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MONITORING OF WAR CRIME TRIALS

A REPORT FOR 2009

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LIST OF ABBREVIATIONS

DORH	the State Attorney's Office of the Republic of Croatia
ŽDO	County State Attorney's Office
USKOK	Office for Prevention of Corruption and Organised Crime, under the DORH
OG	Official Gazette
OKZRH	Basic Criminal Law of the Republic of Croatia
KZRH	Criminal Law of the Republic of Croatia
ZKP	Criminal Procedure Act
ICTY	The International Criminal Tribunal for the Former Yugoslavia
UNDP	United Nations Development Programme
MP	Member of Parliament
BiH	the Republic of Bosnia and Herzegovina
RC	the Republic of Croatia
MUP RH	Ministry of the Interior of the Republic of Croatia
TO	Territorial Defence
HV	Croatian Army
SNO	People's Defence Secretariat
SUS	Independent USKOK Company (military unit)
SFRJ	the Socialist Federal Republic of Yugoslavia
JNA	Yugoslav National Army
RSK	the Republic of Serb Krajina
HVO	Croatian Council of Defence

OPINION SUMMARY

Within the framework of the project „Monitoring war crime trials in the processes of dealing with the past“ in the period between April 2004 and 31 December 2009, we monitored a total of 68 cases at county courts in the Republic of Croatia which represents about 77.2 % of all cases that were conducted during that period or are still ongoing¹.

In relation to war crime trials, we can describe the year in which Croatia was preparing to open the chapter on the judiciary (Chapter 23) in the accession negotiations for joining the European Union as yet another year of "housecleaning". What we mean by that is rectifying mistakes made in the work of the judiciary during the 90's when a large number of persons were sentenced *in absentia* in numerous unprofessionally and ethnically biased proceedings². Likewise, criminal proceedings and ongoing trials are reviewed and updated to clean them up from legally ill-founded indictments³. The State Attorney's Office of the Republic of Croatia (hereinafter: the DORH) is completing its database on war crimes. Exchanges of evidence, documents and data between the prosecution offices of Croatia, Serbia and Montenegro have in the past several years led to investigations, instigations of indictments and adjudications⁴. The system of support for witnesses and victims is being developed.

¹ *Original indictments in these 68 trials encompassed a total of 425 persons: 382 members of Serb units (89.8%); 41 members of Croatian units (9.64%) and 2 officials/members of the so-called Autonomous Region of Western Bosnia forces. Trials were conducted against 209 persons, 166 members of Serb units (79.42%), 41 members of Croatian units (19.6%) and 2 officials/members of the so-called Autonomous Region of Western Bosnia forces. Final verdicts were reached in 37 cases (54.41%), non-final verdicts in 19 cases, while 12 cases are pending (or are expected to be re-tried pursuant to a decision of the Supreme Court. Final convicting verdicts were reached in relation to 55 defendants (for 38 members of Serb units and 17 of Croatian units); final acquitting verdicts were reached in relation to 14 defendants (10 members of Serb units and 4 members of Croatian units); trials were suspended or dismissing verdicts were reached in relation to 78 defendants (members of Serb units) after the prosecution dropped charges or changed legal qualification from war crime/genocide to armed rebellion. Most trials were conducted before county courts in Vukovar, Osijek and Sisak.*

² *A total of 464 persons in 118 cases were sentenced for war crimes in absentia (about 70% of all persons who were sentenced for war crimes before Croatian courts between 1991 and 2009).*

³ *35% (one third) of the cases that we were monitoring since April 2004 were concluded with final verdicts in 2009, while during 2008/2009 that number amounted to 50% (one half). After the Karlovac County Court passed three acquitting verdicts and the Supreme Court quashed them on two occasions, the Supreme Court itself conducted a hearing in the case against the defendant M. Hrastov for the crime on Korana Bridge in order to bring to a close proceedings that lasted for 17 years.*

⁴ *The DORH and the Office of the War Crimes Prosecutor of the Republic of Serbia exchanged evidence in 26 cases. The Office of the War Crimes Prosecutor of the Republic of Serbia acted in nine cases (3 at the investigation stage, 4 at the main hearing stage, 1 concluded with a non-final verdict, 1 concluded with a final verdict). The DORH acted in 3 cases (2 concluded with a final*

However, the aforementioned efforts are slowly taking place and, in our opinion, as a whole they are insufficient, which we find to be irresponsible towards victims of war crimes as well as towards the defendants in proceedings in which the indictments are legally ill-founded and/or insufficiently substantiated with evidence. All of the aforementioned does not stimulate social catharsis.

Likewise, one cannot see a strategy pursuant to which the investigation and processing of a large number of un-investigated war crimes (about 400) and defendants without a verdict (about 670) would be a constant priority. On the contrary, as the establishment of USKOK courts clearly reveals priorities, the non-stipulation of exclusive jurisdiction to county courts in Osijek, Rijeka, Split and Zagreb to try war crimes indicates that there is no political will and strategy for efficient processing of war crimes. Attempts by numerous victims' families (we are familiar with 50 cases) to receive compensation of damage for the killing of their family members by filing private lawsuits failed, which only exposed them to additional traumas and large court expenses which the state, in some cases, collects even forcefully.

We explain the aforementioned opinion in the following manner.

Work of the judiciary, heavily burdened with resolving the consequences and backlog of ethnically biased court proceedings during the 90's, was rendered more difficult due to belated processing of war crimes and due to non-willingness by political elites to determine responsibility for the lack of timely investigations, indictments and verdicts for some criminal acts.

Namely, the standpoint of political and judicial elites that it is not possible to commit a war crime during a defence war was prevailing until the shift in power in 2000 when it was replaced (at least declaratively) by the standpoint that all war crimes should be processed in compliance with the law and international standards.

It was followed by the processing of serious crimes committed by members of Croatian units, while the DORH published information in 2004 that it was conducting reviews of all cases (at all stages) in order to eliminate consequences and practice of non-critical, unsubstantiated with evidence beyond reasonable doubt, conducts against a large number of suspect/defendant members of Serb military and paramilitary formations.⁵

verdict and 1 concluded with a non-final verdict). The Prosecutor's Office of Montenegro acted in 1 case (at the main hearing stage).

⁵ *According to DORH data, between 1991 and 2004 investigations were instigated for 3232 persons. 1400 of them were indicted, while 602 persons were sentenced (almost 80% in absentia). Along with several exceptions, those were members of Serb military and paramilitary formations (until 2001, 7 members of Croatian units were indicted, while additional five members were indicted until 2004).*

According to data from DORH annual reports for the period between 2004 and 2008, in that period investigations were suspended, indictments were abandoned or legal qualification of a criminal act was changed to armed rebellion for about 750 members of Serb units⁶. Apart from that, in order to render it possible to „eliminate“ convicting verdicts reached in unprofessionally and ethnically biased proceedings conducted *in absentia*, the Criminal Procedure Act was amended (OG, 152/08). It rendered it possible to the DORH (but also to the convicts) to request re-opening of criminal proceedings to the benefit of a convict, regardless of the fact whether he/she was present, with presentation of new facts or new evidence which could lead to the release of a person who was sentenced or to his/her conviction according to a more lenient law. Having used this legal opportunity along with the application of the Action Plan and the Instruction of the Chief State Attorney pertaining to standards for criminal prosecution⁷, county state attorney's offices (hereinafter: the ŽDOs) in 2008/2009 conducted reviews of cases adjudicated *in absentia*. Following the additional police on-site investigations, the DORH requested re-opening of proceedings in 14 cases (11.8%) for 90 persons sentenced *in absentia* (19.3%). During 2009, trials were re-opened in 7 cases (5.9%) for 32 defendants, which amounts to 6.8% of all persons sentenced *in absentia*⁸.

All „reviews“, including this review of persons who received final verdicts *in absentia*, were conducted by the same county state attorney's offices which instigated indictments without respecting the standards of objectivity and impartiality. On the one hand, they received responsibility to rectify the damage done. However, this gives room to doubts whether all reviews were conducted in a serious manner⁹. Apart from that, we have also warned about the indictments instigated in 2006 which were below stipulated standards¹⁰.

⁶ *At the first stage, during 2004, a review of investigating procedures was conducted and investigations against 485 persons were suspended. Until 2009, the DORH dropped charges or changed legal qualification of a criminal act to armed rebellion for additional 260 defendants.*

⁷ *Instruction pertaining to the application of provisions of the OKZRH and the ZKP in war crimes cases – criteria (standards) for criminal prosecution, number: O-4/08 of 9 October 2008; Action Plan for the implementation of the Instruction number O-4/08 pertaining to the work on war crimes cases, number: A-223/08 of 12 December 2008.*

⁸ *During 2009, 10 cases adjudicated in the absence of the defendants were re-opened: 7 upon request by the competent ŽDOs and 1 upon request by the defendant pursuant to the possibility of re-opening proceedings in absentia and 2 upon request by the defendants following their arrest. In these cases, in the original proceedings, 35 persons received final prison sentences in the duration between 8-20 years (a total of 578 years). Following the re-opening of proceedings, the State Attorney's Office dropped charged or changed legal qualification of a criminal act to armed rebellion in relation to 34 defendants, while one defendant received a final prison sentence in the duration of 3 years and 6 months!*

⁹ *Example: at the Osijek County Court verdicts were passed in the absence of the defendants in 13 cases (for a total of 48 defendants). All verdicts became final, but in only two cases (15%) a complaint was lodged with the Supreme Court, although court-appointed defence counsels were obliged to lodge appeals against first-instance verdicts. Prison sentences were pronounced in the*

We appreciate the efforts invested by the DORH so far, but we are of the opinion that, due to everything aforementioned, it is necessary to amend the Act on the Application of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law (OG 175/03; hereinafter: the Act on the Application of the ICC Statute) with regard to DORH's competencies in order to establish exclusive competence of the ŽDOs in Osijek, Rijeka, Split and Zagreb. The establishment/strengthening of specialized DORH teams would contribute to a facilitated exchange of information on crimes, use of Hague documentation and efficient regional co-operation between the judiciaries.

It is necessary to investigate and process perpetrators, at least those who committed the most serious war crimes. According to DORH's data, this is a comprehensive task – not even half of the task has been completed so far and it is both important and urgent because the elapse of time renders it difficult to find evidence. Namely, in the period between 2004 and 2009 the State Attorney's Office raised indictments against additional 426 persons¹¹, about 670 defendants are without verdicts and for about 400 crimes (for which the State Attorney's Office has information) only pre-investigating activities are underway.

For the same reason and because of the size and seriousness of the forthcoming work, we repeatedly emphasize the need to concentrate trials at four county courts (in Zagreb, Split, Rijeka and Osijek). Pursuant to the Act on the Application of the ICC Statute, their

range from 5 to 20 years, whereby 36 defendants (75%) were pronounced a prison sentence in the duration of 10 or 15 years. According to data at our disposal, the Osijek ŽDO has so far requested re-opening in one case.

¹⁰ *Example: indictment for the crime in Berak was instigated against 35 persons, 16 of whom were not charged with specific activities related to the commission of a crime. During 2009, the State Attorney's Office abandoned criminal prosecution of 14 defendants from the aforementioned indictment.*

¹¹ *Out of that number, in 10 cases the defendants were 41 members of Croatian units. 17 of them received final sentences, 4 defendants were acquitted, while for 20 defendants there is a pending appellate procedure before the Supreme Court. In 2008 and 2009, 5 new proceedings were conducted (one was transferred from the ICTY). Final verdicts are convicting in 84% of the cases. The aforementioned points at the fact that the State Attorney's Office prepares well substantiated indictments when pressing charges against members of Croatian units. However, it can be pointed out that so far members of Croatian units were processed only if the cases involved the most severe consequences (killings and related serious abuses), while members of Serb units were processed for other (milder) manners of committing criminal acts of war crimes. Likewise, the DORH attempted to rectify its previous omissions when in several cases criminal proceedings against members of Croatian units charged with killings were suspended through erroneous application of the Act on Amnesty from criminal prosecution and proceedings for criminal acts committed during armed conflicts and in the war against the Republic of Croatia. The DORH re-initiated criminal prosecution of perpetrators in two such cases, but this time by legally qualifying the criminal act as a war crime against civilians.*

competence is facultative, but it is not applied as such in practice¹². Here we are talking about serious and specific criminal acts which impose a burden not only on the victims and their families but also on the entire society, whereas inflicted traumas (and attitudes influenced by them) are already being passed on generations born after the war. For several years, we have been observing (in)efficiency of war crime trials (proceedings being conducted for several years; high percentage of cases being repeated based on the Supreme Court's decision because of procedural mistakes or erroneously/insufficiently established facts; unwillingness to reach non-popular verdicts). Moreover, appointments of judges in war crimes councils with no previous experience in the most complex criminal cases is something that we have warned about on several occasions. Although we criticised such practice of "learning by doing" i.e. solving cases as they come along¹³, we wish to highlight certain improvements that we noted in the last several years, particularly in 2008 and 2009. These improvements can be used as a good foundation in establishing permanent war crimes councils at the aforementioned four courts.

Namely, first positive steps in the work of judicial councils are associated with the implementation of the Act on the Application of the ICC Statute, i.e. with the establishment of councils that comprise three professional judges. Together with the corrective role of the Supreme Court of the Republic of Croatia (hereinafter: the Supreme Court) and additional education, this resulted in improved efficiency of trials: the percentage of cases to be repeated based on the Supreme Court's decision gradually decreases, i.e. the percentage of verdicts upheld by the Supreme Court after the first trial gradually increases.¹⁴

We are of the opinion that, after almost two decades of gaining experience in war crime trials, it is impermissible any longer to appoint judges in war crimes councils who do not have many years of experience in criminal cases and, what is even more important, who lack experience in war crime trials. One possibility to resolve this issue would be to select experienced and successful judges for the permanent councils from the list of judges who were previously members of war crimes councils.¹⁵

¹² *Thus far, war crime trials have been conducted before 10 – 12 county courts.*

¹³ *We have warned on several occasions about the omissions made by the county courts in Bjelovar, Karlovac, Sisak, Požega and Rijeka.*

¹⁴ *According to the OSCE Report for 2007, the percentage of repeated cases in 2002 was 95%, and in 2003/04/05/07 it was 50%-65%. Out of the number of trials that we monitored in 2008, 22.7% trials were repeated, while 28.5% trials were repeated in 2009. Moreover, the fact that councils perform their work in a more qualitative manner is also supported by the information that out of 25 cases that the Supreme Court was ruling about in 2008 and 2009 and which we are familiar with, 68% of the verdicts were upheld or modified and 8 cases (32%) were reversed for a re-trial.*

¹⁵ *In 2009, a total of 55 judges were members of war crimes councils.*

Enabling greater opportunities for specialisation and concentration of knowledge, which could be achieved by establishing permanent war crimes councils at four county courts that would comprise judges with experience in war crime trials, is also important because of the need to harmonise court practice (especially penal policy) and achieve greater opportunities for organising protection and support to witnesses.¹⁶

Namely, in the last two years we observed a high percentage of first-instance verdicts carrying sentences which correspond to, or are below the stipulated minimum for the criminal acts concerned (47% in 2008; 51% in 2009). Likewise, explanation of pronounced convictions in the verdicts is often very scarce. Moreover, in all monitored trials conducted thus far against members of Croatian units, when pronouncing sentences the courts found participation in the Homeland War to be an extenuating circumstance. In a rational and righteous criminal justice system, such conduct opens up the issue of equality of citizens before law and related consistence in pronouncing convictions.

The assessment that participation in the Homeland War is an extenuating circumstance also demonstrates current political context in which war crime trials are being conducted. Despite the publicly proclaimed support by the highest state officials of the need to process all war crimes, war crime trials against members of Croatian military and police units are often burdened by support that the defendants receive from a part of the public, defenders' associations and local politicians. Political condemnation of a crime lags behind judicial condemnation.¹⁷

Furthermore, it is well-known that defendant MP Glavaš' departure from the territory of Croatia (practically escaping) immediately prior to the pronouncement of the first-instance (convicting) verdict in a trial that was conducted against him and five other defendants for the crimes committed in Osijek, is a consequence of the Croatian Parliament's political decision to withhold permission to put him in detention. By doing so, the Parliament directly interfered in the work of judicial authorities. But nevertheless, neither the ruling party nor the opposition showed any willingness to accept the initiative by human rights organisations to amend Article 75 of the Constitution of the Republic of

¹⁶ *With the implementation of the pilot project of the UNDP and the Croatian Ministry of Justice at four courts in the Republic of Croatia (county courts in Vukovar, Osijek and Zadar and the Municipal Court in Zagreb) and with the adoption of necessary normative changes, foundations to institutionalise victim and witness support services at courts have been established. The model, contents and experiences acquired so far in practice could serve as a starting point for developing a support system at other courts, but also in the work of state attorney's offices and the police.*

¹⁷ *Only in 2009, several years after the verdicts for war crimes became final, the Croatian President Stjepan Mesić passed decisions on the stripping of war medals awarded to eight members of Croatian units because of „the conduct contrary to legal order and moral values of the Republic of Croatia. Apart from the President of the State and the State Medals and Recognitions Commission, the initiative for stripping of medals may also come from the House of Representatives, the ministries and other state administration bodies, political parties, religious communities, citizens' associations and other legal persons.*

Croatia in such a manner that parliamentary immunity should be revoked in respect of criminal acts with stipulated prison sentence of more than 5 years (which also concerns war crimes).

We expect that the announced amendments of the provisions of the Constitution which regulate the institutes of (non)extradition of state's own citizens will be adopted in order to prevent any further avoidance of criminal prosecution and/or serving criminal sanctions by escapes of defendants/convicts – dual citizens of the Republic of Croatia and of the Republic of Bosnia and Herzegovina from one country to another. We are of the opinion that the Agreement with Bosnia and Herzegovina on mutual execution of court decisions in criminal matters should also be interpreted and applied in respect of war crimes.

Finally, we particularly wish to draw attention to the lack of political responsibility towards families of victims of un-investigated crimes who attempted to collect compensation for the loss of their close persons by initiating indemnity claims against the Republic of Croatia.¹⁸ This institutional insensitivity towards their need to have their suffering acknowledged is evident in obliging them to pay court expenses and in exerting pressure upon them to withdraw their claims if they want to (after losing the case) avoid paying court expenses. We find it necessary to resolve the issue of paying court expenses in lawsuits for compensation of damage caused by the killing of a close person in its entirety. Furthermore, although political will was lacking so far, we expect that the executive, legislative and judicial authorities will address the issue of indemnifying all victims seriously and responsibly.

KEY OBSERVATIONS

Political context in which trials are taking place

Despite the publicly proclaimed support by the highest state officials (President of the RC, the former and the current Prime Minister, the former and the current Minister of Justice...) to the need to process all war crimes, war crime trials in the Republic of Croatia against members of Croatian military and police units are often burdened by

¹⁸ *From the analysis of the legislation it can be concluded that the provisions which rendered compensations possible were being repealed, while provisions which removed the possibility of compensating damage were being adopted. The courts rejected indemnity claims in their entirety, except in the cases where it was previously established in the criminal proceedings that the perpetrator was guilty of a crime, and imposed obligation on the plaintiffs to compensate court expenses to the defendant RC. Documenta is in possession of files in 50 such cases. Although the Government of the RC adopted a decision on writing off the adjudicated court expenses, this decision did not include all plaintiffs.*

support that the defendants receive from a part of the public, defenders' associations and local politicians.¹⁹

Pressure by the legislative and the executive authorities in the trial against Glavaš *et al.*

Pressure during the trial against Branimir Glavaš, a very influential local politician and a Member of Parliament and other defendants for the crime in Osijek, which was mostly coming from political and media allies of the 1st defendant, reached its climax at the beginning of 2008 when the Croatian Parliament withheld its permission to detain MP Glavaš and, by doing so, it directly interfered in the work of judicial authorities. The most significant consequence of the Croatian Parliament's decision to withhold permission to detain the defendant MP Glavaš saw the light of day only in 2009. War crime trials in 2009 will definitely be remembered by the defendant MP Glavaš leaving the territory of Croatia (practically escaping) immediately prior to the pronouncement of the first-instance (convicting) verdict.

Namely, the Croatian Parliament with its decision dated 12 January 2008 in which it granted permission to conduct criminal proceedings but in which, at the same time, „during the term of a parliamentary mandate, the permission to detain MP Branimir Glavaš is withheld“, interfered in the work of judicial authorities, whereby it brought into question their independence and freedom of passing decisions.²⁰

Extensive interpretation of the Constitutional provisions which regulate the issue of parliamentary immunity, by which the Croatian Parliament separated the immunity from initiation of criminal proceedings and the immunity from detention, is harmful because it

¹⁹ *In Požega, high-ranking local politicians and representatives of defenders' associations, by attending trials against the defendants, expressed their support to the defendants charged with liquidations and abuse of civilians of Serb ethnicity; in Sisak, the defendant charged with liquidation of a civilian of Serb ethnicity received support from representatives of defenders' associations; a person at the time non-finally sentenced for unlawful killing and injuring of the enemy received support from representatives of defenders' associations during the session of the Supreme Court; the Zagreb-based Association of Special Police Members from the Homeland War and the Association of Anti-Terrorist Unit Lučko 90 organized in December 2009 in Zagreb a march of support for a war-time deputy commander of special police and four members of special police charged with committing a war crime against Serb civilians in the village of Grubori.*

²⁰ *After the Parliament withheld permission to detain the defendant Glavaš, the court failed to introduce cautionary measures such as seizure of travelling and other documents necessary to cross the state border. Apart from that, it was not established during the proceedings whether the defendant also had BiH citizenship. The defendant Glavaš stated in his personal assets card, available on the web site of the Croatian Parliament, that as of April 2008 he transferred his property to his son. However, this fact obviously did not warn any competent financial, intelligence and judicial institutions about the potential outcome.*

disrupts the principle of division of powers guaranteed by that same Constitution and, apart from that, it also creates the practise of inequality among citizens and does not contribute to the rule of law.

Such inconsiderable decision sent a message to the witnesses that the defendant has strong, for them threatening, political power and influence on the court proceedings and that it does not make sense to get exposed by providing testimonies, which might have immeasurable harmful consequences for this, but also for other court proceedings.²¹

Furthermore, the former Prime Minister publicly criticized the time of pronouncement of the first-instance verdict, objecting to the judiciary that by pronouncing the verdict in the case of *Glavaš et al.* immediately prior to local elections it influenced their outcome.²² This time, by doing so, the executive authorities attacked the judicial authorities, expecting the judiciary to be careful when passing decisions in order not to be useful/detrimental to a certain political option.

Since the duty of judicial authorities is to perform their function independently from daily political events, interests of politicians and of political parties, the aforementioned criticism, which came from the highest level of the executive authorities, speaks of the ignorance of the division of powers by the highest Governmental officials and is detrimental to the establishment of trust in the judicial system.

Dual citizenship and prohibition of extradition

Frequent escapes by numerous defendants/convicts – dual citizens of the Republic of Croatia and of the Republic of Bosnia and Herzegovina from the RC to BiH and vice versa with the objective of avoiding criminal prosecution and/or serving criminal sanctions, opened a wider discussion on the need/necessity to render impossible the aforementioned abuses of dual citizenship.

Namely, according to the agreement concluded between the Republic of Croatia and Bosnia and Herzegovina on dual citizenship, signed in 2007,²³ citizens of one contracting party may also acquire citizenship of another contracting party in a manner and the procedure stipulated by the regulations of the contracting parties.

²¹ *In certain situations when reaction was necessary and mandatory, the judiciary failed to take any action in order to protect the proceedings from negative outside influences. Thus, nothing was done after Anto Đapić, the-then Mayor of Osijek, an MP and Glavaš' coalition partner, during the investigation publicly revealed the names of witnesses stated in the investigating request. He clarified that, by doing so, he "revealed a false witness".*

²² *The first-instance verdict was pronounced on 8 May, while local elections in the RC took place on 17 and 31 May 2009.*

²³ *On 3 October 2007, the Croatian Parliament passed the Act on Confirmation of the Agreement which was published on 10 October 2007 (Official Gazette – International Agreements No. 9/07).*

Furthermore, when a dual citizen is residing in the state territory of one of the contracting parties, he/she is considered exclusively the citizen of that contracting party on the state territory of which he/she resides.

Therefore, when a person who holds citizenship of the RC and of the BiH, against whom criminal proceedings are conducted in the RC, resides in the territory of BiH, the BiH regulations apply to that person, including the regulations pertaining to the issue of extradition.

Prohibition of extradition of its own citizens in Bosnia and Herzegovina is stipulated in Article 415 of the ZKP. It clearly states as a pre-condition „that the person, whose extradition is requested, is not a citizen of Bosnia and Herzegovina“.

Taking into account the fact that the not-finally sentenced Glavaš, apart from the citizenship of the Republic of Croatia also possesses the citizenship of the Republic of Bosnia and Herzegovina, Bosnia and Herzegovina is not in a position to extradite him to the Republic of Croatia.²⁴

Likewise, the Republic of Croatia does not extradite its citizens to other states. Namely, Article 9 of the Croatian Constitution stipulates that „No Croatian citizen shall be exiled from the Republic of Croatia or deprived of citizenship, nor extradited to another state“.

Impossibility to serve prison sentences

In order to regulate mutual execution of court decisions in criminal matters, the Republic of Croatia signed agreements which regulate this issue with several countries.

Thus, *inter alia*, an agreement was concluded between the Government of the Republic of Croatia, the Government of Bosnia and Herzegovina and the Government of Federation of Bosnia and Herzegovina on mutual execution of court decisions in criminal matters.²⁵

²⁴ *After Glavaš' escape, a question was raised pertaining to the manner of acquiring BiH citizenship. Namely, persons born in the SFRJ prior to 1976 acquired citizenship by being entered into the book of citizens of the state in which the child's father was residing during the first post-WW2 census. Since Branimir Glavaš' parents were from BiH, where they also probably resided during the first census, he was entered into the book of BiH citizens. Therefore, regardless of the time when he officially requested confirmation of BiH citizenship, he had that citizenship even before.*

²⁵ *The aforementioned agreement was concluded on 26 February 1996. In its amendments of 7 June 2004, the territory of the Agreement's application was expanded to the entire state territory of Bosnia and Herzegovina, including the Serb entity.*

The Agreement anticipates the commitments of mutual execution of final prison sentences in criminal matters, providing that the convicted person is a citizen of the executing state or that he/she has permanent residence there and that he/she **agrees** to serve the sentence there.

The Agreement also anticipated negative preconditions for the transfer of prison sentences, i.e. the circumstances which, should they exist, render the transfer of prison sentences impossible. Thus, *inter alia*, it was stipulated that the countries will reject to provide legal assistance if the request pertains to an act of political or military nature.

Belated decisions on the stripping of medals awarded to persons finally sentenced for war crimes

Several years after the verdicts became final, the Croatian President Stjepan Mesić, upon a proposal by the State Medals and Recognitions Commission, passed decisions on the stripping of medals awarded to members of Croatian units sentenced for the commission of war crimes. Decisions on the stripping of medals were passed because of „the conduct contrary to legal order and moral values of the Republic of Croatia“²⁶.

