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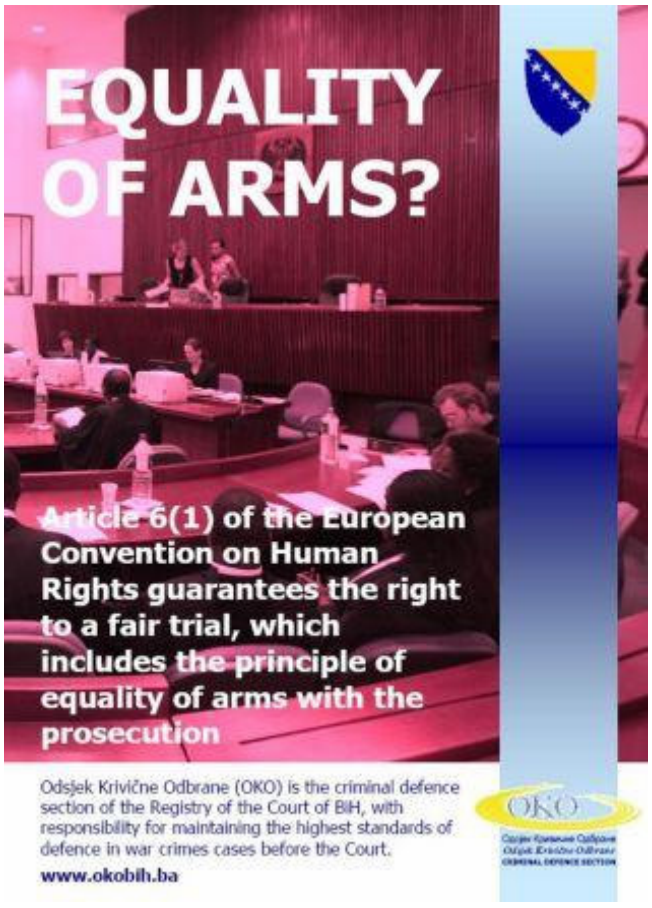

Introduction

Welcome to the third edition of the OKO War Crimes Reporter. The 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 focuses on developments in the Courts of BiH, Serbia, Montenegro and Croatia, as well as international tribunals. We cover issues of International Humanitarian Law and also Human Rights law as they apply to war crimes trials in BiH.

In this edition the Reporter contains summaries of recent decisions from the Court of BiH, the District Court of Banja Luka, the Cantonal Court of Mostar, ICTY as well as the ICTR. Articles in this edition cover the role of the Legal Department of the Court of BiH, war crimes against civilian population, eyewitness identification evidence and the issue of custody in the course of investigation.

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: Šejla Haračić, Kelly Fry, Denaura Bordandini, Meris Dolić, Dženita Hadžo, Muhamed Čučak and Elizabeth-Merry Condon.

Submissions

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

Citation

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Photograph

The picture on the front cover shows the court room at the Court of BiH, Courtroom 4.

Education of young lawyers

OKO held its first conference for young lawyers in May 2006

On May 19, 2006, at the State Court of BiH in Sarajevo, OKO held its first conference for young lawyers. The conference, which focused on crimes against humanity and war crime tribunals around the globe, took place in Courtroom No. 6 – the most sophisticated courtroom in BiH, perhaps even more sophisticated than any ICTY courtrooms. The Conference was organized to inform young lawyers – trainees and senior law school undergraduates – of the relatively new but extraordinarily important issues in the BiH Criminal Code (CC) and the Criminal Procedure Code (CPC). Young lawyers from all over BiH – Sarajevo, Banja Luka, Zenica, Mostar, Bihac, Tuzla – attended.

The conference was divided into four panels. The first panel, chaired by OKO intern Muhamed Mujakić, featured several experts including: Rupert Skilbeck, former OKO Director who worked as a defense counselor for the SCSL; Jasmina Pjanić, an OKO lawyer; Dino Bjelopoljak, a lawyer of the Court Management Section of the Office of the Registrar; Lejla Fadilpašić from the BiH Court Management Section; and Ćazim Hasanspahić, a legal associate with the Prosecution Support Section of the Registry. During

the first half of the session, the panelists briefly introduced the institution they work for, described their duties and explained how to apply for a position within those institutions. During the second part, participants asked questions of the panelists.

The second session, chaired by OKO Director Chris Engels, featured a discussion by experts who have worked for war crime tribunals around the globe. Reinhold Gallmetzer, a former OKO consultant and Legal Associate in the ICC Trial Chambers, gave an overview of the work of both the ICTY and ICC. Richard Rogers, a former OKO consultant who has also served as a consultant with the Special Chambers for war crimes in Cambodia, gave a presentation on war crimes cases before the courts in Rwanda, Kosovo and Cambodia. Emily Langston, Legal Officer of the Prosecution Support Section who worked for the Special Chambers for Serious Crimes in East Timor, provided an introduction to the situation in East Timor. Rupert Skilbeck gave an overview of the SCSL's work.

The third session combined a lecture on crimes against humanity with a mock trial. Zarije Seizovic and Adnan Bostan, OKO lawyers gave the lecture. The mock trial was designed to introduce the participants to methods of witness examination in an adversarial system - a new concept in BiH's CPC. The roles were played by: Sheeren Avis Fisher (Judge); Kwai Hong Ip (Prosecutor); Rupert Skilbeck (Defense Lawyer), and OKO intern Meris Dolić (Witness). Since 2005, Judge Fisher has served as an international judge for Section I for war crimes and Section II for organized crime, economic crime and corruption of the Court of BiH. Prosecutor Kwai Hong Ip has served as an international prosecutor with the Special Department for War Crimes since March 2006.

The fourth session, chaired by Tarik Abdulhak, head of Court Management Section, was designed as a discussion between the experts and the attendees. The young lawyers wrote their questions on the preprinted forms and the participants discussed each question. In attendance were: Rupert Skilbeck; James Rodehaver, director of OSCE Human Rights Department; Nerma Jelačić, Director of the Balkan Investigative Report Network (BIRN); Peter Kidd, international prosecutor with the war crimes chamber appointed by the High Representative in 2005; Almiro Rodrigues, former chairman of the ICTY Trial Chamber I, appointed to the BiH Court' war crimes chamber in June 2005.

The conference also included a tour of the courtrooms.

All of the comments we received by e-mail were encouraging. For example: „*My personal impression is more than good and I hope that you will continue with such projects in the future too. This is really an excellent way to acquaint future, that is, young lawyers with the mode of work of some institutions... the whole conference, from the beginning, unrolled at a very positive pace. Perhaps the only objection would be that there was little time for the broad topics of extremely interesting content...As for the venue, in my opinion, it was the best possible option, because*

we had an opportunity to get acquainted with the BiH Court, and thus we could get a visual picture. The mock trial was an excellent idea too. On the one hand, it flavored the theory, and on the other, to feel the air of the courtroom and learn about the new principle in our judiciary. I hope that this form of conference as organized by the OKO will turn into a practice and that we will have an opportunity to take part in many other conventions of this or similar focus."

OKO encourages young lawyers from BiH, who are interested in the field of war crimes law to attend future young lawyer seminars sponsored by OKO.

Legal Department of the Court of BiH

By David Hein, International Legal Associate, Legal Department

On 2 December, 2004 the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's office of Bosnia and Herzegovina (hereinafter: The Registry) was formally established.

The launch of the Registry officially ended the War Crimes Chamber Project, which was devised to develop special Sections within the Criminal and the Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Divisions of the Prosecutor's Office of Bosnia and Herzegovina to deal with war crimes, organized crime, economic crime and corruption.

The Law on Amendments to the Law on Court of BiH,[1] which entered into force on January 6, 2005, established three Sections: Section I for War crimes, Section II for Organized Crime, Economic Crime and Corruption and Section III for general crime within the Criminal and the Appellate Divisions of the Court of BiH.

The staff of Section I and Section II of the Court are composed of both national and international judges with at least one international judge per Panel. Currently[2] there are 28 judges working in Section I and Section II; 16 of them are nationals of BiH. In each case, the composition of the Panels of Section I and Section II remains the same.

To strengthen the court's capacity, the registry provides legal and administrative support to Sections I and II of the Court of BiH.

Legal Department

The Legal Department (LD) of the Registry, which provides support to Section I and Section II, is divided into the Office of the Head of Department and the Legal Documentation Unit. The LD employs both national and international lawyers. The international attorneys, who work mainly for the LD help strengthen the capacity of the Registry by bringing expertise to complicated criminal cases.

The LD provides substantive judicial support to Section I and Section II of the Court.

Each Panel is supported by a small team of lawyers consisting of one national lawyer (stručni saradnik), one national intern (pripravnik) and one international legal associate or international intern (law clerk). LD staff members are involved in pre-trial and trial procedures; they are responsible for drafting decisions on custody and other measures to guarantee the presence of a suspect and successful conduct of criminal proceedings, as well as drafting verdicts, procedural decisions and orders. Additionally, LD staff conduct research and provide judges with legal analyses.

Additionally, the LD also handles a number of administrative issues, such as the organization of reference meetings, maintaining summaries of cases before the Court of BiH and other related matters.

Legal basis

Amended article 27 of the Law on the Court of BiH[3] states in paragraph 1 that "there shall be a <…> Registry for Section I and Section II". According to paragraph 5 of the same article is the Registry for Section I and Section II managed by a Registrar who is responsible, in cooperation with the President of the Court, for the administration and provision of support services to Section I and Section II of the Court. The Registry Agreement[4] details the administrative and support services provision.

The Agreement explains that the Registry is responsible for the administration and provision of support services to Section I and II of the Criminal and Appellate Divisions of the Court of BiH, article 2 (2). The Agreement enumerates certain support services though the list is not exhaustive and is presumed to include the provision of support staff. This article can be read to supplement article 27 (5) of the Law on the Court.

Article 2 (3) of the Registry Agreement states that the Registry will be responsible for the recruitment and administration of both national and international support staff to assist the work of international judges. According to article 2 (4), the Registry is prohibited from interfering with the independence of the judges of the Court of BiH.

Neither the Law on the Court of BiH nor the Criminal Procedure Code of BiH specifically refer to legal support staff for the Court. However, article 31 (2) of the Law on the Court states that the Court shall determine the duties and responsibilities of their administrative staff; this implies that the Court can task them with legal support. The Court shall determine the organizational structure of its staff in its Rules of Procedure, article 31 (1)

(Continued on page 26)

Published Criteria

The latest criteria for admission to the list of advocates licensed to appear before the Court of BiH, valid until 31st December 2006

Application form

In accordance with Rule 3.3 of the 'Additional Rules of Procedure for Defence Advocates' please complete the "OKO Application Form" for August 2006 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	3 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 post-graduate study of IHL, *or* Substantial work as counsel in the trial phase at ICTY, *or* Completion of 2 domestic war crimes trials as an advocate in any civilian Court, *or* Completion of a training course on IHL approved by OKO	3 day training course on IHL provided by OKO

Continuing Professional Training Criteria

There is no requirement for continuing professional training in 2006. It will become a requirement in 2007.

Period of Validity

These criteria will apply to applications received by OKO before 31st December 2006 when the criteria will be revised and new criteria will be published.

War crimes against civilian population

An Article by Damjan Kaurinović, President of the Appellate Court of BiH Brčko District

ABSTRACT

The incorporation of war crimes against civilians into the BiH criminal legislation implied at the same time that the country's international-legal and constitutional obligations were met. The BiH Criminal Code recognized the established methodology of international criminal acts, exempting crimes against peace, i.e. crimes of aggression. The Geneva Conventions for the Protection of War Victims (I-IV), dated 12 August 1949, with the Additional Protocols I-II, dated 8 June 1977 constitute the initial grounds for the criminalization of war crimes in domestic legislation. This paper offers an analysis of the key elements of war crimes against civilians with an emphasis on the perpetrator of a war crime, the time of commission, special circumstances under which the crime was committed, the object of protection, the act of commission, forms of culpability and non-application of statutory limitation to criminal prosecution, and the execution of a sentence. In addition, we provide explanations of the basic international-legal terms with the aim of providing a better understanding of the term "violation of the rules of international law" as an objective condition for criminalization of this crime.

