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Chris Engels, Editor-in-chief

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Introduction

The OKO War Crimes Reporter is intended to ensure that all lawyers working on war crimes cases in BiH have access to the latest information that they need from around the country, the region and the world. The Reporter will focus on developments in the Courts of BiH as well as regional and international tribunals. We will cover issues of international humanitarian law and also human rights law as it applies to war crimes trials in BiH.

This edition of the Reporter contains summaries of important recent decisions from the courts in BiH, reports from recent events in BiH, as well as articles on the joint criminal enterprise and genocide. I hope that you find this edition of the Reporter useful.

I hope that you find this edition of the Reporter useful and we look forward to receiving your suggestions for the future.

Chris Engels

Editor-in-chief

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Contributions

We are grateful to the following OKO fellows and pripravniks, who prepared case summaries for this issue: Thomas Margueritte, Kornelis Kasper, Muhamed Čučak, Amel Kasapović, Šejla Haračić, Dženita Hadžo, Muhamed Mujakić, Ljilja Vergić and Sanja Đurđević

Submissions

The OKO War Crimes Reporter welcomes articles on current issues and international developments in war crimes law. Please contact the editor.

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Photograph

The picture on the front cover shows the courtroom at the Court of BiH, Courtroom 7.

Specialized Seminar on JCE and Command Responsibility

Held 20 October, 2006 at the Court of BiH

As a result of the interest expressed by defense counsel currently engaged in cases before Section I for War Crimes of the Court of BiH, OKO has organized and convened a one day specialized seminar on command responsibility and joint criminal enterprise. The recent use of these modes of liability in indictments filed by the prosecution coupled with the lack of jurisprudence before the courts of BiH and the significant amount of jurisprudence from the *ad hoc* tribunals (for example ICTY prosecutor has charged 65 persons with joint criminal enterprise. The cases include in Serbia and Kosovo: Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Vlastimir Đorđević, Sreten Lukić, Slobodan Milošević, Vlajko Stojiljković, Vojislav Šešelj, Ramush Haradinaj, Idriz Balaj, Lahij Brahimaj, Fatmir Limaj, Isak Musliu, Haradin Bala. In Croatia: Ivan Čermak, Mladen Markač, Ante Gotovina, Veselin Šljivančanin, Miroslav Radić, Mile Mrkšić. In Bosnia and Herzegovina: Momir Nikolić, Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Predrag Banović, Dušan Knežević, Ratko Mladić, Radovan Karadžić, Močilo Krajišnik, Biljana Plavšić, Radislav Krstić, Ljubiša Beara, Vinko Pandurević, Dragan Obrenović, Ljubomir Borovčanin, Miroslav Deronjić, Darko Mrđa, Milomir Stakić, Momčilo Perišić, Milan Babić, Milan Kovačević, Milan Martić, Stojan Župljanin, Slobodan Dubočanin, Simo Drljača, Momir Talić, Mićo Stanišić, Savo Todović, Mitar Rašević, Milorad Trbić, Zdravko Tolimir, Drago Nikolić, Vujadin Popović, Milan Gvero, Radivoje Miletić, Radoslav Brđanin, Dragan Jokić, Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoje Petković, Valentin Ćorić, Berislav Pušić) has raised interest in these topics.

The specific nature and complexity of the crimes charged in Section I require special considerations regarding criminal liability due to fact that these crimes usually consist of multiple criminal actions, are perpetrated by groups of individuals and, most importantly, have a systematic character which complicates assessment of the individual contribution of a perpetrator in the commission of a crime.

In order to address these issues OKO organized a seminar for 20 lawyers currently representing clients in 11 war crimes cases before the Court of BiH. The keynote speaker and moderator of the seminar was Ms. Gillian Higgins, a UK barrister, expert in international criminal law and former court assigned counsel for Slobodan Milosevic.

In the morning session, participants were introduced to the concept and main features of joint criminal enterprise (JCE), the jurisprudence of ICTY, and the applicability of JCE in BiH. The afternoon session was devoted to the doctrine of command responsibility and included a presentation of the principles of the command responsibility, the ICTY jurisprudence, the applicability of command responsibility in BiH and a case study. Throughout the seminar ample time was allotted to participant discussion.

Following the positive response from the participants, OKO is encouraged to continue organizing training events of this sort.

In that regard, we encourage defense lawyers to assist us in this effort and to continue to propose topics they find interesting and important for the defense in war crimes.

ABA/CEELI War Crimes Seminar

Defense in War Crime Cases in BiH, Croatia and Serbia

In an effort to enable defense attorneys from Bosnia and Herzegovina, Croatia and Serbia to discuss essential issues related to war crimes, ABA CEELI and OSCE ODIHR organized a two-day seminar on defense in war crime cases.

Ivan Jovanović, Legal Adviser for war crime issues with the OSCE Mission in Serbia, gave the opening speech on interstate cooperation in the war crime proceedings between Bosnia and Herzegovina, Croatia, Serbia and Montenegro, "The Palić Process". Marinko Jurčević, Chief Prosecutor in the Court of Bosnia and Herzegovina, gave a overview of the proceedings in war crime cases before national courts and ICTY. Other topics discussed included access to evidence, admissibility of evidence, jurisdictional issues, equality of arms and capacity building.

The seminar concluded with a presentation by OKO lawyer Jasmina Pjanić. The participants from Croatia and Serbia had the opportunity to familiarize themselves with the work of OKO and its role in assisting the defense in war crimes proceedings before the courts in Bosnia and Herzegovina.

In addition to its work organizing seminars, ABA CEELI has produced several helpful publications related to war crimes trials, including the Guidebook for Defense Attorneys: New Criminal Codes in Bosnia and Herzegovina (November 2003), a Practical Guide for War Crime Prosecution in Bosnia and Herzegovina (December 2004) and War Crimes in Bosnia and Herzegovina – Criminal Proceedings Concluded by Final Verdicts in Bosnia and Herzegovina 1992 – 2006 (November 2006), which was published in cooperation with the Association of Prosecutors Bosnia and Herzegovina. This last publication is a collection of BiH war crimes verdicts from 1992 to 2006. The book includes excerpts from the selected proceedings conducted in Brčko District, the Federation of Bosnia and Herzegovina and the Republika Srpska. It also includes a CD with 2755 pages of indictments, appeals and verdicts from these trials.

ICRC Seminar

Held on Mount Jahorina on 3 and 4 November 2006

Introduction

On 3 and 4 November 2006, the International Committee of the Red Cross (ICRC) organized a seminar on International Humanitarian Law for interns of the Court of Bosnia and Herzegovina. In the early morning of 3 November about thirty national and international interns, including eight OKO staff members, made their way through the snow up towards Hotel Termag on Mount Jahorina where the seminar was held.

Program

To ensure the seminar was not only a theoretical exercise the seminar was divided in lectures on a number of topics followed by case studies to place the theory in practice.

Leading up to the first case study concerning the question of who is protected under International Humanitarian Law (IHL) there were two lectures. First Neda Dojčinović, Legal Adviser for the ICRC, presented an overview of IHL that focused mainly on the scope of application and the qualification of different situations.

To this end the presentation started with the definition of IHL and an overview of the development of IHL as well as the Geneva Conventions and their Additional Protocols. Following this was an explanation of the different types of conflicts (international, non-international, internationalized) and the applicability of International Humanitarian Law to each type.

Next was a lecture on persons protected under IHL by Richard Desgagné who is the ICRC's Regional Legal Adviser for Central and South Eastern Europe. Mr. Desgagné explained the four distinct categories of protected persons (the wounded, sick and shipwrecked; medical personnel; prisoners of war and civilians in the power of the enemy) and which of the Geneva Conventions awards protection upon those persons.

The case study following these lectures regarded a fictional scenario involving a group of countries in a region that were all for the most part made up of the same three ethnic groups. As tensions grew in the region the countries ended up in various (non-)international conflicts. This led to a number of questions concerning issues relating to status of the conflict, status of captured enemy fighters and the treatment that should be awarded to them according to IHL.

In the afternoon the seminar continued with a lecture on the differences between International Humanitarian Law, Human Rights Law and International Criminal Law by Paul Hardy, Legal Adviser to the Commission of the European Union. Mr. Hardy focused on the sources, scope of application and enforcement mechanisms of these fields of law. That last issue was then elaborated on by Mrs. Dojčinović who looked at the specific enforcement mechanisms for IHL by explaining the duty to respect and ensure respect for international law as well as the duty to suppress and repress violations of IHL.

The last lecture of the afternoon was presented by Mr. Desgagné and explained the basic principles of the conduct of hostilities i.e. the principle of distinction and the principle of proportionality. All the issues discussed in the afternoon lectures came together in the second case study.

Again focusing on the same scenario as in the first case study, there was now a situation of all-out war between the parties which led to questions concerning proportionality and military necessity of air strikes on sensitive targets and protection and evacuation of children and the wounded and sick.

The second day of the seminar started off with a lecture on command responsibility and individual criminal responsibility by Michelle Jarvis of the Appeals Section of the International Criminal Tribunal for the Former Yugoslavia (ICTY). This was also the topic of the third and last case study. Based on an indictment related to the events in Bosnia during the war and a motion to dismiss that indictment the participants were divided in a defense and a prosecution section to argue on three questions regarding the filed motion. Both parties had to then present their arguments to the presiding panel made up of Mrs. Jarvis and Mr. Hardy.

The seminar concluded with a lecture by Richard Desgagné on the role and practice of the ICRC in which he explained the mandate and the legal basis of the ICRC's activities and the role of the organization in the prosecution of war crimes.

Joint Criminal Enterprise

New form of individual criminal responsibility, an Article by Jasmina Pjanić, OKO lawyer

Introductory remarks

Contemporary international criminal law is largely concerned with holding individual defendants responsible for mass atrocities. Because the crimes usually involve the intensive efforts of many individuals, allocating responsibility among those individuals is of critical importance. This Article examines joint criminal enterprise as a newly emerged liability doctrine that has been playing a central role in the allocation of guilt in international criminal tribunals and may have a similar role in cases before the Court of Bosnia and Herzegovina.

Joint criminal enterprise (JCE) is a theory of liability that has been most extensively elaborated on by the prosecutors, defense attorneys and judges at the International Criminal Tribunal for the former Yugoslavia (ICTY). Although JCE has several forms, it essentially requires the prosecution to prove: that a group of people had a common plan, design, or purpose to commit a crime, that the defendant participated in some way in the plan and that the defendant intended the aim of the common plan. If the prosecution proves these elements, the accused can be convicted of all completed crimes within the scope of the common plan, as well as all crimes that he did not intend but that were a foreseeable consequence of the common plan.

While the recent ICTY jurisprudence shows a strong devotion to the use of this form of individual liability[1], domestic war crime trials seem to maintain a high level of criticism towards its adoption and application as being quite vague, unclear, open to many interpretations and predisposed to abuses.

There are many arguments for and against JCE. The aim of this article is not to argue any, but to provide the reader with basic information on its historical origins, key elements and modes as developed in recent ICTY jurisprudence, as well as dilemmas that have arisen in regard to its concrete application.