It is evident that political condemnation of crimes lags behind judicial condemnation, despite the fact that the initiative for the stripping of medals, apart from the President of the State and the State Medals and Recognitions Commission, may also come from the House of Representatives, the ministries and other state administration bodies, political parties, religious communities, citizens' associations and other legal persons.

Pardons granted to persons sentenced for war crimes

In compliance with the Pardon Act²⁷, and according to data from the media, the President of the Republic of Croatia, Stjepan Mesić, during its two mandates pardoned 283 persons, while he dismissed 2241 requests for pardon.²⁸

²⁶ In July 2009, the Croatian President Stjepan Mesić stripped of medals three convicts from the so-called Gospić Group - Tihomir Orešković, Mirko Norac and Stjepan Grandić, four convicts from the "Lora" case - fugitive Tomislav Duić, Davor Banić, Ante Gudić and Anđelko Botić. Siniša Rimac, sentenced for the killing in Pakračka Poljana, was also stripped of medals.

²⁷ The Pardon Act was published in the Official Gazette No. 175/03, the Act came into force on 1 December 2003. In Article 2 it is stipulated that:

(1) A person is pardoned when he or she is individually granted full or partial pardon for serving a sentence, when a pronounced sentence is replaced by a more moderate one or a conditional conviction is applied, when early rehabilitation is granted, legal consequences of a conviction are cancelled or shortened, security measures of the prohibition to drive a motor vehicle, the prohibition to engage in a profession, activity or duty or the expulsion of aliens are applied.

(2) A pardon shall not prejudice upon the rights of third parties based on a conviction.

Nine persons sentenced for war crimes were granted pardon. Seven of the pardoned persons are members of Serb units, one is a member of Croatian units, while one pardoned convict was, based on the Agreement on the Transfer of Convicts between the RC and BiH, serving a prison sentence in Croatia.²⁹

In December 2009, prison sentence pronounced to Siniša Rimac (sentenced by a final verdict to 8 years in prison for a criminal act of murder) was reduced by one year which stirred up quite a controversy because the public is well aware of the fact that Siniša Rimac also participated in the liquidation of Zec family members, a crime which was never processed.

The act of pardon is an act of „mercy by the President“ given to an individual which, in modern, democratic states, should not be an instrument of intervention into the judiciary. The percentage of 8.9% of granted pardon requests (i.e. 3.1% of pardoned perpetrators of war crimes whose prison sentences were reduced) speaks about acceptable application of the act of pardon in the practice of President Mesić. In the explanation provided in the decision to grant pardon to Siniša Rimac, it was stressed that he was a person who confessed that he had committed a crime and expressed regret. It is legitimate that the pardon provider accepts these reasons and separates the act of pardon from the problem of non-work of competent bodies in the Republic of Croatia, incomplete investigation of the crime, as well as from the failure of these bodies to request responsibility from the persons who failed to investigate the crime against members of Zec family and prosecute those responsible for that crime.

However, we are of the opinion that the act of pardon given to persons sentenced for a war crime must be assessed in the context of social processes of facing with the past,

²⁸ „Pazin portal“, dated 19 November 2009.

²⁹ *President Stjepan Mesić pardoned the following persons:*

- in 2001: Vaso Graovac, Milenko Milaković, Miloš Horvat, Bogdan Banić and Đuro Kuzmanović. The aforementioned persons were released from prison several months prior to the expiry of long prison sentences;
- in 2005 the President gave Nikola Dragušin partial pardon from serving a one-year prison sentence (the convict was sentenced by a final verdict in 1996 to 20 years in prison for a war crime against civilians and a war crime against war prisoners in Bučje detention camp);
- in 2005 the President gave Stjepan Grandić partial pardon from serving a two-year prison sentence due to family reasons (the convict was sentenced, together with Tihomir Orešković and Mirko Norac, by a final verdict to 10 years in prison);
- in 2006 the President gave Dragiša Čančarević partial pardon from serving a one-year prison sentence (the convict was in 2001 sentenced by a non-final verdict in 1996 to 13 years in prison for a war crime against war prisoners. The Supreme Court reduced the sentence to 10 years);
- in 2008 the President gave Romero Blažević partial pardon from serving a 6-month prison sentence (the convict was in 2002 sentenced before the Cantonal Court in Mostar to 3 years in prison for a war crime against civilians and a war crime against war prisoners in Ljubuško Prison).

restoration of trust, accepting responsibility for the crimes committed „on behalf of one's own community“, i.e. condemnation of each crime and creation of atmosphere of solidarity with all victims.

Due to the aforementioned reasons, we believe that granting pardon to convicted perpetrators of war crimes should be very restrictive.

Standpoints and recommendations

Taking into account everything that was mentioned earlier in the text, we are of the opinion that political will on behalf of prosecuting all war crimes would be primarily reflected in the setting of a normative framework in which the most serious criminal acts (such as war crimes) would not be protected against criminal prosecution by a parliamentary immunity, i.e. prohibition of extradition of one's own citizens. As a part of the forthcoming Constitutional amendments it will be necessary to amend the provisions of the Constitution which regulate the issues of (non)extradition of one's own citizens and parliamentary immunity, as well as to amend the Agreement with Bosnia and Herzegovina on mutual execution of court decisions in criminal matters.

We are of the opinion that the purpose of immunity of members of Parliament is free and uninterrupted performance of their duties, i.e. the performance of tasks in the Parliament. That immunity, also known as the immunity of non-responsibility, represents the fundamental and traditional right of independence of MPs.³⁰

On the other hand, the immunity of inviolability, which thanks to the current Constitutional provisions renders impossible criminal prosecution and detention of MPs without the approval by the Croatian Parliament, must not be a smoke screen behind which perpetrators of serious criminal acts would hide. Therefore, we propose that the forthcoming Constitutional amendments should abolish the immunity of inviolability for the criminal acts for which a prison sentence exceeding five years is stipulated.

This amendment that we are advocating did not find place in the proposed drafts amendments to the Constitution of the RC by the Government of the RC and MPs from opposition parties. It is evident that neither the ruling coalition, nor MPs from opposition parties, deemed it useful to amend the provisions of the Constitution which regulate the institute of parliamentary immunity.

Furthermore, we support the proposed draft amendment to Article 9 of the Constitution in such a manner that the institute of non-extradition of citizens of the Republic of Croatia is maintained, with a possibility of extradition pursuant to a concluded international

³⁰ *It is regulated in paragraph 2 of Article 75 of the Constitution which reads: „No representative shall be prosecuted, detained or punished for an opinion expressed or vote cast in the Croatian Parliament.”*

agreement with a third state. We are of the opinion that the subject of these agreements should also include criminal acts of war crime.

Lately, there were announcements pertaining to amendments to the Agreement on mutual execution of court decisions in criminal matters between the Republic of Croatia and the Republic of Bosnia and Herzegovina. According to the information published in the media, the amendments were already agreed between the Ministry of Justice of BiH and the Ministry of Justice of the RC.

Since there is an ever-increasing trend of applying the institute of transfer of sentence execution, and since this is a legal institute in the provision of international criminal and legal assistance which is evidently still at the development stage, we deem it necessary to amend certain provisions of the Agreement with BiH, but also with other states with which similar agreements were signed, in order to render it possible that one state (the convicting state) may request from another state, contracting party to the agreement, to execute the sentence without the consent (approval) of the convicted person.

By the necessity to provide consent, the convicts in such situations are unfoundedly placed in a significantly better position compared to other convicts because serving a sentence has practically become the act of their „good will“.

The necessity to obtain consent from a convict would only be important when a transfer would take place in a state which does not have necessary level of democracy in the execution of prison sentences whereupon the transfer, without the consent of the convict, would bring the convict into a less favourable position. However, since subject agreements have not been concluded with such states, there is no excuse for voluntary execution of prison sentences.

Abandoning the request for consent (approval) of a convict would render impossible the avoidance of serving a sentence which convicts achieve by escaping from the convicting state to the state of their (second) citizenship.

Amendments to the aforementioned Agreement should also facilitate a simplified transfer of sentence execution for the convicted perpetrators of criminal acts of war crimes.

Facultative competence of the four courts and composition of councils – problem in war crime trials

During the monitoring of war crime trials, we noticed that the provisions of the Act on Application of the Statute of International Criminal Court and Prosecution of Criminal Acts against the International War and Humanitarian Law (OG 175/03, hereinafter – the Act on Application of the Statute) are not applied consistently or are misinterpreted.

With that regard, but also due to other current issues (ongoing investigation, new Criminal Procedure Act...) monitors of the Centre for Peace, Non-violence and Human

Rights – Osijek, Documenta and Civic Committee for Human Rights had talks with presidents of county courts and county state's attorneys.

Below in the text we are presenting the most important *findings*.

Although county courts in Osijek, Rijeka, Split and Zagreb have territorial jurisdiction for criminal acts of war crimes, along with courts which have territorial jurisdiction according to general regulations, they failed to formally establish special investigating departments which would conduct investigations for the aforementioned criminal acts. The only exception is the Split County Court.³¹

There is not a single county court where investigating departments have engaged graduate crime investigators as expert assistants.

It often happens that judges from civil departments of county courts are appointed members of war crimes councils. Presidents of certain councils explain that with the insufficient number of judges of criminal departments necessary to compose trial and extra-trial councils.

We have warned on several occasions about the vague wording of the provision of Article 13, paragraph 2 of the Act on Application of the Statute, according to which members of war crimes councils must be judges with many years of experience in the most complex cases, but the Law does not explicitly state what is considered to be „the most complex cases“ nor is it explicitly stated that this experience must pertain to criminal cases.

Even at courts where judges from the criminal department are appointed to the councils, with the exception of county courts in Split and Šibenik, permanent councils for trials in war crimes cases have not been established.

Judges from the majority of county courts passed professional improvement trainings with regard to war crimes cases, mostly by attending seminars and educations organized by the Judicial Academy. Judges from county courts in Sisak, Varaždin and Gospić, although these are the courts before which trials were taking place or still take place, did not attend special educations.

³¹ Article 13, paragraph 1 of the Act on Application of the Statute reads: „In County Courts in Osijek, Rijeka, Split and Zagreb, investigation of criminal acts referred to in Article 2 of this Act shall be conducted by special investigating departments. An investigating department shall comprise judges who are distinguished by their experience and pronounced capacities for investigating the most serious and most complex criminal acts, as well as graduate crime investigators (Article 192, paragraph 4 of the ZKP). Should the number of cases and their complexity permit it, judges from the special investigating department may, according to a decision by the court president, conduct investigations in other cases, as well.“

Many county courts do not have sufficient personnel capacities to try these cases. For instance, at the Gospić County Court there is an evident problem of insufficient number of judges because the criminal department has only 2 judges. In the majority of other county courts, except for those in four regional centres, criminal departments also have up to seven judges. Bearing in mind that each court should have at its disposal an investigating judge, three judges in the extra-trial and three in the trial council to conduct an individual case, it is not to be expected that war crimes cases at all county courts would be conducted exclusively by the judges from criminal departments.

Individual courts do not have spatial and technical conditions to conduct trials in such cases, while some even lack professional capacities and/or will/courage to conduct professional and impartial trials.

For instance, the Požega County Court, before which during 2008 and 2009 proceedings were conducted for the crime in Marino Selo, does not have a courtroom the size of which would satisfy the needs of the proceedings that are of particular interest to the public. Due to spatial limitations, witnesses provided their testimonies from the audience which was largely supporting the defendants, which caused unrest among the witnesses. Court hearings where testimonies were provided via video-link took place in the building of the Osijek County Court, since the Požega County Court does not possess necessary technical equipment.³²

In that sense, the Supreme Court's decision to hold a hearing in the case against the defendant Mihajlo Hrastov for the crime on Korana Bridge is significant (and, in our opinion, commendable).³³

³² *During this project, we monitored a total of four trials at the Požega County Court. In all of them we noticed certain violations:*

- *in 2007, in the trial against Predrag Gužvić charged with committing a war crime against civilians, the Trial Chamber of the Požega County Court comprised two professional judges and three lay judges. Due to (obviously) erroneous composition of the Council, the Supreme Court quashed the verdict and reversed the case for a re-trial;*
- *in the trial for the crime in Marino Selo, the War Crimes Council of the Požega County Court sentenced one of the defendants to 16 years in prison for committing a criminal act referred to in Article 120, paragraph 1 of the OKZRH, although such sentence may not be pronounced for the subject criminal act;*
- *in the re-opened trial against Luka Ponorac et al. and Bogdan Delić et al., after the prosecution changed legal qualification of the criminal acts stated in the indictment (charging the defendants with committing armed rebellion), the Council of the Požega County Court suspended criminal proceedings pursuant to the General Amnesty Act, but failed to quash the previous (convicting) verdicts of the Požega District Court and the Supreme Court.*

³³ *In this case, which was conducted since 1992, after the Karlovac County Court passed three acquitting verdicts and after the Supreme Court quashed them on two occasions, the Supreme Court decided to conduct a hearing by itself, after which the defendant was pronounced guilty and sentenced to 8 years in prison. After the third-instance proceedings, the defendant was sentenced to 7 years in prison by a final verdict.*

The possibility of using audio (and visual) recordings at courts is only used exceptionally. Although it is in compliance with the existing legal regulations, entering data into court records in the form of narration is flawed in practice because of impossibility to fully and precisely reconstruct provided statements and testimonies, which the parties in court proceedings often change and/or deny. We noticed some positive exceptions only at the Vukovar County Court where in the proceedings for the crime in Cerna (in previous years) and the crime in Lovas (this year) parts of hearings were recorded using audiovisual means and then transcripts were drafted which became integral parts of the court file.

Apart from the aforementioned deficiencies, although one of the obvious objectives of the Act on Application of the Statute is „professionalization“ of war crimes councils, it did not anticipate the composition of the Supreme Court Panel as a second-instance court, so that in the proceedings for the crime on Korana Bridge the Trial Panel of the Supreme Court was formed according to general regulations (the Criminal Procedure Act), comprising two professional judges and three lay judges.

Standpoints and recommendations:

1. We are of the opinion that amendments to the Act on Application of the Statute should regulate exclusive (and not facultative) competence of county courts in Zagreb, Split, Rijeka and Osijek.

The concentration of proceedings at the aforementioned four courts would contribute to further professional improvement of judges for trials in war crimes cases and the establishment of permanent war crimes councils, while the possibility of negative influences on court proceedings in (smaller) local environments would thus be eliminated. Apart from the aforementioned, county courts in Osijek and Zagreb already have at their disposal a support service for witnesses and victims of criminal acts³⁴, as well as necessary video equipment.

2. Amendments to the Act on Application of the Statute pertaining to the competence of the State Attorney's Office should be directed at the establishment of exclusive competence of the ŽDOs in Osijek, Rijeka, Split and Zagreb.

The aforementioned amendments would contribute to the creation/strengthening of specialized State Attorney's Office teams.

³⁴ *The Department for the Tasks of Organizing and Providing Support to the Witnesses and Victims in Court Proceedings was formally established at the Split County Court, but we do not have information whether it functions in practice and in what manner experiences of the offices for support to victims and witnesses at the courts in Vukovar, Zagreb, Osijek and Zadar are transferred onto the aforementioned Department of the Split County Court.*

3. It is necessary to amend provisions of the Act on Application of the Statute which regulate the composition of war crimes councils and stipulate that judges with many years of experience in criminal cases may exclusively be appointed into those councils. Until then, it would be necessary to interpret the existing provisions in „good faith“ and appoint into war crimes councils exclusively judges with many years of experience in criminal cases.³⁵

We also believe that the Act on Application of the Statute should be amended by a provision that would stipulate the composition of the Supreme Court panel as the second-instance court in such a manner that lay judges are excluded from the panel's composition and that panel members are exclusively Supreme Court judges.

4. We find it important to establish, as soon as possible, offices for support to the witnesses and victims of criminal acts at other courts, as well. In those offices, employees with legal and psychological background would assist witnesses and victims of criminal acts when appearing before the court and introduce them with technical issues pertaining to their appearance. Appearance of witnesses and victims before the court would be less traumatic, which would largely contribute to their willingness to testify as well as to the quality of testimony, which is something the entire criminal proceedings depend upon.

5. We find it necessary to introduce obligatory audio (and visual) recording of investigating and trial hearings. Since county courts in four biggest cities are exclusively competent for "USKOK cases“, recording and transcripts should be applied precisely at the aforementioned courts, in war crimes cases and „USKOK cases“, which are often singled out as priority cases.

Work of the State Attorney's Office of the Republic of Croatia

In our annual reports from 2005 to 2008, we noticed and warned about numerous imprecise and non-quality indictments which encompass a large number of defendants (some of whom were not charged with a single specific act), about the need to perform additional checks and additional investigating activities in such cases and about the problem of verdicts passed in defendants' absence.

The State Attorney's Office of the RC, aware of the situation in the field, forwarded to county state's attorneys at the end of 2008 the Instruction on Handling War Crimes Cases

³⁵ *The Supreme Court Panel shared the same opinion in the case of the defendant I. H. et al. for a war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH, when in the ruling No. II 4 Kr 11/09-3 of 3 February 2009 it stated its standpoint that war crimes councils should comprise exclusively judges with working experience in criminal cases. The aforementioned ruling accepted the motion to transfer territorial jurisdiction from the Virovitica County Court because that court was not in a position to compose a trial council which would comprise three judges from the criminal department.*

and the Action Plan for the Implementation of the Instruction.³⁶ They indicated that the review of work of individual state attorney's offices on war crimes cases identified two basic problems: a large number of persons against whom proceedings are ongoing and, related to that, possible ethnic bias when passing decisions and the problem of final verdicts passed in defendants' absence (the consequence of indictments instigated during war years and immediately afterwards on the basis of evidence which were flawed or questionable).

The DORH requested from county state's attorneys to direct their work towards investigating all crimes in an equal and impartial manner, assuming a standpoint that in some cases it is not possible to dispute the fact that there are different approaches taking into account ethnic affiliation of a victim or a perpetrator.

The DORH requested from county state's attorneys to abandon criminal prosecution if, on the basis of review of an individual case, it has been assessed that the act with which the defendant was charged was not the criminal act of war crime, while in cases where it is not beyond reasonable doubt that the person in question was the perpetrator of a criminal act, the DORH requested additional checks and/or additional investigating activities and then to pass a decision on further actions.³⁷

Likewise, on the basis of replies provided by individual state attorney's offices, we conclude that this is the case of completing its war crimes database, which should improve the efficiency of state attorney's offices in the processing of war crimes.

Indictments

Indictments in cases that we monitored during 2009 were mostly correctly written, with clearly stated act which the defendants were charged with. This represents a change in relation to the indictments which were written during the 90's, but we still notice negative

³⁶ *The Instruction pertaining to the application of provisions of the OKZRH and the ZKP in war crimes cases – criteria (standards) for criminal prosecution, No: O-4/08 of 9 October 2008; the Action Plan for the Implementation of the Instruction No. O-4/08 pertaining to the work on war crimes cases, No. A-223/08 of 12 December 2008.*

³⁷ *The fact that the State Attorney's Office conducted an internal „review“ of the indictments is evident from the increased number of criminal prosecutions that it abandoned or changes of legal qualifications of the indictments into criminal acts of armed rebellion.*

As an example, we can state the case against the defendant Mihajlo Eror et al. (crime in Berak), in which, following the change of legal qualification of the act, proceedings were suspended in relation to 12 unavailable defendants. In our previous reports, we warned about the deficiencies of the indictment in this case, instigated in 2006 against 35 defendants, in which even 17 defendants were not charged with a single specific act.

examples in cases in which first-instance proceedings have been conducted for several years, while the indictments were instigated in the previously mentioned period.³⁸

Re-openings of proceedings concluded with final verdicts

During the 90s, the war crimes defendants, at that time exclusively members of Serb units, were mostly tried *in absentia*. Although in recent years the practise of *in absentia* trials was mostly abandoned, there is still the problem of verdicts passed in those proceedings.³⁹

Many proceedings conducted in the defendants' absence were conducted in unprofessional manner, the indictments were instigated without a critical discourse whether it was established beyond reasonable doubt that it was precisely the defendant who had committed the criminal act in question, while courts passed verdicts although the acts with which the defendants were charged did not contain a single essential characteristic of criminal acts of war crimes or despite the uncertainty that it was precisely the defendants who committed the criminal acts in question.

³⁸ *Examples:*

- in the trial against the defendant Jugoslav Mišljenović et al. (crime in Mikluševci) the original indictment, which the Osijek ŽDO instigated in 1996 was modified by the Vukovar ŽDO no less than seven times prior to the completion of the first-instance proceedings on 5 February 2009. Apart from the factual description which was modified depending on the witness testimonies provided at the main hearing, which pointed at suspicious quality of the investigation performed, legal qualification of the act was also changed (from the criminal act of genocide to a war crime against civilians and then again to genocide). During the proceedings, prosecution against 13 defendants was suspended due to their deaths. During 2008 and 2009, the Vukovar ŽDO abandoned criminal prosecution against additional 8 defendants;

- in the trial conducted before the Vukovar County Court against Milan Tepavac and Ilija Vorkapić for the crime in Lovas, pursuant to the indictment issued by the Vukovar ŽDO No. K-DO-39/00 of 19 December 2004 (as a result of combining the indictments issued by the Osijek ŽDO No. KT-265/92 of 19 December 1994 and the Vukovar ŽDO No. K-DO-44/04 of 1 October 2004) for the criminal acts of genocide and a war crime against civilians, following the separation of the proceedings in relation to unavailable defendants in April 2009, the Vukovar ŽDO, according to our information, has still not adjusted the indictment in relation to two present defendants;

- in the reopened trial against Milan Španović who was in 1993 charged and convicted that, together with 18 other persons he committed a war crime against civilians in the villages of Maja and Svračica, the indictment issued by the Sisak District State Attorney's Office No. KT-53/93 of 13 August 1993 has not been modified. It is not evident from that indictment which actions pertaining to the criminal act of war crime against civilians the defendant Španović was charged with.

³⁹ In total, 464 persons in 118 cases were sentenced for war crimes in absentia.

Verdicts were often briefly/insufficiently explained, inappropriate to the type of criminal acts (war crimes), the type of verdicts (convictions) and the amount of pronounced sentences (often maximum).

Court-appointed defence counsels often failed to lodge appeals against the convicting verdicts although they were obliged to do so, thus the verdicts became final already after the first-instance proceedings.

After certain persons sentenced for war crimes with final verdicts were extradited to the Republic of Croatia, criminal prosecutions were abandoned claiming that there was insufficient evidence, i.e. that it was not proven beyond reasonable doubt that it was precisely the defendants who committed the criminal acts with which they were charged. Thus, as a consequence, courts quashed the previous convicting verdicts and reopened the proceedings or passed dismissing verdicts.⁴⁰

In order to render it possible to re-open criminal proceedings in relation to absent convicts and to „eliminate“ convicting verdicts passed in unprofessionally and ethnically biased proceedings, the Criminal Procedure Act was amended (OG, 152/08). It rendered it possible for the State Attorney's Office to request re-opening of criminal proceedings on behalf of the convict, regardless of the fact whether he was present, with the presentation of new facts or new evidence that might lead to the release of a person who was sentenced or to him/her being sentenced according to a more lenient law.⁴¹

Following the review of final verdicts passed *in absentia*, the State Attorney's Office filed requests for re-opening of proceedings in 14 cases in relation to 90 convicts.

County Courts (mostly) permitted re-openings of criminal proceedings, even in those cases where no new facts or new evidence were actually presented.

⁴⁰ *An example: re-opened trial against Sreten Peslać, who was in 1993 sentenced in absentia to 10 years in prison for a war crime against civilians and in 2008 extradited from Italy, was concluded in 2009 with a dismissing verdict after the Šibenik ŽDO modified the indictment charging the defendant with a criminal act of armed rebellion. The defendant spent almost one year in detention.*

⁴¹ *Provisions of the ZKP pertaining to re-opening of criminal proceedings (Articles 497 – 508) came into force on 1 January 2009. However, having compared the provisions on re-opening of trials in the old and in the new ZKP, it is evident that the new ZKP does not contain the provision of Article 406, paragraph 1 item 5 of the previous ZKP, pursuant to which criminal proceedings could be re-opened to the prejudice of the convict if proceedings were terminated by a final judgment rejecting the charge if it is established that amnesty, pardon, the period of limitation for the institution of prosecution or other circumstances barring prosecution do not apply to the offence for which the judgment rejecting the charge was rendered. Since we are familiar with the proceedings in which during the 90s the-then valid Pardon Act, i.e. the General Amnesty Act were ill-foundedly applied, omitting the aforementioned provision from the new ZKP would render it more difficult (impossible) to rectify such mistakes.*

In those cases where requests for re-opening were denied, appeals were lodged and proceedings are pending at the Supreme Court.

So far, six re-opened proceedings were concluded (pertaining to 27 persons who previously received final prison sentences *in absentia*), re-opened on the basis of requests filed by the State Attorney's Office.⁴²

From the analysis of re-opened criminal proceedings and the aforementioned Instructions and the Action Plan, it is evident that the State Attorney's Office is aware of the problem caused by lightly instigated and ill-founded indictments. Specific requests for re-opening of criminal proceedings represent necessary step forward in rectifying mistakes in the work of State Attorneys during the 90s but, at the same time, it is also an opportunity for the courts to rectify mistakes because they lightly confirmed the indictments and passed verdicts in the same manner, often without a valid explanation.

Aware of the fact that the State Attorney's Office was even before (from 2001 onwards) issuing similar instructions which did not bring satisfactory results, the actual effects of conducted reviews of cases concluded with final verdicts and the ongoing cases will be visible in the next several years.

Apart from re-openings of proceedings initiated by the State Attorney's Office, we also noted re-openings of proceedings in which requests were filed by the convicts after their

⁴² *The following re-opened proceedings were concluded:*

- *against Luka Ponorac and three other convicts (crime in Bučje), with the ruling on the suspension of proceedings passed by the Požega County Court after the change of legal qualification to the criminal act of armed rebellion;*
- *against Bogdan Delić and Stevan Šteković (crime in Koprivna near Požega), with the ruling on the suspension of proceedings passed by the Požega County Court after the change of legal qualification to the criminal act of armed rebellion;*
- *against Petar Baltić and 10 other defendants (crime in Glina Prison), with the dismissing verdict of the Sisak County Court after the State Attorney's Office abandoned prosecution;*
- *against Dragan Roksanđić and Milan Korač (crime in Glina), with the ruling on the suspension of proceedings passed by the Sisak County Court after the change of legal qualification to the criminal act of armed rebellion;*
- *against Boško Žujić and 6 other defendants (crime in the village of Poljanak), with the dismissing verdict of the Gospić County Court after the change of legal qualification to the criminal act of armed rebellion;*
- *against Ranko Pralica and Stanko Palančan (crime in Glina II), with the ruling on the suspension of proceedings passed by the Sisak County Court after the State Attorney's Office abandoned prosecution.*

Apart from the aforementioned re-opened proceedings, the re-opened proceedings against Nikola Radišević and three other previously validly sentenced persons are ongoing before the Sisak County Court after the Supreme Court established that the request for the protection of legality filed by the State Attorney's Office was well founded and that law was violated to the prejudice of the convicts.

extradition to the RC (for instance Milan Španović) or through their defence counsels (for instance Edita Rađen Potkonjak).⁴³

Investigations

Although it is certain that not all crimes will be investigated and processed, the number of not-investigated cases or insufficiently investigated crimes in certain regions raises serious concerns.⁴⁴

However, what is encouraging is the fact that investigations are underway at the Osijek County Court for crimes against civilians and war prisoners in detention camps in the territory of Serbia, against civilians and detained persons in places like Dalj, Erdut and Aljmaš, and that investigation of the crime committed by shelling the city of Osijek was concluded.⁴⁵

Moreover, investigations against members of Croatian formations for crimes against Serb civilians in Grubori near Knin in 1995 and against captured Serb soldiers in Glamoč in BiH are also underway. In the case against suspects for a crime against captured members of Serb formations in the Military & Investigation Centre “Lora” in Split, the indictment became legally valid.