OPENING REMARKS

War crimes against civilians are crimes referred to in Article 173 of the BiH Criminal Code[1] (hereinafter referred to as: BiH CC) and belong to the group of crimes against humanity and values protected by international law of Chapter XVII of the BiH CC. This chapter of the code refers to a heterogeneous group of crimes, the common characteristic of which is the protection of values protected by international law (national, ethnic, racial or religious group; humanity; fundamental rights of civilian population during war, armed conflict or occupation; cultural, historical and religious monuments; safety of international emblems; safety of aerial and sea traffic; protection from terrorist acts, etc.).

Having defined in its legislation certain violations of the rules of international law that represent criminal offenses, Bosnia and Herzegovina fulfilled both its international obligations in accordance with international conventions it has ratified, and, in some cases, a direct constitutional obligation. Namely, pursuant to Annex I of the BiH Constitution, the Convention for the Prevention and Punishment of Crime of Genocide (New York, 9 December 1948), as well as the Geneva Conventions for the Protection of War Victims I-IV (12 August 1949) with Additional Protocols I-II (8 June 1977), shall be incorporated into the Additional Agreement on Human Rights, which shall be applied in Bosnia and Herzegovina. However, it is evident that the BiH CC only partly recognizes

the structure of international crimes as stipulated by the Statute of the International Military Tribunal (London, 8 August 1945) and the Rome Statute of the International Criminal Court (Rome, 17 July 1998). Pursuant to Article 6 of the Statute of the International Military Tribunal, the following fall under the jurisdiction of the Tribunal: crimes against peace, war crimes and crimes against humanity. Understandably, the same classification of crimes is also stipulated by Article II of the Allied Control Council's Law no. 10 on the punishment of persons guilty of war crimes, crimes against peace and against humanity (Berlin, 20 December 1945). Finally, the provisions of Article 5 (Crimes that fall under the jurisdiction of the Court) of the Rome Statute of the International Criminal Court determine the jurisdiction of that court over four types of crime: the crime of genocide, crimes against humanity, war crimes and crimes of aggression[2]. For many reasons, the Rome Statute of the International Criminal Court is said to represent the future of international justice and the most significant event in the history of international humanitarian law. [3]

It remains unclear why, apart from the crime of genocide as the gravest crime against humanity, the legislator failed to include in this Chapter of the law the crime of aggressive war as the gravest crime against peace. There are international-legal and constitutional grounds for inclusion of the mentioned crime. The international-legal grounds are primarily set forth in Article 1 (Purposes and Principles) of the United Nation's Charter (San Francisco, 26 June 1945), which obliges states to preserve peace and security, remove any threats to peace and suppress acts of aggression and other violations of peace. In order to have a better understanding of the term aggressive war, one should bear in mind the Resolution of the UN General Assembly on the definition of aggression (New York, 14 December 1974), which in Article 1 under the term aggression defines the use of armed force by a state against the sovereignty, territorial integrity and political independence of another state. In accordance with Article 5 of the aforementioned Resolution, aggressive war is an international crime against international peace. Indirectly, the international-legal grounds for the introduction of aggressive war as a separate crime into the criminal legislation may also be the Convention for Pacific Settlement of International Disputes (I Hague Convention, The Hague, 18 October 1907), Manila Declaration on the Peaceful Settlement

of International Disputes (Manila, 15 November 1982) and the Pact for the Renunciation of War (Kellogg-Briand Pact, Paris, 27 August 1928). The constitutional grounds for the incorporation of aggressive war into the domestic criminal legislation are set forth by Annex I of the BiH Constitution which is the source of the Additional Agreements on Human Rights including

the International Covenant on Civil and Political Rights (1966) and the facultative protocols (1966 and 1989). Namely, Article 20 of the International Covenant on Civil and Political rights demands that any war propaganda, hostility and violence be prohibited by the law.

With regard to Article 6 of the Statute of the International Military Tribunal, war crimes constitute violations of the laws and customs of war, which shall include, (but not be limited to): murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity, while Article II, Item (b) of Control Council Law No.10 on the punishment of persons guilty of war crimes, crimes against peace and against humanity, under the term war crimes means atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. With regard to Article 8 of the Rome Statute of the International Criminal Court war crimes mean grave breaches of the Geneva Conventions of 12 August 1949, as well as other grave violations of the laws and customs applied during an international armed conflict.

International criminal law was formed on the basis of international law of war and experience from World War I, and particularly World War II. The legal framework mainly referred to setting the rules for waging a war. However, the experiences of World War II demanded a fuller protection of the civilian population, owing to the unprecedented number of civilian victims. According to some sources, during World War II, 15,000,000 civilians from the Soviet Union were killed, 5,700,000 Polish; 1,700,000 German; 470,000 French; 400,000 Greek; 62,000 British; and 1,300,000 Yugoslav civilians. In order to get a better understanding and correct interpretation of the major characteristics of this crime, it is necessary to know the rules of international law, particularly the contents of the Geneva Conventions (I-IV) for the protection of war victims of 12 August 1949, the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of the victims of international armed conflicts (Protocol I, 8 June 1977), the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of the victims of non-international armed conflicts (Protocol II, 8 June 1977), the Convention for the protection of cultural property in the event of armed conflict (The Hague, 14 May 1954), and the Convention on the prohibition of military or any other hostile use of environmental modification techniques (Geneva, 10 December 1976). The Geneva Conventions (I-IV) of 12 August 1949 are today regarded as part of customary international law and represent the initial grounds for establishing all war crimes, including war crimes against civilians from Article 173 of the BiH Criminal Code. Namely, all contracting parties are bound to take necessary measures and prescribe appropriate criminal sanctions in their national legislations against persons who committed, or who issued orders to commit any of the grave breaches of this Convention. The aforementioned obligation is not limited exclusively to grave breaches, but also includes taking the same measures with a view to suppressing other acts in violation of this Convention (see Articles 146 and 147 of the Geneva Convention (IV) on the protection of civilians during a war). It should be emphasized that the contracting parties can not be releived independently or mutually from the aforementioned obligations. On the contrary, they are bound, at a request of the other side in a conflict, to open an inquiry into any aforementioned violation of the Convention, and if a violation is established, to remove and suppress it within the shortest period possible.

THE MAJOR ELEMENTS OF A CRIME

The perpetrator of a crime

The key elements of a crime indicate its blanket nature**,** referring to the rules of international law. The blanket nature of a crime is binding for the court as to creating an obligation to state all facts and circumstances that constitute elements of a criminal offence as well as to state specific provision/s of international law (Geneva Convention IV, i.e. Additional Protocols I and II) that prohibits specific *actus reus***.** Naturally, the above mentioned obligation of the court also exists during the stage of drafting a verdict pronouncing the defendant guilty. The obligation requires full reasoning related to legal issues that encompass also violations of international law in the course of war, armed conflict or occupation. The perpetrator of a crime may be any person regardless of his/her capacity or citizenship (*delicta communia*)[4]. As a rule it is a person who is a member of a military, political or administrative organization of a party to a conflict[5] Of course, this most often concerns persons who are directly involved in war operations, i.e. armed conflict or the preservation of authority in the occupied territory, and it depends on these very persons whether there will be any violation of the rules of international law or not. On the other hand, an order may be issued only by a person who in a

certain case has the status of ordering authority**.** The ordering authority is a person who in his/her military, official or any other capacity has a possibility to order another person to commit a prohibited action, e.g. a military commander, a state official, a government official, and alike [6]. An order is a special form of instigation, which in this case is defined as an independent crime which exists regardless of whether the crime was committed, attempted or not[7]. As for the responsibility of the superior for war crime against civilian population of Article 175 of the BiH Criminal Code, in regard to Article 180, Paragraph 2 of the BiH Criminal Code, one should certainly bear in mind the rules of international law which bind the contracting parties to order military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and where necessary, to suppress and to report to competent authorities any breaches of the Convention and this Protocol. In this sense, we should construe orders to commanders to ensure, commensurate with their level of responsibility, that members of the armed forces under their command are aware of their obligations.

The obligation of commanders is to prevent possible breaches of the rules of international law, and if violations of the Convention or the Protocol have been committed, to initiate a disciplinary or penal action against the perpetrators. (see Article 87 of the Additional Protocol I).

Time of commission, i.e. circumstances under which a crime is committed

The time of the commission of a crime, that is, the time of war, armed conflict or occupation, represents a separate, additional characteristic of a crime. War is an armed account settling by and between at least two states with the use of larger military potentials between the warring parties and the cessation of relations, which may ensue between two or more countries or within a single country[8]. The term occupation means the conquering and occupying of the territory or a portion of the territory of a state by the use of military force in war or armed conflict[9]. War occupation is a temporary and violent occupation of the territory of another sovereign state which in the international-legal sense is subjugated to the authority of the occupying force. The occupational authority, therefore, must be de facto established and the occupier is in a state to maintain such power for a period of time[10]. Unlike the Geneva Convention (IV), i.e. the Additional Protocols I and II and Article 8 of the Rome Statute, which classify armed conflicts as those of an international and non-international character, the legislator does not classify armed conflicts as international and non-international. This way, a fuller protection, of civilian population above all, is provided as if international law were directly implemented to a full extent. However, the state parties to international conventions are bound to incorporate violations of international law into their respective criminal legislations, given the fact that conventions are not applied directly. Finally, in order for this crime to be recognized it is necessary for the action of commission to have been taken within the time period the beginning of which is associated with the initiation of conflict or occupation, and the cessation with the general close of military operations. The exception to this rule is the extension of the effectiveness of the application of the Geneva Convention (IV) on protected persons until their release for a year upon the general close of military operations in the occupied territory (see Article 6 of the Geneva Convention IV). The practice of the International Criminal Tribunal for the Former Yugoslavia has gone in the same direction: “Armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between government authorities and organized armed groups, or between such groups within a state. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states, or in the case of internal conflicts, the whole territory under the control of a party whether or not actual combat takes place there.” (see decision of ICTY, no. IT-94-1-AR72 of 2 October 1995) 11. It is therefore sufficient for a crime to be recognized that crimes are closely associated with the hostilities in other parts of the territory under the control of parties to the conflict, which is why there does not have to be a concrete armed hostility in the municipality where acts of commission were undertaken in order to apply the norms of international humanitarian law. This means that there does not have to be real combat activities at the given location in order for the norms of international law to be applied, irrespective of whether the conflict is regarded as international or internal. The task of the court is not to establish whether there was an armed conflict in a particular municipality where acts of commission were undertaken, but to establish whether an armed conflict existed in a wider territory and that this municipality is a part of the territory affected by combat activities[12]. The mentioned judicial practice and the content of the Additional Protocols I and II indicate that “armed conflict” is becoming a dominant term in international criminal law in relation to “war”.

Objects of protection

The objects of protection are humanity and the values protected by international law which represent a general, group object of protection of this chapter of crimes. Humanity means respect for basic human freedoms and rights, and international law is international criminal law which prohibits certain actions in all or certain situations and treats them as crimes 13. The passive subject of this crime is civilian population. The subject of attack, i.e. the object against which the act of commission is undertaken is the life, person, health and property of civilian population; then objects posing a general threat (dams, dykes and nuclear electrical generating station), non-defended localities, de-militarized zones, natural environment and the demographic status of the

occupied territory.

The act of commission

The act of commission is an order to commit or an independent commission of some of the acts stated in Article 173, Paragraphs 1-3, of the BiH Criminal Code. An order, i.e. the commission of some of the alternatively prescribed acts of commission should represent a violation of the rules of international law. The term rules of international law applicable in war, armed conflict or occupation means the rules set forth in international agreements to which the parties to the conflict are parties, and the generally recognized principles and rules of international law (see Article 2, Item b of the Additional Protocol I). The application of the rules of international law is obligatory even if the state of war is not recognized by one of the parties to the conflict or if the occupation meets no military resistance. Also, protected persons can in no case renounce partially or in whole the rights secured by the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War and possible special agreements which may only improve the status guaranteed by the mentioned convention.