Historical Development of Joint Criminal Enterprise

In its short formal existence[2] a variety of legal forums[3] have applied this form of liability and all these proceedings share one important principle: each relies-at least in part-on international criminal law as its source of substantive law. While domestic trials usually also include charges drawn from domestic criminal codes, all of the major ad hoc tribunals include within their jurisdiction crimes and institutes that exclusively originate from international customary law and subsequently from their codifications.

Contemporary international criminal law is a complex body of law developed from the civil and common law systems of criminal adjudication, strongly influenced by human rights law and most importantly by domestic criminal codes. Domestic criminal laws regularly focus on individual wrongdoing as a necessary prerequisite to the imposition of criminal punishment. In national legal systems this principle is laid down in Constitutions, in statutes, or in judicial decisions. Similarly, international criminal adjudication has reinforced the principle of individual, personal culpability opposed to the collective guilt notion and reiterated that "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)[4]". Due to that shared principle, many argue that the notion of common purpose upheld in international criminal law has its foundation in many national systems[5].

a) ***Post World War II case law:*** The first traces of JCE in the customary international law are identified in the post-World War II cases in which the doctrine was used under different (common purpose) or sometimes even no specific name. In the aftermath of World War II, the courts established by British and U.S. occupying powers in Germany applied the doctrine in the trials against German Nazis. The Italian Supreme Court applied a similar doctrine in the trials of Italian fascists.

Special reference can be made to the *Georg Otto Sandrock et al.* case (also known as the *Almelo Trial*). There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of "common enterprise". It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.

Possibly, the most well known Italian and German post World War II cases are the so called "concentration camp" cases. Two examples of these are the *Dachau Concentration Camp* case, decided by a United States court and the *Belsen* case, decided by a British military court, both sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps and based on that were found guilty of the charges that they had acted in pursuance of a common plan to kill or mistreat prisoners and hence to commit war crimes.

Finally, the case that demonstrates the closest link to the notion of JCE is the *Essen Lynching* case (also

called *Essen West*), before a British military court. In that case three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were involved in the killing of the three prisoners of war. They included a German captain, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a *Luftwaffe* unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. When the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.

Out of the seven charged, five were found guilty: the German captain, the soldier escorting the airmen and three civilians "were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot or given the blows which caused the death".

As for non-World War II related cases, the ICTY Appeals Chamber in Tadic cited numerous decisions by Italian courts from 1960s to 1990s, decisions by the French Court of Cassation from 1947 and 1984, as well as jurisprudence in England, Wales, Canada, the United States, Australia, and Zambia.

b) ***International instruments*:** In addition to the case law, the notion of JCE has been upheld in two international instruments. Both instruments were adopted by an overwhelming majority of the States expressing their legal position i.e. *opinio iuris* and show that their legal views might not be that different after all. Despite the lack of universally acceptance of the term “Joint Criminal Enterprise”, both legal instruments are consistent with the view that it is a mode of liability well-established in international law and is distinct from aiding and abetting.

The International Convention for the Suppression of Terrorist Bombing, (adopted by the United Nations General Assembly, Resolution 52/164 of 15 December 1997) upholds the notion of a "common criminal purpose" as distinct from that of aiding and abetting and reads (Article 2(3)(c)) that offences envisaged in the Convention may be committed by any person who “[i]n any other way (other than personally committing or attempting, participating as an accomplice, or organizing or directing others to commit an offence) contributes to the commission of one or more offences …by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”

The Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 ("The Rome Statute"), upholds the doctrine in Article 25 paragraph 3(d) and reads:

> *“ In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...*
>
> *(d) In any other way (other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime) contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*
>
> *i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
>
> *ii. Be made in the knowledge of the intention of the group to commit the crime.”*

c) ***Jurisprudence of ICTY:*** The first formal recognition of JCE as a theory of liability can be found in the jurisprudence of the ICTY and its landmark decision in the *Tadic* case[6]. The Statute of the ICTY, in Article 7(1) defines the forms of criminal liability and reads that “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

As apparent from the wording of Article 7(1), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but also extends to other offenders who took part in ordering, incitement, attempt and complicity.

JCE does not explicitly appear in Article 7(1) or any other article in the Statute of the ICTY[7]. Despite this, the ICTY Appeals Chamber in its Decision of July 15, 1999, in the Tadic case provided the *opinio iuris* that participation in the joint criminal enterprise is included in the Statute as a form of “commission” under Article 7(1) of the Statute.

Namely, the Appeals Chamber has adopted a broad interpretation that all those who have engaged in serious

violations of international humanitarian law, whatever the manner of participation in the perpetration of those violations, must be brought to justice. According to this Decision, JCE allows a court to hold criminally liable, subject to certain conditions, anyone who contributes to the commission of crimes by a group of persons or some members of a group, in the execution of a common criminal plan. This interpretation is not only determined by the object and purpose of the Statute but also by the very nature of many international crimes which are often carried out by groups of individuals acting in pursuance of a common criminal design.

Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act (physically perpetrates the criminal act of murder, extermination, etc.) would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

This understanding of participation in JCE follows the principle that the moral gravity of such participation is no different - from that of those actually carrying out the acts in question.

Three categories of Joint Criminal Enterprise cases

There are three distinct categories of JCE liability in war crime cases.

> 1. "*The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill*"[8].

The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

> 2. The "concentration camp" cases are the second category of cases and are in many respects similar to that set forth above. This notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan.

This category of cases is really a variant of the first category. Cases illustrative of this category are the *Dachau Concentration Camp* Case, decided by a United States court sitting in Germany and the *Belsen* Case, decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes. In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system. The convictions of several of the accused appear to have been based explicitly upon these criteria.

> 3. The third category concerns cases involving a common design where one of the perpetrators commits an act which, while outside the common design, is nevertheless a natural and foreseeable consequence of the implementation of that common purpose.

An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (in other words to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. The case law in this category concerned first of all cases of mob violence, that is situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate[9].

Elements of Joint Criminal Enterprise as defined by ICTY

Despite the fact that ICTY's Statute does not specify an *actus reus* and *mens rea* of JCE, the first explicit definition of this form of liability and its constituent elements was provided in the ICTY's Appeals Chamber Decision in Tadic case of 1999. Since then, it has not undergone any significant changes in the subsequent jurisprudence.

The *actus reus* of JCE comprises the simultaneous existence of the three following elements:

1. *A plurality of persons.* They need not be organized in a military, political or administrative structure.

2. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize *ad hoc.*

3. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

Unlike the *actus reus*, the *mens rea* differs according to the category of JCE applied:

> 1. The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).
>
> 2. For the second category which, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.
>
> 3. The third category requires the *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

In Vasiljevic case, the ICTY trial chamber concluded that: "A person participates in a joint criminal enterprise by personally committing the agreed crime as a principal offender, or by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender), or by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.[10]" Further, if the agreed crime is committed by one or other of the participants in a joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.

Distinction between acting in Joint Criminal Enterprise and aiding and abetting

In practice aiding and abetting might be easily confused with JCE, thus it is important to bear in mind the key differences between these.

The aider and abettor is always an accessory to a crime perpetrated by another person, the principal. Under JCE liability each participant in the JCE is a principal perpetrator himself.

The cases of aiding and abetting require no proof of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution. By contrast to the JCE, the existence of a common plan, design or purpose is considered to be *sine qua non*.

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of JCE, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

One should remember that in the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of JCE, more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed).

Finally, it is interesting to underline when an aider or abettor becomes a co-perpetrator. The trial Chamber in Kvocka case, held that an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator. Furthermore, when an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator. Finally, once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator[11].

Concluding remarks

Despite the numerous objections to validity of the JCE mode of liability (such as that "implicit" criminal liability is unacceptable in contemporary criminal law and human rights law; that JCE theory has been used selectively; that the notion is quite vague and unclear with infinite possibilities for unlimited interpretations and abuses; the third -"extended" form of JCE is conviction without guilt; etc.), it is difficult not to observe the significant benefits of its use in war crime proceedings at international as well as national levels.

JCE is a victim-centered, far-reaching theory often used to prosecute the senior leadership[12] as well as low-level individual perpetrators responsible for a broad range of crimes perpetrated in the names of former leaders. For example, there are significant benefits to its use in its expansive version (e.g.) when an international court uses the doctrine to hold a particular defendant liable for the range of crimes associated with regional ethnic cleansing in which he played some part.

At the same time, this doctrine can be abused if used by a dishonest national government to suggest that all persons who provide any sort of support to a terrorist organization, however loosely defined, become liable for all crimes committed by its members. Stated differently, the uncontrolled use of joint criminal enterprise can pose serious dangers to the fairness of the proceedings.

In practice, JCE represents a transfer of power from international judges to prosecutors, who have enormous discretion to decide how much wrongdoing to assign to any particular defendant. Because the doctrine is so loose, JCE closely approaches a theory of guilt by association. When used properly, JCE can assist in connecting participants in a criminal enterprise who operated far from the crime scene. When used selectively this notion represents the infinite possibilities for unlimited interpretations and abuses.

Finally, BiH legal practitioners will probably have to decide if a newly emerged liability doctrine that has been playing a central role in the allocation of guilt in international criminal tribunals would be accepted to have a similar role in cases before the Court of Bosnia and Herzegovina.

Judging from the current jurisprudence, this option is highly unlikely.

1 Up today, ICTY have charged around 65 persons with participation in JCE:
Srbija-Kosovo: Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, Lukić, Milošević, Stojiljković, Šešelj, Haradinaj, Balaj, Brahimaj, Limaj, Musliu, Bala.

Hrvatska: Čermak, Markač, Gotovina, Šljivančanin, Radić, Mrkšić.

BiH: Nikolić, Mejakić, Gruban, Fuštar, Banović, Knežević, Mladić, Karadžić, Krajišnik, Plavšić, Krstić, Beara, Pandurević, Obrenović, Borovčanin, Deronjić, Mrđa, Stakić, Perišić, Babić, Kovačević, Martić, Župljlanin, Dubočanin, Drljača, Talić, Stanišić, Todović, Rašević, Trbić, Tolimir, Nikolić, Popović, Gvero, Miletić, Brđanin, Jokić, Prlić, Stojić, Praljak, Petković, Čorić, Pušić.

2 Tadić Appeal Judgment of 1999 is widely recognized as the first formal recognition of the JCE
3 E.g. ICTY, ICTR, Special Court for Sierra Leone, East Timor Special Panel for Serious Crimes
4 ICTY publication: Judicial Supplement 6, The Prosecutor v. Duško Tadić - Case No. IT-94-1-A, Judgment (15 July 1999)

(item 8) The Prosecution's second ground of cross-appeal http://www.un.org/icty/Supplement/supp6-e/tadic.htm

5 California Law Review, January, 2005. Article "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", Allison Marston Danner and Jenny S. Martinez

6 *Prosecutor v. Tadić*, Appeals Chamber Judgement, Case No. IT-94-1 (July 15, 1999) http://www.un.org/icty/tadic/appeal/judgement/index.htm

7 See: Magazine for legal theory and practice, The Bar association of Serbia, Beograd 2004, Article "Joint criminal enterprise as violation of the rights of the accused in the procedure before ICTY", Slobodan Stojanović

8 *Tadić,* (Appeals Chamber), July 15, 1999, para. 195-196, 202-204
9 For further details regarding these three categories, see *Tadić,* (Appeals Chamber), July 15, 1999, para. 220
10 *Vasiljević,* (Trial Chamber), November 29, 2002, para. 67

11 *Kvočka et al.,* (Trial Chamber), November 2, 2001, para. 284-285

12 The Milošević case featuring three indictments that charge him with participating in three massive separate JCEs to remove non-Serbs from Croatia, Bosnia and Herzegovina and Kosovo, respectively, is a particularly leading example of how JCE may be used to reach high-level perpetrators.