On the other hand, despite the fact that names of direct perpetrators of the crime in Medački Džep were made known during the trial, the State Attorney’s Office has not so far lodged a request for investigation. While monitoring the appellate procedure before the Supreme Court, we got an impression that the DORH did not work on investigating responsibility of high- ranking persons in HV or MUP RH, whom the witnesses were mentioning during the first-instance procedure. The need to investigate the role and

⁴³ *Edita Rađen Potkonjak was in 1995 sentenced before the Zadar County Court to 15 years in prison for a war crime against civilians committed in Škabrnja on 18 November 1991. The Supreme Court upheld the verdict in 1998. After she filed a request for re-opening through her defence counsel, the Zadar County Court in May 2009 permitted the re-opening of criminal proceedings. After the indictment was modified and legal qualification was changed into armed rebellion, the proceedings against Edita Rađen were suspended, but the Court failed to annul the previous convicting verdict. Similar mistakes were made by the Požega County Court in two re-opened proceedings.*

⁴⁴ *For instance: destruction of farming, religious, cultural and housing facilities in Vukovar and a large number of killed civilians caused by randomly shelling the town; crimes against Serb civilians in the Sisak area.*

⁴⁵ *Although the defendants in the aforementioned cases are not available to the Croatian judiciary, the investigation carried out in a quality manner and positive results achieved so far in respect of co-operation, i.e. exchange of evidence between DORH and the Serbian War Crimes Prosecutor’s Office are accountable enough to raise hope that persons responsible for crimes in the aforementioned detention camps/places will be processed.*

responsibility for the crime committed in Medački Džep can be deducted from their testimonies.

Already in 2005, the Centre for Peace, Non-Violence and Human Rights Osijek filed a criminal report concerning the commission of a war crime against civilians against P.K., president of the former Military Housing Commission in Osijek because of organised forceful expulsions of people out of the military, but also out of the state-owned flats and privately owned houses. With a view to several inquiries addressed to the DORH, we received replies that additional investigative actions were being carried out.

Based on the initiative by Sotin victims' families, for several years we were encouraging the State Attorney's Office to hand over evidence material on the crimes committed in Sotin to the Serbian War Crimes Prosecutor's Office because the majority of possible perpetrators reside in Serbia. Finally, the State Attorney's Office submitted the Vukovar ŽDO's indictment to the Serbian Prosecution. Together with the victims' family members, we visited the Serbian War Crimes Prosecutor's Office and spoke with the Deputy Prosecutor. Upon his suggestion, but also with the purpose to obtain additional information, we interviewed Sotin inhabitants and made a chronology of events in Sotin at the incriminating time. This case is currently at the pre-investigative stage in Serbia.

Standing of witnesses, victims and injured parties

It is necessary to provide legal, emotional and practical support to all victims of crime act, including war crimes, who are involved in criminal proceedings. Account is to be taken of the fact that victims also need legal aid and rehabilitation so that when they return to a community, they would no longer carry along unnecessary their traumas and a feeling of being left on their own.

Although victims and witnesses of criminal acts, especially of war crimes, need support from the moment when a criminal offence was committed until the conclusion of judicial proceedings, it was only recently that Croatia aligned its legislation with world trends in improving the rights of victims, protection and aid to witnesses and victims of criminal proceedings, and in particular of pre-criminal proceedings.⁴⁶

Provision of support to witnesses and victims in criminal proceedings is one of the areas of the *acquis communautaire* covered by the Chapter „Judiciary and Human Rights“. Therefore, the National Programme for the Accession of the Republic of Croatia into the European Union anticipated institutional resolving of the support system to witnesses and victims of criminal acts and introduction of a support service as one of the implementing measures.

⁴⁶ *Support standards are, inter alia, laid down by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), the Recommendation of the Council of Europe on assistance to crime victims (2006), the Recommendation of the Council of Europe on the position of the victim in the framework of criminal law and procedure (1985), and the Council Framework Decision on the standing of victims in criminal proceedings (2001).*

With the implementation of the pilot project run by the UNDP and the Croatian Ministry of Justice at four courts in the Republic of Croatia and with the adoption of necessary normative changes, practical and legal foundations for institutionalising victim and witness support services at courts have been established.

Development of systematic support to witnesses and victims of criminal acts

Necessary prerequisites for developing a systematic and comprehensive support to witnesses have been established on the basis of legal and administrative measures.

From 1 May 2008 to 31 October 2009, in co-operation with the Croatian Ministry of Justice, the UNDP implemented the project „*Assistance in the Development of a Witness and Victim Support System in the Republic of Croatia*“ at four pilot courts – county courts in Osijek, Vukovar, Zadar and in the Municipal Criminal Court in Zagreb. Before this project began, the Republic of Croatia had no legal regulations in force which would directly provide for a possibility of witness and victim support. Likewise, offices that provide support to witnesses and victims before the court did not constitute a part of the judicial system.

On 1 November 2009, legal framework necessary to set up support services has been established with the entry into force of the Act on Amendments to the Act on Courts. The position, competence, organisation and modus operandi of the department for organising and providing support to witnesses and victims in judicial proceedings before county courts was regulated in a more detail with the judicial standing order.⁴⁷ This enabled the functioning of the office for support even after the implementation of the UNDP’s project is concluded.

In the course of 18 months of the project's implementation, the Witness and Victim Support Offices at the four mentioned courts provided support to 2269 persons, including 283 persons involved in war crime cases. According to Minister Šimonović, it is planned to further extend support provision to county courts in Rijeka, Split and Sisak, and later to other courts as well.⁴⁸

In 2009, the Ministry of Justice’s Department for Witness and Victim Support in Criminal Proceedings and War crime trials established written contact with 727 witnesses, including 508 witnesses in war crime trials.⁴⁹

⁴⁷ *Judicial Standing Order (OG 158/2009) entered into force on 1 January 2010.*

⁴⁸ *Regional Conference "Witness and Victim Support", Hotel Panorama, Zagreb, 27 October 2009.*

⁴⁹ *Out of the aforementioned number, 258 persons from Croatia were summoned as witnesses before domestic courts, 250 persons from Croatia were summoned as witnesses before the courts abroad (in 9 cases before the Belgrade District Court, and in one case before the Higher Court in*

We are of the opinion that the established Departments should serve as a foundations for building-up and further development of the support system. Acquired knowledge, skills and experiences should be used to extend the support system not only horizontally, i.e. to other courts (county, municipality, and misdemeanour courts) but also vertically through the criminal and legal system (to involve police and state attorney's offices).

Within the state attorneys' offices which, according to the Criminal Procedure Act (OG 152/08) should exercise special relation toward victims and their appreciation, it is also necessary to establish and apply already established support standards, bearing in mind in particular the new role of state attorney's offices at the investigation stage.

The acquired model, the contents and the lessons learned so far in practice could serve as a starting point in developing a support system within the pre-criminal procedure as well, within the work of police which is the first to get in contact with a traumatised person who could be a witness or a victim at a later stage of the procedure.⁵⁰

When considering the number of pending war crime cases, the need to institutionally extend victim and witness support within state attorney's offices and the police bears special importance.⁵¹

Planned institutionalisation of the support system has to be followed by adequate education of judges and state attorneys. This would ensure their greater awareness of the needs of witnesses and victims involved in judicial proceedings and better understanding of the role and significance of witness support. In order to achieve full integrity of the criminal procedure, i.e. to improve the judiciary's performance in its entirety, it is

Podgorica, and 14 persons from abroad were summoned as witnesses before Croatian courts – this was reported in a memo of the Criminal Law Directorate of the Ministry of Justice, in the Overview of Activities for 2009 by the Department for Support to Victims and Witnesses Involved in Criminal Proceedings and in War Crime Trials and Witness Support System Development in the Republic of Croatia of 23 January 2010. Legal assistance was provided in writing to 436 witnesses, by telephone to 113 witnesses, and at joint meetings to 184 witnesses. Psychological assistance was provided via telephone to 319 witnesses, at courts to 10 witnesses and at joint meetings to 184 witnesses. Transportation was organised for 101 witnesses and hotel accommodation for 24 witnesses.

⁵⁰ Pursuant to the Witness Protection Act (OG 163/03), the Protection Unit within the Croatian Ministry of the Interior was established with the purpose to provide protection and assistance to vulnerable persons and to persons close to them who were exposed to serious threat of a larger scale against their life, health, physical inviolability, freedom or assets because of the testimonies provided during the criminal proceedings.

⁵¹ It was specified in two annual reports issued by the Croatian State Attorney's Office, for 2007 and 2008, that out of 703 reported war crimes, 301 trials were initiated while no criminal proceedings were initiated for 402 crimes because perpetrators are not identified.

necessary to ensure a comprehensive support system capable of responding to witness and victim needs and to protect their fundamental rights.

Implementation of efficient witness and victim support in the Republic of Croatia will depend on the Croatian Government's attitude in respect of witnesses and victims. In other words, it will depend on its efforts to achieve rapid and efficient extension of the support system, but it will also depend on joint efforts made by numerous ministries, state institutions but also non-governmental organisations with the aim to accomplish common purpose and objectives. The Government passed a decision on establishing a commission tasked with developing a witness and victim support strategy.⁵²

Standing of victims and injured parties pursuant to the new Criminal Procedure Act

By introducing the term victim in the new Criminal Procedure Act (OG 152/08), a step forward was made in promoting the rights of victims. This new Act guarantees the victims and witnesses the right to efficient psychological and other expert assistance, irrespective of the needs of the criminal proceedings concerned, i.e. irrespective of the victim's role as a witness in the trial. However, since the Act will not be applied before 1 September 2011, both in its entirety and in respect of all criminal acts, and since it will be fully applied until that date only in respect of USKOK cases, the standing of victims and injured parties in war crime cases will not change until the date specified above.

With the new Act in force, bodies conducting the procedure will be obliged to treat victims with more compassion and respect (so far, victims were viewed primarily as a means of evidence). Another obligation will be to better inform injured parties during a trial about the course of proceedings. New provisions were introduced and significant improvements were made in respect of free legal assistance, privacy and identity protection, protection against intimidation, entitlement to social support and assistance, restitutions by perpetrators as well as by the state in cases of severe criminal acts with elements of violence.⁵³

It remains to be seen how the implementation of new legal solutions will function in practice and what affect will it achieve, together with the institutional support system to witnesses and victims of criminal acts, in respect of the victims and witnesses to speak freely about their experiences and traumas.

⁵² The *Decision on establishing a commission for monitoring and improving witness and victim support system (OG 11/2010)*.

⁵³ The *Act on Pecuniary Compensation to Victims of Criminal Acts (OG 80/08)* was adopted by the Croatian Parliament on 2 July 2008. It will be applied as of the date of the accession of Croatia to the EU. However, even with its implementation, victims of war crimes will not be restituted.

Court proceedings for compensation of non-pecuniary damage caused by the killing of a close person

The suffering by the families of victims of un-investigated crimes who initiated legal proceedings against the Republic of Croatia claiming a compensation but who lost the lawsuits, becomes more serious because of their failure to seek justice before the court.

We find it necessary to caution that numerous family members of war crimes victims received no compensation for losing a close person. Many perpetrators were not held criminally responsible for committed war crimes, whereas the majority of family members of victims of insufficiently investigated and non-processed war crimes lost the lawsuits wherein they sued the Republic of Croatia for compensation of non-pecuniary damage.

From the analysis of the legislation, it can be concluded that the provisions which rendered possible the exercise of compensations were being repealed, while provisions which removed the possibility of compensating damage were being adopted.

Until February 1996, the Republic of Croatia was held responsible for all damage (pecuniary and non-pecuniary) caused by terrorist acts pursuant to Article 180 of the Obligations Act. However, in 1996 the aforementioned Article was deleted by entering into force of the new Obligations Act (OG 7/96). Proceedings for compensation of damage instigated pursuant to that Article were suspended and it was stipulated that they would be resumed following the adoption of a special regulation which will regulate the issue of responsibility for damage(s) caused by terrorist acts.

The Act on Amendments to the Obligations Act (OG 112/99) suspended proceedings conducted against the Republic of Croatia for the compensation of damage caused by members of Croatian armed and police forces, regardless whether it was war damage or not.

On 14 July 2003, the Croatian Parliament passed legislation on the basis of which the suspended damage lawsuits were resumed *ex lege*.⁵⁴

All proceedings for compensation of damage instigated on the basis of Article 180 of the Obligations Act were suspended *ex lege* for as many as seven years (from February 1996 to 31 July 2003).

Damage proceedings resumed pursuant to the Act on the Responsibility for Damage Caused by the Acts of Terrorism and Public Demonstrations and the Act on the

⁵⁴ On 31 July 2003, the following acts entered into force: the Act on the Responsibility for Damage Caused by the Acts of Terrorism and Public Demonstrations (OG 117/03) and the Act on the Responsibility of the Republic of Croatia for Damage Caused by Members of Croatian Armed and Police Forces during the Homeland War (OG 117/03).

Responsibility of the Republic of Croatia for Damage Caused by Members of Croatian Armed and Police Forces during the Homeland War, which contain a series of obscurities left to the court practice to deal with. Provisions of the aforementioned Acts shifted the excessive burden of proof onto the plaintiffs (to prove that damage was not a consequence of war damage) whereby the plaintiff's chances of succeeding in a lawsuit against the RC were largely reduced.⁵⁵

We have analyzed 50 damage proceedings in which family members, due to violent death of a close person, initiated lawsuits against the Republic of Croatia. In the claims, they stated the following causes of death: injuries caused by firearms, beatings with hands, legs and stabbing wounds caused by a knife or disappearances of persons (who were later pronounced dead) where exact causes of death remained unknown.⁵⁶

The defendant RC in all those cases stated the same objections: statute of limitations pertaining to the claims, wrongful passive legitimating (liability to be sued), war damage and the amount of claims.

First-instance courts rejected the claims in their entirety and imposed an obligation on the plaintiffs to compensate the court expenses to the defendant RC, citing as an explanation the statute of limitations or war damage for which the RC was not liable. Verdicts reached by the first-instance courts were upheld by the county courts in their entirety.

It was a different situation if there existed a final (criminal) verdict from which it was evident that perpetrators were members of Croatian units.⁵⁷

⁵⁵ *In order to be successful in a trial, the plaintiff has to prove that the case is about the damage caused out of political motives, which occurred as the result of an act of terror.*

Pursuant to the Act on the Responsibility for Damage Caused by the Acts of Terrorism and Public Demonstrations, it was assumed that war damage is damage caused during the Homeland War from 17 August 1990 to 30 June 1996 by members of Croatian armed and police forces or in relation to the performance of military or police duty, if it was caused at the time of and on the territory where military actions took place, but the damaged party may prove otherwise.

⁵⁶ *According to the available documentation, we are familiar with the fact that criminal reports for murders were filed in at least nine cases, but in the majority of cases those were non-investigated crimes at the pre-investigation stage and the perpetrators are for the time being unknown.*

⁵⁷ *The Split Municipal Court, in the legal matter of plaintiffs Ž. B., N. B., D. I. and B. B. against the defendant RC for the compensation of non-pecuniary damage, accepted the claim and awarded the amount of HRK 220,000.00 to each of the plaintiffs. According to the court's opinion, the responsibility for damage of the RC was indisputable because there was a final criminal verdict from which it was evident that HV members killed the plaintiff's husband and father whereby they were liable to the plaintiffs for the damage they were suffering. The Court applied the Obligations Act from 2005 although the damage occurred on 14 June 1992, but the criminal verdict became final on 6 February 2007 and it was only then that the plaintiffs learned*

In cases where criminal proceedings failed to establish criminal responsibility of perpetrators, courts rejected the claims in their entirety citing as an explanation the statute of limitations or war damage, along with the obligation of compensating the lawsuit expenses to the defendant RC.

As an example, we are stating the case of Marica Šeatović whose claim was rejected by a verdict passed by the Novska Municipal Court due to statute of limitations and she was ordered to pay HRK 10,000.00 for the expenses of court proceedings. The claim was rejected due to a lack of possibility to apply a longer deadline for the statute of limitations which is applied if there is a criminal act established by a final verdict.⁵⁸

In the aforementioned example, the plaintiff's claim was rejected and she was obliged to pay the lawsuit expenses to the Republic of Croatia although it was evident that criminal proceedings against her husband's killers were obviously suspended by erroneous application of the Amnesty Act. Apart from the fact that she received no satisfaction in the criminal proceedings, the initiation and conclusion of a litigation procedure only caused new mental suffering to the plaintiff, as well as large financial expenses, while the plaintiff's obligation to pay the expenses of the litigation procedure represents ultimate cynicism bearing in mind the event with regard to which the litigation procedure was instigated.

The defendant RC did not use legal possibility of concluding settlements with regard to litigation expenses in a single case. Namely, litigation parties have a possibility to conclude a settlement (to agree that each party covers its own expenses), without infringing upon the decision on the merit.

about the person responsible for the damage and only then preconditions were created for damage responsibility of the defendant RC.

⁵⁸ *The plaintiff's husband Mihajlo Šeatović was killed as a civilian together with three other persons in the night between 21/22 November 1991 in a house in Novska. The murder was performed by HV members against whom criminal proceedings were conducted for a criminal act of murder before the Zagreb Military Court under number K-42/92. However, the proceedings were suspended by the application of the Act on Pardon against Criminal Prosecution for Criminal Acts committed in Armed Conflicts and in the War against the Republic of Croatia.*

Still, the DORH attempts to rectify its previous omissions and therefore it re-instigated criminal prosecution of the perpetrators, but this time the DORH qualified the criminal act as a war crime against civilians. There is an ongoing investigation before the Sisak County Court against one suspect who was not included in the previous rejecting verdict. The Sisak County Court rejected a request for conducting investigation against Damir Raguž who was previously abolished, obviously by erroneous application of the General Amnesty Act, but the Supreme Court upheld the appeal lodged by the Sisak ŽDO and ordered an investigation to be carried out.

Had the defendant RC used this possibility, regardless of the fact that plaintiffs did not receive any moral satisfaction, the plaintiffs would not have had to pay huge expenses of the proceedings as well.

We would like to draw attention to the fact that the State Attorney's Office, which in criminal proceedings represents the interests of victims and in litigations for compensation of non-pecuniary damage the defendant RC, in the latter proceedings protects the state treasury whereupon it „forgets“ the interest of the victim.

The State Attorney's Office, being the body in charge with criminal prosecution of perpetrators, is co-responsible because many criminal acts were insufficiently investigated or not investigated at all. Bearing in mind the fact that, pursuant to the previous practise, compensation of non-pecuniary damage is almost impossible without final criminal verdicts, the State Attorney's Office in litigations for compensation of damage where it represents proprietary interests of the RC actually represents yet another obstacle on the path towards justice. We would like to caution that the interest of the RC should be restitution of all victims and recognition of suffering by the victims and survived members of their families. All prosecution institutions and judicial institutions should be primarily engaged in the investigation, but also in restitution and recognition of suffering by the families of victims of war crimes.

Still, on 28 May 2009, the Government of the RC passed a Decision by which it wrote off unpaid expenses awarded to the Republic of Croatia by final verdicts passed after 31 July 2003 in the proceedings instigated on the basis of Article 180 of the Obligations Act and which continued on the basis of the Act on the Compensation of Damage Caused by Acts of Terrorism and the Act on the Responsibility of the Republic of Croatia for Damage Caused by Members of Croatian Armed and Police Forces during the Homeland War.⁵⁹ The decision instructed state attorney's offices not to initiate distraining procedures in order to collect expenses and to withdraw distraint motions in the already instigated procedures. The Ministry of Justice assumed the obligation to obtain data on collected expenses and propose to the Government the manner of their return.⁶⁰

In compliance with the aforementioned Decision, the DORH passed a General Instruction on handling such cases in which it was stated that, if the litigation proceedings are still ongoing, the DORH will inform the plaintiff or his/her plenipotentiary in writing about

⁵⁹ *The decision on writing off the expenses did not include those plaintiffs who filed their claims before the courts after 1996 and who constitute the majority of all plaintiffs.*

⁶⁰ *The Constitutional Court of the Republic of Croatia, in its Decision No. U-I-2921/2003 of 19 November 2008, took a position that the Act on the Compensation of Damage Caused by Acts of Terrorism was in compliance with the Constitution of the Republic of Croatia, but assessed in its explanation the aforementioned decision that paying of court expenses would lead to transferring disproportionate and oversized burden on the plaintiffs, which would be constitutionally and legally unacceptable, in particular because this would impose a problem of violating the constitutional guarantee for righteous court proceedings as defined in Article 29 of the Constitution of the Republic of Croatia.*

the Government's decision and will not request compensation of litigation expenses should the plaintiff withdraw the lawsuit against the RC.

By doing so, the plaintiffs, mostly retired and poor persons, are encouraged to drop the claims for compensation of damage and the already compromised protection of the rights of an individual is even more disrupted by this "blackmail".

Recommendations

Dissatisfied with the unresolved process of restitution which has so far showed a lack of political will, we find it necessary:

1. to resolve in its entirety the issue of paying the proceedings expenses in litigations for compensation of damage caused by the killing of a close person,
2. to seriously and responsibly address the issue of restitution by the executive, legislative and judicial authorities for all victims of violation of provisions of conventions on international war and humanitarian law,
3. to set up legal mechanism for compensation of damage caused by the killing of close persons in compliance with the United Nations' General Assembly Resolution adopted on 16 December 2005 titled „ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".

Regional co-operation

In addition to the existing conventions and agreements, for the purpose of more efficient processing of war crimes perpetrators (exchange of evidence and information which is beneficial to more efficient investigations, presentation of evidence and punishing), the DORH signed in 2006 Agreements on Co-operation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide with the prosecution offices of Serbia and of Monte Negro.

Even before the signing of the aforementioned Agreements, the prosecution offices of Croatia and of Serbia co-operated in one war crime case against war prisoners committed at the farming facility „Ovčara“ near Vukovar. In the course of co-operation on this case, a need was detected to establish as effective as possible co-operation methods. Later, this led to the signing of the aforementioned agreements.

Exchanging evidence, documents and information in the past several years resulted in carrying out investigations, instigation of indictments and adjudications.

In view of the already established legal frameworks and positive results of co-operation, present co-operation needs to be intensified by exchanging materials in as many cases as possible for the purpose of more efficient prosecution of a large number of perpetrators.

According to the information obtained from the Office of the War Crimes Prosecutor of the Republic of Serbia, the DORH and the Office of the War Crimes Prosecutor of the Republic of Serbia, having signed the Agreement, exchanged evidence in respect of 26 cases. The Office of the War Crimes Prosecutor of the Republic of Serbia conducted legal actions in nine cases (we will mention them later in the text according to the current stages of trials).

In one case (against one person) a request to carry out an investigation was rejected, in one case (also against one person) a request to carry out an investigation was lodged, and in one case against one person the case was handed over to be dealt by the DORH.

The following four cases are at the main hearing stage before the War Crimes Council of the Belgrade District Court:

- a trial against Ljuban Devetak and thirteen more persons, accused of committing a war crime against civilians in Lovas at the end of 1991. They are charged with the killing of 69 persons, wounding 12 and mentally abusing a larger number of persons;

- a trial against Pane Bulat and Rade Vranešević, accused of committing a war crime against civilians by killing 6 civilians of Croat ethnicity in Banski Kovačevac near Karlovac in March 1992;

- a trial against Milan Španović, accused of committing a war crime against civilians by abusing detained Croatian civilians in the prison in Stara Gradiška at the end of 1991 and beginning 1992;

- a trial against Milorad Lazić and four more persons⁶¹, accused of committing a war crime against war prisoners by abusing one captured member of the Croatian MUP in Medak in September 1992.

A not-final verdict was reached in one case that had been handed over. With the verdict reached on 27 May 2009 by the War Crimes Council of the Belgrade District Court, Boro Trbojević was sentenced by a not-final verdict to 10 years in prison for committing a war crime against civilians in Velika Peratovica near Grubišno Polje. It was established that in 1991 he participated in taking hostages, separating men and women and in the killing of five civilians in the school basement in Velika Peratovica.

A final verdict was reached in one case that had been handed over. On 11 February 2009, with the verdict reached by the Supreme Court of Serbia, Zdravko Pašić was sentenced

⁶¹ In 1996, a trial was conducted before the Gospić County Court against Milorad Lazić, Perica Đaković, Nikola Vujnović, Mirko Marunić and Nikola Konjević. They were sentenced in absentia to 8 (Lazić, Đaković and Konjević), i.e. 6 years in prison (Vujnović and Marunić).

by a final verdict to 10 years in prison for committing a war crime against civilians by killing physician Dragutin Krušić of Croat ethnicity in Slunj in 1991.

Co-operation between Croatian and Serbian prosecution offices was also established in the cases which were, or are conducted before judicial bodies of the Republic of Croatia.

Thus, legally binding verdicts were reached in two criminal proceedings:

- eight members of HV Military Police were sentenced by the verdict of the Split County Court, upheld with the verdict of the Supreme Court for a war crime against civilians committed at the Military & Investigation Centre Lora in 1992 by physical and mental abuse of captured civilians and by killing two civilians⁶²;

- Slobodan Davidović - member of the paramilitary unit „Scorpions“ was sentenced to 15 years in prison for a war crime against war prisoners committed by killing six captured persons in Trnovo (BiH) and by abusing captured Croatian defenders in Bobota,.

On 8 May 2009, the Zagreb County Court reached a (not final) verdict in the crime case in Osijek. Branimir Glavaš received a prison sentence in the duration of 10 years, Ivica Krnjak received 8 years, Gordana Getoš Magdić received 7 years while Dino Kontić, Tihomir Valentić and Zdravko Dragić received a prison sentence in the duration of 5 years each.

In 2008, the Serbian prosecution office handed over information to the DORH about the crime in the village of Biljane Gornje near Benkovac where four civilians of Serb ethnicity were killed in 1995. One person was a suspect.