With regard to Article 3 of the Geneva Convention (IV), which is common to the Geneva Conventions (I-IV), in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (internal, non-international conflict), each Party to the conflict shall be bound to apply, as a minimum, the following provisions**:**

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

So, international law established minimal legal standards which must be applied on protected persons. The incriminations set in Article 173 of the BiH Criminal Code affirms that the legislator provided protection and prescribed appropriate sanctions for the violation of the aforementioned rules, but also expanded the range of protected rights, without making a difference between inter-state and internal armed conflicts, thus securing a better protection of all persons who are benefited by the Geneva Convention (IV) and its Protocols. Apart from that, a better protection is also achieved by the fact that the legislator does not make any difference, i.e. does not classify violations of international law into the grave breaches of the Geneva Conventions and other breaches of the Convention which do not represent grave violations. The mentioned protection, i.e. the application of the rules of the Geneva Conventions (I-IV) and the Additional Protocols I-II applies to all armed conflicts except the situations of internal disturbances and tensions, such as riots, isolated and random acts of violence and other acts of a similar nature, because these are not armed conflicts (see Article 1, Paragraph 2 of the Additional Protocol II).

The acts described in Paragraph 1, Items a), b), c), d), e) and f) are aimed against basic human rights and freedoms, the fundamental rights of civilian population (life, person, health, freedoms, property, etc.). Therefore, the protection provided by the Conventions according to the provisions from Paragraph 1, Article 173 of the BiH Criminal Code is enjoyed by civilian population. The term **civilian population** should mean the entire non-combatant population, i.e. all persons who are civilians and who are in the zone of military operations or in the occupied territory, as well as civilians who have been sent to places of internment (camps**,** places of internment – see Article 83 of the Geneva Convention IV). **A civilian** is any person who is not a member of the armed forces in the sense of Article 4, A (1), (2), (3) and (6) of the Geneva Convention III relative to the Treatment of Prisoners of War, nor does it have the status of a combatant in the sense of Article 43 of the Additional Protocol I. The presence within the civilian population of individuals who are members of the armed forces or have the status of combatant of one of the parties to the conflict does not deprive the population of its civilian character, nor does it deprive the population of the international-legal protection (See Article 50 of the Additional Protocol I). Therefore, the protection of the population from certain consequences of war is general, be-

cause it applies to the entire population of the states to the conflict, without any adverse discrimination founded on race, ethnicity, religion or political beliefs. However, the protection of civilian population is not absolute. Namely, if an individual person protected by the Convention undertakes activities hostile to the security of the state, such individual person shall not be able to claim the rights and privileges provided by the Convention. The same rules apply to spies or saboteurs, though in cases like this, such persons shall be treated with humanity, and shall also be granted the full rights and privileges of a protected person at the earliest date consistent with the security of the State (See Article 5 of the Geneva Convention IV).

Besides, in each concrete case, one must bear in mind that **certain specific categories of civilians** enjoy special protection. Such privileges, amongst others, are enjoyed by **women, children and journalists.** Women are particularly protected from any assault on their honor, particularly from rape, forced prostitution and any other form of indecent assault. Pregnant women and mothers having dependent infants have their cases considered with utmost priority. Children must be treated with special consideration and are to be provided with special protection, regardless of whether or not they are prisoners of war (see Articles 24 and 27 of the Geneva Convention (IV) and Articles 76 and 77 of the Additional protocol I). Journalists engaged in dangerous professional missions in areas of armed conflict are considered as civilians, which is why they fall into the category of protected persons in accordance with international law provided that they take no action adversely affecting their status as civilians (See Article 79 of the Additional Protocol I).

The acts of commission are listed stated and diverse in their character. They are above all aimed against individuals as members of civilian population such as: killing, causing great suffering, causing serious injury to body or health, torture, rape, unlawful confinement, biological, medical and other similar experiments, etc.; then acts aimed against the entire civilian population: measures of intimidation and terror, collective punishment, transfer to concentration camps, appropriation of property, starving the population, unlawful issuance of money**,** and alike. In some acts of commission in Article 173, Paragraph 1, Items c) and f), the illegality, i.e. the unlawfulness (unlawful transfer to concentration camps, unlawful confinement, unlawful destruction or appropriation of property, unlawful contributions and requisitions, and unlawful issuance of money) comprise legal characteristics, i.e. major elements of crimes. This means that the mentioned acts are prohibited only in clearly defined cases, so the intellectual element of premeditation of the perpetrator must also comprise the awareness that the actions taken are illegal, i.e. unlawful. This crime and other war crimes can be said to represent war crime in the narrow sense of the word, because the act of commission is undertaken away from military operations within war or armed conflict, and here the general principles of humanity, i.e. the rules of international law prescribed by the Geneva Conventions I-IV and the Protocols I-II Additional to the Conventions are violated.

On the other hand, war crimes in the broad sense are committed during and in time of military operations and represent violations of the rules of warfare and customs of war (e.g. crime of violation of the laws and customs of war from Article 179 of the BiH Criminal Code.) Given their nature, war and armed conflict are inhumane, but the aim of the prohibition of certain military activities and the stipulation of crimes owing to the disrespect for the anticipated prohibitions is to prevent excessive inhumanity, cruelty and perfidy in the conduct of military operations[16]. The acts of commission of Paragraph 1 of Article 173 of the BiH Criminal Code are alternatively prescribed, so for the recognition of a crime it is sufficient to undertake only one of the aforementioned acts. However, the commission of all or more prohibited acts does not constitute the concurrence of crimes, but this only concerns one crime given the fact that the concurrence is illusory based on the existence of alternativeness.

The act of commission prescribed in Paragraph 2 of Article 173 of the BiH Criminal Code is aimed at three separate objects of protection**:**attacks on objects particularly protected by international law or objects and plants posing a general threat such as dams, dykes and nuclear electrical generating stations; indiscriminate attack on civilian objects which are under the special protection of international law, non-defended localities and demilitarized zones

long-term damaging of natural environment of big proportions, which may cause harm to the health and survival of the population.

With regard to the protection from **attacks on objects specially protected by international law,** i.e. the protection of civilian population and civilian objects, the basic rules in international law distinguish between civilian objects and military objectives, and it follows thereof that military operations can only be aimed against military objectives (see Article 48 of the Additional Protocol I). International law, protecting objects that are indispensable for the survival of the civilian population, such as for instance, drinking water installations, irrigation works, agricultural areas for the production of food-stuffs, crops and livestock indispensable to the survival of the civilian population, etc. The mentioned acts must be undertaken with the specific purpose to deprive the civilian population of the significance these objects have for their survival, regardless of whether the motive is the starvation of the population, displacement or some other motive. **Civilian hospitals** also fall into the category of protected objects, so they can in no case be an object of attack. Military objectives must be situated as far as possible, given the threat for hospitals their vicinity represents. The protection hospitals are entitled to may

cease if they are used to commit, outside their humanitarian duties, acts harmful to the enemy. The nursing of wounded and sick soldiers is not regarded as a harmful act. The condition for the cessation of the protection of a civilian hospital is giving due warning and a reasonable time limit for the harmful acts to be removed. (See Article 19 of the Geneva Convention IV).

Within protection from attacks on objects protected by international law, special protection is provided for works or installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations which by their characteristics and functions are objects and plants posing general threat. However, the special protection of dams and dykes under international law may cease if the aforementioned objects posing general threat are used for other than their normal functions and this way represent direct support of military operations, so that such attack is the only feasible way to prevent such support. Also, nuclear electrical generating stations may be the object of attack if their represent regular, significant and direct support of military operations and if such attack is the only feasible way to prevent such support. However, dams, dykes and nuclear electrical generating stations must not be the object of attack, even if they are military objectives, if such attack can cause the release of dangerous forces and consequent severe losses among the civilian population (See Article 14 of the Additional Protocol II). Other military objectives located at the mentioned objects or in their vicinity can be the object of attack under the same conditions as dams, dykes or nuclear electrical generating stations. However, in all aforementioned situations, the civilian population and individual civilians are entitled to protection under international law, including special precautions in attack on military objectives and in the conduct of military operations (See Articles 56 and 57 of the Additional Protocol I).

Indiscriminate attacks are in each concrete case attacks of a nature to strike military objectives and civilians and civilian objects without distinction, such as for instance: the bombardment of a number of distinct military objectives in a city, village or other area containing a similar concentration of civilians and civilian objects which are treated as a single military objective; an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. The presence or movements of the civilian population and individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attack or to shield, favor or impede military operations (See Article 51 of the Additional Protocol I). **Civilian objects** are all objects that are not military objectives, because attacks are permitted and strictly limited to military objectives. **Military objectives** are limited to those which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a certain military advantage. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, house or other dwelling, or a school, is being made to make effective contribution to military action, it shall be presumed not to be used so. So, it will be considered as a civilian object (See Article 52 of the Additional Protocol I).

In the international-legal sense, non-defended localities are any inhabited place in the near or in a zone where the armed forces are in contact which is open for occupation by an adverse party and on condition that all combatants, mobile weapons and mobile military equipment have been evacuated; there is no hostile use of fixed military installations and establishments; the authorities and the population must not commit any act of hostility and must not undertake any activities in support of military operations. Non-defended localities must be marked and the parties to the conflict are prohibited to attack by any means whatsoever, non-defended localities if they fulfill the conditions set in Article 59 of the Additional Protocol I.

The parties to the conflict may confer by agreement not to extend military operations to the zones that have the status of demilitarized zone. The agreement on these zones must be an express agreement, and may be concluded verbally or in writing, containing the precise definition of the limits of the demilitarized zone and on conditions that all combatants, mobile weapons and mobile military equipment are evacuated; there must be no hostile use of fixed military installations and establishments; the authorities and population must not commit any act of hostility; any activity linked to military effort must cease. If one of the parties to the conflict commits a material breach in relation to the mentioned provisions or uses the demilitarized zone for the conduct of military operations, the other party is released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. This means that the zone loses the status of demilitarized zone, but shall continue to enjoy the protection under other rules of international law applicable in armed conflict, and this primarily refers to the protection of the civilian population (See Article 60 of the Additional Protocol I).

In the international-legal sense, the term **attack** means the acts of violence against the adversary, whether in offence or in defence, and applies to all attacks in whatever territory conducted, including the national territory under the control of an adverse party. The provisions of the law of conventions apply to any land, air or sea warfare which may affect the civilian population, individual civilians and civilian objects on land (See Article 49 of the Additional Protocol I).

In war or armed conflict, **natural environment** enjoys special protection, and for this reason, **widespread, long-term and sever damage of natural environment is prohibited.** This prohibition primarily refers to the

prohibition of the use of methods and means of warfare which are intended or may be expected to cause such damage to the environment and thereby prejudice the health or survival of the population (See Article 55 of the Additional Protocol I). For a better understanding of the protection of natural environment, one should also bear in mind the content on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Geneva, 10 December 1976). Each state party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or serious effects as the means of destruction, damage or injury to any other state party. The term **environmental modification techniques** refers to any techniques for changing, through the deliberate manipulation of natural processes, the dynamics, composition, or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space. The term **widespread** means an area of several square kilometers, the term **long-lasting** refers to duration of several months, or approximately one season, while the term **severe** includes a serious or significant termination or impediment to human life, natural or industrial resources or other resources. Phenomena that may be caused by the use of environmental modification techniques are: earthquakes, tsunami, disorders in the ecological balance of a region, weather changes (e.g. cyclones of various kinds, and tornadoes), changes of climate, changes of some oceanic currents, changes of the state of the ozone layer, and changes of the state of ionosphere**.** The aforementioned phenomena, if caused by a military or hostile use of environmental modification techniques, result or may reasonably be expected to result in widespread, long-lasting or severe destruction, damage or injury (See Articles I and II of the Convention, as well as Articles I and II of the Annex to the Convention on the Prohibition of the Military or any Hostile Use of Environmental Modification Techniques.)

The rules of international law in Paragraph 3 of Article 175 of the BiH CC prohibit the occupying power to order or commit **the transfer of parts of its civilian population** into the territory it occupies, thus changing the demography of the occupied territory. In that se4nse, the provisions of Article 49, paragraph 5 of the Geneva Convention (IV) and Article 85, paragraph 4 (a) of the Additional Protocol I expressly prohibit individual or mass forcible transfers of protected persons from occupied territory, as well as the transfer by the occupying power of its own population into the territory it occupies. An exception to total or partial evacuation may only be the security of the population or imperative military reasons under the conditions referred to in Article 49 of the Geneva Convention (IV).

