Analysis of current issues
in war crimes proceedings
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Public's Right to Know of War Crimes Trials in Serbia

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Abbreviations Used in the Text

BiH	Bosnia and Herzegovina
EU	European Union
HLC	Humanitarian Law Center
Rules of Procedure of the Court	Rules of Procedure of the Court "Official Gazette of the Republic of Serbia" No. 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015 and 113/2015
WCPO	War Crimes Prosecutor's Office of the Republic of Serbia
Law on Prosecution of War Crimes	Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (Official Gazette of the Republic of Serbia, No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009)
CPC	Criminal Procedure Code (Official Gazette of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)

I Summary

The report by the Humanitarian Law Center (HLC) analyzes how are the existing mechanisms for public access to trials for war crimes applied and recommends necessary changes in the legislative framework and practice. The report, therefore, relates to the mechanisms available to the public to access information on trials, but not to proactive actions mostly yet to be adopted by the national judiciary in order to inform the public about their work (so called outreach).

The public's right to know about the war crimes trials, as a minimum, includes the right to access the courtroom where trials are held and documentation of war crimes cases (indictments, judgements, transcripts and audio/video records of main hearings); the right to record a trial for the purpose of public presentation and the right to keep court records from war crimes cases.

Out of the stated rights, only the right to access the courtroom and monitor the trial is strictly adhered to in Serbia and, therefore, it is not specifically analyzed in the Report. The public's right to access relevant documents from war crimes trials is limited in practice by the refusal of courts to deliver judgments from proceedings that are not final and by excessive anonymisation of data. Such actions are based on non-harmonized interpretation of already imprecise legislative framework. The right to record war crimes trials for the purpose of public presentation has not been achieved by any media or non-governmental organization so far, and until present day the public in Serbia has not had the opportunity to see a single testimony of the victims, perpetrators and witnesses, or the pronounciation of a judgment. In practice, the person authorized to decide on the request for recording – the President of the Higher Court in Belgrade, contrary to the law, rejects such requests. Finally, the legislator failed to recognize historical and social significance of court records from war crimes cases by determining them for permanent preservation. Instead, he applied the same rules on destruction to these records as to all other criminal records.

The report is based on several years of practice of the HLC, that monitors national war crimes trials from the start, obtains relevant court documents and reports about them to the public.

II Introduction

Public knowledge on court war crimes proceedings and established facts about the crimes is one of the key prerequisites for an objective assessment of the past and creation of social memory of the crimes committed. At the same time it represents the state's obligation to ensure the public's right to know what happened in the recent past and who the key players were. The public's right to know the truth about human rights violations in the past is one of fundamental principles of transitional justice, which prevents recurrence of crimes. It has been incorporated in a number of international instruments and sets standards in the treatment of post-conflict state aiming to accept and resolve the legacy of wrongdoings from the past. The UN principles to combat impunities stipulate that "all people have the inalienable right to know the truth about the crimes committed in the past and the circumstances that led to them [...]"[1].The UN General Assembly resolution on the right to truth emphasizes "that it is of great importance to have the international community seek to recognize the right of victims of gross violations of human rights and international humanitarian law and of their families, as well as of the society as a whole, to learn the truth about these crimes, in the maximum possible extent, especially to find out the identity of perpetrators, causes and facts of the crime, as well as circumstances under which they were committed."[2]

The importance of providing objective, continuous and timely information to the public on war crimes trials has been recognized by all international criminal courts.[3] Thus, for example, the International Criminal Tribunal for the former Yugoslavia has very early developed a special program to inform the public about the facts established in judicial proceedings being conducted. Despite positive examples of this and other tribunals, the Department for War Crimes of the Higher Court and the Court of Appeal have not yet developed specific services, or programs to inform the public. Almost all decisions of the Court of Appeal may be seen through the website of the Court of Appeal, but they are, as a rule, anonimised. On the other hand, the only

1 Updated set of principles for protection and promotion of human rights through combat against impunities (E/CN.4/2005/102/Add.1), 8 February 2005; available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement, accessed on 16 May 2016.

2 Resolution 68/165 of the UN General Assembly (A/RES/68/165), 18 December 2013.

3 See, e.g. web page of the International Criminal Tribunal for the former Yugoslavia, section Outreach, available at http://www.icty.org/en/outreach/home; web page of the International Criminal Tribunal, available at https://www.icc-cpi.int/; web page of the Special Court for Lebanon, available at http://www.stl-tsl.org/en/; accessed on 19 June 2016.

thing one can see on the website of the Higher Court in Belgrade is that there is a Department for War Crimes in this court, while the trial schedule and decisions of the Panel are not available. The courts of general jurisdiction generally do not have a developed program for informing the public of their work, war crimes trials included. The most developed practice of informing the public on war crimes trials in Serbia is applied by the War Crimes Prosecutor's Office (WCPO). However, this mainly comes down to the disclosure of information via the Prosecutor's Office website, and only occasionally includes activities such as community debates, production of films and information records about cases, etc.

The stated problems have had significant impact on the low visibility of war crimes trials in Serbia. The latest opinion polls in Serbia show that most citizens are not able to list any war crimes case being processed before national courts, or to indicate any of the institutions participating in the processing of war crimes.[4]

Non-transparency of court proceedings denies the victims and their families from public recognition of their suffering. After distress and long-term painful quest for the truth and justice, the only remaining satisfaction for victims, apart from punishing the perpetrators, is social awareness and acceptance of facts of responsibility for their sufferings. Instead, they are further humiliated by the fact that information about their fates do not reach the public in Serbia.

Lack of information among citizens regarding court established facts about the past also contributes to maintaining a distorted perception of responsibility for the committed crimes. Such perception undermines already fragile inter-ethnic relations and it is suitable for various political manipulations. Therefore, rather than create conditions for judicial truth to be publicly disclosed and thus prevent revision and creation of false narratives on perpetrators and victims, with its non-transparent work the judiciary is practically participating in maintaining stereotypical and ethnically biased image of events from the recent past that at a certain point may initiate a new cycle of violence.

Finally, the court record on human rights violations presents potential for formation of collective memory of the suffering of victims and the dam against relativisation, denial and glorification of crime. Multi-year ignorant attitude of courts towards the need to inform the public about the established facts indicates that Serbia is on a good road to choose oblivion instead of remembrance.

4 Belgrade Center for Human Rights, Research of public opinion - Attitudes towards war crimes, the ICTY and the national judiciary 2011 – detailed tables, available at http://www.bgcentar.org.rs/istrazivanje-javnog-mnenja/stavovi-prema-ratnim-zlocinima-haskom-tribunalu-domacem-pravosudu-za-ratne-zlocine/, accessed on 22 July 2016.

1. Action Plan for Chapter 23

The Action Plan for Chapter 23 within Serbia's EU accession negotiations, referring to the judiciary and fundamental rights, envisages a series of commitments and activities of institutions in the field of processing war crimes to be implemented in the coming years during the accession negotiations with the EU. The Action Plan also provides for a range of activities related to the visibility of war crimes trials.

The second quarter of 2016 envisages the "establishment of clear rules of anonymisation of court decisions in different legal areas prior to their publication, relying on the rules of the European Court of Human Rights."[5] Serbia undertook to "improve access to regulations and case law by forming and improving comprehensive electronic database of regulations and case law accessible to all with adherence to regulations governing the confidentiality of data and protection of personal data."[6] Amendment of the normative framework regulating the issue of publication of court judgments has also been envisaged.[7]

The Action Plan also envisages the improvement of the War Crimes Prosecutor's Office (WCPO) website, "to allow the public to follow when and which activities the War Crimes Prosecutor's Office is carrying out in relation to specific criminal charges."[8] Also, the WCPO is obliged to prepare a report "that will be available to the public presenting what has been done in respect of all criminal charges since 2005 in order to examine and present if all charges of war crimes were adequately investigated."[9]

5 Action Plan for Chapter 23 negotiations, activity 1.3.9.2, available at http://www.mpravde.gov.rs/tekst/12647/akcioni-plan-za-pregovaranje-poglavlja-23-usvojen-na-sednici-vlade-srbije-27-aprila-2016.php, accessed on 22 July 2016.

6 Ibid, activity 1.3.9.4.

7 Ibid, activity 1.3.9.3.

8 Ibid, activity 1.4.1.9.

9 Ibid, activity 1.4.1.10.

2. National Strategy for the Prosecution of War Crimes

In accordance with the Action Plan for Chapter 23, in February 2016 the Government of Serbia adopted the National Strategy for the Prosecution of War Crimes for the period from 2016 to 2020.[10]

One of the priorities and goals in the field of processing war crimes, identified in the National Strategy for the Prosecution of War Crimes is "a raised level of awareness and an improved public attitude toward the need for war crimes trials."[11] The strategy recognizes the need to "raise the level of general public awareness about the events in the former Yugoslavia and the need to detect, investigate and prosecute war crimes, and to punish their perpetrators, regardless of their national, ethnic and religious affiliation or their ranking." It emphasizes:

> "Providing timely, impartial and objective information to citizens about war crimes trials is their right, but also a shared obligation of the education system, the media representatives and bodies engaged in the prosecution of war crimes. The obligation of state bodies, in the spirit of full respect for freedom of speech, is to provide citizens, directly but also through the media, as complete information on war crimes proceedings as possible."[12]

The strategy also envisages a number of activities that aim to facilitate the availability of information on war crimes trials:

> "The consistent actions of presidents of competent courts in accordance with Article 16a of the Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (which allows recording main hearings and their publication in the media).[13]
>
> Improvement of the Higher Court in Belgrade website, which will have all of the necessary information about the judgments available, and gradually even more about the judgments in war crimes cases, (in accordance with actions to improve the availability of case law envisaged by the Action Plan for Chapter 23), with full respect for the rules on protection of personal data."[14]

10 National Strategy for the Prosecution of War Crimes of the Government of the Republic of Serbia, 20 February 2016, p. 16..