Pursuant to the previously mentioned Agreement, the DORH submitted to the Montenegrin prosecution evidence about the crimes committed in the detention camp Morinj near Kotor in 1991 and 1992. At the Higher Court in Podgorica, the main hearing is ongoing in the criminal proceedings against six former JNA members and reservists (Mladen Govedarica, Ivo Gojnić, Zlatko Tarle, Špiro Lučić, Boro Gligić and Ivo Menzalin), charged with committing a war crime against civilians and a war crime against war prisoners.

OVERVIEW OF MONITORED TRIALS

⁶² Tomislav Duić and Tonči Vrkić were sentenced to 8, Davor Banić to 7, while Miljenko Bajić, Josip Bikić, Emilio Bungur, Ante Gudić and Anđelko Botić to 6 years in prison. Dujić, Bajić, Bikić and Bungur were tried in absentia. Josip Bikić was re-tried after his surrender. In that (re-opened) trial, he was sentenced to 4 years in prison.

In 2009, we monitored a total of 31 trials⁶³ at the main hearing stage before county courts of the Republic of Croatia. Out of that number, 1 trial was for genocide, 1 for genocide and war crime against civilians, 27 trials were for war crime against civilians, 1 trial was for war crime against civilians and war crime against war prisoners and 1 trial for war crime against war prisoners.

Table 1: Monitored trials in 2009, listed according to legal qualification of the offence, as at 31 December 2009

Criminal act	Concluded with a not final verdict	Main hearing in progress	ŽDO dropped charges	Legal qualification changed into armed rebellion	Total
Genocide	1				1
Genocide / war crime against civilians		1			1
War crime against civilians	13	4	1	9	27
War crime against civilians / war crime against war prisoners	1				1
War crime against war prisoners		1			1
Total	15	6	1	9	31

⁶³ It concerns trials before the following county courts:

in Sisak: crime in Zamlača, Struga and Kozibrod (def. Đuro Đurić); in Zamlača, Struga and Kozibrod II (def. Simo Gaić et al.); in Brezovica forest (def. Ivica Mirić); in Maja and Svračica (def. Milan Španović); in the village of Pecki – hamlet Bjelovec (def. Nikola Radišević et al.); in Glina (def. Dragan Roksandić et al.); in Glina prison (def. Petar Baltić et al.); in Glina prison II (def. Ranko Pralica et al.);

in Vukovar: crime in Mikluševci (def. Jugoslav Mišljenović et al.); in Borovo Naselje (def. Dušan Zinajić); in Lovas (def. Milan Tepavac et al.); at Velepromet (def. Stanimir Avramović); at Drvena Pijaca (def. Slobodan Raič); at Vukovar Hospital (def. Bogdan Kuzmić);

in Osijek: crime in Dalj (def. Željko Čizmić); in Dalj IV (def. Čedo Jović); in Baranja (def. Petar Mamula); in Popovac (def. Stojan Pavlović et al.);

in Požega: crime in Marino Selo (def. Damir Kufner et al.); in Koprivna near Požega (def. Bogdan Delić et al.); in Bučje (def. Luka Ponorac et al.);

in Šibenik: crime at the Corridor, in Potkonje, Vrpolje and Knin (def. Milan Atlija et al.); in Ervenik (def. Sreten Peslać);

in Karlovac: crime in Slunj and other places (def. Mićo Cekinović); in Vrhovine (def. Nenad Pejnović);

in Gospić: crime in the village of Poljanak (def. Boško Žujić et al.); in Frkašić II (def. Goran Zjačić);

in Zagreb: crime in Osijek (def. Branimir Glavaš et al.);

in Rijeka: crime in Velika Kladuša (def. Zlatko Jušić et al.);

in Bjelovar: crime in Vukovje, Koreničani and Dobra Kuća (def. Vlado Gatarić);

in Split: crime in Lora (def. Josip Bikić).

Out of 31 trials, 6 were conducted before the Vukovar County Court, 8 before the Sisak County Court, 3 before the Požega County Court, 2 trials were conducted before the county courts in Šibenik, Gospić and Karlovac and 1 trial was conducted before the county courts in Zagreb, Split, Rijeka and Bjelovar.

Out of the mentioned number of monitored trials (31), in 15 trials the main hearing was held or is being held for the first time, in 6 trials the main hearing was repeated two or several times, 7 trials were re-opened pursuant to the request by the ŽDO for the re-opening of trial (6) or for the protection of legality (1), while 3 trials were re-opened pursuant to the request filed by the sentenced person.

Table 2: Overview of trials listed according to county courts in 2009 (with the emphasis on repeated/re-opened trials)

County Court	Main hearing (the 1 st)	Repeated trials (the 2 nd or more)	Reopened trial / repeated based on the request for reopening or the request for the protection of legality by the ŽDO	Reopened trial requested by the convicted person	TOTAL
Osijek	2	2			4
Zagreb	1				1
Split				1	1
Šibenik		1		1	2
Rijeka	1				1
Karlovac	2				2
Požega	1		2		3
Bjelovar		1			1
Gospić	1		1		2
Sisak	3		4	1	8
Vukovar	4	2			6
TOTAL	15	6	7	3	31

In 31 trials, a total of 86 persons were accused, out of which 70 persons were members of Serb formations, 14 persons were members of Croatian formations and 2 persons were officials of the so-called Autonomous Region of Western Bosnia.

Out of the total number of defendants (86), 37 attended their trials, while 49 are fugitives from justice, unavailable to Croatian judiciary and thus were tried *in absentia*. All defendants tried *in absentia* are charged with war crimes which they committed as members of Serb formations. However, the majority of unavailable persons are charged in trials which were re-opened pursuant to the requests lodged by state attorney's offices or in trials that were conducted for several years (for instance, the trial for the crime in Mikluševci), so that trials *in absentia* actually represent an exception compared with the situation in previous years.

Out of 37 defendants who attended the trials, 20 were not-detained (12 members of Serb formations, 7 members of Croatian formations and 1 official of the so-called Autonomous Region of Western Bosnia). There were 17 persons in detention (9 members

of Serb formations, 7 members of Croatian formations and 1 official of the so-called Autonomous Region of Western Bosnia).⁶⁴

In 15 cases not-final verdicts were reached. Two verdicts comprised convictions for some and acquittals for other defendants, whereas in the remaining 13 cases guilty verdicts were reached. A total of 39 defendants were found guilty (24 members of Serb formations, 14 members of Croatian formations and 1 official of the so-called Autonomous Region of Western Bosnia).

In 2009, the prosecution changed legal qualification into armed rebellion in respect of 20 defendants and it dropped charges in respect of 14 defendants.

Table 3: Belonging of the defendants to military formations, listed according to trial stages as at 31 December 2009

Defendants – members of formations	Not-final acquitting verdict	Not-final convicting verdict	Main hearing in progress	The ŽDO dropped charges	Legal qualification changed into armed rebellion	Total
of the so-called Autonomous Region of Western Bosnia	1	1				2
Croatian formations		14				14
Serb formations	2	24	10	14	20	70
TOTAL	3	39	10	14	20	86

Out of 39 convicted persons, 23 received prison sentenced within the boundaries stipulated for the criminal act for which they were convicted (10 members of Croatian formations, 12 members of Serb formations and 1 official of the so-called Autonomous Region of Western Bosnia).

Sixteen defendants received prison sentences below 5 years, a stipulated minimum for criminal acts of war crime (4 members of Croatian formations and 12 members of Serb formations).

⁶⁴ During 2009, the following persons were in detention:

- members of Serb forces: Goran Zjačić (crime in Frkašić II); Đuro Đurić (crime in Zamlača, Struga and Kozibrod); Sreten Peslać (crime in Ervenik); Mićo Cekinović (crime in Slunj and surrounding places); Nenad Pejnović (crime in Vrhovine); Čedo Jović (crime in Dalj IV); Milan Atljija and Đorđe Jaramaz (crime at the Corridor, in Potkonje, Vrpolje and Knin); Milan Španović (crime in Maja and Svrāčica);

- members of Croatian forces: Damir Kufner, Pavao Vancaš, Tomica Poletto, Željko Tutić, Antun Ivezić (crime in Marino Selo); Ivica Mirić (crime in Brezovica forrest); Josip Bikić (crime in Lora);

- official of the so-called Autonomous Region of Western Bosnia: Ibrahim Jušić

OPINIONS ON MONITORED TRIALS

Repeated trial against Slobodan Raič indicted for a war crime against civilians⁶⁵

Vukovar County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Slobodan Raič

War Crimes Council: judge Nikola Bešenski, Council President, judges Stjepan Margić and Željko Marin, Council Members

Prosecution: Vlatko Miljković, Vukovar County Deputy State's Attorney

Defence: lawyer Zlatko Jarić

Opinion of the monitoring team following the conclusion of the repeated trial

On 22 January 2009, after the repeated trial, the War Crimes Council of the Vukovar County Court found the defendant Slobodan Raič guilty of commission of a war crime against civilians that he committed by unlawful capture of civilian Slavko Batik. The defendant was sentenced to 2 years and 6 months in prison.

Initially, the defendant Raič was charged that, together with three unidentified paramilitary unit members, he found and captured a civilian Slavko Batik in November 1991 and took him to an unknown direction after which Slavko Batik disappeared without a trace – thus, by doing so, he killed a civilian.

In February 2008, following the conclusion of the evidence procedure, the indictment was modified in such a manner that the defendant was charged with unlawful confinement and inhuman treatment of civilian Slavko Batik because he failed to provide medical assistance to the injured person although he was obviously ill and in a very bad mental and physical state.

On 20 February 2008, the War Crimes Council of the Vukovar County Court found the defendant guilty as charged in the modified indictment and sentenced him to 2 years and 6 months in prison.⁶⁶

However, on 30 October 2008, the Supreme Court quashed the verdict issued by the Vukovar County Court and reversed the case to the first-instance court for a retrial.

⁶⁵ *Mladen Stojanović monitored this trial and reported thereof.*

⁶⁶ *Opinion of the Monitoring Team of the Centre for Peace, Non-Violence and Human Rights Osijek, Documenta and Civic Committee for Human Rights, which was prepared after the conclusion of the first-instance trial, has been made available on www.centar-za-mir.hr.*

The quashing decision of the Supreme Court states that the first-instance court finding that the defendant executed inhuman treatment in respect of the injured person because he failed to provide Slavko Batik with medical assistance was based on incorrectly established facts.

On the same day, the Supreme Court vacated detention order against the defendant Raič.⁶⁷

In the repeated trial, only one session of the main hearing was held resulting in the conclusion, with the consent of the parties, that all previously presented pieces of evidence were exhibited again.

The prosecution altered the indictment. Prosecuting attorney pointed out to the fact that the indictment was specified in accordance with the statements contained within the quashing decision issued by the Supreme Court and thus the part relating to failure to provide first aid to the injured person Slavko Batik was omitted from the specified indictment.

On 22 January 2009, the defendant was found guilty of unlawful confinement of a civilian - thus he committed a war crime against civilians. The same prison sentence - 2 years and 6 months in prison - was pronounced as in the first trial.

Although in the quashed verdict, the defendant was found guilty of two types of criminal act commission (inhuman treatment by failing to provide assistance and unlawful confinement), and in the repeated trial he was accused only of one type of commission (unlawful capture). In both cases, the War Crimes Council of the Vukovar County Court pronounced the same prison sentence against the defendant.

Considering the length of detention, it is difficult not to get the impression that the time the defendant had already spent in detention was covered by the pronounced sentence.

Repeated trial against Milovan Ždrnja, initially indicted for a war crime against war prisoners, referred to in Article 122, paragraph 1 of the OKZRH, but following the modified indictment charged with a war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH⁶⁸

⁶⁷ The defendant was detained from 6 May 2006 to 30 October 2008, amounting almost 2 years and 6 months, which corresponds to the prison sentence pronounced against him by the quashed verdict reached by the Vukovar County Court.

⁶⁸ Vlatka Kuić monitored this trial and reported thereof.

Vukovar County Court

Criminal act: war crime against war prisoners, Article 122, paragraph 1 of the OKZRH, and on the basis of the modified indictment - a war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Milovan Ždrnja

War Crimes Council: judge Slavko Teofilović, Council President, judges Zlata Sotirov and Berislav Matanović, Council Members

Prosecution: Zdravko Babić, Vukovar County Deputy State's Attorney

Defence: lawyer Igor Plavšić

Opinion

On 23 January 2009, the trial against Milovan Ždrnja was terminated at the Vukovar County Court since the Vukovar County Attorney's Office dropped charges against Ždrnja.

With the modified indictment from July 2004, the defendant was charged that he had approached Ivica Pavić in the Sremska Mitrovica detention camp on 20 November 1991 and hit the victim on the back of his head using a truncheon, so that the victim had lost conscience and fallen on the ground; and thus the defendant, at the time of the armed conflict, tortured and inhumanely treated civilians causing them great suffering and physical injuries, and thus committed a crime against the values protected by the international law - war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH.

Prior to the mentioned modification, the defendant was also charged with hitting of Šimun Karlušić.

On 31 December 2004, the War Crimes Council of the Vukovar County Court found the defendant Milovan Ždrnja guilty and, by applying the provisions on mitigation of penalty, sentenced him to 3 years and 6 months in prison.

On 20 March 2007, the Supreme Court quashed the first-instance court verdict and reversed the case to the first-instance court for a retrial, to be conducted before the completely altered council. The Supreme Court found that the facts, upon which the decision on the defendant's responsibility was based, had been incomplete and incorrectly established.

Since the verdict rested only on the statement of the victim Ivica Pavić and on the testimony of the witness Šimun Karlušić, the first-instance court, in a repeated trial, following the instructions of the Supreme Court, was obliged to evaluate their testimonies more thoroughly, more critically and comprehensively. If the court had found that the defendant had hit the victim's back of the head once using a truncheon so that the victim had lost consciousness, then it should have evaluated whether such action of torture of a civilian did represent inhumane treatment of the civilian, whether such action did cause great suffering to the victim, which all represented the significant characteristics of the

crime the accused was charged with, or whether the mentioned action could possibly represent another criminal offence.

By changing the factual description of the indictment in July 2004, during the first trial, the Vukovar County Attorney's Office, after hearing the witness Šimun Karlušić, dropped one part of the incrimination relating to the actions taken to his detriment.

In the end, the accusation was based only on the testimony of the victim Ivica Pavić who deceased in the course of the repeated trial.

After seven years of court proceedings, during which one non-final (first-instance court verdict) verdict of guilty was reached, the prosecution dropped charges.

We are of the opinion that in every criminal proceeding, indictments should be issued following the properly conducted investigations and they should be resting on evidence which would create a well founded suspicion that the defendant was indeed the perpetrator of crime.

The court trial that lasted for seven years, after which the prosecution dropped charges, does not support the mentioned.

Trial against Yugoslav Mišljenović *et al.* indicted for genocide⁶⁹

Vukovar County Court

Criminal act: genocide, Article 119 of the OKZRH

Defendants: Yugoslav Mišljenović (at large), Milan Stanković (at large), Dušan Stanković (at large), Janko Kiš (was at large, the proceedings were cancelled in 2004 because of the death), Živadin Ćirić (the proceedings were cancelled because of the death), Petar Lender (at large), Milenko Kovačević (was at large, the proceedings were cancelled in 2004 because of the death), Zdravko Simić (at large), Momir Anđelić (was at large, the proceedings were cancelled in 2003 because of the death), Slobodan Anđelić (was at large, the proceedings were cancelled in 2003 because of the death), Joakim Bučko (not detained), Mirko Ždinjak (at large), Slobodan Mišljenović (not detained, the proceedings were cancelled in 2008 after the prosecution dropped charges against him), Dragan Ćirić (at large), Milan Bojanić (was at large, the proceedings were cancelled in 2009 after the prosecution dropped charges against him), Jaroslav Mudri (not detained, the proceedings were cancelled in 2009 after the prosecution dropped charges against him), Zdenko Magoč (not detained), Dušanka Mišljenović (not detained, the proceedings were cancelled in 2008 after the prosecution dropped charges against her), Dragica Anđelić (was at large, the proceedings were cancelled in 2008 after the prosecution dropped charges against her), Aleksandar Anđelić (was at large, the proceedings were cancelled in 2008 after the prosecution dropped charges against him), Nikola Vlajnić (was at large, the proceedings were cancelled in 2008 after the prosecution dropped charges against him), Zlatan Nikolić (at large), Jovo Cico (at large), Đuro Krošnjar (at large), Ljubica Anđelić (was at large, the proceedings were cancelled in 2005 because of the death), Čedo Stanković (was at large, the proceedings were cancelled in 2009

⁶⁹ *Veselinka Kastratović monitored this trial and reported thereof.*

after the prosecution dropped charges against him), Radoje Jeremić (was at large, the proceedings were cancelled in 2003 because of the death), Joakim Lender (was at large, the proceedings were cancelled in 2003 because of the death), Kiril Builo (was at large, the proceedings were cancelled in 2003 because of the death), Stanislav Simić (was at large, the proceedings were cancelled in 2008 after the prosecution dropped charges against him), Darko Hudak (not detained), Saša Hudak (not detained, the proceedings were cancelled in 2009 after the prosecution dropped charges against him), Srđan Anđelić (was at large, the proceedings were cancelled in 2008 after the prosecution dropped charges against him), Dušan Anđelić (was at large, the proceedings were cancelled in 2004 because of the death), Janko Ljekar (at large).

War Crimes Council: judge Nikola Bešenski, Council President, judges Slavko Teofilović and Nevenka Zeko, Council Members.

Prosecution: Zdravko Babić, Vukovar County Deputy State's Attorney.

Opinion

In the Indictment of the Osijek County Attorney's Office, no. KT-37/93 of 29 April 1996, a total of 35 indictees were charged for genocide referred to in Article 119 of the OKZ RH. In 2005, the Vukovar County Attorney's Office took over the criminal prosecution against 27 indictees for the same criminal offence. The criminal proceedings were cancelled against eight indictees because of their death. By the end of the first-instance criminal proceedings, concluded on 5 February 2009, 14 indictees remained in the indictment. The indictment was modified eight times.

On 5 February 2009, the War Crimes Council of the Vukovar County Court announced the verdict wherein 12 defendants were found guilty of committing war crime against civilian population referred to in Article 120, paragraph 1 of the OKZRH, and two defendants were acquitted of charges that they had committed genocide referred to in Article 119 of the OKZRH.

This trial was marked by several important facts:

- The indictment was issued in 1996 against 35 defendants,
- The moment when the indictment was issued, all defendants were inaccessible to the judicial authorities of the Republic of Croatia; with the decision of the Osijek County Court, no. Kv 46/97, of 21 February 1997, it was decided that all defendants would be tried in *absentia*,
- Investigation was conducted in 1993, at the time when Mikluševci and a large part of Vukovar-Srijem county was occupied and inaccessible to the judiciary and police authorities of the Republic of Croatia; a large number of witnesses and victims was in exile throughout Croatia or was living in the occupied area,
- After the Vukovar ŽDO took over the indictment, no additional investigation was requested; it was only during the main hearing when witnesses were heard, the indictment was modified on several occasions and made more precise based on witnesses' testimonies,

- Some witnesses were heard five or more times during the main hearing, which indicated that the investigation was poorly conducted and that the previous additional investigation had to be carried out,
- During the evidence procedure, the proceedings against 13 defendants were cancelled due to death of the defendants, and during 2008 and 2009 the Vukovar ŽDO withdrew from further criminal prosecution in respect of 8 defendants due to a lack of evidence,
- By taking over the indictment from the Osijek County Attorney's Office, the Vukovar ŽDO modified the indictment, justifying the modifications by significantly altered circumstances and the time of execution of specific incriminating acts and with collected evidence contained in the compiled documentation,
- By modifying the indictment on 20 March 2007, the factual and legal descriptions as well as the legal qualification of offences were modified whereby the defendants were charged with committing war crime against civilian population referred to in Article 120, paragraph 1 of the OKZRH. Soon after, on 13 April 2007, the indictment was modified in a manner that the defendants were charged with genocide referred to in Article 119 of the OKZRH; however, the actions the defendants were charged with remained the same as in the indictment modified on 20 March 2007, whereas the legal qualification of offence was changed back to the original charges – a genocide,
- With the decision of the Osijek County Court, no. Kv-115/97 of 21 March 1997, a detention of defendants was ordered. At the main hearing, the defence lawyers proposed the cancellation of detention for the defendants present at the trial and the caution measures to be imposed against those defendants, which the Deputy Vukovar County Attorney present at the trial agreed to.⁷⁰ The Council issued the decision which cancelled detention against the defendants present at the trial and ordered caution measures prohibiting the defendants to leave the residence, obliging them to get into contact with the Council President every two months, and seizing travel documents and other documents necessary for crossing the state border.

⁷⁰ When asked by the Council President about possible remarks, the defence lawyers Biserka Treneski, Stjepan Šporčić, Vojislav Ore and Andrej Georgievski, in accordance with Article 107a of the Criminal Procedure Act, proposed the termination of detention and taking caution measures referred to in Article 90, paragraph 1 and 2, item 1 and 3 of the ZKP, in respect of the present defendants Milan Stanković, Živan Ćirić, Joakim Bučko, Slobodan Mišljenović, Jaroslav Mudri, Zdenko Magoč, Dušanka Mišljenović, Darko Hudak and Saša Hudak, clarifying that in relation to the aforementioned defendants a legally valid decision on ordering detention did exist. That decision No. KV-115/97 was issued by the Osijek County Court on 21 March 1997.

The Deputy Vukovar County Attorney present at the trial agreed to the proposal of the defence, however, he did suggest that in addition to the mentioned caution measures referred to in Article 90, paragraph 2, items 1 and 3 of the ZKP, a caution measure referred to in item 6 of the mentioned Article of the ZKP were to be introduced as well (as entered into Vukovar County Court records on 25 April 2005, page 8).

The victims and injured parties, as well as the general public, found the decision on not keeping the defendants (present at trial) in custody during the court trial to be incomprehensible since they were indicted for the most severe criminal offence, for which it would be appropriate to have the defendants kept in detention during the trial,

- The length of the first-instance criminal proceedings can cause the witnesses and injured parties to feel that this criminal proceedings are useless,
- Interest of the media gradually weakened during the course of the trial, despite the fact that this was a trial for genocide,
- The right of defendants to a fair trial, as prescribed by the provision stated in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷¹, has been violated with a lengthy first-instance court proceedings⁷² and frequent modifications of the indictment.

The evidence presented during the evidence procedure indicated that in this specific trial the crime of war crime against civilians, described in Article 120, paragraph 1 of the OKZRH, was committed. The Vukovar County Attorney's Office issued the indictment for genocide, referred to in Article 119 of the OKZRH.

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide is worded as follows: "Within the meaning of the Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group such life conditions which would lead to its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of one group to another group."

"Principally, genocide can be committed by any person regardless of its position in the military or political hierarchy. However, by taking into consideration the nature of this crime (historical framework of its occurrence connected to the holocaust) which presumes a massive scale of victims and a capability of the perpetrator to cause massive and severe sufferings, according to the nature of the matter, the genocide perpetrators will be the highest ranked persons in a military and/or political hierarchy. The practice of ICTY and the International *Criminal Tribunal for Rwanda* verifies that."⁷³ The specificity

⁷¹ "In order to have her/his civil rights and obligations determined, or in case of criminal charges being pressed against her/him, everyone is entitled to a fair and public hearing within a reasonable time to be conducted by an independent and impartial tribunal established by law..."

⁷² The trial is ongoing since 1996; the first-instance court verdict was pronounced on 5 February 2009.

⁷³ Ivo Josipović Sc.D, „Ratni zločini“ [War crimes], a manual for trials monitoring, Centre for Peace, Non-violence and Human Rights, Osijek, 2007.

of genocide as a crime is its special intention, *mens rea*, the so-called genocidal intent, a wish to physically destroy a national, ethnic, racial or other group, or its significant part, exactly for the reason this being this particular group. A decision to commit such an act has to be a conscious one, which is directed towards a destruction of this group. In the concrete case, the defendants were members of Serb and Ruthenian ethnic minorities, and the victims were to a great extent Ruthenians and other non-Serb persons. The defendants were members of the local territorial defence. By stating these facts, we do not intend to diminish the significance of the incriminating acts but we believe that in this specific trial, the defendants should have been charged with a criminal act of war crime against civilians, referred to in Article 120, paragraph 1 of the OKZRH.

The indictment was modified eight times. At a certain moment, the legal qualification of the offence was also changed from *genocide* into a *war crime against civilians*. And very soon, the defendants were charged again with a crime of *genocide*. The stated opens up a series of legal issues, amongst other also the issue of violation of the provision of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms to the detriment of the defendants (right to a fair trial⁷⁴). The Holik family victims and Slavko Hajduk's family victims almost got forgotten during the proceedings. By all means, this is not a consequence of the work of the War Crimes Council, which made efforts to conduct the proceedings in a correct manner and in accordance with the ZKP provisions. We believe that because of the seriousness of the crime committed in Mikluševci, the Vukovar County Attorney's Office should have asked for additional investigation to be carried out at the moment when they took over the court case from the Osijek County Attorney's Office. Things would have been clearer after additional

⁷⁴ *Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*

Right to a fair trial

1. *When deciding upon a person's civil rights and obligations, or in case of well founded criminal charges against the person, each person is entitled to a fair and public hearing to be conducted within a reasonable time by an independent and impartial tribunal established by law. The verdict is to be pronounced publicly but the press and the public may be excluded from the entire trial, or a part of it, in the interests of ethics, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties require so, or in special circumstances when the court deems it strictly necessary since the publicity may harm the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3. *Everyone charged with a criminal offence has the following minimum rights:*

a. *to be informed promptly and thoroughly, in a language which she/he understands, of the nature and cause of the accusation against her/him;*

b. *to have adequate time and conditions for the preparation of his/her defence;*

c. *to defend herself/himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to receive it free of charge when the interests of justice require so;*

d. *to personally examine them or request the prosecution witnesses to be examined, and to facilitate his/her presence at the examination of the defence witnesses under the same terms which pertain to the prosecution witnesses;*

investigation being carried out. Without this, the Vukovar County Attorney's Office, throughout the evidence procedure conducted a "hidden investigation", and this is evident from the process of adjusting and modifying the indictment following the testimonies of certain witnesses.

War Crimes Council found proven that twelve defendants committed a crime of war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH. It is beyond any doubt that the verdict will have to provide clarification of such a decision. Although the Council is not bound with the legal qualification of offence, an issue relating to objective identity of the indictment and the verdict could be raised at this point. It is very likely that, in their appeals, both the Vukovar County Attorney's Office and the defence will raise exactly the issue of identity of the indictment and of the verdict. Although it seems that the Council did act in accordance with the provisions of Article 350, paragraph 1 of the ZKP, when determining that the convicted defendants, by acting the way they did, brought into existence the very criminal act of war crime against civilians, which, in relation to the charges for genocide, represents a less serious crime, this decision at the same time opens up a series of legal issues. Primarily, it opens up an issue whether the protected good (protected subject) is the same in the stated two criminal offences.