Published Criteria

The latest criteria for admission to the list of advocates licensed to appear before the Court of BiH, valid until 31st December 2007

Application form

In accordance with Rule 3.3 of the 'Additional Rules of Procedure for Defense Advocates' please complete the "OKO Application Form" for January 2007 in order to apply to be admitted to the list of authorized advocates.

Professional Criteria

Article 3.2 of the Additional Rules requires that applicants must be a current and valid member of either of the bar associations, and must possess as an advocate, judge or prosecutor at least seven years of relevant working experience on legal matters in order to be appointed as the only advocate or the primary advocate.

Knowledge Criteria

Article 12(3) Law on Court of BiH allows the court to set the qualifications of advocates appearing before the Court. Article 3.2(3) of the Additional Rules requires that applicants must possess knowledge and expertise in relevant areas of law in accordance with the criteria published by OKO. The knowledge criteria can be satisfied by experience or by participation in an alternative training course.

Element	Qualification by Experience	Training alternative
New Criminal legislation in BiH	Completion of 1 criminal trial as an advocate before Court of BiH, *or* Completion of 2 serious criminal trials as an advocate before lower courts using the new CC/CPC, *or* Completion of a training course on the CC/CPC approved by OKO	2 day training course on CPC and CC provided by OKO
War Crimes Law (*only required for those wishing to do war crimes cases*)	Completion of 1 war crimes trial before Section I of the Court of BiH, *or* Completion of 2 domestic war crimes trials as an advocate before lower courts, *or* Substantial work as counsel in the trial phase at ICTY, *or* Completion of post-graduate study of IHL, *or* Completion of a training course on IHL approved by OKO	2 day training course on IHL provided by OKO

Continuing Professional Training Criteria

The required continuing professional training in the year 2007 is 8 hours. In 2007, Continuing professional training criteria is required for Section I lawyers only.

Period of Validity

These criteria will apply to applications received by OKO before 31st December 2007.

The Gravity of Genocide in light of Persecution and Extermination as Crimes Against Humanity

An Article by Amir Čengić[1]

In the eye of a layman, there is often a perception that genocide is the most horrible crime that can be committed. This perception is strengthened by the pictures of grave atrocities committed around the world and reported in the daily news, thereby recalling the horrors of the holocaust. It is further nourished by emotional and historical factors and politicians who very often hastily claim commission of genocide, thereby additionally usurping the already frail people they address.

But what are the legal elements required for the establishment of genocide? Is genocide really the worst crime that can take place? Is the non-recognition of genocide in a particular case a denial that a grave crime has been committed on a massive scale? This article will attempt to answer these, and similar questions, by comparing the crime of genocide with the crimes of extermination and persecution as crimes against humanity. The actual gravity of the crime of genocide will be assessed against the background of these two crimes. The article does not intend to discuss the elements of the mentioned crimes in detail. Instead, it will offer a brief overview of the definitions of those crimes, in order to then focus on their differences and the similarities.

Genocide

Lawyers have referred to genocide as "the crime of crimes"[2]. The term was coined by Rafael Lemkin who aimed to describe the horrors of the Second World War[3]. It is therefore remarkable that the Nuremberg Tribunal, which was set up to try those most responsible for those atrocities, did not apply genocide[4]. The two U.N. *ad hoc* tribunals have applied and developed the law of genocide further, and it is expected that the ICC will do so as well[5].

Genocide has been defined in Article 2 of the Genocide Convention[6] which reads that:

Article 2

In the present 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 conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

The Genocide Convention is the central and most important legal instrument on the law of genocide. This definition was reproduced *verbatim* in the Statutes of the ICTY (Article 4), the ICTR (Article 2) and the ICC (Article 6). The adoption of the Genocide Convention also led to national implementations of the convention, thereby introducing this offence to most national legal systems, which subsequently produced jurisprudence that has enriched the study of genocide. Furthermore, the International Court of Justice has found genocide not only to be a part of customary international law, but also that it is a pre-emptory[7] norm of international law when it held that genocide is:

'a crime under international law' involving a denial of the right of the existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations […] The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required in 'order to liberate mankind from such an odious scourge' (Preamble to the Convention)[8].

The *actus reus* of genocide can be constituted by committing any of the acts listed in the abovementioned definition. This list is an exhaustive list of acts of genocide[9]. As to the first act, the term "killing" has been equated to the term murder and it relates to an intentional, but not necessarily a premeditated murder[10]. The causing of serious bodily or mental harm to members of a protected group is "an intentional act or omission causing serious bodily or mental suffering"[11]. It need not be permanent or irremediable, but it must result in "a grave and long-term disadvantage to a person's ability to lead a normal and constructive life"[12]. The third form which may constitute the *actus reus* of genocide concerns "methods of destruction by which the perpetrator does not im-

mediately kill the members of the group, but which, ultimately, seek their physical destruction"[13]. The remaining two forms of *actus reus* are more specific and require less elaboration. However, it should be noted that genocide can also be committed when the perpetrator directs the separation of the people belonging to the targeted group from other groups, as that action is "as much an integral part of the genocide as were the killings which it enabled"[14].

It is the specific intent that is required for genocide that makes this crime unique in international law[15]. In order to be found guilty of commission of genocide, a perpetrator must have the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. It is not sufficient to prove that a person killed individuals because they belonged to a particular protected group[16]. This raises the question of how a national, ethnical, racial or religious group is identified, or defined. The U.N. *ad hoc* Tribunals have found two approaches to answer this question. The first is an objective approach seeking to provide a clear definition of each of the four groups[17]. The second is the subjective approach which seeks to "evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community"[18]. However, the subjective approach alone cannot be conclusive as to the defining of a protected group within the meaning of Genocide Convention[19]. Furthermore, the ICTY Appeals Chamber has found that a targeted group may not be defined in the negative[20]. Also, political, cultural, linguistic, economical, gender and similar other groups are not protected by the Genocide Convention.
In order to establish genocide, it must be proven, amongst other things, that the *actus reus* occurred with the intent to destroy a particular protected group as such, in whole or in part. It is further required that there is a physical destruction of the protected group, or a part thereof. It is not sufficient to destroy the national, linguistic, religious, cultural or other identity of a particular group[21]. The necessary requirement to establish genocide in relation to the actual number of victims is that there is a destruction of a "reasonably substantial number" of the members of a protected group, or a "significant section of the group" (with the intent to do so)[22].

Extermination as a crime against humanity

Ever since the Nuremberg Tribunal, extermination was included as a criminal offence in the statutes of international and internationalized courts. Extermination, as its name suggests, involves a large number of victims. As with any other crime against humanity, the general elements required for crimes against humanity must be met. Therefore, in order to prove extermination, it must be established that it was committed in the context of a widespread or systematic attack against any civilian population[23]. The ICTR Appeals Chamber has held that:

> the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result[24].

This finding relates to both the *actus reus* and the *mens rea* required for the crime of extermination. Previously, the Trial Chamber in *Vasiljević* defined the elements of the crime of extermination as follows:

> 1. The material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals (*actus reus*).
>
> 2. The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*)[25].

The conduct required for the *actus reus* of extermination includes any method of killing[26]. Furthermore, under any acts or combination of acts required for the *actus reus* of extermination, it has been found that this includes conditions such as deprivation of food and medicine[27] and subjection "to conditions of life calculated to bring about the destruction of a numerically significant part of the population"[28]. It is also possible to commit extermination by omission[29], and responsibility for extermination may even be remote or indirect[30]. It should also be noted that extermination "must be collective in nature rather than directed towards singled out individuals"[31].

As to the "numerically significant part" required to satisfy the *actus reus* of extermination, the ICTR Appeals Chamber found that the "crime of extermination is the act of killing on a large scale"[32], and that it must be established that mass killings occurred[33]. A number of ICTY Trial Chambers have declined to give a minimum number of victims required for extermination and seem to agree that "the requirement of massiveness as a constitutive element of the *actus reus* of extermination has to be determined on a case-by-case analysis of all relevant factors"[34]. The Appeals Chamber has found that "the expressions 'on a large scale' or 'large number' do not, however, suggest a numerical minimum"[35].

In order to satisfy the *mens rea* required for extermination, it is necessary that the perpetrator intends to kill persons on a massive scale, or intends to create conditions of life that will lead to the death of a large number of people[36]. It is further required that an accused knew that his actions were part of a widespread or systematic

attack against a civilian population[37]. Discriminatory intent is not required for extermination. The ICTY Appeals Chamber has found that discriminatory intent was not a legal element required for any of the forms of crimes against humanity listed in Article 5 of the ICTY Statute, with the exception of persecution which expressly requires it[38]. Following this finding, the Trial Chamber in the *Krstić* case found that "it is unnecessary that the victims were discriminated against for political, social or religious grounds, to establish the crime of extermination". In Article 3 of the ICTR Statute, there is a jurisdictional requirement that the crimes against humanity need to be committed on a discriminatory ground[39]. However, the ICTR Appeals Chamber has found that this feature in the ICTR Statute:

did not depart from international humanitarian law nor did it change the legal ingredients required under international humanitarian law with respect to crimes against humanity. It *limited* at the very most the jurisdiction of the Tribunal to a sub-group of such crimes, which in actuality may be committed in a particular situation[40].

For a fuller understanding, it should be noted that murder as a crime against humanity, and extermination as a crime against humanity have very similar elements. In the words of the ICTR Appeals Chamber: "the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale"[41].

Persecution as a crime against humanity

The ICTY Appeals Chamber has confirmed that "the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)"[42]. The ICC definition is much broader as it also includes discrimination on cultural, ethnic, and gender grounds[43]. As pointed out above in relation to extermination, the general elements required for crimes against humanity must also be met in relation to persecution as well.

There is no exhaustive list of persecutory acts, but in the ICTY jurisprudence, it has been found that the following acts may constitute persecution: destruction of property or means of subsistence, unlawful detention, unlawful confinement, deportation and forcible transfer, harassment, humiliation and psychological abuse, murder, torture, cruel and inhumane treatment, extermination, serious bodily and mental harm, rape, attacks launched deliberately against civilians or civilian objects, and forced labour[44].

In sum, the crime of persecution requires that there is an act which entails a discriminatory intent against the victim(s) on a racial, political or religious ground. For example, a person is murdered, detained or killed because he is, for example, of a certain race. The discriminatory intent required for persecution is similar to the specific intent required for genocide. Mettraux pointed out that "the discriminatory *mens rea* [required for persecution] stops short of the genocidal intent to destroy a particular group"[45]. This will be discussed further below.