CRIMINAL RESPONSIBILITY AND NON-APPLICATION OF STATUTORY LIMITATIONS TO CRIMINAL PROSECUTION AND EXECUTION OF PUNISHMENT

Criminal responsibility is comprised of two subjective elements which *tempore criminis* characterize the perpetrator, and these are his mental state (lack of mental responsibility**)** and the mental **attitude** toward crime (culpability or guilt)**.** 17 The mental state is an assumption of culpability and what is most frequently assumed, while guilt must be established and proved in each case. Premeditation is the most common form of culpability, and the only form of culpability when it comes to war crime against civilian population referred to in Article 173 of the BiH CC. The **awareness** of the major elements of a crime, i.e. the intellectual component does not include the **awareness** that the commission of some of the alternative acts of commission, the perpetrator is aware that he/she breaches the rules of international law. The breach of the rules of international law in this crime represents an objective condition of incrimination, i.e. the objective condition of **jeopardy.** [18] If an act of commission has been undertaken and the effects have occurred, while the actions taken do not represent a breach of the rules of international law, there shall be no crime referred to in Article 173 of the BHCC and the perpetrator cannot be found guilty of this crime, nor can **criminal-legal** sanction be passed against him (the objective condition of incrimination, i.e. **jeopardy)**. Therefore, the absence of a breach of the rules of international law rule out the possibility of the existence of those crimes against humanity and the values protected by international law where the breach of the rules of international law is foreseen as an additional, objective condition of incrimination. However, in such a case there may be crimes the recognition of which is based on the mentioned objective condition of incrimination (e.g. murder from Article 148, severe bodily harm from Article 156, rape from Article 193, unlawful deprivation of liberty from Article 166, unauthorized transplantation of parts of the human body from Article 217, causing general threat of article 402, damage caused to dams and waterpower establishments of Article 406 of the Criminal Code of the Republic of Srpska, etc.). Direct premeditation is as a rule a more serious form of culpability than possible premeditation from the aspect of the degree of criminal responsibility in the sense of general rules for meting out a punishment from Article 48, paragraph 1 of BH CC. In a concrete case, direct premeditation as a form of culpability is necessary in relation to the commission of the crime from Article 173, Paragraph 1, Item c) of the BH CC, because it ensues from the very legal description of the act: wanton infliction of bodily and mental pain and suffering (torture) on a person. All the same, an attack on objects protected by international law, such as drinking water installations, irrigation works, agricultural areas for the production of foodstuffs**,** crops and livestock indispensable to the survival of the civilian population must be undertaken with the specific purpose to deprive the civilian population of the values these objects have for their survival (See Article 54, Paragraph 2 of the Additional Protocol I). Direct premeditation is, therefore, also present during the commission of the acts referred to in Article 173, paragraph 1, Item f), (starving out population), and Paragraph 2, Item a) (attack on objects particularly protected by international

law) of the BH CC. On the other hand, possible premeditation does not always mean a milder form of culpability, bearing in mind that it is often accompanied by inconsiderateness, indifference and insensitivity 19 such as for instance during an indiscriminate attack which harms the civilian population of Article 173, Paragraph 1, Item b) of the BH CC. According to Article IV of the **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity** (New York, 26 November 1968), Bosnia and Herzegovina as a state party to this Convention is bound to secure that all legal and other provisions on statutory limitations are nor applicable to prosecution and punishment of war crimes. Article 19 of the BH CC therefore prescribes that criminal prosecution and the execution of punishment is not liable to statutory limitations for the crimes of genocide, crimes against humanity and war crimes. Finally, it is worth reiterating that in relation to the suppression of violations of the Conventions and Protocols, which represent breaches of the rules of international law in the criminal-legal sense, the most significant provisions for the purposes of crimes from Article 173 of the BH CC are the provisions of the **Geneva Convention** (**IV) on the Protection of Civilians in time of War and Additional Protocols I and II**, particularly Article 3, Section II – General Protection of Populations against certain Consequences of War, Part III-Section III-Occupied Territories and Part IV-Chapter II-Places of Internment from the Geneva Convention (IV), as well as Articles 11, 75 and 85 of the Additional Protocol I and Articles 4 and 5 of the Additional Protocol II.

CONCLUSION

The war crime against civilian population of Article 173 of the BH CC is part of war crimes according to the classification of international criminal acts adopted by the Statute of the International Military Tribunal and the Rome Statute of the International Criminal Court, while according to the internal classification of crimes it belongs to the group of crimes against humanity and the values protected by international law from Chapter XXII of the BB CC. The perpetrator of a crime may be any person, regardless of status or citizenship, and this most concerns persons who are directly involved in military operations. The major characteristics of a crime, primarily diverse acts of commission, confirm that the legislator has ensured the protection of the values protected by international law to the full extent. It is for the aforementioned reasons that the classification of armed conflicts into international and internal armed conflicts was not made within war crimes against civilian population, nor was the classification of breaches of international law into grave breaches of the Geneva Conventions and other breaches that do not represent grave breaches made. For this reason, protected persons enjoy all rights and privileges guarantees by international law in all armed conflicts except in situations of internal disturbance and tensions**.** The problem of the protection of natural environment, the long-term damage to which directly affects the health and biological survival of the population, i.e. humankind, has been particularly highlighted, and within this also the horrifying consequences of possible uses of environmental modification techniques.

Premeditation as the only form of culpability is necessary for the criminal responsibility of the perpetrator of war crimes against civilian population. The awareness of the perpetrator, i.e. his/her intellectual component does not include the objective condition for incrimination. i.e. the breach of the rules of international law, but it must be unambiguously established that the actions undertaken by the perpetrator objectively represent a breach of international law.

The essential understanding of the basic characteristics of this crime is unthinkable without a full awareness of the contents of international conventions. The acquaintance with the rules of international law creates preconditions for the correct interpretation of major, legal characteristics of this crime and to solving legal issues in each specific case: whether the acts of commission were undertaken against persons and objects that enjoy international/legal protection, i.e. whether or not a breach of the rules of international law occurred.

1 The BiH Criminal Code became effective on 1 March 2003, and the refined text of the Code was published in "BiH Official Gazette", No. 37/03, dated 22 November 2003, whereas changes and amendments of the same Code were published in "BiH Official Gazettes" No. 54/04, dated 8 December 2004 and No. 61/04, dated 29 December 2004.

2 For more details on Conventions mentioned in this paper and other acts of international law see: Vladimir Todorović, Međunarodni ugovori – Ratno pravo i bezbijednost (International agreements – War law and security), book 3, volume I and II, Official Gazette Belgrade", 1999

3 Sami Akl: "Stalni međunarodni krivični sud iskustvo I nove perspective ("Permanent International Criminal Court – experience and new prospects) International conference "Implementation of international criminal law in national legislations", Tara, 2005, page 85

4 For more details on war crimes see: Horvatić/Šeparović and associates, Kazneno pravo – posebni dio (Criminal Law – special part), Masmedia, Zagreb, 1999, pages 150-164.

5 Group of authors, Komentar KZ SFRJ (Commentary SFRY Criminal Code), Savremena administracija, Belgrade, 1978,

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Eyewitness Identification Evidence

Procedural and Substantive Challenges to the Reliability of Eyewitness Testimony, by Kelly Fry, former OKO fellow

INTRO: Courts across the globe have recognized for years that the inherent inaccuracy of eyewitness identifications can cause grave miscarriages of justice against accused persons. Indeed, as asserted by the United States Supreme Court, "the vagaries of eyewitness identification are well known [and] the annals of criminal law are rife with instances of mistaken identification" (*U.S. v Wade*, 388 U.S. 218, 228-229 (1967)(citation omitted)). Criminal defense attorneys must, therefore, be zealous in their challenges to the reliability of such evidence.

Especially in the trial of war crimes cases, where the Prosecution often relies very heavily on eyewitness identification testimony to establish its case against accused persons, it is crucial that the defense thoroughly challenge the reliability of that evidence, both in procedural and substantive terms.

The following article is intended to present defense counsel with the legal basis for making both procedural and substantive challenges to eyewitness identification evidence used in trials against their clients.

EYEWITNESS IDENTIFICATION PROCEDURES: Requirements of the Law of BiH

The law of Bosnia and Herzegovina (BiH), specifically Article 85 of the Criminal Procedure Code (hereafter "CPC") and its accompanying Commentaries, provides detailed eyewitness examination procedures which must be followed by police and prosecutors alike. Failure by the police or prosecutors to abide by any of these procedural requirements constitutes a violation of the CPC. Consequently, as explained in greater detail below, such eyewitness identifications are rendered invalid and courts may not consider those identifications as evidence. As such, it is thus of utmost importance that defense counsel carefully analyze the procedures used by police and prosecutors in obtaining eyewitness identifications of the accused, and make known to the court any procedural violations.

Most notable for purposes of the defense are the identification procedure requirements established by Article 85(3) of the CPC. Article 85(3) requires that eyewitness identification of a suspect or an accused person be conducted either by live or photo-spread line-up procedure. The line-up procedure itself must take place in two distinct steps: First, the witness "shall be required to describe" in detail and to state "distinctive signs" of the suspected perpetrator (*Id.* *See also* Commentaries, Article 85(3)). This description must be "concrete and without imprecise and general descriptions which may by their nature refer to a fairly large group of persons," and must be promptly recorded and entered into the record by the police or Prosecutor (Id.)

Second, and only after proper completion of the first step, the witness shall be shown a line-up of persons. During that line-up, which may be either in live or photo-spread form, the witness must indicate if the person he or she previously described is present (CPC, Article 85(3). *See also* Commentaries, Article 85(3)). The witness' response to the line-up, whether it is positive or negative, must be recorded simultaneously to the procedure itself. If simultaneous recording is for some reason not possible, the witness' response must be recorded immediately after the line-up procedure (Commentaries, Article 85(3)).

Moreover, all line-up procedures, whether in live or photo-spread form, must be conducted with a *minimum* of five to eight unknown persons of similar appearance to the person initially described by the witness (*Id.*). Those other persons, also known as "foils", must be "of similar appearances and approximately the same constitution, hair color, similarly dressed, etc." The suspect or accused person should not in any way be distinctive from the foils. The line-up should, furthermore, take place under light conditions similar to those in which the witness first saw the person (*Id.*).

Effect of Breaches of Identification Procedures

The Law of BiH

As previously mentioned, when the identification procedures prescribed by CPC Article 85 have been breached, courts may not rely upon such evidence in reaching their decisions.

Article 10(2) of the CPC clearly states that "The Court may not base its decision… on evidence obtained through essential violation of this Code" The Commentaries to Article 85(3), moreover, provide that "In the event that the identification has not been performed in accordance with the rules foreseen under the provision of this Article, it *cannot be used as evidence in the proceedings*" (emphasis added). Furthermore, it is worth noting that the Court may not rely upon evidence which may have been *derived* from breaches of Article 85 identification procedures (CPC Article 10(3)). These principles are reinforced by CPC Article 297(1) (i), which

provides that it is an essential violation of the CPC "if [a] verdict is based on evidence that may not be [so] used… under the provisions of this Code")

Therefore, under Article 10(2) of the CPC, the Court may not consider as evidence an eyewitness identification conducted in breach of Article 85, regardless of how important that eyewitness identification may be to the Prosecution's case against the accused. Hence, defense counsel should not hesitate to challenge the legitimacy of identification procedures when those procedures may breach the requirements of Article 85. Where the required identification procedures have been unquestionably violated, defense counsel should *automatically* remind the court via oral or written motion that it may not consider such eyewitness identifications as evidence, as per CPC Article 10(2) and the Commentaries to Article 85(3).

Moreover, in a case where the Prosecution relies primarily or solely upon eyewitness identification evidence that was obtained through violation of Article 85(3) procedures, and where there is no other legally-obtained evidence corroborating such eyewitness identifications, defense counsel should forcefully argue that the Court must dismiss the case against the accused.

The European Convention on Human Rights and Fundamental Freedoms

Defense counsel should challenge improperly conducted eyewitness identification procedures not only on the basis of the law of BiH, but also on the basis of the European Convention of Human Rights and Fundamental Freedoms (hereafter "European Convention").

Although the European Court of Human Rights (hereafter "European Court") has repeatedly stated that it will not comment upon specific domestic rules related to the admissibility, relevance or probity of evidence, the Court *will* review whether the trial proceedings as a whole were fair, under Article 6 of the European Convention. In conducting such review of trial proceedings as a whole, the European Court *will* take into consideration the way in which evidence was taken (*See Vanyan v. Russia* (2005), at para 45; *Schenk v. Switzerland* (1988), at paras. 45-46; *Barbera, Messegue and Jabardo v. Spain* (1998), at para. 68. *See also Miailhe v. France* (1996), at para. 43 and *Teixeira de Castro v. Portugal* (1998), at para. 34).