Just before the end of the evidence procedure, pursuant to the provision of Article 63, paragraph 1 of the OKZRH, the court appointed defence lawyers ex officio to each of the defendants. Until that moment, several defendants shared one defence lawyer. Considering the fact that, formally, the hearing started anew, each defendant formally had his own defence lawyer during the main hearing.

However, this trial went on for twelve years. During the evidence procedure, a substantial evidence was presented at the time when one defence lawyer represented several defendants. A question may be raised whether such a situation was in contradiction to the benefits of their defence.⁷⁵

Trial against Sreten Peslać indicted for a war crime against civilians⁷⁶

Šibenik County Court

Criminal act: war crime against civilians, Article 142 of the assumed Penal Code of Yugoslavia

Defendant: Sreten Peslać

War Crimes Council: judge Branko Ivić, Council President; judges Ivo Vukelja and Jadranka Biga Milutin, Council Members

Prosecution: Sanda Pavlović Lučić, Šibenik County Deputy State's Attorney

Defence: lawyer Vera Bego

⁷⁵ Article 63, paragraph 1 of the OKZRH: "Several accused persons may have a joint defence lawyer only if no criminal proceedings for the same crime are being conducted against these accused persons, or if this is not contrary to the benefits of their defence."

⁷⁶ Maja Kovačević Bošković monitored this trial and reported thereof.

Opinion

The reopened trial against the defendant Sreten Peslać, tried in absence in 1993 and sentenced to a 10-year prison term, arrested in Italy in February 2008 and extradited to Croatia, was conducted before the War Crimes Council of the Šibenik County Court and concluded on 9 February 2009.

At the last hearing the Šibenik County Court modified the legal qualification of the offence, modifying it from a *war crime against civilians* into an *armed rebellion*. Subsequently, the Court reached the verdict which rejected the charges by applying the General Amnesty Act.

This trial is yet another example of the earlier practice of issuing poor-quality indictments and insufficiently precise indictments against a large number of defendants. Later, almost as a rule, the defendants were tried in *absentia* and sentenced to long prison terms.

Recently, we have been witnessing the reinstatement/re-opening of trials against persons who were previously legally sentenced in absence, in which the prosecution, in the course of the evidence procedure, is dropping charges or altering the legal qualification of the offence into criminal act of armed rebellion, so that the courts, by applying the General Amnesty Act, are reaching verdicts on suspension of indictment, or issuing decisions on trial termination.

Because of the mentioned practice by the prosecution and courts, a common one in the 1990s, Sreten Peslać spent one year in custody despite the fact that evidence, available at the first-instance court trial and at the re-opened trial, did not change significantly.

By monitoring the trial, we recorded a situation to which we would like to indicate for the purpose of possible similar re-opened trials in the future although this situation did not affect the outcome of the trial and the “destiny” of the defendant.

Namely, at the first hearing at the trial, following the reading of the indictment and the defendant pleading not guilty to committing any acts he was charged with in the indictment, the War Crimes Council President stated that the trial was being conducted pursuant to the *1993 Criminal Act Procedure (OG 34/93)*, and did not grant the defendant’s request to present his defence at the end of the evidence procedure.⁷⁷

It is obvious that a footing for such a stand, the Council President rested on the provisions on the re-opening of trial of the *Criminal Procedure Act (OG 110/97)*, in force at the time when this re-opened trial was conducted; this Act stipulates that in the case of new proceedings conducted pursuant to the decision allowing the re-opening of the trial, the

⁷⁷ Article 306 of the mentioned Act stipulates that the Council President, after reading the indictment or litigation claim or after an oral presentation of their contents, shall start with hearing of the defendant, as well as that the defendant shall be asked, after entering plea on each count of the indictment, to present her/his defence.

same provisions apply as for the first trial.⁷⁸ In respect of the first trial, in which the defendant was tried in absence, *the Criminal Procedure Act* in force in 1993 was applied.

We believe that in this specific case of a re-opened trial against the def. Sreten Peslać the act in force at the time of conducting the re-opened trial, i.e. the 1997 ZKP, should have been applied. In our opinion, Article 411 of the ZKP relates to the application of material and legal provisions, thus accordingly the penal act valid at the time of the first trial should be applied and not the procedural law. The legislator itself in the “newest” Criminal Procedure Act (OG 152/08) clarified that particular provision by stipulating that for the new trial conducted on the basis of the decision allowing re-opening of the trial, the same material and legal provisions as were valid for the first trial would apply, except the provisions on statute of limitation.⁷⁹

If the re-opened trial was conducted pursuant to the law valid at that time, this would have made possible for the defendant to present his defence plea at the end of the proceedings, since it is prescribed that the defendant, who pleads not guilty to all or some counts of the indictment is to be heard at the end of the evidence procedure, unless the defendant himself requests otherwise.⁸⁰

We would also like to draw attention to the provision of Article 191, paragraph 3 of *the Act on Amendments to the Criminal Procedure Act (OG 58/02)* according to which, if a main hearing, in the case conducted in line with the provisions valid so far (i.e. the law which was previously in force), is to start anew, the plea of the defendants in respect of the charges, within the meaning of Article 320, paragraph 3 of the Criminal Procedure Act, shall be heard and the procedure shall continue pursuant to the provisions of this Act i.e. *the Criminal Procedure Act of 1997*. In the same manner, the court shall act also in the case when the verdict was annulled following a legal remedy and the case was reversed for a retrial.⁸¹

We repeat that this situation did not significantly influence the outcome of this specific trial. However, if the prosecution had not modified the legal qualification of the crime stated in the indictment, we believe that the mentioned situation would have represented a significant violation referred to in Article 367, paragraph 1, item 8 of the ZKP and that the verdict would have been quashed and returned to the first-instance court for a retrial.

⁷⁸ Article 411, paragraph 1 of the ZKP (OG 110/97).

⁷⁹ Article 508, paragraph 1 of the ZKP (OG 152/08). The mentioned Article is a version of Article 411 of the ZKP (OG 110/97).

⁸⁰ Article 320, paragraph 7 of the ZKP (OG 110/97).

⁸¹ It is disputable whether the mentioned Article refers only to situations when the main hearing is to start anew due to regular legal remedies, when the composition of the Council was changed or when the trial recess lasted longer than two months, or it can also be applied in the cases of re-opening the trial.

Trial against Đuro Đurić indicted for a war crime against civilians⁸²

Sisak County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH (following the modification of the indictment – into armed rebellion, Article 236f, paragraph 1 of the Penal Code of the Republic of Croatia)

Defendant: Đuro Đurić

War Crimes Council: judge Melita Avedić, Council President, judges Ljubica Rendulić Holzer and Predrag Jovanić, Council Members

Prosecution: Jadranka Huskić, Sisak County Deputy State's Attorney

Defence: lawyer Zdravko Baburak

Opinion

In February 2009, a main hearing was held before the Sisak County Court in the trial against Đuro Đurić, charged with a war crime against civilians under Article 120, paragraph 1 of the OKZRH.⁸³

After the modification of factual and legal description and the modification of legal qualification of the offence described in the indictment (change of legal qualification - into armed rebellion), on 11 February 2009 the Council passed the verdict dismissing the charges.

The trial against Đuro Đurić was conducted in a correct manner, and despite some minor procedural omissions which we noted when reporting on the main hearing, we have no objections either to the procedure conduct by the court, or to the issued court decision.

The mentioned omissions related to the fact that the witnesses were not cautioned in a prescribed manner stated in Article 324 and Article 236 of the ZKP, although it was entered in the court records that the witness had actually been cautioned in accordance with the mentioned provisions.

However, we find it necessary to note that on the occasion when the County Attorney's Office was changing the bill of indictment (charges) and the legal qualification stated in

⁸² *Marko Sjekavica monitored this trial and reported thereof.*

⁸³ *This is a separated trial. Namely, the indictment of the District Sisak State Attorney's Office No. KT-61/93 of 4 November 1994 was raised against 35 persons (Predrag Orlović et al.).*

The majority of the defendants are not available to Croatian judiciary. According to the prosecutor, some of them were tried individually, once he or she became available. At present, only the 10th defendant Dragan Vranešević was sentenced to 15 years in prison. The defendants Tošo Sundać, Slavko Tadić, Goran Barač, Dušan Badić, Dalibor Borota and Rade Lukač are allegedly deceased or killed. However, in the absence of official documents issued by relevant institutions about their deaths, the criminal proceedings against them is still not terminated.

the indictment – from the *war crime against civilians* (referred to in Article 120, paragraph 1 of the OKZRH) into the *armed rebellion* (referred to in Article 236f, paragraph 1 of the Penal Code of the Republic of Croatia), it failed to take into consideration the testimony of the witness Marija Stipić, who was the only witness who actually charged the defendant, in sense of a possible extension of the bill of indictment (charges) in that direction and further clarification of the circumstances concerned.

Namely, this witness stated that the def. Đuro Đurić took her to Dvor, to the police station premises, to have her beaten up, resulting with serious physical injuries.

Since this event occurred at the time after the incriminating period, this event could not have been the subject matter of the court ruling in this crime case.

We are of the opinion that the modification and amendment to the indictment in this direction, and a possible supplementary investigation could have shed more light on the particular event and could have verified the information, which the witness obtained by hearsay, that the defendant Đuro Đurić took the witness' mother and brother to the bank of Una river where her mother was slaughtered and thrown into the river, and the brother was handcuffed and also thrown into the river.

The practice of issuing joint indictments against several perpetrators of the same criminal act, which was frequently followed in respect of inaccessible perpetrators of war crime against civilians and other related crimes, and the practice of subsequent separation of the proceedings against an individual defendant who would at a certain moment become reachable to the judiciary, along with retaining the same, very generalized indictment, is in our opinion a highly suspect practice.

In respect of the indictment, and in accordance with the accusatory nature of the Croatian criminal procedure, we find the conducted proceedings and the verdict to be correct.

Trial against Damir Kufner, Davor Šimić, Pavao Vančaš, Tomica Poletto, Željko Tutić and Antun Ivezić, indicted for a war crime against civilians stated in Article 120 of the OKZRH⁸⁴

Požega County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendants: Damir Kufner, Davor Šimić, Pavao Vančaš, Tomica Poletto, Željko Tutić and Antun Ivezić

War Crimes Council: judge Predrag Dragičević, Council President, judges Jasna Zubčić and Žarko Kralj, Council Members

Prosecution: Božena Jurković, Požega County Deputy State's Attorney

Defence: lawyers Jovan Doneski and Miroslav Vukelić (for the 1st defendant); lawyer Marko Dumančić (for the 2nd defendant); lawyers Željko Damjanac and Ivica Vrban (for the 3rd defendant); lawyers Branko Baričević and Olivera Baričević (for the 4th defendant); lawyers

⁸⁴ *Vlatka Kuić monitored this trial and reported thereof.*

Gordana Grubeša and Andrijana Vukoja (for the 5th defendant); lawyers Domagoj Miličević and Valentina Gacik (for the 6th defendant)

Opinion

The first-instance court trial was held at the Požega County Court against six members of the former platoon of Military Police of the 76th Battalion of the Croatian National Guard for illegal detention, abusing and killing of civilians of Serb ethnicity from the hamlets of Kip and Klisa in the village of Marino Selo near Pakrac.

According to the (not final) first-instance court verdict, pronounced on 13 March 2009, the defendants were found guilty and sentenced to prison terms.

Although they had been indicted and found guilty according to the command responsibility, defendants Damir Kufner and Davor Šimić were sentenced, by applying the provisions on mitigation of penalty, to prison sentences below the mandatory minimum prescribed for criminal act of war crime against civilians.

The defendant Kufner was sentenced to a joint prison sentence in duration of 4 years and 6 months, whereas the defendant Šimić was sentenced to one year in prison. The defendant Šimić has spent in custody the amount of time which almost equals the duration of the prison sentence passed on him by the first-instance court verdict.

Other defendants, direct perpetrators of the crime, were found guilty and sentenced to following prison terms: Pavao Vancaš – 3 years; Tomica Poletto – 16 years; Željko Tutić – 12 years; and Antun Ivezić – 10 years⁸⁵.

However, according to the provisions of the Basic Penal Code of the Republic of Croatia, prison sentence in duration of 16 years, which was passed on the defendant Poletto, cannot be pronounced by court whatsoever. Namely, provisions in the general section of the mentioned Code prescribe that a prison sentence cannot be shorter than 15 (fifteen) days or longer than 15 (fifteen) years, while a prison sentence in duration of 20 years may be pronounced for the most serious and grave forms of a criminal act committed with intention. Prison sentence in duration between 15 and 20 years cannot be imposed whatsoever.

The Croatian judiciary received the materials from the ICTY investigation teams which had been investigating the crimes committed against persons of Serb ethnicity in vicinity of Pakrac and the specific activities of the members of the reserve units of the Ministry of Interior of the Republic of Croatia, commanded by Tomislav Merčep, in his capacity as Assistant to the Minister of Interior of the Republic of Croatia at the time concerned.

⁸⁵ *By applying the Juvenile Courts Act, the defendant Antun Ivezić, who was 19 years of age at the time of the crime commission, could have been sentenced to a prison sentence in duration of up to 12 years.*

During the pre-investigatory proceeding which was carried out in Bjelovar and the investigation proceeding which was conducted in Požega, a well founded suspicion that they had committed the crime of killing eighteen civilians of Serb ethnicity in Marino Selo was cast on the members of the Military Police Platoon of the 76th Battalion under the command of Damir Kufner and Davor Šimić.

Since the moment the investigation was launched, all aforementioned defendants were in custody. During the main hearing, after the modification of indictment and after the prosecution dropped a part of the charges, defendants Davor Šimić and Pavao Vancaš were released from custody. The defendant Damir Kufner was released from custody at the sentencing hearing, right after the announcement of the verdict, since he received the prison sentence in duration below 5 years.

During the five-month trial, 55 witnesses were heard; the three witnesses out of those 55 are the injured parties who survived the detention in Marino Selo. Two surviving victims were testifying via video conference link. The two surviving victims were giving their testimonies in the District Court building in Belgrade, while the War Crimes Council, parties at the trial, and defence lawyers were located in the Osijek County Court building, since the Požega County Court does not possess the required technical equipment for audio/visual transmission.

In addition to the above mentioned technical flaw, the courtroom at the Požega County Court, in which the trial was conducted, is too small for multiple-defendants trial and the trials which attract a lot of public attention.

In the courtroom, the witnesses were giving their depositions standing in the close vicinity of the audience (public), which was putting additional pressure and burden onto the witnesses, since some of the representatives of Homeland war veterans' associations and some local politicians were also sitting in the audience who came to the trial to support the defendants with their presence.

The witnesses did not receive any psychological support or protection whatsoever. Although some of the witnesses stated that they had received threats and that they were scared to testify, there was only one single injured party who testified following the exclusion of the public.

In case of a possible repetition of the trial before an altered War Crimes Council, either in this case or some other war crime trial, it is questionable, considering the number of judges, whether the Požega County Court would be able to constitute another, new Council, which would comprise of three judges with previous experience in criminal branch. If the mentioned proves to be impossible, the case would have to be delegated i.e. referred to some other county court. This issue is actually one of the reasons why we are advocating for the war crime trials to be conducted exclusively at the county courts in Zagreb, Split, Rijeka and Osijek.

Third (second repeated) trial against Petar Mamula indicted for a war crime against civilians⁸⁶

Osijek County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Petar Mamula

War Crimes Council: judge Zvonko Vekić, Council President, judges Drago Grubeša and Katica Krajnović, Council Members

Prosecution: Zlatko Bučević, Osijek County Deputy State's Attorney

Defence: lawyers Slobodan Budak and Artur Fišbah

Opinion

On 7 April 2009, the War Crimes Council of the Osijek County Court announced the first-instance court verdict no. Krz-88/08, which found the def. Petar Mamula guilty and sentenced him to 4 years and 10 months in prison for criminal act of war crime against civilian population referred to in Article 120, paragraph 1 of the OKZRH.

The third (second repeated) trial was conducted correctly, in accordance with the provisions of the Criminal Procedure Act.

The first-instance court presented the evidence, the presentation of which had been instructed by the Supreme Court of the Republic of Croatia, including the evidence which was found to be necessary and which was proposed by the defence.

In accordance with aforementioned, the first-instance court carried out an inspection into the court files Kio-30/97, Kio 29/97, and into the verdict of the Osijek County Court no. K-17/06. On the basis of this inspection, the Court was to determine for which reasons (factual substratum) the investigation against the def. Petar Mamula had been terminated, and accordingly, whether the concerned offence had already been legally adjudicated. The witnesses Jovan Narandža, Veljko Salonja and Antun Knežević were heard again.

On the basis of the presented material evidence, the court found that the actions constituting the criminal offence that the defendant is charged with in this trial are not identical to the actions which were the subject matter of the investigation terminated by the decision of the Osijek County Court No: Kio-30/97 following the application of the General Amnesty Act.

On the basis of the presented personal evidence, i.e. the depositions of witnesses who were heard again, the read testimonies of previously heard witnesses, the court found that the def. Petar Mamula did commit a criminal act of war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH, as he was charged in the modified indictment.

When deciding on the degree and purpose of the sentence, the court found that the purpose of punishing would be fulfilled with the pronounced less stringent sentence.

⁸⁶ *Veselinka Kastratović monitored this trial and reported thereof.*

Trial against Čedo Jović indicted for a war crime against civilians⁸⁷

Osijek County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Čedo Jović

War Crimes Council: judge Darko Krušlin, Council President, judges Josip Frajlić and Nikola Sajter, Council Members

Prosecution: Dragan Poljak, Osijek County Deputy State's Attorney

Defence: lawyer Tomislav Filaković

Opinion

In April 2009, the War Crimes Council of the Osijek County Court found the defendant Čedo Jović guilty of failing to take any action to punish, in his capacity as the military police unit commander of the 35th Slavonija Brigade of the so called RSK Army, although he knew that military policemen Novak Simić, Miodrag Kikanović and Radovan Krstinić - his subordinate military policemen in Dalj, were abusing non-Serb members of the manual labour platoon, and thus he accepted the continuation of such impermissible actions and he also agreed to the consequences of such acts (five physically abused persons and one person who died from abuse).⁸⁸

He was sentenced to five years in prison.

It was established during the trial, beyond doubt that the defendant was the head of security service of the 35th Slavonija Brigade of the so called RSK Army during the incriminating period (December 1993 - June 1995), that Novak Simić was the military police platoon commander in Dalj and that Miodrag Kikanović and Radovan Krstinić were military policemen, that Kikanović, Simić and Krstinić had beaten up the injured person Antun Kundić who died from caused injuries, that the defendant knew about that event and about the harassing of "the manual labour platoon" members" which comprised mobilised Hungarians and Croats.

A disputable issue in the trial was whether the injured persons (Hungarians and Croats mobilised into the "manual labour platoon") had the status of civilians and whether the defendant, in addition to the position of the security head, was also a military police commander in the 35th Slavonija Brigade of the so called RSK Army, who was a superior

⁸⁷ *Mladen Stojanović monitored this trial and reported thereof.*

⁸⁸ *Military policemen Novak Simić, Miodrag Kikanović and Radovan Krstinić were sentenced by a final judgment in 2008 for a war crime against civilians under Article 120, paragraph 1 of the OKZRH (for physical abuse of Ivan Horvat, Ivan Bodza, Karol Kremenerski, Josip Ledencičan, Emerik Huđik and Antun Kundić who died of abuse).*

Simić was sentenced by a final judgment to 10 years in prison, Kikanović to 6 years and 6 months and Krstinić to 5 years in prison.

officer to military police platoon commander Simić and military policemen Kikanović and Krstinić.

Based on an insight into the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the Council concluded that mobilised members of "the manual labour platoon" had the status of civilians since the mentioned persons had no active involvement in the hostilities.

The defence claimed that the defendant, in his capacity as the security head, was not and could not have been the military police unit commander too, and that the direct superior officer to military police platoon commander Novak Simić was the brigade commander (and during the incriminating period this function was performed by Stojan Pralica - the major).

The defence also pointed out to the fact that the charges were not resting on material evidence but instead they rested on laic witness testimonies who only made conclusions in respect of the role of the defendant on the basis of his appearance or they had heard of it from someone else.

The Council rejected several pieces of evidence proposed by the defence which included, *inter alia*, a proposal to hear Imra Agotić as the witness or some other person with the knowledge about the military services structure, concerning the circumstance of interpreting the provisions of „The rules of the security service in SFRJ armed forces“ and „The rules of the military police service of SFRJ armed forces“, to establish whether it could have been possible that the position of a security head and of a military police commander could have been performed simultaneously. The defence also proposed to obtain (via international legal assistance) the formation structure of the 35th Slavonija Brigade of the so-called RSK Army, but the Council rejected it because it was of the opinion that the presentation of such evidence was unnecessary and that the facts were sufficiently established.

On the basis of witness testimonies provided by Dalj villagers who, mostly by hearsay, heard that the defendant had been the military police commander in Dalj, and the testimonies provided by the military police members at the incriminating period, the majority of whom stated that they considered the defendant to be the "chief" in military police in Dalj and the superior officer to military police platoon commander Simić, the Council concluded that the defendant Jović was a military police unit commander in the 35th Slavonija Brigade and was Simić's superior officer, thus he was also a superior officer to Kikanović and Krstinić.

It is stipulated in the verdict's statement of reasons that the Court's conclusion that the military police was a tool in the hands of the security service chief, that he was managing military police and that military police was under his authority was derived also from the "Rules of the security service in SFRJ armed forces" and the „Rules of the military police service of SFRJ armed forces“.

The question remains whether the Supreme Court will also be of the opinion that presenting all rejected evidence proposals was not necessary, as was found by the War Crimes Council of the Osijek County Court.

The Council, of course, decides independently which evidence proposals it shall accept and have them presented, but we deem that presenting some of the proposed pieces of evidence would not cause a significant delay in the trial, but it would actually contribute to a greater certainty in passing a decision.

However, even the main hearing itself was unusually short for Croatian judiciary practice. Less than a month elapsed from the opening day of the main hearing until the verdict was pronounced. Six hearings were held during that time.

The promptness in processing war crimes cases deserves compliments, but not if it is detrimental to the publicity of the main hearing and the establishment of facts.

Namely, at the main hearing most of the witnesses were only presented with their previous testimonies followed by the Court asking witnesses whether they still adhere to them. Possibly, a question or two was raised. Thus, even 35 witnesses were summoned for the first hearing, and 30 out of the summoned 35 appeared before the court. That is why it was possible that the mentioned hearing, which lasted for 3 hours and 10 minutes⁸⁹, included the opening of the main hearing, reading of the indictment, the defendant's plea, while one opinion by the medical expert was provided and the testimonies of as many as 13 witnesses were heard in the evidence procedure.

We find that such practice should be abandoned.

Trial against Mihajlo Hrastov charged with an unlawful killing and causing injuries to the enemy pursuant to Article 124, paragraphs 1 and 2 of the OKZRH⁹⁰

Supreme Court of the Republic of Croatia

Criminal act: unlawful killing and causing injuries to the enemy pursuant to Article 124, paragraphs 1 and 2 of the OKZRH

Defendant: Mihajlo Hrastov

Court Council: judge Senka Klarić Baranović, Council President, judge Marijan Svedrović, judge rapporteur, judges-jurors Božena Kamenski, Bariša Grbeša and Josipa Galić

Prosecution: Antun Kvakon, Deputy Chief State Attorney of Croatia

Defence: lawyers Krešimir Vilajtović and Igor Meznarić

⁸⁹ *Court records of the main hearing of 11 March 2009, No. Krz-80/08-82.*

⁹⁰ *Veselinka Kastratović monitored this trial and reported thereof.*

Opinion of the monitoring team following the conducted hearing and adoption of the verdict by the Supreme Court

The Supreme Court, as the second-instance court, in its verdict no. K-Kž-738/07 of 4 May 2009 upheld the appeal lodged by the State Attorney's Office and altered the first-instance verdict of the Karlovac County Court no. K-7/04 of 28 March 2007, found the defendant Mihajlo Hrastov guilty of committing a criminal act by unlawful killing and causing injuries to the enemy - under Article 124, paragraphs 1 and 2 of the OKZRH and sentenced him to 8 years in prison.

Despite the conducted hearing before the Supreme Court, several facts remained pending that might bring into question the Court's decision on the standing that the defendant Mihajlo Hrastov alone committed the abovementioned criminal act. Namely, the Court did not explicitly state whether it gave credibility to that part of read witness testimonies provided by Svetozar Šarac and Duško Mrkić in which they testified that there were three persons shooting at war prisoners. Moreover, in the first instance trial, the ballistics expert witness stated that he had seen photographs of casings of the "Ultimax" brand weapon, call. 5.56 mm and 5 casings of the weapon, call. 7.62 mm. The "Ultimax" brand weapon and 59 casings of call. 5.56 mm that were recovered from the site of the event and subjected to expertise, were indisputable. Worth mentioning is that no fingerprints were taken from the defendant to have them matched with the fingerprints found on the weapon, the casings were not compared with the bullets taken out of the victims' bodies. This indicated to the fact that it was not established whether the bullets that killed thirteen war prisoners and caused serious injuries to two of them were fired from the weapons subjected to expertise and whether the casings subjected to expertise were linked with the bullets that killed or wounded the victims at the Korana bridge.

The Supreme Court assessed as extenuating "the circumstance that the defendant M. H. fought in the most difficult period of the Homeland War on many battlefields". We deem that the aforementioned circumstance should not be assessed as extenuating for several reasons. Namely, combats on many battlefields during the most difficult period of the Homeland War came after the critical event and have no direct link with that event, while participation in combats is not and cannot represent an excuse for the commission of the criminal act in question, not even the circumstance upon which the length of the pronounced sentence will depend. Apart from the aforementioned, the term "the most difficult period of the Homeland War" itself is both linguistically and legally unclear.

Besides, the Supreme Court itself found as aggravating circumstance "serious consequence of the committed criminal act, i.e. death of thirteen persons and serious wounding of two persons - which consequence significantly exceeds the legal qualification referred to in paragraph 2 of Article 124 of the OKZRH" and, despite that, the Supreme Court pronounced a prison sentence below the legally stipulated minimum for the subject criminal act.

Following the completion of the main hearing, the Supreme Court did not publicly pronounce the verdict in which the defendant Mihajlo Hrastov was found guilty and

sentenced to 8 years in prison. Detention against the defendant was ordered on the basis of that verdict.⁹¹

The Constitutional Court found impermissible the issuance of detention order by a decision on the basis of the verdict that was not publicly pronounced. By doing so the constitutional complaint applicant (Mihajlo Hrastov) was denied the right to be acquainted with the disposition and a brief statement of reasons of the verdict. Considering the fact that the verdict produces legal effects only after it had been pronounced and made public, which did not happen in this particular case, the detention order too, for that reason, could not have been issued pursuant to Article 102, paragraph 4 of the Criminal Procedure Act. The Constitutional Court found that the constitutional rights of Mihajlo Hrastov were thus violated and that he had the right to indemnification and public apology for unlawful arrest in the period from 5 May (when he was detained) until 30 June (when his defence counsels received the written verdict). With this decision of the Constitutional Court, the release of Mihajlo Hrastov from detention had not been ordered because, at the moment when the Constitutional Court's decision was adopted, the Supreme Court's written verdict had already been delivered to the parties.