11 Ibid.

12 Ibid, p. 15-16.

13 Ibid, p. 36.

14 Ibid.

III Access to documents of war crimes cases

Documentation of war crimes cases is one of the key sources of information about the past and committed human rights violations. Public access to such documentation constitutes an essential element of the right of society to know the truth and a guarantee of undistorted historical narrative, but also a control mechanism for judicial authority's actions in the most sensitive criminal proceedings. War crimes trials cannot be considered transparent if the public has no access to key documents such as indictments, judgments and transcripts of main hearings. In Serbia, only the Court of Appeal in Belgrade and the War Crimes Prosecutor's Office (WCPO) publish the judgments, i.e. indictments on its website on their own initiative. The Higher Court in Belgrade does not, even though the first-instance judgments are the basic factual source about the events that are the subject of war crimes trials.

Even when the stated documents are published or delivered to the public upon the request for access to information, the public's right to know is being mostly limited by excessive anonymisation of data from these documents, making them incomprehensible and inaccessible. By submitting these documents without the possibility of a comprehensive insight into their contents, the state bodies only meet a mere legal form, but not substantive obligations towards the public.

The cause of this state of affairs undoubtedly lies in an insufficiently precise legislative framework. In fact, this subject matter is governed by the Law on Free Access to Information of Public Importance and the Law on Protection of Personal Data, but without specifying which one has the force of lex specialis. Also, many bodies responsible for the prosecution of war crimes have no adopted rulebooks on anonymisation, and those who have adopted such acts, do not respect them in practice. Apart from this, the Commissioner's decisions do not result in unification of practice but produce, at best, an *ad hoc* effect.

In practice, there is also an evident indifference of institutions to achieve a balance between the rights of participants in court proceedings to have their personal information be protected, on the one hand, and the public's right of access to information, on the other hand. As a rule, the interest of protection of personal data outweighs the public interest, provided that the competent authority carries out the harm test and public interest test at all. The impression is that this is due to mechanical application of the law, and that the competent authorities find it easier to completely

remove all data that are potentially person related, than to consider the public interest and the relationship between the two conflicting interests in each specific case.

The Action Plan for Chapter 23 has envisaged "setting clear rules for anonymisation of court decisions in different legal areas prior to their publication, relying on the rules of the European Court of Human Rights."[15]

1. Normative Framework

The possibility to inspect, i.e. obtain indictments, judgments and transcripts from main hearings of war crime proceedings is governed by the Law on Free Access to Information of Public Importance, the Law on Personal Data Protection and Rulebooks on Anonymisation.

1.1. Law on Free Access to Information of Public Importance

The possibility and the method for obtaining indictments, judgments and transcripts from main hearings of war crime proceedings are governed by the Law on Access to Public Information. Information of public importance is the information held by a public authority, which was created in operation or in connection with the work of the public authority. Pursuant to this legal provision, indictments, judgments and transcripts in war crimes proceedings are information of public importance. The law also envisages a presumption of justification for the interest of the public to know all information authorities have at their disposal. This right can only be "exceptionally subjected to limitations" "if this is necessary in a democratic society for the protection against a serious violation of an overriding interest based on the Constitution and the law."[16]

Article 9 of the Law specifies the cases in which the public's right to know can be limited. Among other things, the applicant will not be allowed to access information of public importance if thereby that would jeopardize, hinder or impede prevention or detection of a criminal offence, conducting of a preliminary criminal investigation,

15 Action Plan for Chapter 23 negotiations, activity 1.3.9.2, available at http://www.mpravde.gov.rs/tekst/12647/akcioni-plan-za-pregovaranje-poglavlja-23-usvojen-na-sednici-vlade-srbije-27-aprila-2016.php, accessed on 22 July 2016.

16 Article 8 of the Law on Free Access to Information of Public Importance.

conducting of a court proceedings, execution of a judgment, enforcement of a sentence or a fair treatment and a fair trial.

Also, Article 14 restricts the public's right to know if the submission of information would violate the right to privacy, the right to reputation or any other right of the person to whom the requested personal information relates, **"unless [...] if it is a person, phenomenon or event of interest for the public [...]"**

1.2. Law on Personal Data Protection

The Law on Personal Data Protection regulates conditions for collection and processing of personal data, the rights of persons and the protection of the rights of persons whose data are collected and processed, as well as limits to the protection of personal data.[17] Personal data is any information relating to a natural person, regardless of the form in which it is expressed and the information carrier (paper, tape, film, electronic media, etc.). Data processing includes their collection, search, submission for inspection, disclosure, publication, etc.[18] By virtue of things, indictments, judgments and transcripts contain numerous personal data (about the defendants, injured parties, witnesses, etc), and their collection and publication presents data processing within the meaning of the Law on Personal Data Protection.

Processing of personal data requires consent of persons whose data are processed. However, four exceptions to this rule have been envisaged, the most relevant of which for the subject of this report is the exception **"for the purpose of achieving a prevailing justified interest of the person, operator or user"**specified by the law.[19]

Apart from this, pursuant to this Law, the data **"available to anyone** and published in public media and publications or available in archives, museums and other similar organizations also have no protection."[20] Pursuant to this provision, **personal data communicated at main hearings open to the public, are not protected,** except if "opposite interests of the person to whom the data relate are clearly outweighing."[21]

17 Article 54 of the Law on Personal Data Protection.

18 Ibid, Article 3, Paragraph 1, Item 1.

19 Ibid, Article 12.

20 Ibid Article 5, Paragraph 1, Item 1.

21 Ibid, Article 5, Paragraph 1.

1.2.a. Anonymisation

Protection of personal data in indictments, judgments and transcripts provided to the public is performed by anonymisation. Anonymisation of data is the process of redacting parts of these documents aimed to protect personal data, i.e. privacy. Courts implement this process by replacing, removing or obscuring personal information so that persons to whom the information relate remain anonymous, i.e. unrecognizable.

The Republic of Serbia has no legislation on anonymisation of prosecutorial and judicial decisions, but that area is partly regulated by internal documents of courts and prosecutor's offices, i.e. rulebooks on anonymisation. Not all courts and prosecutor's offices have such rulebooks, including the War Crimes Prosecutor's Office (WCPO) and the Higher Court in Belgrade. The Supreme Court of Cassation and the Court of Appeal in Belgrade have adopted rulebooks on anonymisation.

In 2010 the Supreme Court of Cassation (SCC) adopted the Rulebook on substitution and omission (anonymisation) of data in judicial decisions, which expressly envisages that: **"No data on the defendants and convicted persons in judicial decisions made in war crimes cases shall be anonymised** [...]"[22]

Rulebook on the Minimum of Anonymisation of Court Decisions of the Court of Appeal in Belgrade[23] Rulebook on the Minimum of Anonymisation of Court Decisions of the Court of Appeal in Belgrade has been amended in 2012 to further limit the anonymisation in war crimes cases with respect to the rulebook of the SCC: "No data on the defendants and convicted persons in judgments and decisions on permanent confiscation of assets made in war crimes cases shall be anonymised [...]"[24]

The Higher Court in Belgrade, which conducts the first-instance proceedings in war crimes cases, still has no rulebook on anonymisation adopted.

The WCPO also has no adopted rulebook on anonymisation, but it has a Fact Book on Free Access to Information of Public Importance[25] which, in addition to information

22 Article4, Supreme Court of Cassation, Rulebook on Substitution and Omission (Anonymisation) of Data in Judicial Decisions (I trial303/10-1), 27 May 2010, available at http://www.vk.sud.rs/sites/default/files/PravilnikOAnonimizaciji.pdf, accessed on 12 July 2016.

23 Court of Appeal in Belgrade, Rulebook on the Minimum of Anonymisation of Court Decisions (I trial no. 2/10-82), 27 August 2010, available at http://www.bg.ap.sud.rs/images/pravilnik2010.pdf, accessed on 1 July 2016.

24 Court of Appeal in Belgrade, Rulebook on Amendments of the Rulebook on the Minimum of Anonymisation of Court Decisions (trial no.I -2 84/12), 26 April 2012, p. 178, available at http://www.bg.ap.sud.rs/images/INFORMATOR_7_2013_LAT.pdf, accessed on16 June 2016.

25 Fact Book on Free Access to Information of Public Importanceof the War Crimes Prosecutor's Office, available at http://www.tuzilastvorz.org.rs/html_trz/POCETNA/P_INFORMATOR_CIR_20130118.pdf, accessed on 16 July 2016.

about the work of the prosecutor's office, provides instructions on possibilities and method for access to information of public importance available to the prosecutor's office and at the same time provides an annual overview of responses upon requests.