Notably, the European Court has held in numerous cases that convictions based primarily or entirely upon unlawfully-obtained evidence violate the fair trial requirements of Article 6(2) and 6(3) of the European Convention (*See Vanyan v. Russia* (2005), at para 49; *Teixeira de Castro v. Portugal* (1998), at para. 39).

Therefore, reliance by courts in BiH on eyewitness identification evidence derived from breaches of Article 85 (3) of the CPC not only violates Article 10(2) of that same Code, but likely also constitutes a violation of fair trial rights under Article 6(2) and 6(3) of the European Convention of Human Rights (*See, e.g.,* Keir Stamer, European Human Rights Law, at 298-299). Defense counsel should thus not hesitate to assert that such reliance upon illegally-obtained identification evidence violates the fundamental fair trial rights of the accused under the European Convention.

JUDICIAL ASSESSMENT OF EYEWITNESS IDENTIFICATION EVIDENCE

CONTESTABLE ISSUES

Not only should defense counsel be prepared to contest a court's reliance on eyewitness identification evidence taken in violation of CPC Article 85(3) procedure, but counsel should also be prepared to argue against the substantive reliability of any eyewitness identification of the accused. Because courts often tend to place a great deal of weight on eyewitness testimony in reaching their decisions, it is critical that defense counsel remind the court of the inherent unreliability of eyewitness identifications, due to the very imperfect nature of human perception and cognition itself.

Numerous contestable issues exist with most eyewitness identifications. These issues include the circumstances under which the witness originally identified the alleged perpetrator, the passage of time since the initial identification, the possibility of influence or suggestion on the witness, the confidence of the witness, inconsistencies or inaccuracies in witness testimony, and identification by multiple witnesses. Furthermore, specific identification procedures – such as photo-spread or courtroom identifications – also have inherently contestable reliability issues, of which courts should be made aware.

Because the number of decisions relating to eyewitness identifications in war crimes cases from courts in BiH is extremely limited, the jurisprudence most relevant for purposes of defending persons accused of war crimes or crimes against humanity in BiH is that of the International Criminal Tribunal for the Former Yugoslavia (hereafter "ICTY"). Indeed, the ICTY's decisions on identification issues are highly persuasive to courts trying war crimes cases in BiH. The rules and principles established by the ICTY's eyewitness identification decisions will prove very useful to defense counsel in BiH.

General Issues of Reliability

Where an eyewitness identification is made by a witness under difficult circumstances, where the credibility of the witness is strenuously challenged in a detailed manner by the defense, and where the identification of the

accused turns out not to be corroborated by other credible evidence, the ICTY has found that a court must very carefully assess the reliability of that identification before accepting it as a basis upon which to solely or partially base a conviction (*See Kupreskic Appeal Chamber Judgment* (hereafter "*Kupreskic* Appeal"), at para. 224).

Because of the inherent "frailties of human perception" and "the difficulties associated with identification evidence", courts must always proceed with extreme vigilance when assessing the reliability of identification evidence. Failure to assess the reliability of identification evidence in a circumspect manner leads to a grave risk that a miscarriage of justice may result from a court's over-reliance "upon even the most confident witnesses who purport to identify an accused" (*Id.*, at paras. 34 and 134).

Defense counsel should specifically ensure that courts assess the reliability of eyewitness identifications in light of each of the following factors, even when those identifications have been conducted in accordance with the required procedures discussed in the proceeding section of this article:

Circumstances of the Identification

Identification versus Recognition

Although an eyewitness identification based upon the recognition of a familiar person may on the surface appear to carry more weight than identification of a person previously unknown to the witness, the ICTY has held that courts must closely consider all factors relating to the alleged "recognition" identification. "Recognition" of persons may not, in fact, be any more reliable than identifications of persons previously unknown to the eyewitness (*See*, *e.g.*, *Kupreskic* Appeal, at paras. 146-148, where a witness claimed to have recognized her neighbor as the perpetrator, but her family members – who were also present at the scene of the crime – failed to recognize the perpetrator, thereby eviscerating the reliability of the first witness' "recognition" testimony).

Defense counsel should be vigilant in pointing out that even when a witness is purporting to identify someone whom he or she knows, mistakes in recognition are often made. For example, many people have experienced seeing someone in the street whom they believed they knew, perhaps even a close friend or family member, only to discover they were wrong. The expression "I could have sworn it was you" is not uncommon for this very reason (*See*, *e.g., R. v. Bentley* [1991] Crim.L.R. 620, CA; *See also R. v. Turnbull* [1977] Q.B. 244, at 228-231).

Stressful Situations

The effect of stressful events upon human perception is such that identifications made under those circumstances likely constitute "unsafe" (i.e., unreliable) evidence (*Limaj* Trial Chamber Judgement, at para. 17, citing *Kupreskic* Appeal, paras. 40 (footnotes omitted) and 534; *See also Kupreskic* Appeal, at para. 133). The ICTY Appeals Chamber has held that trial chambers should not, therefore, rely upon eyewitness identifications that were the result of traumatic events (*Id.*).

Fleeting or Obstructed View

Similar to identifications made in stressful circumstances, identifications by witnesses who had only a fleeting glance or an obstructed view of the suspected perpetrator are necessarily unreliable and are, therefore, an unsound evidentiary basis for court decisions (*See Limaj* Trial Chamber Judgement (hereafter "*Limaj*"), at para. 17, citing *Kupreskic* Appeal, para. 40 (footnotes omitted) and 562; *See also Kupreskic* Appeal, at paras. 133, 162).

Lighting and Visibility

The ICTY has held that identifications occurring at dawn, dusk, or in the dark, are of inherently limited probative value and must be treated as an unsafe basis upon which to rest a decision (*Limaj*, at para. 17, citing *Kupreskic* Appeal, para. 40 (footnotes omitted); *See also Kupreskic* Appeal, at para. 132).

Age of Witness and/or Susceptibility to Outside Influence

Eyewitness identifications by a child (including witnesses who were children at the time of the event, but are adults at the time of in-court testimony), or by any witness who is especially susceptible to influence from family or others, must be treated by courts with special caution. This is because, as found by the ICTY, young or otherwise susceptible witnesses are likely to be influenced in their perception of past events by the opinions and testimony of others. Outside influence may thus render unsound the evidentiary value of such identifications (*Kupreskic* Appeal, at paras. 199-201; *See also Limaj*, at para. 35).

If, therefore, defense counsel is presented by the Prosecution with "recognition" identifications, with identifications made under stressful circumstances, identifications made after only a fleeting or obstructed view or in limited light and visibility conditions, or with identifications made by witnesses susceptible to outside influence, counsel ought to remind the court that such evidence is simply *not* reliable. Moreover, due to its inherent unreliability, such evidence is certainly not a safe basis upon which to base decisions against an accused, as has

been readily demonstrated in the jurisprudence of the ICTY and other courts.

Passage of Time

Another factor which courts must take into account in their assessments of eyewitness identification reliability is how great a period of time has passed between the original alleged criminal event and the witness' identification of the accused\. As recognized by the ICTY, the passage of long periods of time between events and the eyewitness identification testimony can render even perfectly honest identifications unreliable. This is due to the innate fact that the greater the length of time between events and identification, the more susceptible human memory becomes to influence and change (*Limaj*, at para. 534; *See also Kupreskic* Appeal, at paras. 133, 162).

Hence, courts must be aware that even perfectly honest eyewitness identification testimony may in fact be highly unreliable. This issue may be especially important for defense counsel in war crimes trials in BiH, given that most events in question at those trials occurred between ten and fifteen years ago, thereby inevitably influencing the accuracy of those eyewitness identifications.

Influence and Suggestion

Press Reports

A common, but under-recognized issue in eyewitness identifications, is the influence –conscious or unconscious – of media reports regarding the accused. As held by the ICTY, where images of an accused person have been portrayed in the media prior to the trial of that person, such exposure gives rise to a significant and "clearly recognizable risk" that identification witnesses in the trial "may have been unconsciously influenced… to associate the media images with the person being remembered by the witnesses" (*Limaj*, at paras. 534, 563).

Thus, where defense counsel represents an accused whose image has been shown in any form of media – whether television, print (i.e., newspapers and magazines), or internet-based – counsel should necessarily remind the court that it must carefully consider the possibility that any eyewitness identifications of the accused have been influenced by the accused's portrayal in the media. If there is any possibility that press reports may have influenced the eyewitness identification of the accused, even if unintentionally so, the court must, in the interests of justice, decline to rely upon such identification evidence.

Subsequent Discussions

Similar to the issue of influence by press reports, the ICTY has found that where an eyewitness has had a delayed assertion of memory regarding the accused, coupled with the "clear possibility" from the circumstances that the witness has been influenced by suggestions from others, such identification evidence is rendered unreliable (*Limaj*, at para. 17, citing *Kupreskic* Appeal, para. 35, 40 (footnotes omitted), ; *See also Kupreskic* Appeal, at paras. 199-201).

The Confident Witness

An especially important, and perhaps non-intuitive issue, is that the reliability of an identification by a confident eyewitness is, in fact, no greater than that of a witness who feels uncertain regarding their identification of the accused. The ICTY has recently held that courts must take special precaution in giving weight to the demeanour of an identification witness, specifically noting that "very often a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy" (*Kupreskic* Appeal, at para. 34). The ICTY has further pointed out that "an enormous amount of research has determined that the relationship between the certainty expressed by a witness and the correctness of the identification is very weak… Even witnesses who are very sincere, honest and convinced about their identification are very often wrong" (*Id.* at para. 138 (citation omitted)). Especially where a confident eyewitness is the primary or sole evidence against the accused, a trial chamber should proceed with "extreme caution" in assessing that evidence or accepting that evidence as the basis for sustaining a conviction (*Kupreskic* Appeal, at paras. 34, 134).

It is extremely important, therefore, that defense counsel ensure that courts recognize that even highly confident and convincing eyewitnesses may in fact be incorrect in their identification testimony. Defense counsel should insist that, in the interests of justice, courts circumspectly consider all underlying elements of the identifications, and refrain from placing undue evidentiary weight or basing their decisions upon the testimonial confidence of an eyewitness.

Inconsistent Statements and/or Inaccurate Testimony

Another eyewitness identification issue that often arises, and is ripe for challenge by the defense, is the issue of inconsistent statements and inaccurate testimony. For example, the ICTY has found that inconsistent eyewitness statements (that is, inconsistent statements of one witness or statements that are conflicting between various witnesses) regarding the physical characteristics of the accused at the time of the alleged event are an illegitimate basis for court decisions (*Limaj*, at para. 17, citing *Kupreskic* Appeal, para. 40 (footnotes omitted);

See also Kupreskic Appeal, at paras. 145, 162).

The ICTY has similarly found that reliance upon *inaccurate* eyewitness identifications as to the physical characteristics of the accused at the time of the event (such as testimony that a suspected person had facial hair at a time when it has been factually proven that the suspected person was clean-shaven) is plainly invalid (*Id.*).

Furthermore, initial eyewitness *mis*identification, or denial of the ability to identify the accused, subsequently followed by a *positive* identification by the eyewitness, clearly constitutes unreliable evidence (*Id. See also Kupreskic* Appeal, at para. 133).

Finally, where a number of irreconcilable eyewitness statements exist in a case, a court should not base its decision upon *any* of those eyewitness identifications, because each and/or every such statement may constitute unsafe evidence (*Id.*).

Hence, where inconsistent and/or inaccurate eyewitness identifications are present in a case, defense counsel must be certain to make the court aware of those issues. The court should be reminded, moreover, that it must not rely upon such eyewitness identifications in reaching its decisions, lest it cause a miscarriage of justice against the accused.

Identification by Multiple Witnesses

When there are eyewitness identifications of an accused by multiple persons, from different times and under different circumstances, those numerous identifications will not necessarily serve to negate the inherent risk of "honest mistake" that is present in each separate identification. In fact, the combined effect of multiple identifications may instead serve to "highlight the extent of the uncertainties and inconsistencies prevalent in the body of evidence" (*Limaj*, at para. 561-562).