Differences and similarities between the three crimes and concluding remarks

Genocide and crimes against humanity are indeed very similar offences. At times, genocide has been considered to be a form (the most vicious one) of crimes against humanity. Even though the two crimes are, in the words of Schabas, "cognates"[46], there are important differences. The main elements that distinguish genocide from crimes against humanity are (i) the required *mens rea*, (ii) the more limited range of underlying offences which may qualify as genocidal, (iii) genocide need not occur in the context of a widespread or systematic attack against a civilian population, (iv) crimes against humanity may only be committed against civilians, whereas genocide can be committed against combatants, and (v) at the ICTY and the ICTR, conspiracy and attempt to commit genocide are punishable whereas the conspiracy or attempt to commit crimes against humanity are not[47].

The crimes of extermination and genocide are both directed against a group of individuals, and usually as a consequence result in a large number of victims and enormous human suffering. But in relation to genocide, the actual number of victims may be much smaller than in relation to the crime of extermination. Furthermore, genocide may be established as an isolated attack. However, in relation to genocide, the group of targeted individuals has to be a national, racial, religious or an ethnic one, and has to be targeted as such. In order to establish extermination, it is sufficient to prove an intended killing on a large scale, regardless of the question whether the victims were killed with a discriminatory intent and whether they were members of a group[48]. Therefore, the offence of extermination targets a large number of individuals, who do not need to share any common characteristic[49]. Unlike both persecution and genocide, extermination does not require a discriminatory intent.

In this context, it is questionable whether in relation to the crime of extermination, it is necessary for the perpetrator to target a population or a part thereof. One author suggests that the crime of extermination does not appear to contain a "requirement under customary international law that the murderous enterprise must impact or bring about destruction of a specified proportion of a targeted group"[50]. As pointed out above, what is required for extermination is that a large number of individuals are killed, regardless of the question whether they belong to a population. However, the ICC Elements of Crimes require that a perpetrator inflicts "conditions of

life calculated to bring about the destruction of part of a population"[51]. Additionally, the *Krstić* Trial Chamber, which relied on this ICC definition, found that the crime of extermination required a "destruction of a numerically significant part of the population concerned"[52]. Neither of the two authorities provides a definition of the envisaged population[53], or the source of this requirement in law, prior to the adoption of the ICC Elements of Crime. It seems unclear why the drafters of the ICC Elements of Crime departed from the requirement of a large number of victims in favor of the requirement of a part of a population. It is also not clear how the required population is to be distinguished from any other population. On the other hand, considering the number of States that have ratified the ICC Statute, it could now be argued that the requirement of a (part of a) population, in relation to the crime of extermination, is now customary international law. It remains to be seen how the ICC will deal with this matter, if it is ever faced with this issue.

It has been noted that the crime of extermination fills a useful gap in international criminal justice where the elements of genocide have not been satisfied[54]. This is certainly true in a number of situations where there had been a massive killing, without the specific intent to destroy a national, ethnic, religious or a racial group. On the other hand, the gap seems to be getting smaller. For example, the International Law Commission concluded that extermination "also applies to situations in which some members of a group are killed while others are spared", thereby filling in another gap in the law[55]. This conclusion implies that genocide would not be applicable in such situations. However, this view seems to be superseded by the jurisprudence of the ICTY on the genocide in Srebrenica, where mainly Bosniak men were killed, and women and children were spared.

Genocide and persecution are similar as they both entail a specific intent towards a victim. Under persecution, an individual is singled out and targeted on political, racial or religious grounds. For genocide, it is required that a group of people bearing a common national, racial, ethnic or a religious characteristic is targeted as such. In the words of the *Jelišić* Trial Chamber:

"Genocide therefore differs from the crime of persecution in which the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such.[56]"

Therefore it is the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such that is the fundamental characteristic of the crime of genocide:

it is the mental element of the crime of genocide that distinguishes it from other crimes that encompass acts similar to those that constitute genocide. The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase 'as such' in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. This is what differentiates genocide from the crime against humanity of persecution. Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds[57].

In fact, the perpetrators of genocide:

identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity[58].

It is this evil virtue of genocide that makes genocide the crime of crimes and fascinates so many scholars, activists, politicians and others. Furthermore, emotional, historical and political factors add to the already grave connotation that the term genocide bears. So the perception that genocide is the worst crime is not that strange to the legal world either, and is not limited to popular belief. Never have courts used more prophetic words than when dealing with genocide. There is therefore merit to the claim that genocide stands out above all the other crimes.

But it is also often forgotten that a finding that genocide did not occur, does not deny that a killing on a mass scale had occurred. Such a finding is often accompanied with a ruling that there had occurred a serious violation of international humanitarian law and a conviction for crimes against humanity or war crimes. It is further also not understood, in the eye of the public and in eye of the victims, that a conviction for persecution as a crime against humanity entails a discriminatory intent against the victims. In such a case, the victims had been killed because they belonged to a particular national, ethnical, racial or religious, or even some other group[59]. What lacks in labeling the crime as genocide is the lack of proof in a criminal trial that there was an intent on behalf of the perpetrator to destroy the national, ethnical, racial or religious group as such[60]. It must be borne in mind that it is often very difficult to prove the specific intent as it is "a mental factor which is difficult, even impossible to determine". If there was no high requirement for the *mens rea* of genocide, it would not be different from extermination or persecution. In case of a conviction for extermination, there is a lack of both the discriminatory intent and the specific intent to destroy a protected group. But the factual result, the number of victims, can often be higher in cases of conviction of extermination, and even persecution, than in a case of genocide.

It is true that genocide stands out from other crimes as the worst atrocity because of its specific intent. But, the high threshold which needs to be met in order to establish genocide can, and often does, result in a failure to enter a conviction for genocide. This can lead to an understandable outcry and disappointment in the system of justice by the victims and the public. Therefore, it is necessary to understand that there are crimes which just fall short of being labeled as genocide, but crimes which carry almost the same gravity and cruelty with them as genocide, and which may even have resulted in a higher number of victims.

1 Associate Legal Officer, Chambers ICTY; formerly Associate Legal Officer in ICTY Registry and Legal Assistant to an ICTY defense team. All views presented in the article are solely those of the author in his individual capacity and do not represent the views of the United Nations or the International Criminal Tribunal for the former Yugoslavia.

2 See for example, *Prosecutor v. Serushago,* Sentence, 5 February 1999, para. 15

3 He combined the ancient Greek word *genos*, which means race, nation or tribe, with the Latin word to kill, *caedere*, see William A. Schabas, *Genocide in International Law,* Cambridge University Press (2000), p. 25 ("Schabas *Genocide*"), who refers to Raphael Lemkin's renowned book *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals of Redress,* Washington: Carnegie Endowment for World Peace (1944)

4 It is true that no definition of the crime of genocide existed at the time, but the term had already begun to be used. The ICTR Appeals Chamber had found that "the Indictment before the International Military Tribunal at Nuremberg charged, as part of the war crimes count, that the defendants 'conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others'" (*Prosecutor v. Rwamakuba*, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 24 October 2002, para. 14 which also refers to *United States of America, et al. v. Göring, et al.*, International Military Tribunal, Indictment dated 6 October 1945, Count Three, Part VIII(A)). The term genocide was also used in the closing speech of the prosecution. Also less then two months after the Nuremberg Judgment, the U.N. General Assembly had adopted a resolution which provides that "genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings." (U.N. GA Res. 96(I), UN Doc. A/RES/96(I) (1946), 11 December 1946). For more on this, see Guénaël Mettraux, "International Crimes and the Ad Hoc Tribunals", Oxford University Press (2005), ("Mettraux, *International Crimes*") pp. 193-199

5 The Statute of the Special Court for Sierra Leone does not include the crime of genocide

6 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948) ("Genocide Convention"), Adopted by U.N. General Assembly Resolution 260(III)A on 9 December 1948. The Genocide Convention entered into force on 12 January 1951, upon its twentieth ratification

7 Article 53 of the Vienna Convention on the Law of Treaties provides the definition of a pre-emptory norm: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"

8 *Reservations to the Convention on the Prevention and Punishment of the Crime of genocide (Advisory Opinion),* 1951 ICJ Reports 16, p. 23

9 See Schabas, *Genocide*, pp. 153-154

10 *Prosecutor v. Kayishema and Ruzindana* (Appeal) Judgment (Reasons), 1 June 2001, para. 151. *Prosecutor v. Blagojević and Jokić*, Judgment, 17 January 2005, para. 642 ("*Blagojević and Jokić* Trial Judgment"); *Prosecutor v, Brđanin,* Judgment, 1 September 2004 ("*Brđanin* Trial Judgment"), para. 689. In the jurisprudence of both U.N. Tribunals "murder has consistently been defined as the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death" (see *Blagojević and Jokić* Trial Judgment para. 556). *See, e.g., Prosecutor v. Delalic et al*., (Appeal) Judgment, 20 February 2001, para. 423; *Prosecutor v. Jelišić*, Judgement, 14 December 1999 ("*Jelišić* Trial Judgement"), para. 35; *Prosecutor v. Stakić*, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"), para. 584; *Prosecutor v. Krstić*, Judgement, 2 August 2001 ("*Krstić* Trial Judgement"), para. 485

11 *Krstić* Trial Judgment, para. 513

12 *Krstić* Trial Judgment, para. 513; *Blagojević and Jokić* Trial Judgment, para. 645

13 *Stakić* Trial Judgement, para. 518 referring to the *Akayesu* case at the ICTR. Examples of such methods consist of, but are not limited to, "methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion" (*Brđanin* Trial Judgment, para. 691)

14 See *Prosecutor v. Gacumbitsi*, (Appeal) Judgement, 7 July 2006, paras. 59-61. In this case, Mr. Gacumbitsi separated Tutsis, who were subsequently killed, from Hutus at the scene of crime

15 *Prosecutor v. Kambanda,* Judgment, 4 September 1998, para. 16

16 See the discussion on persecution below

17 *Prosecutor v. Akayesu*, Judgment, 2 September 1998, ("*Akayesu* Trial Judgment"), paras. 512-515

18 *Jelišić* Trial Judgment, para. 70

19 See *Prosecutor v. Stakić*, (Appeal) Judgment, 22 March 2006 ("*Stakić* Appeal Judgment"), para. 25

20 *Stakić* Appeal Judgment, paras. 26-28. For example in this case, the 'definition' 'non-Serbs' was not sufficient

21 "Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996", UN Doc. A/51/10, ("ILC Report 1996"), pp. 45-46