The courts and prosecutor's offices of general jurisdiction dealing with cases of war crimes do not publish information on these proceedings on their websites. However, they submit the documentation required pursuant to the provisions of the Law on Access to Information of Public Importance, as a rule, with the prior anonymisation performed. The practice of anonymisation carried out by the courts and prosecutor's offices of general jurisdiction is not unified.[26]

Indictments

War crimes indictments are available to the public via the website of the War Crimes Prosecutor's Office (WCPO) on the basis of the Law on Access to Public Information. However, the WCPO has no clearly defined standard on the method for posting indictments to the website. Therefore, the WCPO most often applies the rule to publish indictments without rationales[27], but indictments with rationales can also be found.[28] The indictments do not anonymise data on defendants such as the first and last name, while data on injured parties are sometimes anonymised,[29] and sometimes not.[30] If they are anonymised, this is done in a way to leave only initials instead of the first and last name.

26 See, e.g. the second-instance judgment in the *Orahovac* case, available at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Orahovac_Presuda_Apelacionog_suda.pdf; indictment in the *Orahovac* case, available at http://www.hlc-rdc.org/wp-content/uploads/2012/02/1.Orahovac-12.11.1999-optuznica1.pdf; the first first-instance judgment in *Miloš Lukić* case, available at http://www.hlc-rdc.org/wp-content/uploads/2012/04/2-Prva-prvostepena-presuda-OS-u-Prokuplju-25.06.1999..pdf; indictment in the *Miloš Lukić* case, available at http://www.hlc-rdc.org/wp-content/uploads/2012/04/1-Optuznica-14.06.1999..pdf; the second-instance judgment in *Miloš Lukić* case, available at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Drugostepena_presuda_09.10.2014..pdf; the first-instance judgment in *Emini* case, available at http://www.hlc-rdc.org/wp-content/uploads/2014/05/Emini-Prvostpena_presuda_sa_obrazlozenjem_15_06_2007.pdf, accessed on 21 July 2016.

27 See, e.g. the indictment in the *Trnje* case, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2013_11_04_CIR.pdf, accessed on 19 June 2016.

28 See, e.g. the indictment in the *Logor Luka* case, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2014_03_31_CIR.pdf, accessed on 19 June 2016.

29 See, e.g. the indictment in the *Čelebići* case, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2013_05_17_CIR.pdf, accessed on 19 June2016.

30 See, e.g. the indictment in the *Bosanski Petrovac – Gaj*, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2014_10_10_CIR.pdf, accessed on 19 June2016.

Judgments and Transcripts from Main Hearings

War Crimes Department of the Higher Court in Belgrade does not publish judgments (first-instance judgments in war crimes cases), or transcripts from trials on its website. These documents are available to the public only if requested pursuant to the Law on Free Access to Information of Public Importance. Judgments and transcripts that the court provides in this way are anonymised.

The Department of War Crimes of the Court of Appeal publishes all judgments (the second-instance judgments in war crimes cases) on its website.[31] All judgments on the website of the Court of Appeal are anonymised.

Audio and Video Records of Main Hearings

According to the Law on Free Access to Information of Public Importance, the information of public importance is any information that is held by public authorities, whereby the carrier of information is irrelevant, i.e. whether it is paper, tape, film, electronic media or other.[32] Accordingly, the audio and video recording of the main hearing also presents information of public importance, which may be subject of the request pursuant to this Law.

The Criminal Procedure Code envisages as **mandatory to sound record the main hearings** in war crimes proceedings, while optical recording of a specific main hearing requires approval of the Presiding Judge.[33] According to the CPC, sound and optical recording may be publicly presented in professional and scientific purposes only after the full validity of the proceedings.[34]

On the other hand, the Law on the Prosecution of War Crimes, which is *lex specialis* in this matter with respect to the CPC, envisages that "sound recording shall be taken during the main hearing, and *if possible* video recording as well.[35] Although the

31 Web page of the Court of Appeal in Belgrade, case law: war crimes, available at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/, on 19 June 2016.

32 Article 2, Law on Free Access to Information of Public Importance.

33 Article 236, Paragraphs 1 and 3, CPC.

34 Ibid, Paragraph 10.

35 Article16, Law on the Prosecution of War Crimes.

Department of War Crimes of the Higher Court in Belgrade *has the ability* to take video recordings of main hearings in war crimes cases, it never does.

The HLC has sent a request to the Higher Court in Belgrade for access to information of public importance containing the question whether the building of the Higher Court in Belgrade at Ustanička Street (the building of the so called *Specijalni sud* (War Crimes Chamber)), as well as the building *Palata pravde* (Palace of Justice) have devices for optical recording of the trial, i.e. are there *possibilities* to keep a video record of a war crimes trial. The Higher Court has informed the HLC that two courtrooms at the Palace of Justice have been furnished with equipment for optical recording since 2004, while **all four courtrooms of the Higher Court at Ustanička Street have been furnished with equipment for optical recording since 2006.**[36] However, although there is equipment for optical recording, the Higher Court in Belgrade does not record the main hearings. They have replied to the HLC's requests for video records of testimonies from several cases that no video recordings were made in these cases.[37] On the other hand, the Higher Court provides audio records of testimonies.

2. Problems in Practice

Non-application of the Harm Test and Public Interest Test

In several cases the Department of the Higher Court refused to provide judgments and transcripts from main hearings, upon request for access to information of public importance, in cases that were not final. When rejecting the request, the court would reference the Article 9 of the Law on Free Access to Information of Public Importance, i.e. stating that this would jeopardize the criminal proceedings. The Court, however, has never explained or showed in its rejecting decisions how the disclosure of the requested documents would actually jeopardize the criminal proceedings, i.e. did not apply the harm test and public interest test.

The HLC complained to this practice to the Commissioner for Access to Information of Public Importance, whose has repeatedly pointed out by his decisions that this practice of the courts is illegal, stating that the courts failed to provide valid evi-

36 Higher Court in Belgrade, trial no. 42/15-110 as of 13 July 2015.

37 HLC requested video records of testimony of Zoran Rašković in the Ćuška case; testimonies of Božidar Delić and Ratko Mitrović in the Suva Reka case; testimony of Goran Radosavljević in the Bytyqi case. Higher Court in Belgrade, trial no. 42/15-94 as of 8 July 2015; trial no. 42/15-98 as of 8 July 2015; trial no. 42/15-57 as of 18 May 2015.

dence on how provision of the requested data would seriously lead to the disruption of the proceedings:

> "The first-instance authority (apart from referencing in the rationale of the appellate decision the fact that the criminal proceedings in the stated case are not final, and that it is on appeal before the Court of Appeal in Belgrade) failed to provide a valid proof of justification to reject access to the requested information, i.e. did not specify how access to these, in this particular case, would seriously interfere further conduct and termination of the judicial proceedings, since **the arguments for denying access to information cannot be based solely on the assumption of the first-instance authority that 'provision of the requested information in a case where criminal proceedings is not yet final could seriously hinder further conduct and termination of the procedure.** In the specific case, the first-instance authority did not provide evidence that the interest of unhindered proceedings outweighs the interest of the appellant to know in this respect that, for example, during the arraignment or the examination of witnesses the public was excluded, which was at the same time informed through the media about the defendant, as well as crimes of which he was charged."[38]

Excessive Anonymisation

The most common way of restricting access to indictments, judgments and transcripts is performed through the process of anonymisation (sanitization, redaction) of written judgments. In some cases, courts have darkened even the names of accused, their defence attorneys, names of judges, witnesses, experts, and even entire paragraphs and pages of judgments. This way **judgments are becoming entirely illegible and unusable for legal analysis, the victims are denied of symbolic recognition of sufferings, and society is denied of knowledge about the crimes committed.**[39]

Until 2012 the courts submitted judgments upon requests for access to information of public importance to the HLC in their integral versions, and then they started with the practice of anonymisation. When rejecting the HLC's request for providing non-anonymised judgments, as a rule the courts would reference the Law on Protection of Personal Data. However, this argument of the courts cannot stand because

38 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-04661/2014-03 as of 19 April 2016. See also the Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01776/2012-03, 30 August 2012, Decision of the Commissioner for Access to Information of Public Importance and Personal Data Protection number: 07-00-02408/2014-03 as of 6 October 2015;

39 Humanitarian Law Center, *"Anonymization of judgments in war crimes cases contrary to national and international regulations"* (press release), 14 January 2014, available at http://www.hlc-rdc.org/?p=26065, accessed on 21 May 2016.

the law does not protect personal data when they are available to the public[40] or in cases of "protection of rights and freedoms and other public interests,"[41] as well as in cases when it comes to a person, phenomenon or event of public interest.[42]

The first exception to the protection of personal data should be particularly emphasized here. War crimes trials are public (except in few justified cases) and, therefore, all personal data communicated at main hearings – e.g. names of victims and witnesses – are "publicly available" and not protected. The absurdity of anonymisation of data communicated at public trials is especially evident if one takes into account that journalists can attend and report on all the details they learned during the hearing.