Defense counsel should ensure that courts recognize that multiple eyewitness identifications do not necessarily serve to strengthen the overall case against an accused. Courts must carefully and individually analyze *each* eyewitness identification for any discrepancies or irreconcilable differences, keeping in mind the inherent risk of honest mistake in each identification. Failure to analyze multiple identifications in such a manner, coupled with reliance upon such evidence as the basis for a decision, may constitute a miscarriage of justice against the accused.

Methods of Identification

Challenges to the reliability of eyewitness identifications may also be made on the basis of innate procedural issues. Photo-spread and courtroom identifications, specifically, are frequently presented by the Prosecution as evidence against accused persons; defense counsel should thus recognize and argue the issues that are consistently present in each of these identification methods.

Photo Spread Procedures

> The reliability of photo spread identifications, generally, can readily be challenged by defense counsel on behalf of the accused, even it those identifications are the result of proper legal procedures. As the ICTY has found in its eyewitness identification jurisprudence, one overarching concern with photo-spread identifications is that the photograph used "may not be a typical likeness" of the accused, even though it accurately recorded the accused's features as they appeared at one particular moment in time (*Limaj*, at para. 19). Also relevant to assessing the general reliability of photo-spread identifications are the clarity and quality of the photograph used, and "the limitation inherent in a small two-dimensional photograph by contrast with a three-dimensional view of a live person" (*Id.*).

To fairly assess the reliability of photo-spread identifications, a court must carefully consider a large number of factors. According to the ICTY, these factors, which are similar to those discussed in preceding sections, include , :

> "whether the photograph matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification… whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media, and whether the procedure in some way may have encouraged the witness to make a positive identification despite some uncertainty, or encouraged the witness to identify the Accused rather than someone else" (*Id.*).

Because the reliability of photo-spread identifications is inherently questionable due to the effect of such procedural factors, defense counsel should be prepared to rebut the reliability of photo-spread identifications in much the same way that it challenges the reliability of eyewitness identification testimony generally.

Courtroom Identifications

Similarly to identification by photo-spread line-up procedures, the reliability of courtroom identifications of an accused person is highly questionable. The ICTY has held that in-court identifications (or "dock identifications") have, at best, a "rather limited" probative value. Moreover, the ICTY found that any courtroom identification should not be conducted without first holding a formal line-up for the witness prior to his or her courtroom examination ("Provisional Order on the Standards Governing the Admission of Evidence and Identification" (25 Feb 2002) in *Stakic*; The Provisional Order confirmed by Trial Chamber II's Order on the Standards Governing the Admission of Evidence (16 April 2002)).

This prior line-up is necessary because the court must clearly ascertain *outside of the courtroom* whether the witness is able to accurately identify the accused person. As stated by the ICTY in *Limaj*, "identification of an Accused in a courtroom may well have been unduly and unconsciously influenced by the physical placement of the Accused and [by] the other factors which make an Accused a focus of attention in a courtroom" (*Limaj*, at para. 18 (citation omitted); *See also Vasiljevic* Trial Chamber Judgement, para. 19).

Failure by a court to establish the witness' ability to identify the accused outside of the courtroom, in a manner such as that described by the ICTY, and subsequent reliance by the court on the very limited probative value of the courtroom identification, must be vigorously opposed by the defense.

Conclusion

Eyewitness identification evidence is, in practical terms, very important in the trial of persons accused of genocide, war crimes and/or crimes against humanity. Defense counsel must, therefore, be prepared to strenuously challenge the procedural validity of eyewitness identifications on the basis of the Criminal Procedure Code of BiH and the European Convention on Human Rights. Counsel must, moreover, be able to convincingly argue against the reliability of eyewitness identifications of the accused on the basis of the substantive principles discussed above, specifically using the persuasive jurisprudence of the ICTY to support those arguments.

(Continued from page 14)

pages 495-501.

6 Dr Ljubiša Lazarević, Krivični zakon SRJ sa kraćim komentarom (FRY Criminal Code with an abridged commentary), Savremena administracija, Belgrade, 1999, pages 301-303

7 Dr Dragoljub R. Atanacković, Krivično pravo – posebni dio (Criminal Code – special part), Privredna štampa, Belgrade, 1979, pages 53-67

8 Horvatić/Šeparović and dr Ljubiša Lazarević, ibidem

9 Horvatić/Šeparović, ibidem

10 Dr Ljubiša Lazarević and a group of authors, Commentary FRY Criminal Code, ibidem

11 John E. Ackerman and Eugene O'Sullivan: The practice and procedure of the International Criminal Tribunal for the Former Yugoslavia, Muller, Sarajevo, 2002, page 13.

12 John E. Ackerman and Eugene O'Sullivan, ibid., pages 24 and 25.

13 A group of authors, Komentar KZ SFRJ (Commentary SFRY Criminal Code), ibidem.

14 Prof. Dr Miloš Babić et al.: Komentari krivičnih – kaznenih zakona u Bosni i Hercegovini, Knjiga I, Savjet – Vijeće Evrope i Evropska komisija (Commentaries on the Criminal Laws on Bosnia and Herzegovina, Book I, Council of Europe and European Commission), Sarajevo, 2005, page 124.

15 Dr Dragoljub R. Atanacković, ibidem

16 Dr Dragoljub R. Atanacković, ibidem

17 Prof Dr Miloš Babić, ibid., page 204.

18 For more details of objective condition of incrimination see: Dr Franjo Bačić, Criminal Law - General Part, Informator, Zagreb, 1998, page 108.

19 Dr Franjo Bačić, ibid., page 240

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The justifiability of custody in the course of an investigation

An Article by Senada Mirojević, OKO lawyer

Opening remarks

Issues surrounding pretrial detention are some of the most complex addressed in criminal procedure. This complexity arises from its purpose and its consequences. The purpose of custody is to ensure the presence of the suspect (accused) in the criminal proceedings and prevent obstruction during these proceedings. The social significance of this measure is reflected through this fact. Society is interested in conducting the criminal proceedings so that the perpetrator of a crime is punished, thereby protecting society from crime, which would see the accomplishment of its final goal – to ensure personal safety of citizens. On the other hand, custody results in depriving an individual of liberty, thereby depriving him/her of a fundamental human right as guaranteed by the Constitution of Bosnia and Herzegovina (BiH) and the European Convention on Human Rights (ECHR). Namely, this measure is used against a person who is presumed innocent, which in its nature is identical to the sentence of imprisonment, and thus jurisprudence recognizes it as preventative imprisonment.

The Criminal Procedure Code of BiH (BiH CPC) strives to reconcile these two opposing interests (the interest of an individual and the interest of society) by prescribing in Article 131 of the BiH CPC conditions that must be met in order to order custody. With the aim of protecting the rights of an individual to freedom, by this provision, the legislature prescribes that custody is ordered only if the purpose cannot be achieved by another measure; that the duration of custody must be reduced to the shortest necessary time; that the duty of all bodies participating in criminal proceedings and agencies extending them with aid to proceed with particular urgency; as well as that throughout the proceedings, custody shall be terminated as soon as the grounds for which it was ordered cease to exist.

It is not contentious that in some cases the presence of the accused in the criminal proceedings and the unobstructed conduct of the criminal proceedings can be achieved only by applying this measure. Its establishment in the BiH CPC is not questionable. However, it is contentious whether the ordering of this measure is necessary at all stages of criminal proceedings.

We shall here raise the issue of the justifiability of ordering custody in the course of an investigation.

The analysis of the relevant provisions of the BiH CPC

Namely, although custody is often a focus of professional discussions, those discussions mainly refer to the duration of custody; the harmonization of reasons to order custody with ECHR; the issues of jurisdiction, etc. whereas the issue of the justifiability of ordering this measure in the course of an investigation is not called into question. There is a consensus that the law must contain provisions that provide for the existence of this category in the investigation as well.

We shall try to prove that such a view is erroneous and that the present legal framework is legally illogical and ungrounded by analyzing Article 132, Paragraph 1, Article 226 Paragraph 1 and Article 228 Paragraph 2 of the BiH CPC.

In Article 132, Paragraph 2 of the BiH CPC as a precondition for ordering custody the legislature demands that there is a grounded suspicion, which is defined by Article 20 as, “a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offense may have been committed”.

Article 226 Paragraph 1 of the BiH CPC stipulates that when in the course of an investigation the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offence, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge.

Article 228 Paragraph 2 of the BiH CPC stipulates that during the confirmation of an indictment, the preliminary hearing judge shall examine each count of the indictment and materials submitted by the Prosecutor in order to establish grounded suspicion.

Although the three aforementioned articles regulate different subject matter they share the same requirement that there is grounded suspicion.

Therefore, during the submission of a proposal to order custody, the Prosecutor must have in possession enough evidence for grounded suspicion that a certain individual has committed a criminal offence. The same degree of suspicion must be established for the confirmation of the indictment. If the Prosecutor already possesses sufficient evidence that substantiates grounded suspicion based on which the indictment can also be confirmed, why are not the submission of a proposal to order custody and the submission of the indictment

for confirmation made at the same time?

What is legally illogical, and therefore unsustainable is the fact that the current legal framework, which despite the conditions for simultaneous confirmation of the indictment and rendering a decision on custody, gives the Prosecutor a possibility to first propose custody against a certain individual, and after custody has been ordered, to decide within one year (in extremely complex cases for the criminal offences for which sentence of long-etrm imprisonment is prescribed) whether an indictment against that person will be issued at all. Namely, if custody against a person is ordered, it means that the grounded suspicion has been established by the Court that this person has committed a crime, so there is no viable reason that would justify the postponement of the confirmation of an indictment for a period of up to one year despite the established grounded suspicion of the commission of a crime.

This legal framework, in addition to being legally illogical as we have said, does not adequately protect the individual's fundamental human rights, because the duration of custody is unjustifiably extended for a period of up to one year. We should note here the fact that apart from being deprived of liberty, the person against whom custody has been ordered is also kept in suspense in terms of the further conduct of the criminal proceedings by such practice, which also raises the issue of humane treatment.

It should also be emphasized that ordering custody in the course of an investigation is in direct conflict with Article 13 of the BiH CPC, which regulates, as the basic principles of criminal proceedings, the rights of the suspect to be tried in the shortest reasonable time period (Paragraph 1) and that the duration of custody must be reduced to the shortest necessary time (Paragraph 3).

Should the BiH CPC stipulate that an indictment shall be submitted for confirmation at the same time as the proposal to order custody, the aforementioned principles of Article 13 of the BiH CPC would certainly be met.

The consequences of termination of provisions on ordering custody in the course of the investigation

Those who wish to maintain the established legal framework will emphasize that the ordering of custody in the course of the investigation is necessary because after custody has been ordered it will be necessary to conduct certain investigative actions in order to collect evidence related to an alleged crime (e.g. it is necessary to interview more witnesses, search certain premises or to conduct other investigative actions in order to find traces of criminal offence relevant for criminal proceedings).

Without entering into a deeper analysis one could conclude that the cessation of detention would have a negative effect on the investigation, for by doing so a possibility would be left to influence the witnesses, to destroy, hide or exchange evidence, as well as that by doing so the prosecution, as a party in the proceedings, would be placed in a less convenient position than the one it has according to the current legal framework.

We will be assured that such a conclusion is incorrect if we consider the legal consequences of termination of detention in the course of the investigation. Termination of detention in the course of the investigation, as a consequence, would require amendments of some legal provisions, and those would primarily refer to the following:

1) Termination of paragraphs 1 and 3 of Article 225 of the BiH CPC, with the inclusion that the issue that is regulated by paragraph 2 of the same Article, and refers to the questioning of the suspect, was prescribed by Article 77 of the BiH CPC. If the detention could not be ordered before the confirmation of the indictment a justification for time limitation of investigation before the confirmation of indictment, would cease to exist. The Prosecution investigation, until the confirmation of indictment, would no longer be limited by custody time limits.

2) Until confirmation of indictment, The Prosecutor's Office would not be obliged to inform the suspects of the investigation, nor would it be obliged to deliver evidence they collected during its investigation, to the defense, whether or not it is evidence that favors the suspect. This solution would result in the deletion of paragraphs 1 and 2 of Article 47 of the CPC BiH.

