accordance with the Criminal Law of the SFRY.[596]

593 Court of Bosnia and Herzegovina, first instance judgment in *The Prosecutor's Office of BiH v. Novak Đukić* (X-KR-07/394), of 12 June 2009.
594 Court of Bosnia and Herzegovina, second instance judgment (X-KRŽ-07/394) of 6 April 2010.
595 Constitutional Court of BiH, decision on the merits (case no. AP-5161/10), 23 January 2014,.
596 Constitutional Court of BiH, decision on the merits (case no. S1 1 K 015222 14 Krž), 11 April 2014,

BiH's mutual legal assistance request to Serbia for recognition and enforcement of a final court decision

Shortly after Đukić's release, his Defence Counsel informed the Court in BiH that their client was receiving medical treatment in Serbia. When he failed to turn up to begin serving his term in BiH, the Court of BiH issued a warrant for his arrest. According to the Law on International Legal Assistance in Criminal Matters, Đukić, being a Serbian citizen, could not be extradited to BiH (Đukić has dual citizenship, Serbian and that of BiH).[597] So the Court of BiH in October 2015 sent a formal mutual legal assistance request to Serbia, requiring Serbia to recognize and enforce the final and binding judgment passed on Đukić by the Court of BiH.

The War Crimes Department of the Higher Court in Belgrade, which was in charge of hearing the case, repeatedly postponed its decision-making because of Đukić's non-appearance in court due to his supposed ill health.

Đukić's Defence Counsel moved that the letter of request not be complied with, claiming that Đukić's trial before the Court of BiH was unfair, and later requested that the Court in Belgrade obtain Đukić's case file from the Court of BiH, which would support their claims. The court granted this request. However, only a part of the documents requested had been delivered to the court in Belgrade by the end of the reporting.

Because of Đukić's repeated non-appearance in court due to health reasons, the chamber ordered that a medical expert evaluate his ability to attend the sessions and take part in the proceedings.

Reconstruction of the crime scene at the Serbian army's training grounds

At the request of Novak Đukić's Defence Counsel, an experiment – the reconstruction of the crime scene in Tuzla's "Kapija" – was carried out at the Army of Serbia's Technical Testing Centre in Nikinci during 2014, 2015 and 2016.[598] The reconstruction included a simulation of the impact of an artillery projectile on a scale model that was supposed to represent the buildings and other structures in Tuzla's "Kapija". On the basis of this experiment, it was concluded that the civilians could not have been killed from a blast of a shell fired from the VRS positions on 25 May 1995, and that the facts established in the final judgment of the Court of BiH against Novak Đukić were therefore untrue.[599]

597 Law on International Legal Assistance in Criminal Matters (Official Gazette of the RS no. 20/2009), Article 16, paragraph 1, sub-paragraph 1.

598 Reply of the VJ General Staff to the HLC's request for information of public importance, 13 April 2016, available online (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Odgovor_na_zahtev_za_pristup_informacijama_od_javnog_znacaja,rekonstrukcija_dogadjaja_na_Tuzlanskom_trgu_25.05.1995,Generalstab_Vojske_Srbije.pdf, accessed on 21 September 2018.

599 *Večernje novosti* daily newspaper, 'Srpska granata nije ubila ljude u Tuzli' [Serbian shell did not kill people in Tuzla], 25 February 2016, available online (in Serbian) at http://www.novosti.rs/vesti/naslovna/hronika/aktuelno.291.html:592567-Srpska-granata-nije-ubila-ljude-u-Tuzli, accessed on 21 September 2018.

Overview of the proceedings up to 2017

None of the four chamber sessions scheduled in 2017 took place, because of Novak Đukić's non-appearance in court. Đukić's justified his absence as due to medical reasons - that is, to his frequent hospitalisations at the VMA.

Medical expert Branimir Aleksandrić, who chaired the commission that was set up on the court's orders to assess convict Đukić's state of health, stated that the commission found that Đukić was able to take part in the proceedings. But the court sessions could nevertheless not be held because of Đukić's frequent hospitalisations.

Overview of the proceedings during 2018

During 2018 only one session was scheduled; but it did not take place, owing to the absence of Novak Đukić, who was receiving treatment in a hospital.

At the beginning of 2018, medical expertise found that Novak Djukic was temporarily not able to take part in the proceedings, and that new medical expertise will be done after a year.