The Department for War Crimes of the Court of Appeal also regularly anonymises data on accused in war crimes cases, which is also contrary to the Rulebook on Anonymisation of this Court that explicitly prohibits anonymisation of data on the defendants and accused persons in judicial decisions made in war crimes cases.[43] In addition, the Court of Appeal anonymises names of victims, witnesses and expert witnesses.[44]

What is worrying is the practice of the Constitutional Court of Serbia, which in one of its judgments related to a war crime committed at Ovčara (Vukovar, Croatia) anonymised information in the judgment in a manner contrary both to the Law, and to the Commissioner's practice. Apart from anonymising name of the plaintiff and names of attorneys-in-fact, the court has also anonymised and names of judges of lower-instance courts, including even name of the judge whose actions led to the proceedings before the Constitutional Court, and thus prevented the public to gain insight into the work of state officials. Moreover, contrary to the rules of anonymisation aimed at protecting personal data, the **Constitutional Court has also anonimised the war crime location in this decision** –"S.R. convicted to a 20 year prison sentence for war crime against prisoners of war [...] conducted in the period from 20 to 21 November 1991, on the farm 'O.' in V..."[45]

Until present day the Commissioner has determined by his decisions that the following personal data contained in the court records of war crime cases do not present protected information: the first and last names of deputy prosecutors for war crimes,

40 Article 5, Paragraph 1, Item 1of the Law on Personal Data Protection.

41 Ibid, Article 13.

42 Ibid, Article 14.

43 See Article 4, Paragraph 3, of the Rules of Procedure of the Court of Appeal in Belgrade on amendments to the Rulebook on the Minimum of Anonymisation of Court Decisions, available at http://www.bg.ap.sud.rs/images/INFORMATOR_7_2013_LAT.pdf, accessed on 19 June 2016.

44 See, e.g. judgment of the Court of Appeal in the *Logor Luka* case, available at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-8-15.html, accessed on 19 June 2016.

45 See judgment of the Constitutional Court of Serbia in the *Ovčara* case, available at http://www.hlc-rdc.org/wp-content/uploads/2015/06/ODLUKA_Ustavnog_suda_po_zalbi_Sase_Radaka.pdf, accessed on 19 June 2016.

defendants, i.e. the accused; the first and last names of their defence attorneys and deputy defence attorneys, expert witnesses and sworn-in-court interpreters, presiding judges and members of the chamber, professional associates of the court and prosecutor's office, lawyer trainees and holders of state and political functions..[46]

With reference to the defendants in war crime cases, the Commissioner pointed out that only the following personal data are protected: "date and place of birth, place of residence, qualifications, occupation, family status and information from criminal records."[47]

However, when it comes to victims of war crimes, the Commissioner has taken a diametrically opposed position, which is analyzed in detail in the following section.

Anonymising Names of Victims

Anonymisation of names of victims in war crime judgments is a particularly alarming action of courts in Serbia.[48] Although such practice is still not a general trend, the HLC believes that this question deserves particular attention bearing in mind that the Commissioner for Information of Public Importance has taken the stand that anonymisation of names of victims in war crime judgments is in accordance with the Law.[49] Contrary to this, the HLC believes that this view is in opposition to the relevant laws and this **makes victims of war crimes invisible to the public, which violates the right of victims and their families, but also the whole society, to the truth.**

In several cases, the courts, acting upon the HLC's requests, delivered judgments with anonymised names of victims and injured parties in the proceedings. In appeals to the Commissioner, the HLC requested judgments to be provided in an integrated, not anonymised form. The Commissioner, however, rejected the HLC's requests for

46 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01258/2014-03 as of 15 December 2015.

47 Ibid. See also the Decision of the Commissioner for Access to Information of Public Importance number: 07-00—00337/2014-03 as of 17 March 2014.

48 See, e.g. the judgment of the Court of Appeal in Belgrade in the Orahovac case, available at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Orahovac_Presuda_Apelacionog_suda.pdf, accessed on 19 June 2016.

49 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-04847/2014-03 as of 11 May 2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Resenje_Poverenika_za_informacije_od_javnog_znacaja_doneto_po_zalbi_FHP.pdf, accessed on 22 July 2016; Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01258/2014-03 as of 15 December 2015; Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01088/2014-03 as of 9 December 2015 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01258/2014-03 as of 15 December 2015; Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01088/2014-03 as of 9 December 2015.

de-anonymisation of names of victims, i.e. and the removal of protective actions from their names.[50]

In the rendered decisions the Commissioner has taken the stand that the data on the full name of the accused should be available to the public, *since in the specific case these are persons charged with the criminal offenses of war crimes against civilian population, the execution of which cause great social danger and which are prosecuted ex officio*, which meets the requirement for application of an exception in protection of the right to privacy envisaged by the Article 14, Paragraph 2, of the Law on Free Access to Information of Public Importance. This article has envisaged that authorities will not enable the applicant to exercise the right to access information of public importance if that will violate the right to privacy of the person to whom the requested information relates *unless it is a person, phenomenon or event of public interest*.[51]

However, when it comes to the first and last names of victims, the Commissioner considers that they should remain inaccessible to the public because their disclosure would, in the opinion of the Commissioner, *seriously jeopardize their right to privacy*.[52]

The Commissioner explained the decision to apply exemption to privacy protection of defendants by the fact that *they are charged with criminal offenses of war crimes against civilian population, the execution of which cause a great threat to society and which are prosecuted ex officio*. It remains unclear based on what the Commissioner found that the war crimes defendants are *persons of interest to the public*, while victims of war crimes are not. It is also unclear why the Law on Free Access to Information of Public Importance is applied to the defendants, while provisions of more restrictive Law on Personal Data Protection are applied to victims.

The Commissioner found that the names of victims of war crimes are *particularly sensitive data* protected by the Article 16 of the Law on Personal Data Protection, since this is the case of data on the victims of violence.[53] According to the Law, these data can be published only with the person's consent. However, the HLC believes

50 Ibid.

51 Article 14, Paragraph 2, of the Law on Free Access to Information of Public Importance: „A public authority shall not grant an applicant his/her right to access information of public importance if it would thereby violate the right to privacy, the right to protection of reputation or any other right of a person who is the subject of information, except where: [...] 2) Such information relates to a person, event or occurrence of public interest, especially in case of holder of public office or political figures, insofar as the information bears relevance on the duties performed by that person."

52 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-04847/2014-03 as of 11 May2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Resenje_Poverenika_za_informacije_od_javnog_znacaja_doneto_po_zalbi_FHP.pdf, accessed on 19 June 2016.

53 Article 16 of the Law on Personal Data Protection: "Data relating to ethnicity, race, gender, language, religion, political party affiliation, trade union membership, health status, receipt of social support, **victims of violence, criminal record** and sexual life shall be processed on the basis of informed consent of data subjects, save where the law does not allow the processing of such data even with the subject's consent."

that with respect to the names of victims, the Commissioner also needed to apply exemption from Article 14, Paragraph 2, of the Law on Free Access to Information of Public Importance, which envisages that personal data shall not be protected *if this is a person, phenomenon or event of interest to the public.* In addition, it should be reminded once again that publicly available personal data, such as, for example, name of the victim who publicly testified, are not protected under the Law.[54]

The fact that particularly sensitive data are subject to exemptions for public interest as well as other personal data, apparently stems from the fact that data on convicted persons in judgments of war crime cases are not anonymised, although these data are "the data on conviction for criminal offense", i.e. particularly sensitive data pursuant to the Article 16 of the Law on Personal Data Protection.[55]

Being that particularly sensitive data are subject to exemptions from the right to privacy protection, envisaged by the Law on Free Access to Information, the HLC believes that the names of victims of war crimes present *persons of interest to the public*, and that war crimes present *phenomena or events of public interest,* and that, therefore, the names of victims must be publicly available. Moreover, the systemic violation of human rights and international humanitarian law is not only a phenomenon or event of interest to the public, but the public has a right to know the truth about these events, their circumstances, motives and consequences. When it comes to war crimes against civilian population, such as in the present case, **the public has the interest and right to be informed about the identity of victims, not just the defendants.**

Legitimate public interest to know exists in relation to *particularly sensitive data.* For example, when it comes to the crime of genocide or hate crimes, it is precisely these "particularly sensitive information" on victims, such as nationality, race and religion that are of key interest to the public, since these are elements of the criminal offence. It is similar in war crime cases. It is only after publication of identities of victims that they cease to be a statistical data and that the public gets to know them as persons who, just because of their national or religious affiliation, became victims of a crime. On the other hand, revealing the victim to the public and mentioning his/her name in public is a form of redress for the victim and a prerequisite for recognition of suffering he/she underwent, primarily on the basis of his/her identity.

The Working Group for Data Protection, established pursuant to the Article 29 of the Directive 95/46/EC of the European Parliament and the Council, especially pointed in one of its opinions to the risk of "mechanical" application of rules on personal

54 Article 5, Paragraph 1, Item 1, of the Law on Personal Data Protection.

55 Ibid.

data protection, which might lead to "absurd consequences", as was done in these cases, and called for flexibility in application of these rules.[56]

One should not forget that special rules on processing of sensitive personal data, such as nationality, race and religion, have been developed from the experiences of totalitarian regimes, where individuals and groups suffered and were persecuted for these personal characteristics, as mechanism of guarantee not to have such totalitarian practices repeat in the future. However, it is absurd to use such protection mechanism when this is contrary to the interests of precisely those individuals for whom it was established, and even more absurd when it damages the aims and purpose of the trial for crimes in the past – to establish the truth about crimes (which inevitably implies the identity of victims) with exact purpose to achieve the objective of general prevention.