This amendment would cause no different consequence from the current one in that it would be possible to conduct the investigation and that specific persons would have no knowledge of that. The first time that a person would be informed of being suspected of committing a certain offence, would be at the moment of receiving a summons by the authorized official person, after which one would be questioned. A novelty occurs in the case if the Prosecutor's Office wishes to file a motion to order detention. The Prosecutor's Office would be obliged, at the same time when filing a motion to order detention, to file an indictment for confirmation, with the inclusion that grounds for detention would be decided upon after the confirmation of the indictment.

3) If the provisions regulating detention during the investigation would be deleted, and in that respect a termination of Article 225 of the BiH CPC occurs, there would be no legal obstacles for the continuation of investigation after the confirmation of indictment, with inclusion that, by the moment of confirmation of indictment, each party to the proceedings would be obliged to continuously deliver evidence to the other party, immediately after receiving such (the current legal framework does not prescribe this obligation of the Prosecutor's Office, since

under Article 47 paragraph 3, 4 and 5 the Prosecutor's Office is obliged only to make inspection into the file by defense possible).

The obligation of continuous delivery of evidence to the Prosecutor's Office would lie on defense as well, so that by such exchange of evidence in due time, both parties would have the time to become familiar with evidence of the opposing party, and to prepare for the main trial in a quality manner, which would result in achieving judicial economy and efficiency of criminal proceedings.

In that respect, before the commencement of the main trial, hearings where the Court would conduct verification as to whether the parties have conducted mutual exchange of evidence would be introduced.

Conclusion

With a view to raising the issue of the justifiability of custody in the course of an investigation, this paper touches on only some of the reasons that support the argument that custody in the course of an investigation, irrespective of how it may be opposed to our legal notions and legal tradition, is not justified. However, this matter is quite complex and more attention should certainly be paid to it in order to move past the level of mere presentation of arguments and begin to discuss specific amendments to the BiH CPC.

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CRIMINAL DEFENCE SECTION

Director of Odsjek Krivične Odbrane (OKO)

Registry of the Court of BiH

Sarajevo, Bosnia and Herzegovina

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Case Report: Bagaragaza

ICTR Decision on referral to the Kingdom of Norway

Background

In order to conclude trials by the end of 2008 and appeals by the end of 2010, the UN Security Council's Completion Strategy authorizes the ICTR Prosecutor to refer appropriate cases to national jurisdictions for prosecution and urges Member States to accept those cases. As part of the Completion Strategy, the ICTR Prosecutor in the Bagaragaza case made a request to the Kingdom of Norway to take over prosecution of that case.

During the 1994 Rwandan genocide, Bagaragaza was director general of the office controlling the Rwandan tea industry. He was also a member of the Prefectoral committee of the MRND political party in Gisenyi *Préfecture,* Rwanda -- the political party of former Rwandan President Juvenal Habyarimana, and the party that established a youth wing known as the *Interahamwe*.

The indictment

The indictment confirmed on July 28, 2005 contains three counts against Bagaragaza: 1) conspiracy to commit genocide; 2) genocide; and 3) complicity in genocide in the alternative. The indictment alleges that Bagaragaza participated in a plan to fund, arm and train the *Interahamwe* militia so that they could attack and kill the Tutsi civilian population of Rwanda. It further alleges that the tea production units under the control of Bagaragaza were used to store weapons and for the recruitment and training of persons deployed in the extermination campaign against Tutsi civilians. Lastly, the indictment alleges that the Accused provided material support to persons who attacked and killed Tutsi civilians in Gisenyi *Préfecture* in April 1994, including the Tutsis who sought refuge in Nyundo Cathedral.

Before his surrender on August 16, 2005, Bagaragaza entered into an agreement with the Prosecutor and gave an extensive statement in which he incriminated himself and other Rwandans. Bagaragaza requested that he be tried before a national court, which would be determined at a later stage.

The Prosecution excluded the Rwandan Republic, the State where the crime was committed, because it did not meet Rule 11 *bis* (C) requirements – namely the absence of the death penalty and the guarantee of a fair trial. Additionally, the Prosecution excluded the United-Republic of Tanzania, the State where the Accused was arrested following his surrender, because this referral would conflict with Art. XX (1) of the Headquarter Agreement (31 August 1995); this Article bans the United-Republic of Tanzania, host country of the ICTR, from prosecuting accused within the jurisdiction of the International Tribunal.

Decision

On May 19, 2006 the ICTR issued a decision on the Prosecution's motion for referral of Bagaragaza Michael's case (Case No. ICTR-2005-86-R11bis) to the Kingdom of Norway. The ICTR Trial Chamber III found that the Kingdom of Norway does not have jurisdiction *ratione materiae* over the crime of genocide, conspiracy in committing genocide or complicity in genocide as charged in the confirmed Indictment. Consequently, Bagaragaza could not be prosecuted for the alleged criminal acts of which he has been accused under Norwegian criminal law. Thus, the ICTR dismissed the Prosecution's motion for referral.

Reasoning

Rule 11 *bis* of the ICTR Rules of Procedure and Evidence requires that, in deciding a motion for referral, three requirements must be considered: 1) the jurisdiction, willingness and preparedness of the Referral State; 2) the ability of the Referral State to conduct a fair trial; and 3) the non-imposition of the death penalty in the Referral State. Rule 11 *bis*(A) further limits which jurisdictions may accept a referral. Under that rule, a confirmed Indictment may only be referred to a State (i) in whose territory the crime was committed, or (ii) in which the accused was arrested, or (iii) which has jurisdiction and is willing and adequately prepared to accept the referral.

In the Bagaragaza case, the Prosecution requested that the ICTR refer the Indictment to the Kingdom of Norway pursuant to Rule 11 *bis*(A)(iii), arguing that the Kingdom of Norway has jurisdiction and is willing and adequately prepared to accept such a case as evidenced by the further submissions produced by parties and the Kingdom of Norway itself as *amicus curiae*.

Following the submission made by the Norwegian Ministry of Foreign Affairs, the Chamber concluded that the Kingdom of Norway's domestic criminal law does not include any provision banning genocide. The Norwegian authorities claimed, however, that the Accused may be prosecuted for the acts alleged in the Indictment as an accessory to homicide or negligent homicide, for which the maximum sentence is 21 years imprisonment. Pursuant to universal jurisdiction, the King in Council and the Kingdom of Norway could exercise their discretion to determine whether, in light of the evidence, the prosecution is warranted and approve the indictment.

The ICTR Trial Chamber, quoting the ICTY Appeal Chamber's Decision on Rule 11 *bis* Referral in *Prosecution v. Radovan Stankovic*, September 1, 2005, affirmed that the Referral Bench must be satisfied that an adequate legal framework exists to crimi-

nalize the alleged behavior of the Accused. The Chamber further held that, if the defendant is found guilty, an appropriate punishment could be applied based on the offenses currently charged by the Tribunal.

Additionally, the interpretation of Rule 11 *bis*(A)(iii) should rely on the definitions of jurisdiction provided in the Statute at Articles 1, 2, 3, 4, 5 and 7, which require *ratione materiae*, *ratione personae*, *ratione loci* and *ratione temporis*. According to the Statute, in order for any tribunal to have jurisdiction, the Court must, in confirming the indictment, find that each of those requirements is satisfied. In this case, the universal jurisdiction referred to in the submissions of the Kingdom of Norway will permit the prosecution of the Accused *ratione personae*, *ratione loci* and *ratione temporis*. However, the fact that Norwegian criminal law does not include the crime of genocide directly impacts the finding of *ratione materiae* jurisdiction. A state's ratification of the Genocide Convention does not mean that the State has incorporated its principles into its domestic criminal law; in other words, a state that has ratified the Genocide Convention still may not possess the capacity to prosecute anyone for the perpetration of such acts. International treaties do not include proper criminal provisions because they contain general rules and do not provide for punishment.

The Chamber affirmed its duty to decide whether the Referral State has jurisdiction within the definition provided by the Statute. However, where the Referral State has several laws which may be applicable and each law provides for appropriate legal qualification in accordance with the Statute, the Chamber does not have the authority to determine which one should be applied. The Chamber cited the Appeal Chamber Decision in the *Stankovic* Case. In that case, the Referral Bench refused to decide which of two applicable laws the Referral State should apply. The Referral Bench provided a detailed analysis of the substantive law which could be applied if the case were referred to BiH. In that case, the Referral Bench found that even if the applicable criminal code lacked provisions criminalizing the actions charged in the Indictment, the state had other legal instruments which contained provisions similar to those in the Statute and the Rules of Procedure and Evidence of the ICTY which criminalize participation. Thus, BiH could prosecute some or all of the alleged criminal acts of the Accused.

The ICTR Trial Chamber found that the crimes the Accused was charged with differ significantly, in terms of both their elements and gravity, from the Kingdom of Norway's domestic crime of homicide. The crime of genocide is distinct in that it requires the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". In marked contrast, Norwegian criminal law does not require this specific intent for the crime of homicide. Accordingly, the ICTR Trial Chamber found that subject matter jurisdiction for the crimes alleged in the confirmed Indictment does not exist under Norwegian criminal law and therefore refused the Prosecutor's request for transfer.

(Continued from page 5)

Law on the Court. This implies that the Court has the discretion to set-up legal teams to support the Panels and that the Court can decide whom to hire. According to article 2 (3) of the Registry Agreement, the Registry supports the Court in recruiting staff.

As discussed above, the Court's structure consists of legal teams composed of two national lawyers and one international lawyer. Pursuant to the Registry Agreement, however, international support staff may only assist the work of international judges. Because lawyers work as part of teams that support a particular Panel, and international judges form part of each Panel, the international staff provide *de facto* support to the Panel as a whole.

The Law on the Court does not mention the possibility of international staff becoming employees of the Court. The Book of Rules on the organizational structure of the Court of BiH states in Article 24 that the work of the employees of the Court of BiH is based on the Labor law for Institutions of BiH. According to article 10 (1) b) of this law, in order to be employed by an Institution of BiH, one must be a national of BiH. Pursuant to article 2 (2) of the Registry Agreement, international Legal Associates and International Law Clerks have the authority to work for international judges. Therefore, they work *de jure* for the Registry.

Although the Registry employs international staff, it does not supervise their work. Article 2 (4) of the Registry Agreement states that the Registry shall not interfere with the independent exercise of the judges of the Court of BiH in the fulfillment of their duties under law. If the Registry were to supervise the work of the legal teams, it would compromise the independence of the judges, a direct violation of article 2 (4) of the Registry Agreement.

The Court of BiH will gradually phase out its use of international judges and the international component of the LD. By the end of 2009, the LD will no longer have any international staff; thus, all Court staff will be nationals of Bosnia and Herzegovina.

1 Law on Amendments to the Law on Court of BiH, Official gazette of BiH, 61/04.

2 August 2006.

3 Law on the amendments to the Law on the Court of BiH, Official gazette of BiH, 61/04.

4 Agreement between the High Representative for BiH and BiH on the establishment of the Registry for Section I for war crimes and Section II for organized crime and corruption of the Criminal and Appellate Divisions of the Court of BiH and the Special Department for war crimes and the Special Department for organized crime, economic crime and corruption of the Prosecutor's Office of BiH, Official gazette f BiH, International Agreements, 12/04.

Case Report: Paunović case

News in proceedings before the Court of BiH

Background

On March 18, 2005, Paunović Dragoje, also known as "Špiro", was arrested pursuant to the Decision on Custody of the Cantonal Court in Sarajevo. Paunović, born on June 19, 1954 in Mojkovac, Serbia and Montenegro, is a citizen of both Serbia and Montenegro and BiH. He permanently resides in Prijedor, BiH.

On May 26, 2005, the Prosecutor's Office of BiH filed a proposal to the Cantonal Court to take over the Dragoje Paunović case. Because he was charged with War Crimes against Civilians, in violation of Article 172, Paragraph 1, (a), (h), (k) of the CC BiH, the case was classified as extremely sensitive in accordance with the Orientation Criteria for Sensitive Rules of the Road Cases of the Prosecutor's Office of BiH. The Court of BiH determined that the case fell under Category I, very sensitive, based on the gravity of the alleged acts and the status of the perpetrator at the relevant period of time.

The indictment

On September 14, 2005, a Court of BiH preliminary hearing judge confirmed the indictment against Paunović.