HLC Findings

An attempt to influence the judicial process

The results of the experiment at Nikinci were presented to the Serbian media and at a public debate held at the Belgrade University Law School.[600] Also, on 4 November 2016, a documentary "Mučni teret podmetnute krivice" [The Painful Burden of Imputed Blame], based on this experiment, was screened at Belgrade's Zvezdara Theatre.[601] At the same time, an allegation was put out that expert witness Berko Zečević, who had testified at Đukić's trial before the Court of BiH, faced a criminal complaint for giving a false testimony before that court.[602] This media campaign is undoubtedly aimed at influencing the Higher Court in Belgrade to refuse the request of BiH to recognise and enforce the guilty judgment passed on Novak Đukić by the Court of BiH.

Unfair trial as grounds for dismissing request for legal assistance

According to the Law on International Legal Assistance in Criminal Matters, the Higher Court may grant or refuse a formal request for the recognition and enforcement of a foreign judgment, but in either case, the

600 *Večernje novosti* daily newspaper, 'Laž razbijena 32 puta: Ljudi na 'Kapiji' ubijani simultano iz više pravaca' [Lie debunked 32 times: People in Kapija killed simultaneously from multiple directions], 24 October 2016, available online (in Serbian) at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:631462-Laz-razbijena-32-puta-Ljudi-na-Kapiji--ubijani-simultano-iz-vise-pravaca, accessed on 21 September 2018.

601 *Večernje novosti* daily newspaper, 'Dokumentarac o Tuzli: Prava istina o poturanju laži,' [Documentary on Tuzla: Real truth about fabricating lies], 4 November 2016, available online (in Serbian) at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:633415-Dokumentarac-o-Tuzli-Prava-istina-o-poturanju-lazi, accessed on 21 September 2018.

602 *Blic* online, 30 May 2016, available (in Serbian) at http://www.blic.rs/vesti/hronika/u-sredu-o-priznavanju-presude-generalu-novaku-djukicu/l6cbr5l, accessed on 21 September 2018.

court in its decision-making is bound by the factual description of the offence set out in a foreign judgment.[603] Accordingly, in no case may the Higher Court open a hearing to listen to and assess the results of the experiment conducted at Nikinci. However, it is certain that Đukić's Defence Counsel will make use of these results to support their allegations that Đukić had an unfair trial at the Court of BiH, and an unfair trial is grounds for refusing the request.[604] But the HLC does not see the Higher Court in Belgrade as an appropriate forum for assessing the fairness of the trial in question. As BiH is a State Party to the European Convention on Human Rights, Đukić's Defence Counsel could have taken the case to the European Court of Human Rights, had it considered that Đukić's right to have a fair trial had been violated by the Court of BiH. Finally, bearing in mind that the Court of BiH grounded its judgment not only on the findings of the criminal investigation, testimonies of insider witnesses from the VRS and several Tuzla residents who survived the attack, but also on the findings of two ballistics experts, who were examined, cross-examined and confronted in court, with Đukić having his own firearms and ballistics expert during the trial, the HLC considers it unlikely that Đukić's Defence Counsel can offer any compelling arguments to support its allegations of unfairness.

In the HLC's view, by recognizing the judgment of the Court of BiH, the War Crimes Department of the Higher Court in Belgrade would demonstrate not only its commitment to regional cooperation but its independence as well.

Infringement of the National War Crimes Prosecution Strategy

In the HLC's opinion, the abovementioned experiment serves two purposes: by denying the facts established by the Court of BiH its exerts pressure on the Serbian judiciary so that Đukić can avoid serving his sentence in Serbia; and by denying judicially established facts, it attempts to revise the recent wartime past.

The announcement of a new experiment to be conducted at Nikinci, which would deal with the VRS attack on the Markale marketplace in Sarajevo, clearly suggests that the campaign aimed at denying the truth of the findings of the Court of BiH regarding the responsibility for the attack on Tuzla's "Kapija" is part of wider efforts for revising the judicially established record of the 1992-1995 war in BiH.[605]

The HLC considers that the involvement of state authorities in such endeavours runs contrary to the National Strategy for the Prosecution of War Crimes, in which Serbia undertook to provide "objective informing of citizens about war crimes trials" in order to raise "the level of general social awareness about the events in the former Yugoslavia and the need to detect, investigate and prosecute war crimes, and to punish their perpetrators, regardless of their national, ethnic and religious affiliation or their ranking."[606]

603 Law on International Legal Assistance in Criminal Matters (Official Gazette of the RS no. 20/2009), Article 61, paragraph 4.

604 *Ibid*, Article 63, paragraph 1, sub-paragraph 4.

605 *Večernje novosti* daily newspaper, 'S. J. Matić: Srbija u Nikincima ruši laž s Markala" [Serbia debunks Markale hoax at Nikinci], available online (in Serbian) at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:625814-Srbija-u-Nikincima-rusi-laz-s-Markala, accessed on 21 September 2018.

606 *National War Crimes Prosecution Strategy*, p 14, available online at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF, accessed on 21 September 2018.

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