Explanation

In the first instance verdict of the Karlovac County Court, No. K-7/04 of 28 March 2007, following the third (second repeated) trial, the defendant Mihajlo Hrastov was acquitted of charges that he had committed a criminal act referred to in Article 124, paragraphs 1 and 2 of the OKZRH because he had acted in self-defence.

In its appeal lodged against the aforementioned verdict, the State Attorney's Office stated that the first instance court, while assessing the presented evidence, only accepted the evidence or parts thereof that confirmed the standpoint that the defendant had acted in self-defence. Further, it was pointed at the lack of credibility of the witness testimony of Goran Čerkez who changed his testimony regarding the crucial facts during the criminal proceedings. The appeal stated that witness testimonies of Goran Čerkez and the defendant Mihajlo Hrastov were contrary to the presented evidence and that the defendant Mihajlo Hrastov did not act in self-defence because there were no attacks on the defendant during the critical event.

The Supreme Court was deciding at the session of its Panel held on 24 September 2008. However, in the closed part of the session it was decided, *ex officio*, that the Supreme Court, as the second instance court, should pass a decision on the basis of a conducted hearing. The Panel determined that the facts in the challenged first instance verdict were erroneously established and that, in order to decide on the facts, it was necessary to exhibit some already presented evidence at the hearing and that there were justified reasons not to return the case to the first instance court for a new main hearing.

⁹¹ Article 102, paragraph 4 of the Criminal Procedure Act reads: "When pronouncing a prison sentence of 5 years in prison or more, detention against the defendant shall always be ordered."

After the conducted hearing (20 April and 4 May 2009), and after the evidence was presented (personal and material), the Supreme Court established different facts in comparison to the first instance court.

The Supreme Court did not accept witness testimonies of Goran Čerkez and Darko Grujić. "Having assessed the defence presented by the defendant M. H. and the witness testimony of G. Č., it has become perfectly clear that these testimonies did not differ only in details, but these testimonies essentially differed: it is correct that the witness G. Č. from the very beginning of the criminal proceedings testified that he was at one point attacked on the bridge, but the witness describes these attacks upon himself with so many "additional details" that it brings into serious doubt the credibility of his entire testimony".⁹²

The Supreme Court accepted the witness testimonies of Svetozar Šarac, Duško Mrkić and Nebojša Jasnić who testified that they did not see any of the captured reservists attacking anyone. The Court found unacceptable the general and unequal approach to the assessment of presented evidence by the first instance court: "while assessing the testimonies ... of the aforementioned witnesses (Svetozar Šarac, Duško Mrkić and Nebojša Jasnić), the Court particularly stressed that their testimonies were assessed "more carefully" due to the fact that their testimonies varied "in many details" and, besides, those witnesses "consider themselves to be the injured parties, thus it is only logical that they are interested in the outcome of this criminal proceedings".⁹³ The Court did not accept reasons provided by the first instance court that the aforementioned witnesses, because of the darkness, attack on the city and an attempted escape, did not notice the attack on Goran Čerkez. Moreover, the Supreme Court deems that the darkness and the attack on the city could have influenced other witnesses, direct eyewitnesses of the event, who were heard during the first instance trial, which the first instance court did not deem relevant when assessing these witness testimonies.

Apart from the erroneously established facts regarding the assessment of personal evidence, the Supreme Court established that the first instance court erroneously assessed material evidence as well. For the Supreme Court "there is no doubt that the defendant M. H. on 21 September 1991, around 21.00 hours, in K. as a member of the special unit of the Police Administration ... (hereinafter: the PA), upon receiving the task that he and his group should guard and bring to the PA premises a group of soldiers who had surrendered their weapons, having arrived to the bridge over the river K. in R., opened fire at the soldiers from a heavy machine gun of "Ultimax" brand, whereby as a result of numerous gunshot perforated wounds to the head, body and limbs, thirteen enemy soldiers - reservists were killed, while D. M. and S. Š. sustained serious and life-threatening injured but thanks to medical intervention managed to survive".⁹⁴

⁹² *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 10, section 7 and page 11, section 1.*

⁹³ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 11, section 8.*

⁹⁴ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 13, section 5.*

The Supreme Court did not accept defence by the defendant Mihajlo Hrastov presented at the hearing before that Court. "This modification of the testimony (of the defence) by the defendant M. H. resembles the witness testimonies of G. Č. and D. G. which they gave at the hearing before the Supreme Court as the second instance court".⁹⁵ "From such witness testimonies of G. Č. and D. G. and the modified defence of the defendant M. H. it has become evident that this is their attempt to harmonise the testimonies and, in any way they can, assist the defendant H., whereby they only additionally brought into question the former thesis of the defence that the defendant had acted in self-defence, because they now deviate from this thesis".⁹⁶

"The Supreme Court established that it was precisely the defendant M. H. who shot at the enemy soldiers from a heavy machine gun of "Ultimax" brand, thus killing thirteen of them and inflicting serious physical injuries on two of them, on the basis of the confession by the defendant M. H. (testimony provided at the hearing before the Karlovac County Court), when he testified: "Then I started shooting from the heavy machine gun of "Ultimax" brand call. 5.56 mm, with a drum, loaded with one hundred bullets and I shot in bursts because it is not possible to fire individual shots, and it was loaded with the so-called NATO ammunition with much better power of penetration... after I fired all one hundred bullets and after members of the so-called JNA fell to the ground ...".⁹⁷

Apart from material evidence, the Supreme Court assessed the witness testimonies of Goran Čerkez and Darko Grujić: "... who explicitly testified: "The defendant M. H., in order to save my life, started shooting at those reservists from the "Ultimax" using burst fire, so that the reservists fell to the ground somewhere near the end of the bridge" (G. Č. - sheet 154 of the case file), and: "... at that moment the defendant M. H. started shooting at the reservists from the "Ultimax" who started to fall to the ground a little bit further away from the beginning of the bridge looking towards M." (D. G. - sheet 156 of the case file)"⁹⁸. Therefore, for the Supreme Court as the second instance court, there is no doubt that the defendant shot at the soldiers from the "Ultimax" heavy machine gun.

From the analysis of testimonies provided by expert witnesses of forensics and of ballistics profession, the Supreme Court concluded "that the defendant M. H. *temporae criminis* was not attacked by the reservists neither "semi-circular" nor "formation-wise" - as erroneously established by the first instance court on page 27, section 1 of the challenged verdict".⁹⁹ Likewise, the Supreme Court "deems that the reservists did not

⁹⁵ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 14, section 5.*

⁹⁶ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 15, section 4.*

⁹⁷ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 15, section 3.*

⁹⁸ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 16, section 2.*

⁹⁹ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 17, section 6, line 3-5.*

head towards the defendant M. H. ... which means that there was no "imminent" unlawful attack which would give the right to the defendant M. H. for self-defence against such an attack".¹⁰⁰ The Supreme Court concluded that there was no attack against the witness Goran Čerkez and bases its conclusion on the changes of witness testimonies about that attack by Goran Čerkez and Darko Grujić. Besides, witnesses Svetozar Šarac, Branko Mađarac, Duško Mrkić and Nebojša Jasnić, the survived prisoners from the bridge, testified that they did not see any resistance on the part of the prisoners. The Supreme Court gave faith to these witness testimonies.

From the testimony of the forensic expert witness, the Supreme Court established the manner in which survived witnesses Svetozar Šarac and Duško Mrkić sustained their injuries.

The quoted verdict explained the decision of the Supreme Court regarding the violation of the international law rules, which constitutes a precondition for the commission of a criminal act referred to in Article 124, paragraphs 1 and 2 of the OKZRH. The Supreme Court invoked the practice of the International Criminal Court for the former Yugoslavia (hereinafter: the ICTY) "... that the armed conflict exists where there is a long-term armed violence between the Government forces and organised armed groups, or between such groups within one state" (the prosecutor /T.-IT-94-1-AR72 of 2 November 1995)".¹⁰¹ Moreover, armed conflict on the territory of one state regularly represents an internal conflict. In order for a perpetrator of the criminal act referred to in Article 124, paragraphs 1 and 2 of the OKZRH to perform this act, he must act towards the enemy who had unconditionally surrendered".¹⁰² The Supreme Court based its conclusion that the reservists had unconditionally surrendered and that their long and short weapons had been taken away on the Mekušje side before crossing the bridge over the Korana River, on the witness testimonies of Svetozar Šarac, Duško Mrkić, Branko Mađarac, Nebojša Jasnić and Josip Ribar.

Regarding the status of war prisoners, the Supreme Court quoted the ICTY practice: "in the ICTY practice, a person belonging to the other side "shall be considered a war prisoner from the moment they were captured by the enemy. In case there are doubts about one's status, the presumption of status of a war prisoner applies as long as the competent court body decides about the status of the enemy".¹⁰³

¹⁰⁰ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 19, section 2.*

¹⁰¹ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 21, section 6, line 3-5.*

¹⁰² *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 21, section 7, line 3-8 and page 22, section 1.*

¹⁰³ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 22, section 5 and page 23, section 1.*

The Supreme Court concluded that the defendant Mihajlo Hrastov committed a criminal act under Article 124, paragraphs 1 and 2 of the OKZRH with premeditation. At the time of commission of the act he was accountable and aware of unlawfulness of his actions. However, the Court also accepted the finding and opinion of the expert witness psychiatrist that at the critical period the defendant was significantly less accountable.

While deciding on the extenuating and aggravating circumstances, the Supreme Court assessed a string of extenuating circumstances on the part of the defendant. Regarding the aggravating circumstances, the Supreme Court assessed on the part of the defendant "a serious consequence of the committed criminal act, i.e. the death of thirteen persons and serious injuring of two persons - which consequence significantly exceeds the legal qualification referred to in paragraph 2 of Article 124 of the OKZRH ".¹⁰⁴

Trial against Branimir Glavaš, Ivica Krnjak, Gordana Getoš Magdić, Dino Kontić, Tihomir Valentić and Zdravko Dragić, indicted for a war crime against civilians¹⁰⁵

Zagreb County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendants: Branimir Glavaš, Ivica Krnjak, Gordana Getoš Magdić, Dino Kontić, Tihomir Valentić and Zdravko Dragić

War Crimes Council: judge Željko Horvatović, Council President, judges Rajka Tomerlin Almer and Sonja Brešković Balent, Council members, and judge Mirko Klinžić, additional Council Member

Prosecution: Jasmina Dolmagić, Zagreb County Deputy State's Attorney and Miroslav Kraljević, Osijek County Deputy State's Attorney (temporarily referred to the Zagreb ŽDO by a decision from the Chief State Attorney)

Defence: lawyers Dražen Matijević, Ante Madunić and Veljko Miljević representing the defendant Glavaš; lawyers Domagoj Rešetar and Zoran Stjepanović representing the defendant Krnjak; lawyers Antun Babić and Tajana Babić representing the defendant Getoš-Magdić; lawyer Radan Kovač representing the defendant Kontić; lawyer Boris Vrdoljak representing the defendant Valentić; and lawyer Dragutin Gajski representing the defendant Dragić

Opinion

This criminal proceeding will be remembered by the exertion of particularly severe pressure on the witnesses, the belated response of prosecuting bodies, disrespect for the independence of judiciary – the pillar of any law-based state, performed by the highest legislative body in the country.

On 8 May 2009, the first-instance verdict was pronounced wherein the defendants were found guilty of committing a war crime against civilians in Osijek in 1991. It was

¹⁰⁴ *The verdict of the Supreme Court No. I-Kž-738/07 of 4 May 2009, page 25, section 2, line 2-3.*

¹⁰⁵ *Jelena Đokić Jović monitored this trial and reported thereof.*

established in the first-instance verdict that the defendants violated the international law rules in time of war because each defendant, depending on his/her function, ordered i.e. directly apprehended, tortured and killed civilians, whereby they performed the aforementioned unlawful acts with the purpose of intimidation and retaliation, while almost all victims were of Serb ethnicity.¹⁰⁶

Branimir Glavaš is the first MP who was charged and convicted of a war crime. For full 17 years he performed the highest state and military functions, he was a war commander of Osijek, an MP, former County Prefect and an associate of President Tuđman, but also of the former HDZ President and the former Prime Minister Ivo Sanader, until they parted their ways several years ago. His political influence was also evident during the criminal proceeding.

While other defendants are awaiting the appellate procedure before the Supreme Court in detention,¹⁰⁷ the 1st defendant Glavaš, having abused the institute of dual citizenship, avoids being deprived of liberty after, as stated earlier in the text, in the first instance decision he was pronounced guilty and received a prison sentence.¹⁰⁸

¹⁰⁶ *The 1st defendant Branimir Glavaš was sentenced to 5 (five) years in prison for committing the criminal act referred to in count (1) of the verdict, which he committed by failing to take any action. He was also sentenced to 8 (eight) years in prison for committing the criminal act referred to in count (2) of the verdict. Therefore, by applying the provisions of Article 60 of the KZRH, he received a joint prison sentence in the duration of 10 (ten) years.*

In respect of the criminal act referred to in count (2) of the verdict, other defendants received the following prison sentences: the 2nd defendant Ivica Krnjak 8 (eight) years; the 3rd defendant Gordana Getoš-Magdić 7 (seven) years, and the 5th defendant Dino Kontić, the 6th defendant Tihomir Valentić and the 7th defendant Zdravko Dragić 5 (five) years each.

The Court altered and aligned the facts pursuant to the evidence procedure results, so that it left out the non-proven incriminations from the perpetuated (extended) criminal offence (the 1st defendant Glavaš was charged with the killing of Đorđe Petković, while the 1st defendant and other defendants were charged with the killing of Jovan Grubić).

The Court excluded the incrimination under count 2(a) of the indictment (the killing of Đorđe Petković) from the factual description of the case. In respect of other incriminating events that the defendants were, for technical reasons, charged with under two counts of the indictment – the killing of Branko Lovrić, Alija Šabanović, Milutin Kutlić, Svetislav Vukajlović, Bogdan Počuča, Jane Doe and attempted murder of Radoslav Ratković – since this was one event in which all defendants were involved, the Court merged the facts referred to in counts 2 and 3 of the indictment.

¹⁰⁷ *The provision of Article 102, paragraph 4 of the ZKP lays down obligatory detention when pronouncing a prison sentence of five years or more.*

¹⁰⁸ *The defendant Glavaš was not present at the pronouncement of the first-instance verdict by the Zagreb County Court. In a decision reached by the Mandate-Immunity Committee of the Croatian Parliament, his immunity from detention was stripped only three days after the verdict's pronouncement. This gave him enough time to leave the country in no rush and go to BiH, the*

The Appellate Panel of the Court of Bosnia and Herzegovina dismissed the appeal lodged by Croatia against the decision reached by the first instance Council of that same Court in which the request for extradition of the defendant Branimir Glavaš was rejected.¹⁰⁹

The principal responsibility for Glavaš' escape from justice undoubtedly lies with the Croatian Parliament. Having violated the principle of the rule of law, as well as of the division of powers, the Croatian Parliament based its decision on, in our opinion, erroneous interpretation of the Croatian Constitution, whereby it rendered it impossible for the judicial bodies to independently and impartially decide on ordering detention against Branimir Glavaš. As a result, since 11 January 2008 (when his mandate as an MP was established at the inaugural session of the Croatian Parliament) he was not under detention.

By passing such a decision, the Croatian Parliament made a mockery out of the judiciary, the independence of which is considered to be imperative for each civilized, modern, democratic and, above all else, law-based state, based on the protection and respect of human rights and fundamental freedoms.¹¹⁰

The Glavaš case also put into focus the issue of impossibility to extradite one's own citizens between the countries that emerged following the disintegration of the former SFRJ, who increasingly abuse dual citizenships for the purpose of avoiding criminal responsibility for severe criminal acts of war crime and organized crime. Namely, due to the existing constitutional prohibition of extradition, the Republic of Croatia is not in a

citizenship of which he managed to obtain in December 2008. Article 6 of the Citizenship Act regulates the acquiring of Bosnian-Herzegovinian citizenship by origin. Relevant for acquiring the BiH citizenship is that both parents at the time of a child's birth were BiH citizens regardless of the place where the child was born.

¹⁰⁹ *Initially, the BiH Court considered the Croatian request for extraditing the defendant Glavaš in June and rejected it at the time. The Appellate Council confirmed on 26 October that Glavaš could not be extradited because it was proven beyond doubt that he was a BiH citizen with permanent residence in Ljubuški. The BiH Criminal Procedure Act prohibits extradition of its own citizens.*

¹¹⁰ *The 1st defendant Glavaš went on hunger strike on 8 November 2007 which he ended after his detention order was cancelled. According to the opinion of the medical expert team, he was competent to stand trial. The detention against him was vacated following the decision by the Extra-trial Chamber of the Zagreb County Court on 11 January 2008. Previously, the defendant was granted parliamentary immunity after his parliamentary mandate had been established at the constitutional session of the Croatian Parliament pursuant to the provisions of Article 75, paragraphs 1 and 3 of the Constitution of the Republic of Croatia, and the provisions of Article 23 to 28 of the Rules of Procedure of the Croatian Parliament. The Croatian Parliament decided by a majority vote to withhold the approval for detention of MP Glavaš during the time of his parliamentary mandate. On 17 January 2008, the Council of the Supreme Court dismissed the appeal of the State Attorney lodged against the decision of the Zagreb County Court of 11 January 2008, so the decision on the vacation of detention became legally valid.*

position to extradite its own citizens, at least not prior to amending the Constitution and joining the EU, i.e. concluding bilateral agreements on extradition with other countries. The proposed constitutional amendments that the Government of the RC forwarded to the Parliament maintained general prohibition of extradition as a characteristic of citizenship, but extradition is permitted in exceptional cases when being requested „in compliance with an international agreement or legal system of the EU“.¹¹¹

In this criminal case, two investigations were conducted, one before the Osijek County Court and the other before the Zagreb County Court, for liquidation of civilians on the Drava river bank and for apprehensions and abuse of civilians in the premises of the National Defence Secretariat.

On 30 September 2008, the Zagreb ŽDO forwarded to the Court a new, combined indictment No. K-DO-105/06 against the 1st defendant Glavaš, the 2nd defendant Krnjak, the 3rd defendant Getoš Magdić, the 5th defendant Kontić, the 6th defendant Valentić and the 7th defendant Dragić.¹¹²

The indictment was read at the main hearing held on 4 November 2008 which started anew.¹¹³

The criminal proceeding, which is characterized by the long-lasting evidence procedure, was conducted correctly procedure-wise. Following the belated pre-investigation

¹¹¹ Article 9, paragraph 2 of the Constitution of the Republic of Croatia stipulates that no Croatian citizen shall be exiled from the Republic of Croatia, deprived of citizenship, or extradited to another state.

¹¹² The modified indictment also charged the 1st defendant on two counts: as a person who issued crime orders and a person responsible for failing to prevent the crimes. He was charged with failing to take measures to prevent unlawful actions carried out by the members of the unit under his command, the so-called „Guard Troop“, „Branimir's Osijek Battalion“ etc. against civilians, primarily of Serb ethnicity. The defendant was also charged with giving orders to unlawfully apprehend, detain, abuse and kill civilians.

In the modified and combined indictment, the 1st defendant was no longer charged with personal participation in the abuse of two unidentified civilians detained in one of the SNO garages. Likewise, he was no longer charged with the abuse of Smilja, Rajko and Snežana Berić in the SNO premises on 6 September 1991.

In the modified and combined indictment, the unidentified SUS members were no longer charged with the apprehension and killing of Petar Ladnjuk, Milenko Stanar and an unidentified male person.

¹¹³ The main hearing started anew on 5 November 2007 after the replacement of the additional Council member, and again on 4 November 2008 following the adjournment which lasted longer than two months. On 14 November 2008, after only five court sessions, the evidence procedure of the reinstated trial reached the phase in which the evidence procedure in the previous trial was on 7 July 2008.

activities¹¹⁴, the first so-called Zagreb investigation commenced almost three years ago. A total of 97 witnesses were heard during the evidence procedure at the main hearing alone, while more than 120 court hearings were conducted.

It is worth pointing out that establishing the facts which the Court deemed important for proper adjudication was exceptionally difficult, primarily because of inadequate reaction by the state bodies at the time when the killings were taking place, as a result of which only few actual (the so-called material) pieces of evidence remained¹¹⁵, and then also because of belatedly initiated activities by the criminal prosecution bodies.¹¹⁶

Precisely because of that, the presentation of evidence was based on verbal testimonies. Therefore, it comes as no surprise that pressures exerted against the witnesses during the criminal proceeding were particularly harsh.¹¹⁷ The most substantiated and the most

¹¹⁴ *An extensive crime investigation concerning the suffering of Serb civilians in Osijek during 1991 and 1992, which resulted with the lodging of corresponding criminal charges, was conducted by Vladimir Faber. For that purpose, he was in 2005 appointed the Head of the Osijek-Baranja Police Administration.*

¹¹⁵ *The on-site inspection minutes that was written after the killing of Čedomir Vuković in the SNO yard contains a series of omissions and false statements. The rifle that the injured person allegedly had in his possession was not seized. The investigating judge did not seize the weapon from which Čedomir Vučković was shot from the crime scene and did not seize the casings that had to be found after the shooting. He determined several gun-shot perforating head wounds on the corpse although no gun-shot perforating head wounds were found on the injured person. The investigating judge Mladen Filipović failed to order the testing by paraffin gloves of persons who would qualify as suspects of shooting at the injured person. He ordered only an external examination of the gun-shot perforating wounds on the body.*

¹¹⁶ *The criminal proceedings were initiated in July 2005, i.e. fourteen years after the crimes took place. To our knowledge, no action had been taken until then in terms of initiating investigation procedure. The word about the crimes was out in the public thanks to journalist Drago Hedl and the public statements provided by the persons who participated in the unlawful acts themselves. At the time when serious pre-investigation and investigation actions were initiated, the 1st defendant was a member of the Croatian Parliament, but he was also a dissident member of his original political party (the ruling party HDZ). From the very beginning of the criminal proceedings he based his defence in the public, and later before the court, on the claim that the case against him was politically staged. Besides enjoying parliamentary immunity, political power and influence on local media – all of which he was using in his defence – he also violated detention regulations, without any sanctions, by recording a pre-election video clip within the detention premises.*

¹¹⁷ *The most obvious example of breaching the Criminal Procedure Act was publishing secret testimonies, i.e. testimonies provided at closed trials. In the aforementioned cases, not only the decision of the War Crimes Council of the Zagreb County Court was violated, but disrespect to the court was also displayed. By publishing only one part of the testimony or by paraphrasing it, the testimony is made available to the public. With such actions, the Council's decision is ignored, the self-will and disrespect of the positive legislation of the Republic of Croatia is displayed which provides basis for the Council's decision on excluding public from the trial.*

conclusive pieces of evidence came from protected witnesses and the witnesses who requested the trial to be closed for public.

We have already emphasised that the key dispute was a direct intervention by the Croatian Parliament in the first-instance proceedings. Having passed a political decision on whether the 1st defendant in the criminal proceeding for a war crime should be detained or not, the Croatian Parliament did not leave that decision to the judiciary. Thereby, witnesses were sent a very clear message that the 1st defendant has strong, for them threatening, political power to influence the process and that there is no sense to get exposed by testifying.¹¹⁸

Furthermore, based on a decision by the Croatian Constitutional Court, four defendants were released from detention and, while invoking that decision, the Zagreb County Court also released the remaining two defendants from detention a day later.

Since the beginning of the main hearing on 15 October 2007, we have noticed several situations when pressure was exerted against the witnesses. Several witnesses testified that they were exposed to threats, some of them requested protection and there were situations in which they were not protected from the pressure exerted by the defence counsels, but also by the defendants.¹¹⁹

The Council President, Judge Željko Horvatić, conducted the proceedings in compliance with the law and taking into account victims' dignity. The Court applied the provisions of the ZKP on a special manner of participation and questioning of protected

Indirectly, one influences the witness concerned and other witnesses who are expected to provide their testimonies.

Considering that giving out information which was presented at the main hearing that was previously closed for public qualifies as a criminal offence for which a prison sentence from three months to three years is stipulated (Article 351), the State Attorney's Office reacted within their powers. Lawyer Krešimir Krsnik, the defence counsel of the 3rd defendant, received a final suspended prison sentence for revealing a testimony.

¹¹⁸ *Legal arguments of the Parliament's decision can rest on a fact that this was a court proceeding that was at the main hearing phase and for which the Croatian Parliament had already issued a decision to strip Glavaš' immunity; it was stated in the decision's statement of reasons that „the defendant should be given a possibility to defend himself at large because this could not have any influence on the outcome of the proceedings“; the issue of interpreting Article 75, paragraph 2 of the Constitution of the Republic of Croatia pertaining to the application of the institute of parliamentary immunity, i.e. Article 75, paragraph 3 of the Constitution and the alignment of the Rules of Procedure of the Croatian Parliament with the mentioned Articles.*

¹¹⁹ *Lawyer Ante Madunić, the defence counsel of the 1st defendant Glavaš, took photographs of witnesses using a mobile phone during the main hearing sessions held from 13 to 15 February 2008. The 2nd defendant tried to provide the witness Vlado Frketić with a transcript from the main hearing so that Frketić would align his testimony with the testimonies of the witnesses who had already been heard and which were contained in the offered transcript.*

witnesses in the proceedings, the provisions of the ICTY Rules of Procedure and Evidence with its amendments and the provisions of the Act on Application of the ICTY Statute and Prosecution of Criminal Offences against International War and Humanitarian Law. The Court also used international legal assistance when presenting evidence by hearing witnesses in Serbia.