Such practice of absurd application of the law – contrary to the interests of people for the benefit of whom the rules have been initially developed, was pointed out in the Global Principles on National Security and the Right to Information (Tshwane Principles). The principle 10A, which refers to cases of violations of human rights and international humanitarian law, envisages that the public has the right to know "the identity of victims, while respecting privacy and other rights of victims, their relatives and witnesses." There is a special note below this right: This principle should be interpreted having in mind the reality, i.e. that different states used to conceal human rights violations from the public by referring to the right to privacy, including the right to privacy of those persons whose rights were violated or had been grossly violated, not taking into account the actual wishes of individuals concerned.[57]

3. Comparative Practice

BiH

The indictments and court decisions in Bosnia and Herzegovina are available on the basis of the Freedom of Access to Information Act in Bosnia and Herzegovina[58] and the Rulebook for Exercise of the Right to Access to Information under Control

56 Working Group for Data Protection, Opinion 4/2007 on the concept of personal data (01248/07/EN), p. 5, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf, accessed on 20 July 2016.

57 Global Principles on National Security and the Right to Information (Tshwane Principles), 12 June 2013, available at https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles, accessed on 19 July 2016.

58 Freedom of Access to Information Act Bosnia and Herzegovina, "Official Gazette of Bosnia and Herzegovina" No. 28/00, 45/06, 102/09 and 62/11.

of the Court of BiH and on Collaboration of the Court with the Community,[59] which envisages that the **first and last names of participants in war crime proceedings are not anonymised** in judgments for war crimes.

However, the practice of prosecutors in BiH with respect to availability and anonymisation of indictments is uneven, both between different prosecutor's offices, and practices within a single prosecutor's office. The indictments in war crime cases may be found, as a rule, on websites of the Prosecutor's Office of the Brčko District[60] and cantonal prosecutor's offices,[61] as well as on websites of competent prosecutors' offices in the Republic of Srpska.[62] The Prosecutor's Offices in the Federation of BiH usually do not anonymise names of defendants and victims in indictments on their websites, while the prosecutor's offices in the Republic of Srpska sometimes anonymise these data and sometimes do not.[63] There are no available indictments on the website of the Prosecutor's Office of BiH.

When it comes to judgments in war crime cases, the practice is uneven on websites of Cantonal Courts in the Federation and District Courts in the Republic of Srpska. In line with this, the website of the Cantonal Court in Bihać contains completely unanonymised judgments,[64] while the website of the District Court in Bijeljina contains only completely anonymised releases on passed judgments in war crime cases.[65] The website of the Court of BiH, contains, in the majority of the final war crime cases, completed first-instance and second-instance judgments and all releases related to the case, where personal data such as names of participants in the process, the defendants and the victims, are not anonymised.[66]

59 Rulebook for Exercise of the Right to Access to Information under Control of the Court of BiH and on Collaboration of the Court with the Community as of 30 May 2014, available at http://www.sudbih.gov.ba/files/docs/PIOS/Pravilnik%20BOS.pdf, accessed on 5 April 2016.

60 Web page of the Prosecutor's Office of Brčko District, special section on war crimes, available at http://jt-brckodistriktbih.pravosudje.ba/vstv/faces/kategorije.jsp, accessed on 20 July 2016.

61 See, e.g. Web page of the Cantonal Prosecutor's Office of the Middle Bosnia Canton, war crimes section, available at http://kt-travnik.pravosudje.ba/; web page of the Cantonal Prosecutor's Office of the Herzegovina-Neretva Canton, war crimes section, available at http://kt-mostar.pravosudje.ba/; web page of the Cantonal Prosecutor's Office of the Una-Sana Canton, war crimes section, available at http://kt-bihac.pravosudje.ba/, accessed on 20 July 2016.

62 See, e.g. web page of the District Prosecutor's Office in Banja Luka, war crimes section, available at http://ot-banjaluka.pravosudje.ba/; web page of the District Prosecutor's Office in Doboj, war crimes section, available at http://ot-doboj.pravosudje.ba/; web page of the District Prosecutor's Office in East Sarajevo, war crimes section, available at http://ot-istocnosarajevo.pravosudje.ba/, accessed on 20 July 2016.

63 See, e.g. web page of the District Prosecutor's Office in East Sarajevo, war crimes section, available at http://ot-istocnosarajevo.pravosudje.ba/, accessed on 20 July 2016.

64 Web page of the Cantonal Court in Bihać, available at http://ksud-bihac.pravosudje.ba/, accessed on 20 July 2016.

65 Web page of the District Court in Bijeljina, available at http://oksud-bijeljina.pravosudje.ba/, accessed on 20 July 2016.

66 Web page of the Court of BiH, available at http://www.sudbih.gov.ba/, accessed on 20 July 2016.

Croatia

The indictments and court decisions, as well as the minutes of main hearings in Croatia are available to the public under the Act on the Right of Access to Information.[67] In accordance with the Rules on Anonymisation of the Court Decisions [68] and the Instruction on the Method of Anonymisation of the Court Decisions issued by the Supreme Court of Croatia,[69] the first and last names of all the participants in criminal proceedings are anonymised by replacing them with their initials.

There are no war crime indictments on the websites of State's Attorney Offices, and there are no judgments for criminal offences of war crimes on the websites of County Courts. Only the Supreme Court of Croatia has a special section on its website with the case law, under which judgments in war crime cases can be searched.[70] The judgments of the Supreme Court anonymise names of all persons in the proceedings, as well as the determinants of locations, including crime location, thus denying the reader of almost all factual information and making the judgments incomprehensible.[71]

Only the County Court in Vukovar has a special section on its website on war crimes from the period when they had jurisdiction for war crimes cases, where it is possible to see an overview per cases and per defendants. However, only judgments from two cases are available.[72]

67 Act on the Right of Access to Information (consolidated text of the law NN 25/13, 85/15), available at http://www.zakon.hr/z/126/Zakon-o-pravu-na-pristup-informacijama, accessed on 20 July 2016.

68 Rules on Anonymisation of the Court Decisions, Supreme Court of the Republic of Croatia, available at http://www.iusinfo.hr/Appendix/DDOKU_HR/DDHR20100816N30_24_1.pdf, accessed on 20 July 2016.

69 Instruction on the Method of Anonymisation of the Court Decisions, Supreme Court of the Republic of Croatia, available at http://www.iusinfo.hr/Appendix/DDOKU_HR/DDHR20100816N30_25_1.pdf, accessed on 20 July 2016.

70 Web page of the Supreme Court of the Republic of Croatia, case law search section, available at https://sudskapraksa.csp.vsrh.hr, pristupljeno dana 20. jula 2016. godine.

71 See, e.g. judgment of the Supreme Court of the Republic of Croatia in the case I Kž 700/04-3, available at https://sudskapraksa.csp.vsrh.hr/decisionText?id=090216ba8054a0eb&q=ratni+zlo%C4%8Din; presudu Vrhovnog suda Republike Hrvatske u predmetu II-5-Kr 91/1997-2, available at https://sudskapraksa.csp.vsrh.hr/decisionText?id=090216ba80257fa7&q=ratni+zlo%C4%8Din, pristupljeno 20 July 2016.

72 Web page of the County Court in Vukovar, review of case law in war crimes cases, available at http://www.zupsudvu.hr/rz_predmet.asp, 20 July 2016.

Kosovo

The indictments and court decisions, as well as the minutes of main hearings, are publicly available in Kosovo under the Law on Access to Public Documents.[73] Public access to judgments in Kosovo is also regulated by the Administrative Instruction on Anonymisation and Publication of Final Court Judgments of Kosovo Judicial Council.[74] In accordance with the Instruction, final judgments in Kosovo are published on the websites of courts within sixty days from the date of validity.[75] The names of victims and defendants are anonymised by replacing them with their initials, while the names of judges, prosecutors and representatives of state bodies are not anonymised.[76] A large number of judgments of courts in Kosovo are available on the website of the EULEX mission.[77] Access to indictments is not regulated by a special instruction. Instead, the Law on Access to Public Documents and the Law on the Protection of Personal Data are applied to them.[78] They are not available on websites of the courts and prosecutors' offices, but delivered upon request for access to public documents, with anonymised names.[79]

73 Law on Access to Public Documents (Br. 03/L-215), available at http://www.oag-rks.org/repository/docs/LQDP-serb._693444.pdf, 20 July 2016.

74 Administrative Instruction on Anonymisation and Publication of Final Court Judgments of Kosovo Judicial Council (02/2016), available at http://www.gjyqesori-rks.org/GetDocument/2296, 20 July 2016.

75 Ibid, Article 6.1.

76 Ibid, Articles 3.2.1, 5 and 4.1.

77 Web page of the Eulex mission, court judgments, available at http://www.eulex-kosovo.eu/?page=3,8, accessed on 20 July 2016.

78 Law on the Protection of Personal Data (br. 03/L- 172), available at http://www.kuvendikosoves.org/common/docs/ligjet/2010-172-ser.pdf, accessed on 22 July 2016.

79 Telephone interview with the representative of the Humanitarian Law Center of Kosovo as of 22 July 2016.

4. Recommendations

Departments and the War Crimes Prosecutor's Office should timely post all relevant documents from war crime cases on their websites (indictments, judgments and transcripts).