22 See *Prosecutor v. Sikirica,* Judgment on Defense Motions to Acquit, 3 September 2001 ("*Sikirica* R98*bis* Decision"), para. 65. The first element examines the actual number of the targeted members of the protected group as a proportion of the entire group, thereby acknowl-

edging the possibility of targeting a protected group in a limited geographic zone The second element focuses on the significance of a targeted section of the group, such as its leadership
23 The general requirements required for crimes against humanity differ somewhat in the Statutes of the ICTY, ICTR and ICC. For example, at the ICTY there is a jurisdictional requirement that the widespread or systematic attack against any civilian population be committed in an armed conflict (ICTYSt., Article 5). At the ICTR, it is required that the widespread or systematic attack against any civilian population be committed on national, political, ethnic, racial or religious grounds (ICTRSt., Article 3). For more on the general elements required for crimes against humanity at the ICTY and the ICTR, see Mettraux, *International Crimes*, pp. 147-173. For ICC, see William A. Schabas, "An Introduction to the International Criminal Court", 2nd ed., Cambridge University Press, (2004), pp. 41-51
24 *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* (Appeal) Judgment, 13 December 2004 ("*Ntakirutimana* Appeal Judgment"), para. 522
25 *Prosecutor v. Vasiljević*, Judgment, 29 November 2002 ("*Vasiljević* Trial Judgment"), para. 229. This definition was also adopted in the *Brđanin* Trial Judgment, para. 389, fn. 920
26 See ICC Elements of Crimes (ICC-ASP/1/3), Article 7(1)(b), under 1, fn. 8. See also *Krstić* Trial Judgment, para. 498
27 *Brđanin* Trial Judgment, para. 389
28 *Krstić* Trial Judgment, para. 503; See also ICC Elements of Crimes (ICC-ASP/1/3), Article 7(1)(b), under 1
29 *Ntakirutimana* Appeal Judgment, para. 522; *Brđanin* Trial Judgment, para. 389; *Blagojević and Jokić* Trial Judgment, para. 573
30 *Brđanin* Trial Judgment, para. 390
31 *Vasiljević* Trial Judgment, para. 227; *Stakić* Trial Judgment, para. 639; *Brđanin* Trial Judgment, para. 390
32 *Ntakirutimana* Appeal Judgment, para. 516, *Vasiljević* Trial Judgment, para. 232
33 *Ntakirutimana* Appeal Judgment, para. 521
34 See *Brđanin* Trial Judgment, para. 391; *Stakić* Trial Judgment, para. 640; The Trial Chamber in *Vasiljević* concluded that it "is not aware of cases which, prior to 1992, used the phrase 'extermination' to describe the killing of less than 733 persons. The Trial Chamber does not suggest, however, that a lower number of victims would disqualify that act as 'extermination' as a crime against humanity, nor does it suggest that such a threshold must necessarily be met" (*Vasiljević* Trial Judgment, fn. 587). The Trial Chamber in *Brđanin* has found that at least 1699 victims satisfy the element of massiveness for the crime of extermination (*Brđanin* Trial Judgment, para. 465)
35 *Ntakirutimana* Appeal Judgment, para. 516
36 *Brđanin* Trial Judgment, para. 395; *Blagojević and Jokić* Trial Judgment, para. 574; *Stakić* Trial Judgment, paras. 641-642; *Vasiljević* Trial Judgment, paras. 228-229. One ICTY Trial Chamber found that "the *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused's act or omission must be done with intention or recklessness (*dolus eventualis*)", see *Brđanin* Trial Judgment, para. 395
37 See *Vasiljević* Trial Judgment, para. 229. See ICC Elements of Crimes (ICC-ASP/1/3), Article 7(1)(b), under 4
38 *Prosecutor v. Tadić*, (Appeals) Judgment, 15 July 1999, para. 281-305
39 See Article 3 of the ICTR Statute. See also *Prosecutor v. Akayesu*, (Appeal) Judgment, 1 June 2001, para. 464 where the ICTR Appeals Chamber held that: "In the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity. To that extent, the Appeals Chamber endorses the general conclusion and review contained in *Tadic*, as discussed above. However, though such is not a requirement for the crime *per se,* all crimes against humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population. As held in *Tadic*: "[i]t is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons". It is within this context, and in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack), that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible crimes against humanity"
40 *Prosecutor v. Akayesu*, (Appeal) Judgment, 1 June 2001, paras. 464-469
41 *Ntakirutimana* Appeal Judgment, para. 542. The International Law Commission has found that "the act to carry out the offence of extermination involves an element of mass destruction which is not required for murder"; See also ILC Report 1996, p. 48. See also *Brđanin* Trial Judgment, para. 388 where it was held that: "The jurisprudence of this Tribunal and the ICTR has consistently held that, apart from the question of scale, the core elements of willful killing (Article 2) and murder (Article 3 and Article 5) on the one hand and extermination (Article 5) on the other are the same"
42 *Prosecutor v. Krnojelac*, (Appeal) Judgment, 17 September 2003, para. 185
43 See ICC Statute, 7(1)(h). Regrettably, the purposes of this article do not allow a more extensive comparison between the two definitions
44 For an overview of the ICTY jurisprudence on these acts, see Human Rights Watch, "Genocide, War Crimes and Crimes against Humanity, a Topical Digest of the Case Law of the International Criminal Tribunal for the former Yugoslavia", New York (2006), Volume 1, pp. 276-328
45 Mettraux, *International Crimes*, p. 334
46 William A. Schabas, "The UN International Criminal Tribunals", Cambridge University Press (2006) ("Schabas, U.N. Tribunals"), p. 185
47 See Mettraux, *International Crimes*, pp. 329-340. See Article 4(3) of the ICTY Statute, and Article 2(3) of the ICTR Statute
48 See also *Prosecutor v. Musema* (Appeal) Judgment, 16 November 2001, para. 366
49 ILC Report 1996, p. 48
50 See Mettraux, *International Crimes* , p. 78
51 ICC Elements of Crimes (ICC-ASP/1/3), Article 7(1)(b), under 1 (emphasis added). The ICC Elements of Crimes further require that, in relation to extermination, "the conduct constituted, or took place as part of, a mass killing of members of a civilian population" (ICC Elements of Crimes, Article 7(1)(b), under 2, emphasis added)
52 *Krstić* Trial Judgment, para 502
53 For example, it is unclear whether the population concerned is a population of a town, or a camp, or any population
54 See Schabas, U.N. Tribunals, p. 199, referring to Chesterman, "An Altogether Different Order: Defining the Elements of Crimes Against Humanity" in 10 *Duke Journal of Comparative and International Law* 137 (2000) at pp. 336-337
55 ILC Report 1996, p. 48
56 *Jelišić* Trial Judgment, para. 79
57 *Sikirica,* Rule 98bis Decision, para. 89
58 *Prosecutor v. Krstić* (Appeal) Judgment, 19 April 2004, para. 36
59 One Trial Chamber considered that: "All crimes falling within the jurisdiction of this Tribunal are characterizes [sic] as 'serious violations of international humanitarian law.' The crimes for which the Accused in th*is case have been convicted clearly warrant such a label. While not seeking to minimize the gravity of any other crimes, the Trial Chamber finds that two of the crimes for which the Accused have been convicted warrant special attention due to their targeting of groups because on discriminatory grounds: genocide and persecutions as a crimes against humanity" Blagojević and Jokić* Trial Judgment, para. 834
60 *Akayesu* Trial Judgment, para. 523

Judgments Pronounced in Cases against Marko Samardžija and Nikola Andrun

On November 03 and December 14, 2006, the Court of BiH pronounced first instance verdicts in the cases against Marko Samardžija and Nikola Andrun, sentencing them to 26 and 13 years of imprisonment, respectively. In accordance with Article 289 BIH Criminal Procedure Code the Trial Panel should prepare the written version within 15 days with the possibility of an extension to a total of 30 days from the date the verdict was announced.

Marko Samardžija

Marko Samardžija was charged with having committed the criminal offense of crimes against humanity and was sentenced to 26 years. The trial panel, consisting of judges Gogala Zorica, Dekkers Roland and Lindseth Tore, established that the defendant Samardžija Marko, in his capacity as the Commander of the 3rd Company of Sanica Battalion of the 17th Light Infantry Brigade, on 10 July 1992, had ordered his soldiers to take out men, Bosniak civilians, from the hamlets of Brkići and Balagića Brdo, from their houses and bring them to the meadow of Jezerine. At that location, the accused with his subordinate armed soldiers met them after which he took the persons above 18 and under 60, with their hands behind their back, in a column, to the yard of the Elementary School in Biljani. Furthermore, the trial panel found that the accused was guilty of having had a number of Bosniak men locked up in the school classrooms from where they were taken in groups of 5 to 10 and forced through a gantlet, while being beaten, leading to a bus, which took them in the direction of Lanište where the majority of them were killed. The defendant also took part in collecting and disposing of the corpses of the victims killed on that occasion. These bodies were exhumed (at least 144) from the mass graves at Lanište, Crvena Zemlja and Biljani in the course of 1996. The main trial in the case started on 1 February 2006. In the course of the trial there were 23 hearings with over 118 courtroom hours. Representing the prosecution was Vesna Ilić of the Prosecutor's Office of BiH, while the defense counsel was lawyer Zlatko Knežević.

Nikola Andrun

Nikola Andrun was charged with having committed the criminal offence of war crimes against the civilian population and was sentenced to 13 years imprisonment. The Trial Panel, consisting of judges Vukoje Dragomir, Gebelein Richard and Reniers Georges, stated that in the second half of 1993, in the capacity of deputy camp commander in Gabela camp, municipality of Čapljina, and also as a member of HVO brigade Knez Domagoj, Nikola Andrun tortured detained civilians, treated them in an inhumane manner and applied intimidating measures against them. Furthermore, the Trial Panel stated that during the end of September or early October 1993, together with another individual, the accused took one detainee from Gabela camp to a police station in Čapljina, where he participated in physical and mental abuse of the detainee. On two occasions, in August and September 1993, together with the camp commander, he transferred a group of Bosniaks from Gabela to Silos camp with the intent to prevent members of the Red Cross from registering detainees. The Trial Panel acquitted Andrun of charges for murder and the charge that on September 30, 1993 together with two other individuals he participated in the abuse of one detainee. The main trial began on June 22, 2006 with 27 hearings. Representing the prosecution was Tančica Vesna of the Prosecutor's Office of BiH and defense counsel were Kulenović Hamdo and Gržić Nikica.

Case report: Nikola Kovačević

Court of BiH case number: X-KR-05/40

Background information

Upon the proposal of the Prosecutor's Office of BiH, on 30 September 2005, the case of Nikola Kovačević was taken over from the Cantonal Court of Bihac to the jurisdiction of the Court of BiH. The Court of BiH confirmed the indictment on 5 January 2006 and at the hearing held on 20 January 2006, the accused pleaded not guilty. The main hearing before Section I for War Crimes commenced on 20 April 2006.

On 3 November 2006, the Court of BiH rendered the first instance judgment finding the accused guilty of committing, aiding, abetting and instigating persecutions of Muslims and Croats, because of their national, religious, political and ethnic affiliations, as a part of a widespread and systematic attack directed against the civilian population in the area of the Sanski Most municipality, by which he committed the criminal offence of crimes against humanity under Article 172, paragraph 1., item h) persecution, in relation to Article a) murder, e) imprisonment, f) torture and k) other inhumane acts, in relation to Article 180, paragraph 1 of the CC of BiH and sentencing him to 12 years imprisonment. The appeal is currently pending before the Appellate Panel of the Court of BiH.

Charges

The indictment alleges that Nikola Kovačević, in the period between May and August 1992, as a member of the SOS unit (Serbian Defense Forces), by participating in a widespread and systematic attack by the Army of the Serb Republic of Bosnia and Herzegovina and other forces directed against the civilian population of the Sanski Most municipality, having knowledge of those attacks, took part and thereby committed, aided and instigated the persecution of Muslims and Croats.

In the period between May and August 1992, either alone or together with Milan Martić and other members of the army and police, Kovačević detained civilians in the facility of Betonirka, where they were subjected to torture and inflicted grave bodily and mental suffering and pain.