Paunović Dragoje was charged with ordering the commission of and committing murder, persecution and other inhumane acts against Bosniak civilians during the widespread and systematic attack of the Army and the Police of the Serb Republic of BiH and the paramilitary forces under the leadership of SDS. These attacks were aimed against the Bosniak population in the area of Rogatica in Eastern Bosnia between May and September 1992.

As alleged in the indictment, on August 15, 1992, Paunović Dragoje**,** a superior officer of a small military formation of the Rogatica battalion, ordered his soldiers to use twenty-seven civilians who were unlawfully detained at "Rasadnik" camp in Rogatica to form a "human shield". Paunović allegedly ordered his soldiers to advance in the direction of the BiH Army positions. As a result, two civilians were wounded. Later that day, as stated in the Indictment, the accused ordered his soldiers to execute those twenty-seven civilians by personally executing them with a rifle. Twenty-four civilians were killed; only three of the civilians who were unlawfully detained survived.

Decision

The main trial began on October 31, 2005 and lasted for more than a hundred hours, which included twenty hearings.

Following the closing arguments three days prior, the verdict was scheduled for May 26, 2006. The trial panel of Section I for War Crimes of the Court of BiH found Paunović Dragoje guilty of the criminal offense of Crime against Humanity, and sentenced him to twenty years.

The defense announced their intention to file an appeal based on incomplete and erroneous establishment of facts, violation of criminal code provisions, and the sentence. The appeal decision is pending.

Case Report: Maktouf case

News in proceedings before the Court of BiH

Background

The accused Abduladhim Maktouf was charged committing war crimes against civilians under Article 173 paragraph 1(e) of the Criminal Code ("CC") of BiH, and Article 142 of the Criminal Code ("CC") of SFRY. According to the allegations contained in the indictment, on or around October 18, 1993, Maktouf aided the fighters of the Al Mujaheed detachment. Along with the Al Mujaheed, Maktouf illegally arrested three civilians of Croat ethnicity, Ivo Fišić, Kazimir Pobrić and Ivan Rajković, in Travnik. As further alleged in the indictment, Abduladhim Maktouf participated in the planning of the kidnapping and drove one of the two vehicles that transported the captives.

First-instance proceedings

Upon completion of the trial, on July 1, 2005 Maktouf was found guilty of war crimes against civilians under Article 173 paragraph 1(e) in conjunction with Article 31 of the CC of BiH. Pursuant to the above mentioned legal provision and Article 49 of the CC of BiH, the Court sentenced Maktouf to a five-year prison term. Within the prescribed deadline, Maktouf's attorneys filed an appeal, contesting the verdict on the following grounds:

a. essential violation of the provisions of criminal procedure,
b. violation of the Criminal Code,
c. erroneously and incompletely established facts,
d. decision as to the sanctions and
e. incorrect decision on claims under property law.

Appellate Proceedings

Citing Article 314 of the CPC, the defense team argued that the prosecution did not sufficiently prove that the accused committed the criminal offence with which he was charged and urged the appellate panel to overturn the trial court's verdict. The Prosecution also filed an appeal claiming that the punishment was too mild.

Decision

On November 24, 2005, the appellate panel issued a decision reversing the trial court's verdict and scheduled a rehearing before the appellate panel. The panel noted that the trial court's conviction rested principally on the testimony of two witnesses: Ivo Fišić and a protected witness who was involved in the kidnapping. The testimony of both witnesses troubled the panel. First, the panel found that Ivo Fišić's testimony about Maktouf's participation in the crime was inconsistent with his earlier statements. Second, the panel found the protected witness' testimony problematic because the defendant was sentenced as an accomplice in the kidnapping in which the protected witness participated. However, unlike Maktouf, the protected witness was not prosecuted. The appellate panel stated that it "could not exclude the existence of a *de facto* agreement between the Prosecutor's Office of BiH and the protected witness."

The appellate panel pointed out that because there was no other direct evidence establishing the defendant's guilt, the testimony of these two witnesses should have warranted extra attention from the trial court. The panel noted that that the Constitutional Court of BiH presented similar legal arguments in its decision on April 22, 2005 in the case No. 661/04. That case also dealt with the issue of testimony from an accomplice who entered into an immunity agreement with the prosecutor. Based on that decision the appellate panel reversed the trial court's verdict and reheard the case.

The panel ruled that, in addition to new evidence, evidence presented at trial should be re-presented if deemed necessary to establish the facts. At the appellate panel hearing, numerous pieces of evidence were presented including the audio recording of witness testimony from Ivo Fišić, the protected witness, Salko Beba and Husein Delić. Upon a joint proposal of the defense and the prosecution, Ivo Fišić and the protected witness each gave their statements once again. New defense witnesses, Ribo Elvis and Ramo Durmiš, were also heard.

The defense and the prosecution, over the course of three days – March 28-30, 2006 – presented their closing arguments. On April 4, 2006, the appellate panel of Section I for War Crimes of the Court of BiH issued a final verdict. The court found Maktouf Abduladhim guilty and sentenced him to a five-year prison term. The court credited the time that Maktouf spent in custody during the criminal proceedings beginning on June 12, 2004 toward his sentence.

Case Report: Ljevo et al.

Cantonal Court Mostar, Case No. K-13/03, Verdict of March 29, 2006

Background

Ljevo Zikrija, Zahirovic Vernes, Omanovic Becir, Copelj Habib and Orucevic Husnija, all from Mostar, citizens of Bosna and Herzegovina were charged with acts in violation of provisions of Article 3 paragraph 1 and Article 13 of the Third Geneva Convention Relative to the Treatment of Prisoners of War dated 12 August 1949 and committing war crimes against prisoners of war in violation of Article 144 of the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY).

The indictment alleges that the 5 captured a group of soldiers from II HVO Battalion Široki Brijeg: Zovko Dragan, Jure Kosir, Stanislav Ljubica, Gojko Zovko, Pero Kosir, Jozo Primorac, and Dragan Lasic, between 19 September and 21 September 1993, during the armed conflict between HVO and the Army of BiH. After they had taken the abovementioned persons captive, they transported them on a truck in the direction of Bijelo Polje. One of the captives, Jozo Primorac managed to escape. Ljevo Zikrija and Zahirović Vernes took all the other prisoners from the truck, punched them repeatedly and hit them with rifles, inflicting pain and bodily injuries. On the same night, 19 September 1993, the captives were imprisoned in a house in Bijelo Polje. Ljevo Zikrija, Zahirović Vernes, Omanović Becir and Copelj Habib came to that house on several occasions and beat them with the wooden sticks, chairs, a bicycle and other hard objects.

On 20 September the physical abuse of the prisoners continued. On the night between 20 and 21 September, the accused Ljevo Zikrija and one other unknown member of the Army of BiH entered the house where the prisoners were, took Dragan Lasic out and fired a burst at him, which killed him. On the same night, Orucevic Husnija, a member of the Military Police of the Army of BiH, punched and kicked the prisoners several times, after the prisoners had been tied with wire and before they were taken to Mostar.

Proceedings

The indictment was filed by the Cantonal Prosecutor's Office of Mostar on 23 October 2000. The Cantonal Court in Mostar rendered a verdict by which the accused were acquitted on 30 April 2001 (No. K: 20/99).

Deciding upon the appeal of the cantonal prosecutor from Mostar, the Supreme Court of the Federation of BiH issued a decision on 19 March 2003 by which the verdict of the Cantonal Court in Mostar was revoked and the case was remanded to the First Instance Court for a retrial.

After the retrial and the re-presentation of evidence, on 29 March 2006 the Cantonal Court in Mostar found the accused guilty.

Decision of the Court

The Cantonal Court in Mostar, with Judge Zoran Krtalic as the Presiding Judge found the five accused guilty of the criminal offence of War Crimes against Prisoners of War.

The Cantonal Court in Mostar passed a Verdict on 29 Marh 2006 whereby it sentenced:

- The first accused, LJEVO ZIKRIJA to a seven-year prison term,
- The second accused, ZAHIROVIĆ VERNES to a two-year prison term,
- The third accused, OMANOVIC BECIR to a one year and six months prison term,
- The fourth accused COPELJ HABIB to a one year and six months prison term, and
- The fifth accused ORUCEVIC HUSNIJA to a one year and six months prison term,

finding that they acted contrary to the provisions under Article 144 of the CC SFRY, and Article 3, paragraph 1, item 1 and Article 13 III of the Geneva Convention on Treatment of the Prisoners of War.

Case Report: Vujanović Case

Verdict of the District Court in Banja Luka issued on March 9, 2005

Background

Vujanović Milanko was first indicted on March 15, 1993 by the Military Prosecutor's Office at the First Krajina Corps Command in Banja Luka for Murder. Vujanović is a BiH citizen of Serbian origin from the city of Novi Grad.

On December 2, 2005, the District Prosecutor's Office in Banja Luka amended indictment No. KT-751/04 to charge Vujanović with War Crimes against Civilians pursuant to Article 142, paragraph 1, in conjunction with Article 22 CC RS (Former Criminal Code of Republic of Srpska taken from the SFRY Criminal Code "Official Gazette of RS" No.: 12/93-504) as a co-perpetrator in the death of five civilians. Vujanović was charged with violating the fourth Geneva Convention on Protection of Civilians in Time of War, and the Additional Protocol II, dated 19 October 1992.

The indictment

The indictment alleged that, as a member of the Military Posted to 7031 Kozarska Dubica at Blagaj Rijeka in the Municipality of Novi Grad, Vujanović, with two other persons, abducted and killed Huzeirović Aziz. Thereafter, Vujanović took Huzeirović Enver, from Huzeirović Brdo at Blagaj Rijeka to a place near a creek called „Vrilo" and fired several shots, killing him instantly.

On the afternoon of October 20, 1992, in Blagaj Rijeka in the Municipality of Novi Grad, Vujanović and two others, took Memić Safeta and Halilović Mina from Halilović Kasim's house and tied their bodies together in the courtyard with a wire they previously prepared for this purpose. They poured gasoline over their bodies, and Vujanović Milanko set them on fire with a lighter. Both died as a result of the injuries they sustained. After that, Vujanović returned to the house where he found Memić Arif. He took Memić Arif to the 'Blagaj Rijeka' creek, near Hodžić Muharem's house, where he shot and killed him.

Proceedings

During the proceedings, the defense attorney, in attempting to prove that the defendant was deployed with the unit, examined witnesses Zec Milan and Vukić Predrag. The witnesses' statements, however, did not support the defense's allegations.

The Court accepted the statements of witnesses Memić Bekira, Memić Sakib and Halilović Kasim because their testimony was consistent with the interpretation of the essential facts of the proceedings.

Decision

On March 9, 2005, a panel composed of Presiding Judge Milovanović Daniela and Judges Čupeljić Edina and Lay Judges Petković Nikola, Bekić Mileva and Crnogorac Petar, rendered a guilty verdict. Based on the evidence presented, the Court concluded that the accused Vujanović Milanko committed the offense with which he was charged, because his intention, awareness and willingness were to murder non-Serb civilians.

The Court found that the victims, Huzeirović Aziz, Huzeirović Enver, Memić Arif, Memić Safeta and Halilović Mina, were civilians of non-Serb ethnicity during the armed conflict, the accused was a member of Military Post Office 7031 Kozarska Dubica, and that there was an armed conflict in BiH. These persons were protected by the Geneva Convention on Protection of Civilians in Time of War.

Upon sentencing, the Court considered the purpose of the punishment, the degree of criminal liability, and the defendant's motive in committing the offense, as well as the manner in which the crime was committed and the consequences of the criminal offence. In weighing the mitigating circumstances, the Court found that the accused is the father of three, has health problems and has a poor financial situation. Because the defendant's previous conviction was not of a similar nature, the Court did not consider that conviction as an aggravating circumstance. The District Court in Banja Luka sentenced Vujanović Milanko to twenty years imprisonment, crediting the time he already spent in detention from December 25, 1992 until July 28, 1992. According to the Court, the purpose of the criminal sanction is to both rehabilitate the defendant and deter others from committing criminal offenses.

International Humanitarian Law & Criminal Procedure

Sarajevo and Banja Luka

OKO provides training for advocates wishing to appear before the Court of BiH. This Autumn, there will be two courses presented in both Sarajevo and Banja Luka.

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- *Sarajevo: 18-20 September 2006*
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- *Sarajevo: 16-18 October 2006*
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