Special public interest in war crime cases requires, following positive examples from the region, the anonymisation rules in this area to be regulated in a unique and unambiguous manner, so as to prevent doubts in practice.

As a minimum, the names of victims, defendants, representatives of state bodies and the names of crime locations must not be anonymised in documents from war crimes trials.

IV Recording war crimes trials for the purpose of public presentation

The right to record war crimes trials for the purpose of public presentation should be distinguished from the right of the public to access audio and video recordings of the trial, which present information in the possession of the court and an integral part of the criminal records (see section above - audio and video recordings of main hearings). This chapter speaks of the right of, primarily, the media and non-governmental organizations to use their technical equipment to record certain parts of trials for the sake of, e.g. making television reports, making documentaries, etc.

Visibility of war crimes trials, as well as informing the public in an understandable and accessible manner of the court established facts on crimes, is an indispensable element in the process of dealing with the past. The communication of the judiciary operation in cases of war crimes provides satisfaction to the communities of victims in the form of recognition of suffering on the one hand, while it reduces prospects for success of ideas for revisioning and negation on the other hand. At the same time it also sends a message of zero tolerance of crime, and in this sense has a preventive effect. In a country where television is the main source of public information,[80] the visibility of war crimes trials implies television reports from trials.

Former War Crimes Prosecutor Vladimir Vukčević has repeatedly emphasized that the public is contaminated by false images of the past through the regime media, as well as the need to sober the society from them. One way to "sober up" or deal with the past that he proposed are live broadcasts of trials, because "when one hears the testimonies of victims in the courtroom, one does not need a lot to conclude in what dark times and with what kind of crimes we have lived all these years."[81]

Despite the legislative framework that has allowed it, **for more than 12 years of prosecuting war crimes in Serbia, the public has had no opportunity to see a single testimony of victims, perpetrators and witnesses of war crimes involved in these cases, or the pronounciation of a judgment.** In fact, in practice, the person authorized to decide on the request for recording –the President of the Higher

80 See, e.g. research of media integrity in Serbia performed by Bureau for Social Research, http://www.birodi.rs/barometar-integriteta-medija-bim/, accessed on 2 July 2016.

81 NIN, 'Najvažnija – politička volja', 13 July 2006, available at the HLC, *Medijski diskursi o suđenjima za ratne zločine u Srbiji, 2003-2013*, p. 3,available at http://www.hlc-rdc.org/wp-content/uploads/2014/11/medijski-diskursi_SR.pdf, accessed on 3 July 2016.

Court in Belgrade, contrary to the law, rejects these requirements on regular bases. On the other hand, video recordings of war crimes trials in regional countries appear regularly in media reports.

The National Strategy for Prosecuting of War Crimes reflected on this problem and set forth:

"The consistent actions of presidents of competent courts pursuant to Article 16a of the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings."[82] For this activity, however, no implementation control mechanism has been envisaged. Bearing in mind that the President of the Higher Court in the earlier practice refused to enforce the law, there are no grounds to expect that the President of the Court shall apply a non-binding strategy in the future.

1. Normative Framework

Recording trials in war crimes cases is regulated by the Rules of Procedure of the Court and the Law on the Prosecution of War Crimes.

The Article 60 of the Court's Rules of Procedure specifies that:

> "Taking photos, making audio and video recordings at hearings for the purpose of public presentation of the recording shall be performed **with the previously obtained approval of the presiding judge, the judge and written consent of the parties and participants in the recorded action."**

Pursuant to Article 16 of the Law on the Prosecution of War Crimes, which is lex specialis in this matter, it is specified that:

> "Recording of the main hearing for the purpose of public presentation may be authorized by the President of the court **upon obtained opinion** of the parties."[83]

This Law was amended in 2009 precisely to allow recording and public broadcasting of court proceedings in war crime cases, because there was a need to get the public

82 National Strategy for the Prosecution of War Crimes, p. 36, available at http://www.mpravde.gov.rs/vest/12116/-nacionalna-strategija-za-procesuiranje-ratnih-zlocina-.php, accessed on 20 July 2016.

83 Article 16a, Law on the Prosecution of War Crimes.

familiar with the facts and evidence of committed war crimes.[84] Thus, the requirement of the Court's Rules of Procedure for obtaining *consent* is relaxed by the fact that the law requires only *opinion* of the parties to be obtained.

2. Problems in Practice

Unlike in the cases of organized crime, the media did not broadcast main hearings in cases of war crimes, despite the existence of legislative provision that makes it possible. In practice, such recording is prevented, because requests of the media and non-governmental organizations are either rejected with no explanation, or more rigorous procedure envisaged by the Court's Rules of Procedure is applied to them, instead of Article 16 of the Law on the Prosecution of War Crimes.

On 26 May 2015 the HLC sent a request to the President of the Higher Court in Belgrade to grant them recording of the public declaration of judgment in the *Beli Manastir* case. In his response, Aleksandar Stepanović, the President of the Higher Court in Belgrade, stated only that recording of sentencing "shall not be approved," without any additional explanation. Similarly, the Higher Court in Belgrade rejected request of the BIRN from February 2014 for recording the judgment in the *Ćuška* case.[85]

The Law on the Prosecution of War Crimes does not require explicit explanation of the decision prohibiting recording of the trial. Still, an elaborated judicial decision is an unquestionable standard of the rule of law and the human right to a fair trial. The ECtHR stated in its practice: "Only by providing an elaborated decision can be public monitoring be ensured over the implementation of justice."[86] The CPC also stipulates that "the chamber's decision to exclude the public must be elaborated and publicly announced. "[87] Given the fact that prohibition of recording the trial, which are otherwise public, essentially presents a form of restriction of public hearings, the relevant provision of the CPC had to be applied in this case by analogy.

84 *"Uskoro izmene zakona o suđenjima za ratne zločine", (Amendments to the Law on Prosecution of War Crimes Coming Soon) Blic*, 26 September 2009, available at http://www.blic.rs/vesti/drustvo/uskoro-izmene-zakona-o-sudenjima-za-ratne-zlocine/3mzz1nx. accessed on 18 July 2016; Siniša Važić, *"Približavanje suđenja za ratne zločine javnosti: audio-video snimanje i javno emitovanje suđenja", Pravda u tranziciji – Broj 5, ("Bringing War Crimes Trials Closer to the Public: Audio and Video Recording and Public Broadcasting of Trials", Justice in Transition - Number 5)* available at http://www.tuzilastvorz.org.rs/html_trz/(CASOPIS)/SRP/SRP05/1209.pdf, accessed on 18 July 2016, accessed on 3 June 2016..

85 Mail reply of the BIRN representative to the inquiry of the HLC, 9 May 2016.

86 See, e.g. Judgment of the ECtHR in the *Suominen against Finland* case (petition no.37801/97), 1 July 2003, Par. 37.

87 Article 365, CPC.

3. Comparative Practice

Unlike Serbia, the war crimes trials in BiH, Croatia and Kosovo are regularly recorded and presented in the media.

BiH

Pursuant to the Criminal Procedure Code of BiH, all actions undertaken during the criminal proceedings are audio or audio-visually recorded and can be publicly displayed only with the written consent of parties and participants in the recorded action.[88] However, the BiH Court's Rules of Procedure for gaining access to information envisage that the President of the Court may release audio/video recordings of hearings with the right to public presentation "if it is determined in the specific case that there is an increased legitimate public interest, and that it may be derived from all the facts of the specific case that the public release of records shall not endanger the court proceedings in the case."[89] The Court's Rules of Procedure envisage a special, accelerated procedure at the request of the media for releasing parts of audio or video records in the duration of 10 minutes "being guided by the importance of timely and quality information of broader public concerning the work of the Court."[90] These requests are processed within the same day. In practice, a large number of requests for access and the public presentation of audio and video recordings of the trial is approved.[91]

Croatia

Pursuant to the Criminal Procedure Act of Croatia, the rule is that photography, film and television recordings of criminal proceedings must not be carried out. However, "when this is relevant due to public interest," the President of Higher Court may

88 Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13), Article 155.

89 Rulebook on Amendments of the Rulebook for Exercise of the Right to Access to Information under Control of the Court of BiH and on Collaboration of the Court with the Community, Article 9, available at C:\Users\Milica Kostic\Downloads\Su-197-2_Pravilnik_o_izmjenama_pravilnika_o_pristupu_informacijama_7_04_2015 (1).pdf, accessed on 4 July 2016.

90 Ibid, Article 10.

91 See, e.g. https://www.youtube.com/watch?v=0kCfnFZEf6A of sentencing of Veselin Vlahović; https://www.youtube.com/watch?v=gWHbw8gL94M on the *Dnevnik* of TV1 on sentencing of Aleksandar Cvetković; https://www.youtube.com/watch?v=qOimlRqM8iE on the Dnevnik of TV1on the arraignment in the *Naser Orić* case, etc, accessed on 9 July 2016.

authorize a television recording, and the President of the Court, before which the proceedings is led, may authorize the taking of photographs.[92] In practice, video recordings from war crimes trials in Croatia are published in the media.[93]

Kosovo

The Criminal Procedure Code of Kosovo has the most liberal rules with respect to recording of trials and their public presentation. Unlike all other laws in the region that contain the assumption of prohibition of recording, it is the other way around in Kosovo. Pursuant to Kosovo law, taking photographs, recording using a movie camera, television recording or any other recording are permitted except in cases "when a single judge or the presiding judge of the chamber limits it in the elaborated written decision."[94] In practice, recordings of war crimes trials in Kosovo are published in the media.[95]

4. Recommendations

The HLC believes that decision-making on permission to record trials for the purpose of public presentation should be transferred from the competence of the president of the court to the presiding judge, who best knows the reasons that could potentially present a barrier to public disclosure of recorded material.