In June and July 1992, together with other members of the army and police, Kovačević took part in taking civilians detained at a Police Station, Betonirka facility, Elementary School Hasan Kikić and the high school gym to the Manjača camp. In the course of the transport, the detained civilians were subjected to extreme abuse and severe beatings, with some of them subsequently disappearing.

On 6 June 1992, in the vicinity of Manjača camp, the accused and others separated about 7 civilians and subjected them to severe beatings using rifle butts and sticks, inflicting on them severe injuries because of which they fell down motionless in a pool of blood. Subsequently, the accused and others drove their bodies in an unknown direction.

On 11 June 1992, together with other members of the army and police, Kovačević in the Manjača camp participated in severe beatings of civilians and particularly one of them, after which he drove him with five others in an unknown direction. Since then, there has been no trace of them.

On 7 July 1992, together with other members of the army and police, Kovačević placed 60 detained civilians from the Betonirka facility onto the back of a truck and covered them with a canvas, which the detainees were not allowed to lift. Due to the enormous heat, injuries and exhaustion at least nineteen civilians suffocated.

On the same day, the bodies of the dead, suffocated civilians were placed on the truck, while other civilians who had tried to help them were not handed over to the Manjača camp but were taken to an unknown location, subsequently disappearing.

Reasoning of the Verdict

The first instance panel ruled in relation to all the counts that Kovačević Nikola acted with intent and was aware that his actions violate rules of international law and that he obviously sought to cause the resulting consequences. The Court found that despite the fact that the accused committed many criminal acts (murder, imprisonment, torture, persecution and other inhuman acts), the concrete case deals only with one criminal offence, namely, persecution as a Crime against humanity under Article 172 paragraph 1. item h) of the CC of BiH. The Court held that the crime of persecution incorporates the *actus reus* of all the above mentioned criminal acts; however, the Panel held that the commission of multiple acts committed on separate occasions demonstrates a certain persistency in commission of crimes by the accused. The Panel, therefore, considered this conduct as an aggravating circumstance in sentencing.

Case report: Boban Šimšić

Court of BiH case number: X-KR-05/04

Background information

On 13 May 2005 the Court of Bosnia and Herzegovina (BiH) rendered an *ex officio* decision stating that it would take over the case against Boban Šimšić from the District Court in Istočno Sarajevo, pursuant to Article 449(2) of the Criminal Procedure Code of Bosnia and Herzegovina (BiH CPC). Considering that the case was in the investigative stage, the case file was referred to the Prosecutor's Office of BiH for further action. Defense counsel for Boban Šimšić appealed this decision, but on 15 June 2005 the Appellate Panel refused the appeal as unfounded and upheld the decision to try the case before the War Crimes Section of the Court of BiH. On 28 June 2005 the Prosecutor filed his Indictment which was confirmed by the Court on 8 July 2005. At the plea hearing of 14 July 2005 the accused pleaded not guilty to all counts of the Indictment. On 8 September 2005, the Court held a status conference and on 14 September 2005 it opened the main trial with the reading of the Indictment. During the course of the main trial 31 hearings were held. A total of 27 prosecution and 15 defense witnesses were examined.

Charges

The Indictment alleged that Šimšić, in the territory of Višegrad Municipality in the period from April 1992 to July 1992, aided and abetted enforced disappearance of persons as well as rape of non-Serbian women. It was alleged that the accused, on an undetermined date in the second half of June 1992, aided and abetted Milan Lukić and other members of the Serb army, police and paramilitary formations in taking away Bosniak civilians imprisoned on the premises of the elementary school ”Hasan Veletovac“ after which these civilians disappeared without a trace.

During the second half of June 1992 the accused was also alleged to have singled out girls and young women, unlawfully imprisoned in the same elementary school, and to have taken them away in order to hand them over to other members of the Serb army who carried out multiple rapes and beat and humiliated several of these women.

According to the Indictment the accused thus, as a part of a widespread and systematic attack directed against Bosniak civilians and, while being aware of such an attack, aided and abetted members of the Serb army in the enforced disappearance of persons and in coercing others by force or by threat of immediate attack upon life or limb into sexual intercourse. In doing so, the accused committed the criminal offence of Crimes against Humanity pursuant to in Article 172(1) (i) enforced disappearance and (g) sexual violence of the Criminal Code of Bosnia and Herzegovina (BiH CC), in conjunction with Article 31 BiH CC.

Reasoning of the Verdict

On 11 July 2005, the Court pronounced its verdict against Boban Šimšić, finding him guilty of assisting in the commission of Crimes against humanity under Article 172(1) (i) and (g) BiH CC, in conjunction with Article 31 BiH CC. Accordingly, the Court sentenced him to five years imprisonment. The verdict acquitted Šimšić of the charges relating to the counts of the Indictment concerning murder, unlawful confinement, torture, rape and the infliction of physical and mental injuries. The charges brought against Šimšić under Counts 1a and 4b of the indictment relating to acts of persecution, torture and other inhumane acts were dismissed.

Both the Prosecution and the Defense appealed the pronounced verdict. On 05 January, 2007 the Appeals Panel issued its Decision to re-hear the case.

Case report: Radovan Stanković

Court of BiH case number: X-KR-05/70, 11bis case

Background information

Radovan Stanković was originally indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) together with 4 other accused. On 3 March 2003 the ICTY Prosecutor issued a Second Amended Indictment against Stanković alone. This Indictment was followed by a Third Amended Indictment on 24 February 2004. This Indictment charged Stanković with 4 counts of Crimes against Humanity and 4 counts of Violations of the Laws or Customs of War relating to offences allegedly committed in and around Foča municipality in south eastern Bosnia. On 1 September 2005, following proceedings initiated thereto, the case against the accused became the first case to be transferred from the ICTY to the Court of Bosnia and Herzegovina (BiH) pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence. The BiH Prosecutor's Office filed its adapted Indictment on 28 November 2005 which was accepted by the Court on 7 December 2005. The main trial against Stanković commenced on 22 May 2006. In total 16 hearings were held before the Trial Panel, lasting for more than 44 hours. Vaso Marinković, Prosecutor of the Prosecutor's Office of BiH, appeared for the Prosecution whereas Dragica Glušac and Nebojša Pantić appeared for the defense.

Charges

The Indictment charged Radovan Stanković with 6 counts of Crimes against Humanity pursuant to Article 172 (1) paragraphs c) enslavement, (e) imprisonment, (f) torture and (g) sexual violence of the Criminal Code of Bosnia and Herzegovina (BiH CC). In particular the Indictment alleged that the accused, as a member of the Miljevina Battalion that was subordinated to the Foča Tactical Brigade perpetrated, instigated and aided and abetted enslavement, torture, rape and murder of civilians of non-Serbian ethnicity in the Foča municipality between April 1992 and February 1993. The offences were alleged to have been committed as part of a widespread and systematic attack executed together with members of the police and paramilitary formations against the non-Serbian population of the Foča Municipality.

As alleged in the Indictment, the accused, together with other persons, established a women's detention centre, which was referred to by the soldiers as "the Brothel", at the so-called "Karaman's house" in Foča in August 1992. The Indictment reads that at least nine female persons were detained in this centre, most of whom were underage.

The Indictment further alleged that the accused, at this detention centre, alone or together with other persons, compelled a number of detainees over an extensive period of time to engage in sexual intercourse and perform forced labour, verbally insulting and beating them in the process.

The accused was also alleged to have kept one particular detainee detained on several locations until the beginning of November 1992. During that time, he allegedly forced her to engage in sexual intercourse on a daily basis and also compelled her to perform forced labour which included cooking, washing clothes and cleaning apartments. According to the Indictment, Stanković often raped this detainee in the presence of other persons and on one occasion, in the presence of this detainee, he raped her underage sister.

Reasoning of the Verdict

On 14 November 2006, the first instance Panel for War Crimes of the Court of BiH composed of Presiding Judge Davorin Jukić and international Judges Almiro Rodrigues and Lars Folke Bjur Nystrom, rendered its verdict against the accused. The Panel found Radovan Stanković guilty of committing the criminal offence of Crimes against Humanity as alleged in the Indictment pursuant to Article 172(1) (c), (e), (f) and (g) of the BiH CC. The accused was acquitted on one count pertaining to allegations that he took a female patient out of the hospital to an apartment with the intention of forcing her into sexual intercourse.

As a result, the Panel sentenced Radovan Stanković to 16 years imprisonment, with credit being given for the time the accused has already spent in custody since 9 July 2002 in the ICTY and Court of BiH detention facilities.

Case report: Željko Mejakić and Others

Court of BiH case number: X-KR-06/200, 11 bis case

Background information

In order to comply with the deadlines set out in security council resolution 1503[1], the Appellate Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) confirmed, on April, the 7th 2006, the referral of the case of Željko Mejakić, Momčilo Gruban, Dušan Fuštar and Duško Knežević to the State Court of Bosnia and Herzegovina (hereinafter, Court of BiH) according to rule 11*bis* of the Statute of the ICTY[2]. The indictment[3] recalls that from April to the end of 1992, in the context of a widespread or systematic attack directed against the non-Serb population by the Prijedor municipality crisis staff, more than 7000 people were captured and interned in Keraterm, Omarska and Trnopolje camps (Prijedor). They were held there in inhuman conditions and subjected to grave physical, psychological and sexual maltreatment and many of them were killed on the basis of their ethnicity, religion or political affiliation.

According to the indictment, Željko Mejakić was Chief of Security, or at least the *de facto* Commander, of the Omarska Camp. It is alleged that he supervised the three shifts of camp guards and had effective control over them. Momčilo Gruban was called to perform full time duty at the Omarska camp as guard shift commander. Dušan Fuštar was a guard shift commander at the Keraterm camp who supervised one of the three shifts of guards that operated within the camp. Duško Knežević, although he did not appear to hold an official position in either camp, was apparently able to enter and leave the compounds at will; an ability he used to perform the alleged criminal acts.

Charges

All the accused are charged with crimes against humanity pursuant to article 172 of the Criminal Code of Bosnia and Herzegovina (hereinafter BiH CC) in conjunction with items (a) depriving another person of his life (murder); (f) torture; (k) other inhumane acts; and (h) persecution. Željko Mejakić and Momčilo Gruban are also charged with items (e) imprisonment and (g) sexual violence. Dušan Fuštar is charged as well with item (e) and Duško Knežević with item (g). As to the mode of liability, they are charged in conjunction with article 29 (accomplices) and 180(1) (individual criminal responsibility). Željko Mejakić, Momčilo Gruban and Dušan Fuštar are also charged under article 180(2) (superior responsibility) of the BiH CC.

Proceedings before the Court of BiH

The accused were handed over to the Bosnian authorities on 09 May, 2006. On the same day and the following, a hearing was held before a preliminary proceedings judge. Pre-trial custody was ordered for an initial period of thirty days. The Prosecution was ordered to adapt the indictment within this time[4]. Judge Shireen Avis Fisher partially upheld the arguments of the prosecution that there existed grounded suspicions to hold the accused in custody pursuant to the requirement of article 132(1) of the Criminal Procedure Code of Bosnia and Herzegovina (Hereinafter BiH CPC). She particularly considered that there was an actual risk of flight of the accused as all possessed citizenship of Serbia and Montenegro. She also considered that the release of the accused would be a threat to public security because of the manner of perpetration of the offence and its long-term and severe consequences on the population. However, she denied that there would be a risk that witnesses will be threatened or influenced if suspects were released. An appeal was filed against this decision. The Appeal Panel upheld the pre-trial judge's decision. By order of the Court dated 09 June 2006, custody was extended for another month[5].