The Court undisputedly established that the defendant Glavaš, despite Nikola Jaman being the formal commander, had the actual commanding powers in relation to the so-called Guard Troop.¹²⁰ The action against the village of Tenjski Antunovac is a clear example that the 1st defendant had effective commanding powers in relation to the so-called Guard Troop, i.e. that even before he formally entered the military hierarchy on 2 November 1991, he already had commander's prerogatives in relation to the aforementioned unit.¹²¹

Apart from having actual commanding powers over the so-called Guard Troop, the 1st defendant also had actual commanding powers in relation to a secret group which formed a part of the reconnaissance-and-diversion unit of the Osijek Operational Zone¹²². Thus, there was a dual chain of command in the SUS, one formal, which went vertically from the direct commander of this unit, the 2nd defendant Krnjak to his superior officer, commander of the Operational Zone Karl Gorinšek, and the other through the 1st defendant Glavaš who actually issued orders to the members of the secret group within this unit, despite the fact that he did not have formal commanding powers in relation to the reconnaissance-and-diversion unit, which was established much before its formal organization.¹²³

¹²⁰ *The basic idea of the evidence procedure was aimed at the defence/denial of the allegations contained in the indictment that the 1st defendant was commander of the so-called Guard Troop. The prosecution attempted to prove that, despite the presented material evidence wherein Nikola Jaman was mentioned as formal commander, the 1st defendant was commanding over the aforementioned troop members in key military actions, although he did not belong to the regular chain of command. This, of course, relates to the period before 7 December 1991 when the 1st defendant was appointed formal commander of defence of Osijek.*

¹²¹ *The Verdict No. X-K-rz-1/07, pages 56 and 57.*

¹²² *The indictment charged the 2nd defendant that, as commander of a special reconnaissance-and-diversion unit of the Osijek Operational Zone, later officially named the Independent USKOK Company (SUS), during November and December 1991, accepted, participated and conveyed the orders issued by the 1st defendant. These orders pertained to unlawful capturing, detaining, abusing and killing of civilians and they were assigned to subordinate members of the secret group formed for that purpose. The defence presented as the key argument the oath taken by the SUS members on the occasion of the SUS formal establishment in February 1992, meaning after the incriminating period. However, some witnesses proposed by the prosecution testified that they had joined the SUS already in October/November, some even earlier in 1991 – at the time when, according to the statements by the defence, the SUS did not exist.*

¹²³ *The verdict No. X-K-rz-1/07, pages 62 and 67.*

Likewise, it is worth pointing out that the court decision was also based on the testimonies of the 3rd defendant Gordana Getoš Magdić and the 7th defendant Zdravko Dragić provided during the pre-investigation stage and during the investigation procedure, for which the Court established that they had been obtained in a legal manner (legal evidence). The decision was upheld by the Supreme Court.¹²⁴

We are of the opinion that the pronounced prison sentences in relation to all defendants are too low and that such sentences will not achieve the general purpose of stipulating criminal sanctions (Article 4, paragraph 2 of the OKZRH), nor will such low sentences achieve the purpose of punishment stipulated by Article 31 of the OKZRH.

Namely, although having analyzed criminal responsibility of the defendants, the first-instance court established that all defendants were accountable at the time of committing the criminal act and that they acted with direct premeditation, the high level of guilt of all defendants was insufficiently reflected in the pronounced sentences. Even the motives from which the criminal act was committed did not influence the pronouncement of longer prison sentences.

Three defendants received the minimum sentences stipulated for this criminal act.¹²⁵

On the other hand, when considering objectively the severity of the act, the proportions and nature of consequences, it should be pointed out that the manner in which the victims were taken away from their homes, detained and abused in the garages of the National Defence Secretariat, i.e. in the basement premises of the house in Dubrovačka Street No. 30, and then (in the „Selotejp" case) with their hands tied and mouth covered with a scotch tape, they were taken away under cover of the night to the Drava river bank for

¹²⁴ *When presenting their defence at the main hearing, the 3rd defendant Gordana Getoš Magdić and the 7th defendant Zdravko Dragić denied the statements provided at the pre-investigation phase and during the investigation procedure by stating that police officers extorted their confessions by abusing and blackmailing them. Concerning the actions performed by the police officers when Gordana Getoš Magdić and Zdravko Dragić were interrogated, the Court heard all persons involved and established that the interrogation of the 3rd and the 7th defendant at the Osijek police station and before the Osijek investigating judge was conducted in a lawful manner. For that reason, with the decision of 26 March 2008, the Court rejected the proposal by the defendants and their defence counsels to exclude from the court file the transcripts on the interrogation of the 3rd defendant in the Osijek Police Administration of 20 October 2006 and before the investigating judge of the Osijek County Court of 21 October 2006 (sheet 7179) – as unlawful evidence. In its decision No. I Kž 376/08 of 30 April 2008, the Supreme Court upheld the Court's decision.*

¹²⁵ *The criminal act of a war crime against civilians that the defendants were charged with represents, when considering its features, one of the most severe criminal acts. This is also supported by the stipulated sentence (minimum five – maximum twenty years in prison). The sentence to 20 years in prison can only be pronounced for the most severe forms of criminal acts.*

execution, undoubtedly exceeds the usual circumstances and consequences of committing the criminal act of a war crime.¹²⁶

Taking into account the circumstances pertaining to the perpetrators' personalities outside the context of the act, the 1st defendant Glavaš is still a fugitive from justice and although the first-instance verdict found him criminally responsible for committing one of the most serious criminal acts, he still bears no legal consequences. On the contrary, the Croatian state still pays him a high salary, including the possibility of using the apartment in the centre of Zagreb and a compensation for separate life from his family, since the conditions for cessation of his MP mandate have not yet been created.

Re-opened trial against Dragan Roksanđić and Milan Korač, previously sentenced by a final verdict *in absentia* for a war crime against civilians¹²⁷

Sisak County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH, following the modification of the indictment armed rebellion pursuant to Article 236, paragraph 1 of the KZRH

Defendants: Dragan Roksanđić and Milan Korač

War Crimes Council: judge Melita Avedić, Council President, judges Ljubica Rendulić Holzer and Ljubica Balder, Council Members

Prosecution: Ivan Petkač, Sisak County Deputy State Attorney

Defence: lawyer Josipa Miffek Herak - defence counsel representing the 1st defendant and lawyer Dušanka Nenadović - defence counsel representing the 2nd defendant

Opinion

In May 2009, the War Crimes Council of the Sisak County Court, in the re-opened trial against the absent defendants Dragan Roksanđić and Milan Korač, after the Sisak ŽDO modified the indictment no longer charging the defendants with committing a war crime against civilians but with a criminal act of armed rebellion, reached a verdict which annulled the final verdict of the Sisak District Court No. K-

¹²⁶ *Brutality and ruthlessness was particularly evident in the abuse of the injured person Čedomir Vučković in the National Defence Secretariat's garage. According to the finding of the court-medicine expert witness, the cause of death of the mentioned injured person was poisoning with sulphuric acid. According to the testimony of the crown witness Krunoslav Fehir, the injured person was forced by Zoran Brekalo, a member of the so-called Guard Troop, to drink up the acid following the beatings that lasted for several hours. The fact that the injured person was dying in horrifying pains is also supported by the fact that he, while in agony, managed to break through the locked garage door where he had been captured, but immediately after that he died in the Secretariat's yard.*

¹²⁷ *Tino Bego monitored this trial and reported thereof.*

21/93 of 26 May 1993, in which both defendants were found guilty and sentenced to 20 years in prison. Also, pursuant to the General Amnesty Act, it dismissed charges.

The War Crimes Council of the Sisak County Court conducted in a correct manner the re-opened criminal proceedings, except for one omission of which we learned from Dušanka Nenadović – the court appointed defence counsel of the defendant Korač.

Namely, as was stated by the defence counsel, she did not receive a decision designating her as the court appointed defence counsel. She only received summons for the main hearing. Thus, she concluded that this was the case of mandatory defence representation.

But, given the fact that the indictment was later modified and charges were dismissed, no serious consequences were caused by the described omission.

Explanation

On 26 May 1993, the Sisak District Court reached a verdict No. K-21/93 wherein it found the absent defendants Roksandić and Korač guilty of committing a war crime against civilians under Article 120, paragraph 1 of the OKZRH. They were found guilty because, by acting in capacity of the Glina municipality secretary (the defendant Roksandić) and the Glina municipality Executive Board President (the defendant Korač), in agreement with the Glina municipality President Dušan Jović, during 1991 and 1992 in Glina, with the purpose of undermining and subverting a newly-established democratic society in Croatia, they formed a headquarters in the village of Šibine near Glina. There they planned and co-ordinated armed actions of unlawful chetnik units, issued the attack order on the Glina Police Station, issued orders to alienate movable property, to destroy movable and immovable property and farming facilities owned by the inhabitants of Croatian ethnicity, to deprive of liberty a larger number of Croatian ethnicity members, who were exposed to physical and mental harassment. As a result, Stjepan Šmičl, Ivan Palarić and Ivan Gregurić died of sustained injuries while captured. Each defendant was sentenced to 20 years in prison.

Since no appeal was lodged against the mentioned verdict, the verdict became final upon the deadline expiry for lodging a complaint.¹²⁸

This occurred despite the fact that the court appointed defence counsel was obliged to represent the defendant until the verdict becomes legally binding – therefore he was also obliged to lodge an appeal against the verdict.

On 4 March 2009, the Sisak ŽDO filed a request for reopening the criminal proceedings.

¹²⁸ Although we did not make an inspection of the case file, it is evident from the Request for the reopening of the criminal proceedings by the Sisak ŽDO No. KT-175/92 of 4 March 2009 and the Decision on the reopening of the trial by Extra-trial Chamber of the Sisak County Court No. Kv-54/09 of 9 March 2009 that the trial was concluded with the verdict of the Sisak District Court No. K-21/93 of 26 May 1993.

It reasoned its request with new facts and new evidence contained in the file of the Investigation Department of the Sisak County Court No. Kio-25/07 against the defendant Dušan Jović *at al.* for criminal acts of war crime against civilians and war crime against war prisoners, stating that the functions of secretary and president of the Glina Municipality Executive Board were not functions which would render possible the issuance of orders, which Roksandić and Korač were sentenced by the final verdict.

It was evident from the file No. Kio-25/07 that authorisations for issuing orders were under the competence of the defendant Dušan Jović, in the capacity of the War Presidency president and commander of the Regional Headquarters of the Banija and Kordun TO, and Stanko Divjakinja, Vlado Čupović and Marko Vrčelj who were TO and JNA leading men in Glina and who are currently under investigation. It is also evident from the collected evidence that the abovementioned persons belonged to the chain of command of the units, the members of which committed crimes in the Glina area.

It was pointed out that inspection of the Investigation Department of the Sisak County Court file No. Kio-27/02 represents new evidence. This file reveals that a total of 30 witnesses - camp detainees stated that Mile Paspalj, the then TO deputy commander for moral-political work was issuing orders for the events in prison. Not a single witness mentioned Dragan Roksandić and Milan Korač.

It was also mentioned in the request that certain actions which pursuant to the verdict legally qualify under a war crime against civilians do not even represent the characteristics of this act, but the characteristics of armed rebellion (the headquarters formation, planning and co-ordinating armed actions, ordering attack on the Glina Police Station).

With the Decision of the Sisak County Court's Extra-trial Chamber No. Kv-54/09 of 9 March 2009, the request for the reopening of criminal proceedings was accepted and the trial was reversed back to the main hearing stage.

In the re-opened trial, all previously exhibited evidence was read. The Sisak Deputy ŽDO stated that, until the hearing in a re-opened trial, no new facts or evidence were collected which would charge the defendants with the crime as indicted earlier (the indictment No. KT-175/92 of 14 April 1993). He partially altered the factual description, legal description and legal qualification of the offence in such a manner that he was charging the defendants with armed rebellion.

The Council then reached and pronounced a verdict that quashed the final verdict of the Sisak District Court No. K-21/93 of 26 May 1993 in its entirety and, pursuant to Article 353, item 6 of the Criminal Procedure Act, in respect of Article 2, paragraph 2 of the General Amnesty Act, it dismissed charges.

Trial against Dušan Zinajić indicted for a war crime against civilians¹²⁹

Vukovar County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Dušan Zinajić

War Crimes Council: judge Nikola Bešenski, Council President, judges Željko Marin and Milan Kojić, Council Members

Prosecution: Vlatko Miljković, Vukovar County Deputy State Attorney

Defence: lawyer Jasminka Mandić, court appointed defence counsel

Opinion

With the first-instance verdict reached on 12 June 2009, the War Crimes Council of the Vukovar County Court sentenced the defendant Dušan Zinajić to 4 years in prison.

The indictment No. K-DO-5/06 of 29 December 2006 issued by the Vukovar ŽDO charged Dušan Zinajić that on 20 November 1991 in Vukovar, as a paramilitary unit member, after the occupation of Borovo Naselje, at the junction of Karl Marx Street and Borovo Road, in the area in front of the coffee bar "Lion" where members of the JNA and paramilitary units had brought and kept approximately one hundred detained civilians, they ordered a group of about 15 male persons to lie down next to each other, facing the ground, with their hands on the back of their heads. Among them there was also Tomislav Kovačić, whom the defendant approached from behind and fired a shot from a rifle at his head. However, at that moment Tomislav Kovačić moved his head, so that the bullet only scratched his skull, after which he was covered in blood, whereby the defendant caused Kovačić a light physical injury - a perforating wound to the skull, therefore, he inhumanely treated civilians by applying the measure of intimidation and terror, whereby he committed a war crime against civilians.

In the written verdict, the Court analysed the testimonies of heard witnesses. He accepted the testimonies of all heard witnesses, of the injured party Tomislav Kovačić and the findings and opinions of court medical experts.

The Court rejected to carry out a partial reconstruction of the event and it justified this decision by stating that: „a partial reconstruction of the event would only stall the proceedings; it practically would not result in any new facts and there is no need for that because the facts have been established with certainty and completely without a partial reconstruction of the event, ...¹³⁰“.

The Court rejected the suggestion for an exhibition of ballistic expertise evidence and reasoned it by stating: „... because this suggestion too was provided with the purpose to

¹²⁹ *Veselinka Kastratović monitored this trial and reported thereof.*

¹³⁰ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 20, section 2, lines 20-23.*

stall the proceedings and there was no need for that; and it is worth mentioning that neither the rifle was seized from the defendant nor a potential bullet, a casing used in shooting. Regarding the mentioned event when Kovačić was injured, no investigation or any related activity had been performed but, quite the opposite, Kovačić had to stay within the group of detainees, he was taken to Kombinat Borovo, to a shed in Dalj, then to the „Spens“ hall in Novi Sad and only after midnight he was released from the "Spens" hall to be taken by his friends who recognised him¹³¹.

The Court rejected the proposed evidence execution of hearing the witness Dragan Pantić and reasoned it by stating that „...when the hearing of Dragan Pantić was proposed, the defence immediately reacted by stating that the mentioned witness had no knowledge of the critical event“¹³².

The Court accepted certain parts of the defence presented by the defendant wherein „he stated, *inter alia*, that in September 1991 he became a TO member in Borovo Selo and received a "uniform" of olive-green colour which the former JNA was wearing then ... The defendant also did not deny that at the junction of the K. Marx Street and Industrijska Street, from which he was arriving, i.e. nearby the "Lion" coffee bar, present were many civilians who were being separated by JNA members "on various" places, and there were also civilians who were lying down "on their stomachs" facing the ground while some were placed to the side. He also did not deny that he had been at the mentioned place for an hour or two, that the persons concerned were detainees and that he got in contact with someone but this person was not Tomislav Kovačić. He confirmed that he had seen that Kovačić was wounded, but then a JNA member approached him and took away his rifle. He clarified that by saying that he, just like the others with uniforms and weapons, was walking around... The Court also accepted a part of the defence that the defendant, after he had been released, had gone to his flat and normally walked up the stairs reaching the fourth floor....“¹³³.

The Court „did not accept ‘the essence’ of the defendant's defence because it was provided with the purpose to avoid criminal responsibility and is contradictory to the witness testimonies of Đuro Pećkovski, Josip Blažević, Vladimir Kukavica, Đuro Vereš, Eduard Vajand and of the injured person Tomislav Kovačić. The Court did not accept the defendant's defence that he was not the one who shot Tomislav Kovačić, that he had not addressed the same and that his rifle had been all the time on his shoulder, i.e. he had not taken it off his shoulder. ... worth pointing out is the fact that the witness Đuro Pećkovski who was sitting approx. half a meter behind Kovačić, clearly and directly saw when the defendant Zinajić lowered the rifle's barrel from his skull and turned the barrel toward

¹³¹ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 20, section 2, line 25-28 and page 21, section 1, line 1-3.*

¹³² *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 21, section 1, line 5 and 6.*

¹³³ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 19, section 3, lines 1- 16.*

Tomislav Kovačić's head and said: „And you too, Kovačić“,....i.e. Pećkovski saw from immediate distance, clearly and undoubtedly, the act of the defendant firing at the injured person. Witness Josip Blažević had seen the defendant Zinajić holding the rifle from which firing smoke went into his face, and he turned immediately after he had heard the sound of shooting. It is a fact that he saw a soldier, who had until that moment weapon directed at him, taking away the weapon from Zinajić's hands.¹³⁴

The defence of the defendant Dušan Zinajić objected that there was no criminal act in the specific case because the defendant and the injured party were of the same ethnicity.

The Court reasoned it in the following manner: „... and the fact that the mentioned injured person was a Serb (his father was a Serb, and he indicated himself that he had declared himself as a Serb because he could not have been a Yugoslav), that his wife was a Serb, bears no importance to his status of a captured civilian. Namely, belonging to a nation bears no relevance to the status of a person in a specific situation¹³⁵.

Such attitude is in accordance with the provisions of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations on 29 November 1985¹³⁶.

The Court established that the defendant's actions represent a violation of the international law rules, of the provisions of Article 3, paragraph 2, items (a) and (c) of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and a violation of Article 51, paragraphs 2 and 6 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I).

The Court reasoned its decision by the following: „... the fact that the defendant approached the detained civilian Kovačić from behind and fired a shot in the direction of his head whereby the bullet grazed the skull of his head causing a vertex laceration, i.e. a

¹³⁴ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 19, section 4, lines 1- 17.*

¹³⁵ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 22, section 2, lines 14- 17.*

¹³⁶ *The Declaration lays down that the term "victims" means persons who, individually or collectively, have suffered harm, including physical and mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions, that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The Declaration also establishes that the provisions contained therein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability - from the book „Kriminologija“ written by Mladen Singer, published by Nakladni zavod Globus, in Zagreb, 1994.*

(light) physical injury, qualifies as a violation against life and body but also as a violation of personal dignity of the mentioned injured person, because the same had to lie down "on his stomach" as a detainee. It is also a fact that the injured person was getting up in order to try to explain that he needed help for his father, and it was then that the defendant fired, but also it is a fact that the injured person was subjected to assault by the defendant¹³⁷.

The Court established that, at the time of the critical event, the injured party had the status of a detained civilian. It clarified its decision by stating that: „ ... it was indisputably proven that the injured party Kovačić before the defendant shot at him had the status of a detained civilian ... it is a fact that the injured party Kovačić left the shelter when a JNA member called for him and it is also a fact that he went out primarily to look for assistance for his father who could not move and who stayed in an improvised dispensary but, on the other side, JNA soldiers and soldiers adjoined to it ordered him to lie down in a group of at least 15 or so detainees who were already laying down, and it was certain that the injured person was in the status of a detained person for at least one hour before sustaining the injury and that on several occasions he attempted to get up and seek assistance¹³⁸.

The defendant's defence claimed that the indictment was “on a shaky ground”, that the criminal report was submitted fifteen years after the critical event by a natural person.

The Court did not accept this objection and we find this to be correct, by taking into consideration the provision of Article 172, paragraph 1 of the ZKP (OG 62/03)¹³⁹.

Furthermore, the defence was claiming that the criminal act of a war crime against civilians may be committed by a person who issues an order for systematic abuse, harassment or killing of civilians, and that the act that the defendant was charged with represents an individual act of a person under the influence of alcohol, and that it was not determined during the evidence procedure who gave orders to the detained persons to lie down in front of the "Lion" coffee bar.

We consider it true that the crime before the "Lion" coffee bar in Borovo Naselje had not been investigated. Namely, the witnesses heard during the evidence procedure provided testimonies stating that they were laying down at the mentioned place for several hours, provided testimonies about the conduct of Serb paramilitary unit members towards them,

¹³⁷ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 22, section 2, lines 2-12.*

¹³⁸ *The verdict of the Vukovar County Court No. 11/07 of 12 June 2009, page 22, section 2, lines 13- 24.*

¹³⁹ *Article 172, paragraph 1 of the Criminal Procedure Act reads: „Citizens shall report criminal offences subject to public prosecution. “*

the threats etc. However, the subject of this proceeding was a specific act performed by the defendant against the injured person.

Furthermore, the defence objected that the number of the Convention, the provisions of which were violated by the defendant's acts, was not specified.

The Court did not accept that objection, what we find justified on the basis of the Constitutional Court's Decision No. U-III-386/98 of 5 July 2000.¹⁴⁰

The Court pronounced a prison sentence against the defendant below the mandatory minimum sentence stipulated for a war crime against civilians.

The Court viewed as extenuating circumstances the fact that the defendant had no previous convictions, exemplary behaviour in court, the elapse of time from the event to the proceedings and that "the defendant did not contribute with his own actions to possible stalling of the proceedings"¹⁴¹ and that, at the time when the crime was committed, he had a reduced mental soundness.

However, when considering that it was established in the verdict that the defendant committed a criminal act with direct premeditation, that he was aware of his act and that he wanted it to be executed, it remains unclear which are particularly extenuating circumstances on the basis of which the purpose of punishing may be achieved even with a mitigated sentence¹⁴².

Repeated trial against Milan Atlija and Đorđe Jaramaz, indicted for a war crime against civilians¹⁴³

¹⁴⁰ *Decision of the Croatian Constitutional Court No. U-III-386/98 of 5 July 2000 stipulates that: „Since a war crime against civilians referred to in Article 120 of the OKZRH can only be committed by violating the international law rules, in the verdict which finds the defendant guilty of that criminal act, it is compulsory for the court to precisely stipulate which rules in particular were violated by the defendant“. However, since the court is familiar with laws and other regulations (iura novit curia), if the prosecution stipulates in the indictment the name of the convention but fails to provide its number, this does not prevent the court in concluding that this particular convention was the IV Geneva Convention.*

¹⁴¹ *The Verdict of the Vukovar County Court No. K-11/07 of 12 June 2009, page 22, section 5, line 3 and page 23, section 1, line 1.*

¹⁴² *Article 38, paragraph 1, item 2 of the OKZRH reads: „The Court can determine to the perpetrator a sentence below the threshold stipulated by law, or apply a mitigated type of sentence: ... 2) where it finds the existence of particularly extenuating circumstances, so that even with a mitigated sentence the purpose of punishing could be achieved.“*

¹⁴³ *Martina Klekar monitored this trial and reported thereof.*

Šibenik County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendants: Milan Atlija and Đorđe Jaramaz

War Crimes Council: judge Jadranka Biga - Milutin, Council president, judges Sanibor Vuletin and Ivo Vukelja, Council Members

Prosecution: Zvonko Ivić, Šibenik County Deputy State Attorney

Defence: lawyer Jadranka Sloković representing the 1st defendant, lawyer Zoran Petković representing the 2nd defendant

Opinion

On 7 May 2009, following the repeated trial, the verdict of the Šibenik County Court was published, which found Milan Atlija and Đorđe Jaramaz guilty. Milan Atlija received a not final joint prison sentence in the duration of 14 years, while Đorđe Jaramaz was sentenced to 10 years in prison.

The indictment of the Šibenik ŽDO was charging the defendants with a war crime against civilians pursuant to Article 120, paragraph 1 of the OKZRH (liquidation of an unidentified civilian in June 1992 in BiH, in the so-called Corridor area, while the defendant Atlija was also charged with planning, organising and ordering attacks on Croatian ethnicity citizens of Potkonje and Vrpolje, with the purpose of intimidating and terrorising with expelling as the consequence, as well as for abuse of Dragomir Grgić in the “militia station” in Knin). The defendant Atlija was also charged with a war crime against war prisoners pursuant to Article 122 of the OKZRH (inhuman treatment and abuse of detained Croatian MUP members).

In 2007, the Šibenik County Court reached a verdict that found the defendants guilty of a criminal act referred to in Article 120, paragraph 1 of the OKZRH (liquidation of an unidentified civilian). Each defendant was sentenced to 10 years in prison. The defendant Atlija was also found guilty of a criminal act under Article 122 of the OKZRH and sentenced to 3 years in prison. Therefore he received a joint prison sentence in the duration of 12 years. He was acquitted of charges of planning, organising and ordering attacks on Potkonje and Vrpolje causing the expulsion of Croatian ethnicity population.

Then in April 2008, the Supreme Court quashed the mentioned first-instance verdict due to erroneously and incompletely established facts relative to the criminal act referred to in Article 120, paragraph 1 of the OKZRH (liquidation of an unidentified civilian) and relative to the criminal act referred to in Article 120, paragraph 1 of the OKZRH (organising attacks on Potkonje and Vrpolje). In that part of the verdict, the Court reversed the case to the first-instance court for a retrial. Regarding the criminal act referred to in Article 122 of the OKZRH (abuse of detained MUP members), the first-instance verdict was modified, sentencing Atlija to 5 years in prison.

With the same verdict, the Supreme Court ordered the first-instance court to present in a repeated trial all the already exhibited evidence. Also, in relation to the criminal act referred to in Article 120, paragraph 1 of the OKZRH (liquidation of a civilian), the first-instance court should hear directly or indirectly by another court a possible injured person

Jasko (Halum) Gazdić in order to: establish whether this was the person who was mentioned, in the incriminating event as “an unidentified injured civilian”, i.e. whether this was the person who was killed according to the indictment in respect of the criminal act referred to in Article 120, paragraph 1 of the OKZRH (organising attacks on Potkonje and Vrpolje, abuse of Dragomir Grgić); with the presentation of further evidence to establish the position of Milan Atlija within the so-called SAO Krajina “militia”, his relation with Milan Martić and Milenko Zelenbaba; by hearing the witnesses who already gave their testimonies and, where necessary, by hearing new witnesses to establish the facts on his participation in the attacks on Potkonje and Vrpolje, on the unlawful depriving of civilians of their liberty, especially Dragomir Grgić, and to establish what exactly happened to him in the “militia station” in Knin.

In the repeated trial, the defendants were found guilty of the criminal act committed in the so-called Corridor and sentenced to 10 years in prison each. The defendant Atlija was acquitted of charges that he organised attacks on Vrpolje and Potkonje and abused Dragomir Grgić.

The Council established that the defendant Atlija hit the injured person Grgić in the Knin “militia” building. However, as was specified in the verdict’s statement of reasons, it is not possible to exclude that event from the entire factual description of the criminal act referred to in Article 120, paragraph 1 of the OKZRH, for which Atlija was acquitted of charges. Since the defendant Atlija was already sentenced to 5 years in prison by the final verdict in respect of the criminal act referred to in Article 122 of the OKZRH, he received a joint prison sentence in the duration of 14 years.

In the repeated trial, despite all efforts to do so, the Council failed to hear Jasko Gazdić neither directly nor indirectly by means of another court. Namely, the Council was searching for the mentioned person via Interpol and the Republic of Srpska’s Ministry of Justice. However, no results were obtained. Interpol informed the Court that Jasko Gazdić was a fugitive with unidentified residence address and that there was an ongoing criminal proceedings against him charging the same with a war crime. The Court did not give credibility to the testimony of Jasko Gazdić, provided earlier before the court in Belgrade, wherein he claimed that he was the injured person in the incriminating event at the so-called Corridor, but that he was not shot at. The Court valued that the mentioned testimony was provided with the purpose to assist the defendants.

Witness Pero Bajić, whose testimony was the basis for the convicting verdict in the first trial, was not heard again. It is unclear to us why the Council, despite the proposal by the defence, did not use the possibility of a video-link for hearing the witness who, for some reasons, was not in a position to attend the hearing.