In accordance with positive examples from the region, the rules on recording of the trial for the purpose of public presentation should be fully equalized with the rules on publicity of the main hearing– if the hearing is public, the recording should be allowed.[96]

92 Criminal Procedure Act of the Republic of Croatia (152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14), Article 395, Paragraph 3, available at http://www.zakon.hr/z/174/Zakon-o-kaznenom-postupku.

93 See, e.g. https://www.youtube.com/watch?v=7EBKC-48qn U *Al Jazeera Balkans*, sentencing of Tomislav Merčep before the County Court in Zagreb, accessed on 20 July2016.

94 Article 301, Paragraph 3, Criminal Procedure Code of Kosovo, available at http://www.psh-ks.net/repository/docs/Kodi_i_procedures_penale_(serbisht).pdf, accessed on 15 July 2016.

95 See, e.g. https://www.youtube.com/watch?v=gO6ChZRDiOs *Al Jazeera Balkans*, sentencing of Oliver Ivanović before the Basic Court in Mitrovica; https://www.youtube.com/watch?v=r-rYz4COkQs RTV on arraignment of Oliver Ivanović, etc, accessed on 18 July 2016.

96 Articles 362-366 of the CPC.

V Storing court records of war crime cases

Successful implementation of transitional justice mechanisms and realization of the right of society to know the truth about mass and systematic human rights violations of the past implies access to, primarily, state archives containing data on these events. Case files relating to these crimes, i.e. the court's archives, are the key source of information about the past. Nevertheless, a serious discussion on preservation of the archives of war crimes trials has still not been initiated in Serbia.

The HLC is the only organization in Serbia monitoring national war crimes trials from the start, obtaining documentation of these cases from judicial authorities, keeping them in its archives and making them available to the public through its website.[97] However, the HLC, as well as the general public, has available only the indictments, judgments and transcripts, and this is often not the integral form (see above section on anonymisation). Still, for full understanding of the subject, but also events to which they relate, it is necessary to review and keep entire records from war crime cases. Despite historical, scientific and research significance of these records, they are treated in Serbia as any other criminal cases, and the records of the war crime cases are being destroyed within the same time limits envisaged for other cases. Other states in the region have recognized the social and historical significance of these records, and they have envisaged adequate mechanisms for their protection.

1. Normative Framework

a. International Legal Framework

Each society has a collective right to the truth, i.e. the right to know the truth about the circumstances and motives of systematic violations of human rights and in-

97 See web presentations on the website of the HLC on individual cases of war crimes, available at http://www.hlc-rdc.org/?cat=234; accessed on 20 July 2016.

ternational humanitarian law.[98] Transitional societies are entitled to "undistorted historical narrative", i.e.to the right to the truth about the past.[99] However, realization of this right requires archives. The archives, in terms of right to the truth, and in accordance with position of the UN Commission on Human Rights, refer to the collection of documents on violations of human rights and humanitarian law from various sources, **"especially those in charge of the protection of human rights, such as the judicial bodies"**[100]

An updated set of principles for the protection and promotion of human rights through the fight against impunity of the UN Commission on Human Rights envisages a set of principles related to accessing and preserving archives on human rights violations as a guarantee for realization of human rights.[101] Principle number 3 obliges states to keep their archives –"knowledge of a nation on their own oppression is part of its heritage and as such must be secured by adequate measures through the performance of the **state's obligation to preserve archives and other evidence concerning violations of human rights and provisions of humanitarian law and to facilitate the acquisition of knowledge on these violations.** Such measures are aimed at preserving collective memory, and particularly preventing revisioning and negating ideas."[102] Principle 5 refers to guarantees of effectiveness of the right to the truth and emphasizes that: *"[...] the state must ensure preservation of and access to archives related to violations of human rights or humanitarian law."* Principle 14 points out: "The right to know implies that **archives must be preserved.** Technical and punitive actions should be envisaged to prevent removal, **destruction**, concealment or falsification of archives.."[103]

b. National Legal Framework

Keeping court records, including those of war crime cases, is regulated in the Republic of Serbia by the Court's Rules of Procedure and the Law on Cultural Property.

98 Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth, 8 February 2006, Par. 55; Resolution 68/165 of the UN General Assembly (A/RES/68/165), 18 December 2013; Resolution 65/196 of the UN General Assembly (A/RES/65/196), 21 December 2010..

99 Report of the United Nations High Commissioner for Human Rights on seminar about experiences with archives as a means to ensure the right to the truth (A/HRC/17/21), 14 April 2011, p. 3.

100 Updated set of principles the protection and promotion of human rights through the fight against impunity (E/CN.4/2005/102/Add.1), 8 February 2005; available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement; accessed on 20 July 2016.

101 Ibid.

102 Ibid.

103 Ibid.

1.1. Rules of Procedure of the Court

Contrary to the relevant international standards, applicable rules in the Republic of Serbia on keeping court records do not treat war crime cases in a special way, that is, the records of these cases are kept and destroyed in the same manner and within the same period as well as records from other cases.

Pursuant to the provisions of the Court's Rules of Procedures, retention period for archived cases referring to criminal records with rendered sentence of imprisonment exceeding 10 years is 30 years; for those referring to criminal records with rendered sentence of imprisonment over 3 up to 10 years is 20 years;[104] for all records of second-instance - five years; and for all other records this period is 10 years.[105] Upon expiry of these deadlines, the records are to be destroyed.[106] Thus, the records of war crime cases can be kept no longer than 30 years.

Having recognized the importance of permanent storage of certain records, the Court's Rules of Procedure, however, have envisaged exceptions to these rules. In line with this, testaments, decision declaring a missing person as dead, and "criminal records in criminal cases for criminal offenses for which a sentence of imprisonment of 30-40 years was rendered" are permanently kept."[107] The logical assumption is that such an exception for sentences from 30 to 40 years of imprisonment has been envisaged because the legislator recognized the necessity of a special treatment for cases involving the most serious criminal offences. The envisaged exception for the most serious crimes, however, is not comprehensive, i.e. it ignores the fact that the previous criminal code is applied in war crimes trials under which the maximum penalty for war crimes is 20 years.[108]

Until present day no case of war crimes prosecuted before the War Crimes Chamber has achieved the legal deadline for destruction. However, **in the next two years time limits for keeping records for a series of war crime cases will start to expire and soon be eligible for destruction. Therefore, it is necessary to modify the Court's Rules of Procedure to enable permanent storage of records of war crime cases.**

104 Article 241, Paragraph 1, Items 3 and 4, Court's Rules of Procedure ("Official Gazette of the RS", No. 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015 and 113/2015 - corr.).

105 Ibid, Items 10 and 13.

106 Ibid, Paragraph 4.

107 Ibid, Article 240, Paragraph 1, Item 4.

108 Criminal Code of the Federal Republic of Yugoslavia is applied in war crimes cases (*Official Gazette of the SFRY*, No. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and *Official Gazette of the FRY*, No. 35/92, 37/93 and 24/94) in effect at the time the offences were committed.

1.2. Law on Cultural Property

Pursuant to the Law on Cultural Property, "cultural properties are items and creations of material and spiritual culture of general interest which enjoy special protection stipulated by this law," and they include the "archive material."[109] In accordance with the Law, cultural property must not be destroyed.[110]

According to the Law the archive holdings includes "original and reproduced written, [...] or otherwise recorded documentary material of special importance for science and culture that was created in the work of state bodies and organizations [...]"[111]"The archive and film holdings created in the work of state bodies and organizations, bodies of territorial autonomy units and local self-government, institutions,

109 Article 2, Law on Cultural Property ("Official Gazette of the RS" No. 71/94, 52/2011 – other laws and 99/2011 – other law).