The defense raised the point that the court defined the initial thirty days period as a maximum and not a minimum time frame for the Prosecution to adapt the indictment. They contented that extending custody would violate Article 5(3) and Article 6 of the European Conventions on Human Rights. Although the Court expressed its concern in respect to the time spent in custody by the suspects since they surrendered to the ICTY, the Panel concluded that the time spent in the ICTY should not be taken into consideration in assessing the length of pre-trial detention of the accused in proceedings before the Court of BiH. This decision was affirmed by the Appeal Panel in its 27 June, 2006 decision.

Proceedings before the Constitutional Court

An appeal against the decision extending custody was filed with the Constitutional Court of BiH. It was argued that the panel failed to take into account the time spent in custody at the ICTY in assessing the reasonableness of the length of detention. In so doing, it violated the Constitution of BiH and the European Convention of Human Rights. The Constitutional Court rejected the appeal as unfounded. Addressing the issue of detention

(Continued on page 27)

Case Report: Mitar Rašević and Others

Court of BiH case number: X-KR-06/275, 11 bis case

Background information

Mitar Rašević and Savo Todović were originally charged together with Milorad Krnojelac in an Indictment issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY) on 17 June 1997. After the arrest of Krnojelac on 15 June 1998 and his subsequent trial and conviction, Judge Liu Daqun unsealed an Indictment against Rašević and Todović on 29 November 2001. Mitar Rašević surrendered himself to the authorities of Serbia and Montenegro on 15 August 2003 and was transferred to The Hague the same day. Savo Todović surrendered himself on 15 January 2005 and was also transferred to the ICTY. Both accused failed to enter a plea at their respective initial appearances and had pleas of "not-guilty" entered on their behalf according to the Tribunal's Rules of Procedure and Evidence. On 7 April 2006 ICTY Trial Chamber II rendered a decision that confirmed the joint Indictment against Rašević and Todović.

Following proceedings initiated by the Prosecutor of the ICTY based on Rule 11*bis* of the ICTY Rules of Procedure and Evidence, the Referral Bench of the Tribunal decided to refer the case against Rašević and Todović to the judicial authorities of Bosnia and Herzegovina. This decision was confirmed by the ICTY Appeals Chamber on 4 September 2006. Accordingly, on 3 October 2006 both accused were transferred to Bosnia and Herzegovina and handed over to the jurisdiction of the Court of Bosnia and Herzegovina.

Charges

In the Second Joint Amended Indictment, dated 24 March 2006, the ICTY Prosecutor charged both accused with seven counts of Crimes against Humanity (persecutions; torture; inhumane acts; murder; imprisonment; enslavement) and five counts of Violations of the Laws or Customs of War (torture; cruel treatment; murder; slavery), committed in and around the prison in the town of Foča in South-East Bosnia. The Indictment alleged that Mitar Rašević was commander of the guards at the Foča Kazeno-Popravni Dom (KP Dom) and that Savo Todović functioned as the second in command of the prison staff and later on as Assistant Warden. It is further alleged that the accused participated in a joint criminal enterprise that came into being from no later than 18 April 1992 until 31 October 1994. The purpose of the joint criminal enterprise was to imprison Muslim and other non-Serb civilians from Foča and the surrounding areas in inhumane conditions and subject them to beatings, torture, enslavement, deportations and forcible transfers.

Proceedings before the Court of BiH

On 3 October 2006 the BiH Prosecutor filed a Motion requesting pre-trial custody to be ordered against both accused according to Article 132(1) (a), (b) and (d) of the Criminal Procedure Code of Bosnia and Herzegovina (BiH CPC) and pursuant to the fact that the Prosecutor needed a certain amount of time to adapt the Indictment of the Prosecutor of the ICTY to the BiH CPC. The Preliminary Hearing Judge granted the Motion by the Prosecutor's Office, though custody based on Article 132(1) (b) was denied, and ordered custody against the accused for an initial period of one month. On 3 November 2006 a decision was rendered extending the pre-trial custody for Mitar Rašević and Savo Todović for another two months. The Court of BiH, on 29 December 2006, accepted the adapted Indictment against the accused charging them with Crimes against Humanity.

Case report: Paško Ljubičić

Court of BiH case number: X-KRN-06/241, 11 bis case

Background information

Paško Ljubičić, aka Toni Raić, was born on 15 November 1965 in Nezirovići, Busovača, BiH. In August 2001 the Prosecutor of the ICTY filed an Indictment against Ljubičić. On 21 November 2001 Ljubičić surrendered voluntarily and was transferred to The Hague. At his initial appearance before the Tribunal on 30 November 2001 he pleaded not guilty to all counts of the Indictment. On 8 April 2002 a corrected and amended Indictment was filed, which was confirmed on 2 August 2002. On 26 September 2002 Ljubičić pleaded not guilty to all counts of the new Indictment. On 12 April 2006, pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence, the Tribunal's Referral Bench ordered that the case against the accused be referred to the authorities of Bosnia and Herzegovina. On 9 May 2006 the Defense for the accused appealed this decision. The ICTY Appeals Chamber dismissed the appeal on all grounds, and on 4 July 2006 it confirmed the Decision to refer the case to the Court of BiH. On 22 September 2006 Paško Ljubičić was transferred from the ICTY detention unit and handed over to the custody of the BiH authorities.

Charges

The corrected and amended ICTY Indictment alleges that Paško Ljubičić served as a commander of the 4th Battalion of the Croatian Defense Council (HVO) Military Police from January 1991 to July 1993 and as an assistant to the Chief of Military Police Administration for the Central Bosnia Operational Zone until October 1993. From January 1993 Ljubičić was a member of the HVO Military Police. In this capacity, he exercised *de jure* and *de facto* authority over members of the 1st and, later on, the 4th Military Police Battalion. The Indictment alleges that Paško Ljubičić, individually and in concert with other members of the HVO Military Police, who were under his command and control, as well as with other HVO members, as part of a widespread and systematic attack planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation and perpetration of Crimes against Humanity by persecuting Bosnian Muslims on political, racial or religious grounds, in the territory of the Vitez and Busovača.The Indictment alleges that the persecutions were committed in widespread or systematic attacks on cities and villages inhabited by Bosnian Muslims. During and immediately after the attacks, the offences were committed by way of depriving Bosnian Muslim civilians of their lives, and by inflicting severe bodily injuries or subjecting them to sufferings. Throughout the attacks on Ahmići, Nadioke, Pirići and Šantići on 16 April 1993, approximately 100 civilians were killed, and many others sustained severe bodily injuries. On 19 April 1993, five women from one family were killed during an attack on Očehnići. The Indictment also alleges that persecution was conducted through ruthless destruction and plunder of residential and business premises of Bosnian Muslims, their religious and educational institutions as well as private property and cattle owned by civilians. In Vitez and Busovača, persecutions are also alleged to have been committed through systematic selection and arrests of hundreds of Bosnian Muslims. According to the allegations in the Indictment, they were incarcerated in facilities controlled by HVO. The arrested men were beaten and subjected to physical and mental abuse. It is also alleged that they were forced to dig trenches on the front line. Bosnian Muslims were also expelled from their homes and forcibly transferred from Vitez and Busovača to other parts of BiH by the HVO Military Police.

Proceedings before the Court of BiH

After he was transferred to BiH authorities on September 22, 2006, Paško Ljubičić was detained in the Detention Unit of the Court of BiH.The Indictment against Paško Ljubičić was filed and confirmed on December 21, 2006. The indictment charges him with crimes against humanity referred to in Article 172 paragraph 1 of the BiH Criminal Code points a) murder; e) imprisonment; f) torture; h) persecution and k) other inhumane acts; War Crimes against civilians referred to in Article 173 paragraph 1 of the BiH CC points a) attacks on civilian population, f) forced labor, starvation of the population, plunder, destruction of property; violations of laws and practices of warfare referred to in Article 179 paragraph 2 of the BiH Criminal Code point d) confiscation, destruction or deliberate damaging of establishments devoted to religious or educational purposes, all in relation to Articles 29 (Accoplicies); 31 (Accessory), 35 (Intent) and 180 paragraphs 1 and 2 (Individual and superior criminal responsibility) of the BiH Criminal Code. On December 21, 2006 a Decision was issued extending detention against the accused until the end of the main trial or September 09, 2009. Detention was extended pursuant to Article 132 paragraph 1 points a) and d) of the BiH CPC. In a plea hearing on January 09, 2007 Paško Ljubičić refused to plea saying the Indictment was not confirmed but only accepted. His defense argued that provisions of the BiH CPC (Articles 228 and 229) had been violated, stating that the Indictment should be confirmed and not merely accepted. The judge considered there was no violation of the law and entered a plea of not guilty into the record.

Case report: Romeo Blažević

Cantonal Court Mostar case number: K-43/02

Background information

On 26 April 2004, Romeo Blažević was convicted by the Verdict of the Cantonal Court in Mostar for the criminal offence of War Crimes against Prisoners of War, pursuant to Article 144 of the adopted SFRY Criminal Code (SFRY CC), and sentenced to imprisonment for a period of one year. He was also convicted for the criminal offence of War Crimes against the Civilian Population, pursuant to Article 142 SFRY CC for which he was sentenced to imprisonment for the period of one year and six months, therefore, pursuant to Article 48 SFRY CC, a single compound sentence of imprisonment was pronounced against him for the period of two years. The Cantonal Prosecutor's Office filed an appeal against the aforementioned verdict, contesting the length of the sentence, referring to it as disproportionate and too mild. On 16 December 2004, the Supreme Court of the Federation of BiH (FBiH), in its verdict (No. Kž-272/04) accepted in part the appeal of the Cantonal Prosecutor's Office in Mostar and entered a new sentence relating to the criminal offence of War Crimes against Prisoners of War under Article 144 of the SFRY CC, for a period of two years. The Supreme Court adopted the prison sentence for crimes committed under Article 142 SFRY CC. Accordingly the compound sentence was altered to reflect the new sentence and the Supreme Court entered a new compound sentence of imprisonment against the accused for the period of three years.

Charges

The Cantonal Prosecutor's Office Mostar issued an Indictment on 29 November 2002, before the Cantonal Court in Mostar. The Indictment charged Romeo Blažević with inhuman treatment of civilians and prisoners of war, as well as acting in violation of the provisions of international law in time of war as a member of the Croatian Defence Council (HVO). The Indictment alleged that the accused, during the war between the HVO and the BiH Army, in violation of Articles 3, 13, 14 and 130 of the third Geneva Convention relative to the Treatment of Prisoners of War, had beaten, insulted and verbally and physically abused imprisoned members of the BiH Army at the Police Station of the HVO in Široki Brijeg. Blažević was also accused of criminal offences after the war between the BiH Army and the HVO had ended. The indictment alleged that he, in violation of Articles 3 and 147 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, took an imprisoned woman from the HVO war camp "Heliodrom" with the intention of having her extract the body of his killed brother which was located between the separation lines of the two armies. The accused allegedly took the woman to a check point of the HVO and ordered her to find his brother's body threatening her that he would kill her two small children if she failed to return. The woman accepted and set out towards the BiH Army lines but was subsequently captured there, since there had been no agreements made concerning the exchange of casualties. This left the woman in great uncertainty over the fate of her children.