The Council also rejected a proposal by the defence to obtain a drawing of the Vidaković’s family house with its immediate surrounding that was related to Pero Bajić’s witness testimony provided to the investigating judge. This testimony contains a statement that from that yard it was possible to see the road and the river where the body of unidentified male person was thrown on the critical event. Theoretically, such a

drawing could have served as a control evidence in respect of Bajić's testimony. The Court gave credibility to his testimony which could, in the end, give the Council a greater certainty to adjudicate correctly.

We find that the repeated trial was conducted in accordance with the ZKP. However, it remains unclear why the court rejected the proposal for obtaining the aforementioned drawing because obtaining this evidence could not affect the cost-effectiveness and efficiency of the trial.

However, it is up to the council to decide which evidence will be accepted and exhibited. The Council rejected numerous evidence proposals by reasoning that they were redundant and unnecessary for a correct adjudication. However, the Supreme Court quashed the previous verdict exactly due to incorrect and incomplete establishment of facts.

Repeated trial against Stojan Pavlović, Đuro Urukalo and Branko Berberović, indicted for a war crime against civilians¹⁴⁴

Osijek County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendants: Stojan Pavlović, Đuro Urukalo and Branko Berberović

War Crimes Council: judge Damir Krahulec, Council president, judges Drago Grubeša and Mario Kovač, Council Members

Prosecution: Dražen Križevac, Osijek County Deputy State's Attorney

Defence: lawyer Dubravko Marjanović representing the 1st defendant, lawyer Sibila Jagar, representing the 2nd defendant, lawyer Dubravka Pešo representing the 3rd defendant

Opinion

After the conducted repeated trial, the Osijek County Court pronounced a first-instance verdict on 7 July 2009 wherein **defendants Pavlović, Urukalo and Berberović were found guilty**. By applying the provisions on mitigating the sentence, the defendant Pavlović was sentenced to **3 years**, the defendant Urukalo to **2 years** and the defendant Berberović to **1 year and 6 months** in prison.

The Court ruled that the defendants Pavlović, Urukalo and Berberović committed a war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH in the period between August 1991 and the end of 1996 in the village of Popovac in Baranja area. The defendant Pavlović as a member of the Popovac Territorial Defence Headquarters and president of the Committee for Accommodating Refugees at the Popovac Local Board, the defendant Urukalo as a member of the Headquarters and head of the civilian protection, and the defendant Berberović as a member of the Territorial Defence, with the intention to make the Popovac village an ethnically clean Serb area, participated in the work of the Headquarters where decisions were executed which

¹⁴⁴ *Vlatka Kuić monitored this trial and reported thereof.*

exposed civilian population to physical and mental abuse, unlawful arrests and apprehensions, interrogation, beating and torture, forced labour, holding hostages and various other forms of intimidation, as the result of which the majority of non-Serb Popovac population had to abandon their homes and cross over to the free part of the Republic of Croatia.

The first trial was conducted in 2004.¹⁴⁵ It was conducted against four defendants. Following the change of legal qualification of the act into criminal act of armed rebellion, the verdict rejected the indictment in relation to the 4th defendant Milan Šarić. The 1st defendant Stojan Pavlović was acquitted of charges in relation to two counts of the indictment and was pronounced guilty in relation to the remaining counts. Thus, he was sentenced to 2 years and 6 months in prison. The 2nd defendant Đuro Urukalo received 2 years in prison for a war crime against civilians while he received 6 months for unlawful possession of weapons and explosive devices. Thus, he received a joint prison sentence in the duration of 2 years and 2 months. The 3rd defendant Branko Berberović received a prison sentence in duration of 1 year and 6 months for the committed war crime against civilians.

On 18 March 2008, the Supreme Court altered the first-instance verdict in the sentencing section **in relation to the defendant Urukalo**. It sentenced him to **6 months in prison for the criminal act of unlawful possession of weapons and explosive devices**.

In the remaining (convicting and acquitting) verdict sections, the first-instance court's verdict was quashed and the case was reversed to the first-instance court for a retrial, due to essential violation of the criminal procedure provisions because, in respect of the same act, the first-instance court passed both the convicting and the acquitting verdict.¹⁴⁶

In the repeated trial, the evidence was not presented once again but, with the consent of the parties, their reading was simply stated. Since we did not monitor the first trial (in 2004) and, considering what was stated in the previous sentence, we have no knowledge whether the injured persons had been advised in the first trial about the possibility of lodging a proprietary claim and what had been their response with regard to this possibility. But, in the enacting terms of the verdict of 7 July 2009 it was not decided on (possible) proprietary claims.

Moreover, in the statement of reasons of the verdict, the Court failed to clarify the form of defendants' guilt in a satisfactory manner. It was only stated that the defendants consciously performed actions and activities directed towards violating the provisions of the Geneva Conventions. Namely, bearing in mind that a war crime against civilians can only be committed with intention (direct or indirect) and that the degree of criminal

¹⁴⁵ *We did not monitor that trial.*

¹⁴⁶ *The Supreme Court reasoned that in the enacting terms of the verdict it is not legally possible that a verdict simultaneously convicts and acquits the defendant for the same factual description of the offence, because all activities of one continued offence represent one single offence and one single event. A single offence must be ruled in its entirety.*

responsibility is a circumstance taken into account when determining a sentence, we are of the opinion that more attention should be paid to the circumstances which affect the severity of sentence. Particularly because in determining the sentence, the provisions on reducing the sentence were applied because of the particularly extenuating circumstances. The Court acknowledged for the defendants Urukalo and Berberović, *inter alia*, their social situation and their unemployment status as extenuating circumstances. However, despite that, the Court obliged them to pay the expenses of the criminal proceedings in the lump sum of HRK 3 000. The defendant Pavlović was obliged to pay the same amount although his material conditions are much better than those of the aforementioned defendants.

Re-opened trial against Luka Ponorac, Luka Nikodinović, Miodrag Simeunović and Rajko Dreković, previously sentenced in absentia for a war crime against civilians¹⁴⁷

Požega County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH, following the indictment modification into a criminal act of war rebellion, referred to in Article 236, paragraph 1 of the KZRH

Defendant: Luka Ponorac, Luka Nikodinović, Miodrag Simeunović and Rajko Dreković

War Crimes Council: judge Predrag Dragičević, Council President, judges Žarko Kralj and Jasna Zubčić, Council Members

Prosecution: Krešimir Babić, Požega County Deputy State's Attorney

Defence: lawyer Karlo Gregurić, court appointed defence counsel

Opinion

After the re-opened trial, the Požega County Court reached a judgment on 13 July 2009 by which, pursuant to the General Amnesty Act, it terminated the criminal proceedings against Luka Ponorac, Luka Nikodinović, Miodrag Simeunović and Rajko Dreković (they were sentenced *in absentia* by a final 1993 verdict to 8 years in prison each).

In 1993, the Požega District Public Prosecution indicted Luka Ponorac, Luka Nikodinović, Miodrag Simeunović and Rajko Dreković for a war crime against civilians, under Article 120, paragraph 1 of the OKZRH.

They were charged that in August 1991, as Serb-chetnik formations' members, they came armed to the warehouse of the shop where Željko Makarun was working and they seized various goods from him. Then, under the threat of weapons, they took him to Bučje where he was detained for 42 days. There, just as other detainees, he was physically and mentally abused, starved and beaten and, after 42 days of detention, exchanged.

¹⁴⁷ *Vlatka Kuić monitored this trial and reported thereof.*

It is evident from the testimony of the injured person Makarun specified in the indictment's statement of reasons that the defendants were the persons who took him by force to the mentioned detention camp where he was questioned on several occasions. However, it was not specified which person was questioning and physically abusing him.

Further in the text of the indictment's statement of reasons, the prosecution concluded that the defendants abducted the injured party Makarun and took him to Bučje. The defendants were the ones who physically and mentally abused Makarun together with several other unidentified persons,.

During the first trial, the injured person testified that he was blindfolded when he was being questioned in Bučje. By considering the raised questions, he concluded that he was interrogated by the persons who knew him and that the defendants could have physically attacked and abused him, as well.

The Požega District Court conducted the trial and, in April 1993, reached a verdict wherein the defendants were found guilty *in absentia* and each defendant was sentenced to 8 years in prison.

The first-instance verdict was upheld in July 1993 by the Supreme Court's verdict.

Both in the indictment and in the verdict the act was legally qualified as a war crime against civilians, despite the fact that Tomislav Makarun testified that he was a member of the Reserve Unit of the Croatian Police (hereinafter: the MUP reserve unit) at the critical period. He also testified that the defendants were aware of that and that he was questioned in Bučje about the weapon which he received as a reserve police officer.

It ensues from the aforementioned that the injured person was not a civilian at the incriminating period, although he was captured in the warehouse of the shop where he was working. We believe that in respect of the defendant as a detained member of the MUP reserve unit, the provisions of the Geneva Convention of 12 August 1949 relative to the Protection of War Prisoners should have applied.¹⁴⁸

Based on the injured person's testimony, it is clear that he was a victim of a war crime against prisoners of war. When under questioning he was physically abused, but he did not specify who precisely abused him, nor did he state that the defendants were the persons who were abusing him.

The defendants, by participating in armed rebellion, detained the injured person. However, there was not a single evidence exhibited during the trial that would substantiate the allegation that they had committed any act which would qualify under war crime against war prisoners.

¹⁴⁸ *Under the Geneva Convention, prisoners of war are defined as „1. Members of the armed forces of a party to the conflict and members of militias and of volunteer corps of such armed forces; 2. Members of other militias and members of other volunteer corps...“*

However, in February 2009, the Požega ŽDO filed a request for the reopening of the case. This was based on the report and official note of the interview conducted with the injured person Željko Makarun.¹⁴⁹

The Požega County Court permitted the re-opening of the case (i.e. a new criminal proceedings).

In July, the Court heard (before the Extra-trial Chamber) the injured person Željko Makarun. In his testimony he stated that the defendants, whom he knew from before most likely came with the purpose to pick him up and take him to Bučje and that it was obvious that they intended to take no one else but him. He specified that the defendants were not guards in Bučje and that he did not see them there at all.

Then, the Požega ŽDO altered the indictment. The defendants were charged that, as members of Serb-chetnik formations located in Bučje area, came armed to the warehouse of the shop where Željko Makarun was working. They seized various goods from him and then, under the threat of weapons, forced him to come along and took him to Bučje. Thus, by participating in the armed rebellion, they committed a criminal act against the Republic of Croatia – armed rebellion under Article 236, item (f) of the KZRH.

We believe that the indictment against the aforementioned defendants was carelessly instigated in 1993, that the judicial proceedings which followed was conducted without willingness to determine complete and correct facts. All this resulted in a guilty verdict for a war crime against civilians.

Considering that the State Attorney's Office of the Republic of Croatia announced the lodging of requests for the re-opening of trials in respect of as many as 90 persons who were sentenced *in absentia* for war crimes, this procedure obviously serves as an example of previous unprofessionally conducted and ethnically biased trials.

However, even the reopened trial contained incorrect court actions too, but this time of procedural nature. Namely, after the prosecution modified the indictment, the Council terminated criminal proceedings against the defendant on the basis of the General Amnesty Act, but it failed to quash the previous (convicting) verdicts reached by the Požega District Court and the Croatian Supreme Court.¹⁵⁰

¹⁴⁹ As of 1 January 2009, the provisions of the new Criminal Procedure Act (OG 152/08) are applied in respect of extraordinary judicial remedy for the reopening of criminal proceedings. It is also new that the state attorney's office can file a request, beneficial to the convicted person, for the reopening of the case that was concluded by a final verdict, regardless of the fact whether the convicted person was present or not.

¹⁵⁰ Paragraph 2, Article 508 of the ZKP (OG 152/08) reads: "If the new proceedings are discontinued before the beginning of the trial, the court shall annul the previous judgement by a ruling on discontinuation of the proceedings."

Therefore, two different decisions currently exist in respect of the accused persons: the convicting verdict reached previously by the Požega District Court and upheld by the Supreme Court's ruling and the decision on the cancellation of the proceedings issued on 13 July 2009.

Re-opened trial against Bogdan Delić and Stevan Šteković, sentenced previously to 8 years in prison for a war crime against civilians by a final verdict¹⁵¹

Požega County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH, following the modification of the indictment – armed rebellion, Article 236, item (f) of the KZRH

Defendants: Bogdan Delić and Stevan Šteković

War Crimes Council: judge Predrag Dragičević, Council president, judges Tihomir Božić and Žarko Kralj, Council Members

Prosecution: Božena Jurković, Požega County Deputy State's Attorney

Defence: lawyer Julka Lučić - Prša, court appointed defence counsel

Opinion of the monitoring team following the conducted re-opened trial

Following the conducted re-opened trial in which the Požega ŽDO altered the indictment charging the defendants with committing a criminal act – armed rebellion referred to in Article 236f of the KZRH, the Požega County Court in its decision No. Kv-64/09 of 13 July 2009 suspended further criminal proceedings against the defendants pursuant to Article 2, paragraph 2 of the General Amnesty Act

On 25 March 1993, the Požega ŽDO raised the indictment No. KT-81/92 against the defendant Bogdan Delić and Stevan Šteković, charging them with a war crime against civilians pursuant to Article 120, paragraph 1 of the OKZRH. They were charged that, on 29 August 1991 in the Koprivna village in the Požega municipality, as member of the so-called "Territorial Defence of SAO Western Slavonija" (hereinafter: TO SAO Western Slavonija), during the armed conflict in the north-western part of the Požega Municipality and the Pakrac Municipality, contrary to the provisions of Articles 31 and 34 of the Geneva Convention relative to the Protection of Civilians in Time of War, they stopped Dubravko Klanfar who was driving his tractor with a trailer on the Striježevica - Milivojevci road, collecting milk. They pointed an automatic rifle to Dubravko Klanfar, searched him and then put him in the trailer and drove him to the village of Cikota. Under the threat of weapons, they requested data from him about the Croatian Military and the Croatian Police units, about their deployment and armament. After that, they drove him to the village of Bučje, Pakrac Municipality, where a detention camp was located. They kept him in the camp as hostage for 46 days, until 13 October 1991 when he was exchanged together with several other persons of Croatian ethnicity who were detained in

¹⁵¹ *Veselinka Kastratović monitored this trial and reported thereof.*

the same or similar manner. They were exchanged for persons deprived of liberty due to criminal acts committed against the Republic of Croatia.

The Požega County Court accepted the indictment in its entirety. The defendants were charged, *inter alia*, with keeping the injured party hostage although that claim was not substantiated with evidence. Therefore, the Court needed to request from the prosecution to modify the indictment. The injured party stated already during the investigation that he was driven to Bučje in a van and that, after Bučje, he did not see the defendants any more. Moreover, the defendants were charged with keeping the injured party hostage for 46 days.

On 20 May 1993, the defendants were found guilty and sentenced to eight years in prison each.

The court-appointed defence counsel for both defendants lodged no appeal against the aforementioned verdict and, since the prosecution did not lodge an appeal against it either, the verdict became final on 24 June 1993, upon the expiry of the appellate deadline.

Following the adoption of a new Criminal Procedure Act (Official Gazette 152/08) which rendered it possible for the State Attorney's Office to request re-opening of criminal proceedings in relation to unavailable defendants, the Požega ŽDO filed a request for re-opening of the trial. It based its request on a special report issued by the Požega-Slavonija Police Administration and an official note on performed informative talk with the injured party Dubravko Klanfar.

The re-opening of the criminal proceedings was granted and, after the injured party Dubravko Klanfar was heard before the Extra-trial Chamber, the Požega ŽDO modified the indictment on 10 February. The modified indictment charged the defendants that, as members of the TO SAO Western Slavonija, on 29 August 1991 in the village of Koprivna near Požega, armed with automatic rifles, on the Striježevica - Milivojevci road they stopped a tractor driven by Dubravko Klanfar. Then, under the threat of weapons, they ordered Dubravko Klanfar to sit in the tractor trailer, put a backpack over his head and drove him to the village of Cikota where they handed him over to unidentified persons, members of Serb-chetnik formations, who took the injured party to Bučje, whereby they participated in the armed rebellion and committed a criminal act against the Republic of Croatia, armed rebellion referred to in Article 236 f of the KZRH.

It is evident that this modification of the indictment follows in the footsteps of the State Attorney's Office strategy of re-examination of war crimes proceedings concluded with a final verdict, particularly those conducted in the absence of the convicts.

However, in this particular case there is a series of problems.

The provision of Article 501, paragraph 1, item 3 stipulated that a criminal proceedings concluded with a final verdict will be re-opened to the benefit of the convicts regardless of the fact whether they were present or not, providing that "new facts or new evidence is

presented which, by itself or in relation with previous evidence, might lead to the release of a person who was convicted or for him/her to be sentenced pursuant to a more lenient law".

There are no new facts contained in the statement of reasons of the request for re-opening of the criminal proceedings or in the injured party's testimony provided before the Extra-trial Chamber in the re-opened trial. The injured party Dubravko Klanfar testified the same in 1993 and in 2009.

Following the aforementioned modification of the indictment, the Požega County Court, pursuant to Article 2, paragraph 2 of the General Amnesty Act, suspended the criminal proceedings against Bogdan Delić and Stevan Šteković. However, it failed to apply the provision of Article 508, paragraph 2 of the Criminal Procedure Act (OG 152/08). This provision stipulates the following: where new criminal proceedings are to be suspended by the court, the court must also annul the previous (convicting) verdict before the main hearing takes place by way of decision on the suspension of trial.

Therefore, by looking formally, there are two decisions at present in force in relation to the defendants: the convicting verdict No. K-31/93 of 20 May 1993 and the decision on the suspension of trial issued on 13 July 2009.

Trial against Ivica Mirić indicted for a war crime against civilians¹⁵²

Sisak County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Ivica Mirić

War Crimes Council: judge Snježana Mrkoci, Council president, judges Željko Mlinarić and Višnja Vukić, Council Member

Prosecution: Marijan Zgurić, Sisak County Deputy State Attorney

Defence: lawyer Domagoj Rupčić

Opinion of the monitoring team following the conclusion of the first-instance trial

On 26 August 2009, the War Crimes Council of the Sisak County Court pronounced a first-instance verdict No. K-14/09 wherein the defendant Ivica Mirić was found guilty of committing a war crime against civilians under Article 120, paragraph 1 of the OKZRH and sentenced to 9 (nine) years in prison.¹⁵³

¹⁵² *Tanja Vukov monitored this trial and reported thereof.*

¹⁵³ *The defendant was found guilty that, on 9 October 1991, in the capacity of a Sisak Police Administration reserve unit member, having learnt that Miloš Čalić, a person of Serb ethnicity whom he had known from before because they used to live in the same street, was in Zagreb in the "Rebro" Hospital, he went together with two unidentified police reserve unit members, a reserve policeman Ilija Čakarić and an unidentified female person, in a van to the "Rebro"*

The time the defendant Mirić spent in detention from 2 March 2009 onwards was included in the sentence reached against him. With the pronouncement of the verdict, detention against the defendant was extended.

Trial against the defendant Ivica Mirić is the first war crime procedure conducted before the Sisak County Court which involves a defendant who is a member of Croatian units. With this regard, and taking into account our previous experiences in monitoring war crime trials at the County Courts in the Republic of Croatia, we are not surprised with negative pressures/resistance expressed against conducting a trial against a member of Croatian units from the local environment (defenders and a part of local public).

During the main hearing, we noticed the following pressures and obstructions on the part of the audience:

- The exclusion of public from a part of the main hearing during the testimony provided by Predrag Pavlović who, while testifying, felt very uncomfortable and afraid for his security and the security of his family, while granting permission to monitor this part of the main hearing to the monitors of the Civic Committee for Human Rights, Documenta and the OSCE caused great disapproval among the audience. At the next court hearing, the Council President informed the audience that she had received a remark from high-positioned places because she had “emptied the courtroom” and then she clarified the role of monitors from Documenta, the Civic Committee for Human Rights and the OSCE¹⁵⁴;
- During the testimony provided by Ilija Čakarić, who charged the defendant with his testimony, comments were coming from the audience because of which the Council President had to request order in the courtroom;
- We learned from the injured person Čalić’s sister that one of the persons from the audience who supported the defendant Mirić insulted her using harsh curses;
- After the completion of the main hearing, some persons from the audience lined up on both sides of the entrance to the courtroom and applauded at the moment when the defendant Mirić appeared;
- During the presentation of the defendant’s defence, the Council President had to react on several occasions against the comments coming from the defendant Čalić’s niece who was sitting in the audience;

Hospital and waited for Miloš Čalić. There, he told him to come with them. Then they took Miloš Čalić to the Brezovica woods near Sisak. There, together with two unidentified police reserve unit members, he pulled Miloš Čalić out of the vehicle and forced him to walk toward the little bridge over the “Dužec” channel, some 50 meters distance from the vehicle. There, Miloš Čalić was murdered by shots from the firearms just because he was of Serb ethnicity.

¹⁵⁴ Article 294, paragraph 2 of the Criminal Procedure Act lays down that a panel may grant permission for certain officials, scholars or public figures to be present at a trial closed to the public.

- During the pronouncement of the verdict, one person from the audience, dissatisfied with the verdict, loudly protested by saying: „Well, my Croats, we learned nothing from history“, after which the Council President removed him from the courtroom, after which another person also protested and then walked out of the courtroom by himself.

Without interfering with the free judges' opinion and the court's conclusion on the (non)existence of facts which are relevant for passing a decision on the merits, we noticed that the court did not use the possibility of confronting witnesses whose testimonies differed with regard to some facts.¹⁵⁵

Although the defendant mentioned in his defence the names/nicknames of two unknown persons („Blaž“ and „Štef“) who came on the incriminating day to the hospital to pick the injured person Čalić, and he even stated where their unit was located and who was their commander (Jadranko Garbin), as well as stating that he had information that „Blaž“ and Jadranko Garbin died later on, neither the State Attorney's Office nor the court attempted to establish their identity at the trial, despite the fact that it was not possible to conclude from the course of the main hearing that the identity of these persons was known.

Trial against Nenad Pejnović indicted for a war crime against civilians 156

Karlovac County Court

Criminal act: war crime against civilians, Article 120, paragraph 1 of the OKZRH

Defendant: Nenad Pejnović

War Crimes Council: judge Ante Ujević, Council President, judges Mladen Kosijer and Vesna Britvec, Council Members

Prosecution: Zdravko Car, Karlovac County Deputy State's Attorney

Defence: lawyers Đuro Vučinić and Slađana Čanković

Opinion

On 3 April 2009, the War Crimes Council of the Karlovac County Court found the defendant Nenad Pejnović guilty of a war crime against civilians referred to in Article 120, paragraph 1 of the OKZRH and sentenced him to 6 years in prison.

Pursuant to Article 102, paragraph 4 of the Criminal Procedure Act, detention against the defendant was extended (he has been detained since 10 February 2008).

¹⁵⁵ *These are witness testimonies of Predrag Pavlović and Damir Božičević, i.e. of Ivan Vojnić Hajduk and Damjan Ivaniš. More about their testimonies and about the entire case is available on www.centar-za-mir.hr*

¹⁵⁶ *Martina Klekar monitored this trial and reported thereof.*

In the Indictment No. K-DO-4/08 of 27 May 2008, the Gospić ŽDO charged the defendant Nenad Pejnović that on 4 October 1991, as a member of the so-called SAO Krajina militia in the village of Vrhovine, hamlet Čorci, based on the agreement and together with other members of Serb paramilitary formations, firstly, he unlawfully deprived of liberty villagers of Vrhovine of Croat ethnicity (Martin Čorak, Mato Čorak, Kata Čorak, Stjepan Čorak, Vladimir Čorak and Slavko Čorak) and then they took them to the Militia station in Vrhovine and left them to stay there over night. The following day, they took them to the area Ćurinke-Oštri Vršak and killed them - thus, he unlawfully captured and killed civilians and therefore he committed a war crime against civilians.

The defendant Pejnović was found guilty of unlawfully capturing civilians who were taken away and killed the following day by unidentified persons. The Council did not find it established that the defendant participated in liquidation of civilians.

The Supreme Court transferred jurisdiction over this case from the Gospić County Court to the Karlovac County Court because of insufficient number of judges at the Gospić County Court.

Since the jurisdiction over the case was transferred, we are of the opinion that the provisions of the Act on Applying the International Criminal Court Statute and Prosecution for Criminal Act against the International War and Humanitarian Rights Values (OG 175/039) should have been applied and the case should have been transferred to one of the four courts with territorial competence according to that Act.

Although the Council President thoroughly and patiently heard the witnesses during the evidence procedure and although he treated all participants in the trial with respect, we find that several mistakes were made during the trial which could eventually have affect not only on the validity of the conducted trial, but also on the viability of the verdict.

Despite the objections made by the defendant's defence counsel, the witness Snježana Valinčić was heard at the main hearing, although she, in her capacity as the injured party and as the daughter of the murdered Stjepan Čorak, was present during the interrogation of other witnesses in the investigation. Pursuant to Article 198, paragraph 4 of the Criminal Procedure Act (Official Gazette 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06 and 152/08 – hereinafter: the ZKP), the injured person may be present at the interrogation of a witness only when it is likely that the witness shall not appear at the trial.

Moreover, the reminding or cautioning of the witnesses, within the meaning of the provision of Articles 324 and 236 of the ZKP, on several occasions was not properly conducted i.e. it was not presented orally to them at all or the cautioning was not presented clearly enough. Also, when individual witnesses were presenting their

statements at the course of hearing, the Council President was frequently interrupting them.¹⁵⁷

When entering the answers provided by the witnesses in the court records, the Council President did not enter individual answers separately. Instead, he subsequently inserted them into previously given testimony provided by individual witnesses. This can create an erroneous picture which facts the witness remembered and stated himself and which facts he recalled only after being asked about them. Although such dictation method of creating the records is in accordance with the existing legislation, such practice manifests many defects. The main disadvantage is a lack of possibility for a full reconstruction of the trial course necessary for the purposes of the Council, the Supreme Court, the parties and keeping of authentic statements from all participants in the trial. Therefore, we are of the opinion that courts should more frequently exercise the possibilities of audio (and visual) recording of a trial for the purpose of preparing transcripts.

Although it is not our interest to interfere with the institute of free judges' opinion that the court uses when assessing the evidence and establishing the facts, because in its nature it cannot be questioned, we are of the opinion that the first instance court could have confronted the witnesses, as well as interrogated individual witnesses at the main hearing (or at their homes, if it concerns witnesses who cannot appear before the court due to illness), instead of reading their testimonies provided during the investigation procedure. By doing so, the court could have established more precisely the facts which are essential in the trial – which could affect the viability of the verdict when assessed by the second-instance court.

¹⁵⁷ *The provision of Article 239 of the ZKP reads: "After general questions, the witness shall be called upon to state everything known to him about the case, whereupon questions shall be directed to him in order to check, complete or clarify his testimony." Therefore, first of all the witness should be given a possibility to state independently and uninterruptedly everything known to him about the case concerned.*