Reasoning of the Verdict

The first instance Court stated that Romeo Blažević, in perpetration of the criminal offences described in the Verdict, acted with direct intent. The Court found that the accused knew that there were many imprisoned members of the BiH Army in the closed room at the Police Station and that he did not have any official function in that facility. The Court also noted that the accused was well aware of the fact that the prisoners should have received protection, but it concluded that Blažević merely wanted to humiliate them by abusing the prisoners verbally and physically and therefore brought a whip and a pistol with him as instruments for doing so. Regarding the other offences referred to in the Verdict, the Court found that the accused was well aware of his actions when he separated the imprisoned woman from her small children. It also concluded that despite the fact that the accused realized that he was using and exploiting the woman's fear for the wellbeing and safety of her children, he decided to commit the offence.

Having reviewed the grounds for appeal filed by both the Prosecution and the Defence, the Supreme Court of FBiH concluded that the first instance court pronounced an inadequate sentence of imprisonment for the criminal offence of War Crimes against Prisoners of War pursuant to Article 144 SFRY CC.

The Supreme Court was also mindful of the fact that the offence had been committed in relation to a large number of injured parties and in a particularly humiliating manner, as well as the fact that the accused had already been convicted on several occasions to date.

Case report: Konstantin Simonović

Brčko Basic Court case number: Kp-218/05

Background

On 18 October 2005 Konstantin Simonović, aka "Kole", was convicted by the Basic Court of Brčko District in Bosnia and Herzegovina (BiH) for committing the criminal offence of War Crimes against Civilians pursuant to Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC). The accused and his defense attorneys entered into a plea agreement with the Public Prosecutor's Office of Brčko District, which the Court accepted. The accused was detained on December 29, 2004 and the Public Prosecutor's office filled the indictment number KT-390/04 on June 13, 2005. The Basic Court of Brčko District BiH rendered verdict number Kp-218/05 on October 18, 2005., sentencing Simonović to six years' imprisonment.

Indictment

The Indictment charged the accused in seven counts with the perpetration of offences committed in the territory of Brčko, in the period from May 1992 to July 1992 in the "Luka" camp. Simonović was the camp warden. The accused was charged with the fact that he, as a warden of the "Luka" camp, together with others, issued orders for and took part in torture, inhumane treatment, unlawful bringing in concentration camps, violation of bodily integrity and health of civilian persons and rape of non-Serb women.

In doing so, the accused breached the rules of international law applicable during times of international armed conflict (Article 3 and Article 27 of the 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War as well as Article 75 and Article 76 of the first Additional Protocol to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts).

Reasoning of the Verdict

Brčko District Basic Court sentenced Konstantin Simonović to six years imprisonment for commission of war crimes against civilian population referred to in Article 142 paragraph 1 of the SFRY Criminal Code. At the plea hearing, the Court found that the accused entered into the plea agreement voluntarily, conscientiously and with full understanding of the consequences thereof. It also established that, upon the review of the testimonies of witnesses, the finding and opinion of an expert witness as well as further evidence, there was sufficient evidence of Simonović's guilt in order to accept the plea agreement.

The Court, after reviewing the evidence, concluded that at the time of the perpetration of the offence, there existed an armed conflict in BiH and that the accused had knowledge of that conflict. All acts were committed as part of a widespread and systematic attack directed against the Muslim and Croat civilian population of Brčko Municipality[1]. None of the injured parties participated in hostilities, but were brought to "Luka" camp as civilians. Simonović issued orders for and took part in the acts described in the Indictment, from his office at the camp site. As a result of these actions, the injured parties as well as eyewitnesses suffered physical and mental injuries. The actions of the accused established an atmosphere of fear and terror in and around the camp where living conditions were already extremely poor. The guards in the camp and members of other units often abused prisoners, and the accused had knowledge of this abuse.

In relation to application of Law, the Court found the accused guilty of the criminal offence of War Crimes against Civilians in violation of Article 142(1) of the SFRY CC, which was applicable at the time of the perpetration of the offences. However, given that the said law was subject to several amendments, the Court had an obligation to apply the most lenient law with reference to the punishment, that being the Criminal Code of the Brčko District of BiH, which the Court deemed more lenient considering that it does not prescribe the death penalty for any criminal offence, but only lists monetary punishment, imprisonment and long-term imprisonment as possible criminal sanctions.

Regarding the criminal liability of the accused, the Court found Konstantin Simonović responsible for individual breaches of international humanitarian law pursuant to the Geneva Conventions and the Additional Protocols thereto. The accused, as a warden of the camp, had actual possibility to issue orders to his subordinates. The Court also found that the accused perpetrated the offence with intent and considered him to be mentally competent at the time of perpetration.

In pronouncing the sentence the Court took into account as mitigating circumstances the facts that the accused was a family man, his unemployment, his expression of deep regret, his guilty plea as well as the fact that he apologized to the injured parties and that 13 years had elapsed since the perpetration of the offence. As aggravating circumstances, the Court took into account the number of acts comprising the criminal offence and the ruthlessness and persistence with which the perpetration of the offence had taken place as well as the

consequences thereof.

As part of the plea agreement, the sentence pronounced in the verdict cannot be appealed.

1 Though convicting Simonović of war crimes against civilians, the Court found that the actions were part of a widespread and systematic attack.

(Continued from page 22)

at the ICTY, The Constitutional Court ruled that "the assessment of the reasonableness of time the appellants had spent in custody [at the ICTY] (…) is irrelevant". Considering that this issue raises a fundamental and original question on the respect of human rights in criminal proceedings, defense counsel in conjunction with OKO are preparing an application to the European Court in Strasbourg addressing this issue.

The adapted indictment was finally confirmed on 14 July, 2006. Custody was then ordered for the duration of the main trial, with a maximum duration of three years. On 27 July, 2006, at the plea hearing, all the accused entered not-guilty pleas to all counts of the indictment. A status conference was held before the Trial Panel on 19 October, 2006 in order to prepare the time frame and the general organization of the trial. The main trial, which was planned to begin on 14 November, was postponed due to unforeseeable circumstances. The trial began on 20 December.

1 In resolution 1503 of 28 August 2003, United Nation Security council recalled and reaffirmed the ICTY strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (…), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions(…)
2 For a complete report on the 11*bis* referral of this case, see OKO War Crimes Reporter, Issue 1 (2005) page 31
3 Confirmed on the 14/07/2006
4 Order X-KRN/06/200, 10 May 2006
5 Order X-KRN/06/200, 9 June 2006, n°AP 2499/06
6 Constitutional Court Judgement of 11/12/2006
7 Ibid at para 25
8 Order X-KRN/06/200, 14 July 2006

Odsjek Krivične Odbrane (OKO) is the criminal defence section of the Registry of the Court of BiH, with responsibility for maintaining the highest standards of defence in war crimes cases before the Court.

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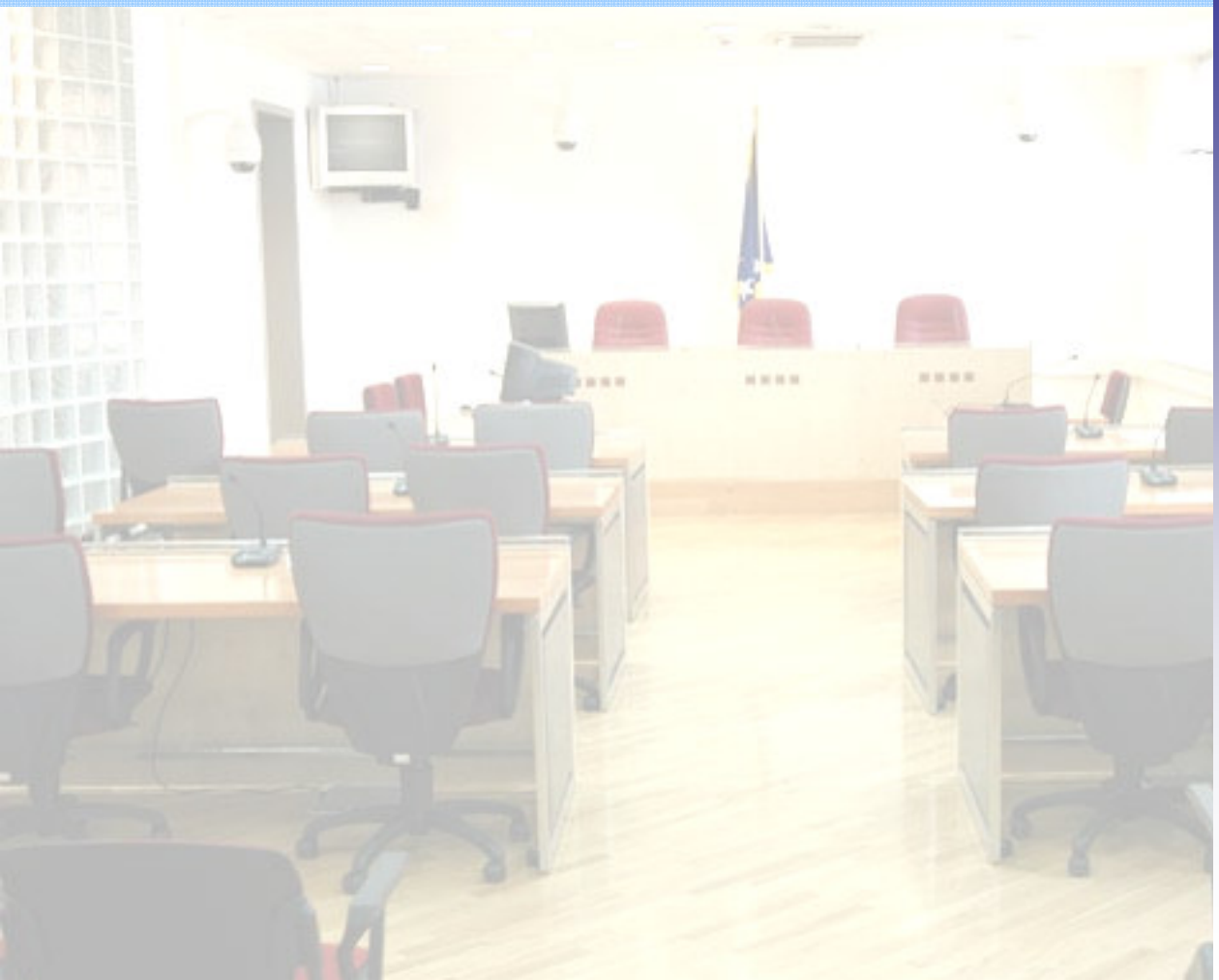
Одсјек Кривичне Одбране
Odsjek Krivične Odbrane
CRIMINAL DEFENCE SECTION

OKO War Crimes Reporter

The OKO War Crimes Reporter is published four times a year, and is intended to provide information on war crimes trials in south eastern Europe, primarily dealing with the Court of Bosnia and Herzegovina.

Published in both English and Bosnian-Croatian-Serbian, the War Crimes Reporter will be a source of information on legal developments in domestic trials, as well as articles dealing with specific problems that arise in practice.



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