110 Ibid, Article 7.

111 Ibid, Article 24.

enterprises, other legal entities and individuals, which they keep in accordance with this law, present cultural assets pursuant to this law."[112]

In accordance with the provisions of this Law, **archive holdings from war crimes trials can be protected as a "cultural asset of exceptional importance"** given that they have the following characteristics:

- they have "particular importance for the social, historical and cultural development of the nation in national history";
- they "testify on crucial historical events and persons and their actions in the national history;"
- they have "great impact on the development of society";[113]

Likewise, in accordance with the Law, **archive holdings from war crimes trials can be protected as a "cultural asset of exceptional importance"** because:

- they "testify of social conditions, i.e. the conditions of social and economic and cultural and historical development in certain periods;"
- they "testify of important events and prominent figures from national history."[114]

The fact that **the state archives keep documents related to the investigation and prosecution of crimes from World War II** confirms that the Law has envisaged keeping records of war crime cases in the competent archives as cultural assets .[115]

2. Comparative Practice

The court records from criminal cases of war and other crimes against international law are not being destroyed in BiH. The Rules on Internal Court Operation in BiH envisages that "records of criminal cases for offenses which pursuant to the law are not subject to statute of limitations for criminal prosecution and records of criminal

112 Ibid, Article 53.

113 Ibid, Article 5, Paragraph 1, Items 1, 2 and 4.

114 Ibid, Article 5, Paragraph 2, Items 2 and 3.

115 Web page of the Archives of Yugoslavia: State Commission for Determining Crimes of Occupiers and Their Abettors from World War II, available at http://www.arhivyu.gov.rs/active/sr-cyrillic/home/glavna_navigacija/izdanja/istoriografija/drzavna_komisija_za_utvrdjivanje_zlocina_okupatora.html; accessed on 18 July 2016.

cases where the sentence of long term imprisonment was rendered" are to be permanently kept in the archives."[116]

The Rules of Procedure of the Court of Croatia do not explicitly envisage keeping permanent records of criminal cases of war crimes. However, the rules of procedure do envisage keeping permanent "records that, due to their content and the people to whom they refer, have the historic, scientific or social significance, as well as records important for general or local history."[117] Precisely pursuant to this provision war crime cases are permanently kept in Croatia.[118]

Kosovo is currently having rulebooks drafted to regulate the periods of storage and destruction of court records.[119]

It is common practice in many states to have national archives permanently keep records of trials for crimes against international law.[120]

3. Recommendations

The Republic of Serbia should amend the Court's Rules of Procedure, modelled on the legislative solutions in the region, in such a way to explicitly envisage permanent storage of war crime cases, regardless of their judicial epilogue.

The Republic of Serbia should permanently keep records from war crime cases in accordance with provisions of the Law on Cultural Property.

116 Article 142(h), Rules on Internal Court Operation in BiH, available at http://www.pravosudje.ba/vstv/faces/faces/docservlet?p_id_doc=1605, accessed on 20 July 2016.

117 Article 168, Paragraph 1, Item 1, Rules of Procedure of the Court of Croatia (consolidated text N.N. 37/14, 49/14, 8/15 and 35/15 and 123/15), available at http://www.vsrh.hr/CustomPages/Static/HRV/Files/2016dok/SudskiPoslovnik_2015-123.pdf, accessed on 20 July 2016.

118 Telephone interview of the HLC with representative of the *Documenta* as of 19 July 2016.

119 Reply of the representative of secretariat of the Judicial Council of Kosovo as of 21 July 2016.

120 See, e.g. of the archives holdings on trials related to World War II of the National Archives of the United States of America, available at http://www.archives.gov/research/captured-german-records/war-crimes-trials.html; archives holdings on war crimes trials of the National Archives of Australia, available at http://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/SeriesDetail.aspx?series_no=A471; court records from trials in France for crimes committed during World War II, permanently kept at the Institut national de l'Audiovisuel, see at Trudy Huskamp Peterson, Temporary Courts, Permanent Records, p. 57, available at https://www.wilsoncenter.org/sites/default/files/TCPR_Peterson_HAPPOP02.pdf, accessed on 18 July 2016.

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Co-Perpetration in the War Crimes Cases in Serbia

I About Co-Perpetration

Co-perpetration, according to the doctrine opinion, is a form of complicity, and is defined as such in the Criminal Code of the Republic of Serbia.[121] Our theory from the German doctrine accepts the division of complicity into complicity in the narrow sense (encompassing incitement and assistance) and complicity in the wide sense (also encompassing co-perpetration).[122]

As a legal institute, co-perpetration was formulated for the first time in the Serbian legislation by the Criminal Code of the SFRY from 1976.[123] Until that time, in practice, the courts solved the questions and problems related to co-perpetration relying upon the existing provisions of complicity, criminal liability and criminal offences and upon the criminal law theory.[124] The definition of complicity did not change until

121 *Official Gazette of the RS*, No. 85/2005, 88/2005 – corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014. The opinion that co-perpetration is a form of complicity is a consequence of a broadly adopted restrictive notion of co-perpetration, according to which a perpetrator is only the person who undertakes the action of commission a criminal offence. The criminal offence theory also knows the so-called extensive notion of perpetrator according to which all participants in the commission of the criminal offence are perpetrators. For more details see Franjo Bačić, *Krivično pravo: opći dio*, Zagreb, 1978, p. 324.

122 Ljubiša Lazarević, *Krivično pravo Jugoslavije: Opšti deo,* Savremena administracija, Beograd, 2000, p. 241, Zoran Stojanović, Milan Škulić, Milenko Radoman, *Krivično pravo (materijalno, procesno i izvršno),* Udruženje pravnika Srbije, Beograd, 2013, p. 84, Nataša Delić, *Saizvršilaštvo – Zakonodavstvo, teorijski stavovi i sudska praksa*, „Pravni život", No. 9/2005, p. 341.

123 Criminal Law of the Socialist Federal Republic of Yugoslavia, *Official Journal of the SFRY*, No. 44/76.

124 Miodrag Đorđević, *Saizvršilaštvo*, Jugoslovenska revija za kriminalistiku i krivično pravo, 1/1988, Beograd, p. 29 – 30, N. Delić, op. cit, p. 342.

the passing of the currently applicable Criminal Code, and co-perpetration was defined under Article 22 of the Criminal Law of the SFRY:

If several persons, by participating in commission or in some other way, jointly commit a criminal offence, each and every one of them shall be punished by the penalty prescribed for such offence.

Article 25 paragraph 1 prescribes the limits of the liability and punishability of accomplices:

An accomplice is culpable for a criminal offence within the limits of his intent or negligence, and the inciter and abettor within the limits of their intent.

Thus the notion of co-perpetration was more widely defined and divided into two parts, the one that determines that perpetrators or co-perpetrators are the persons who jointly commit a criminal offence by participating in the very action of commission, and the other that recognises co-perpetration in the case when several persons jointly commit a criminal offence in another way. The science has interpreted differently an imprecise determination and absence of criteria for delimitation of "another way" in which the criminal offence is jointly committed.[125]

The first part of the definition is undisputable – an actualization of the common action is required for the existence of co-perpetration and then every co-perpetrator is essentially a perpetrator.[126] On the other hand, the legislator has not regulated or prescribed the criteria for interpretation of the second part of the definition of co-perpetration – what represents ''another way'' of committing a criminal offence, with bigger precision, so that the answer has had to be searched for by relying upon the theoretical understandings of the notion of co-perpetration. The ex-Yugoslavian doctrine mostly presented the opinion that the answer to this question

125 According to Z. Stojanović, an extensive understanding of the notion of co-perpetration is observed, allowed by the vague provision of article 22, Zoran Stojanović *Krivično pravo: opšti deo*, Beograd, 2009, p. 243. In the opinion of N. Delić, a legal solution of the notion of co-perpetration could not have provided a necessary platform for construction of a unified case law in the cases of co-perpetration realized by undertaking the action of non-commission, and in some cases, opposite to the principle of legality, a variable and, more often than not, an extremely extensive interpretation of the given legal provision, has appeared, N. Delić, *Neke dileme u vezi zakonskog pojma saizvršilaštva*, Beograd, 2009, p. 260 (ibid in Nataša Delić, *Saizvršilaštvo – Zakonodavstvo, teorijski stavovi i sudska praksa*, „Pravni život", No. 9/2005, p. 348). According to I. Simović – Hiber, the dilemmas regarding distinguishing co-perpetration from complicity have become even more open and not solved, I. Simović – Hiber, *Pojam saizvršilaštva u jugoslovenskom krivičnom pravu*, Beograd, 1981, p. 24. On the other hand, the legal solution gives, in a pretty much generalized and not quite precise manner, a satisfactory framework for solving specific cases and directs towards certain solutions that lead to harmonising of case law in the interpretation of these legal provisions, M. Đorđević, op. cit, p. 33.

126 Nataša Delić, *Saizvršilaštvo* RRK 3/09, 253.

was given by the objective – subjective theory.[127] According to this theory, co-perpetration necessitates the existence of two elements, objective and subjective: the objective element represents an undertaken action closely related to the action of commission, or having quite a significance for committing a criminal offence, while the subjective element represents awareness of the joint action, or that the person that participates in the offence is aware of the actions of other participants, that his/her doing is encompassed by the actions of other persons, so that all individual actions represent a unity.[128] At determining co-perpetration, both elements should be observed in their entirety and interconnection.[129] Thus, in the case of co-perpetration undertaken by the action of non-commission, the objective element is far less expressed (than in the case of participation in the very action of commission) and is compensated for through the subjective element that has to be more intensive and presumes a presence of the will for commission.[130] Co-perpetration thus represents undertaking of a certain action of non-commission driven by certain will for commission.[131] This theory has become prevalent in case law as well.[132] Thus the

127 It is about the so-called mixed theory generated through a synthesis of the objective theory (that takes as a perpetrator or a co-perpetrator a person who, even partially, executes the very action of commission of the criminal offence) and the subjective theory (according to which co-perpetration exists whenever a person participates in committing the criminal offence by wanting the offence as his/her own, i.e. has a will for commission – *cum animo actoris*). According to this theory, co-perpetration represents undertaking of the action which is action of non-commission, but is guided by the will for commission – "co-perpetrationis not just action, in terms of a phenomenon in the external world, or just a subjective relationship, in terms of the internal attitude towards the committed criminal offence, but an actual significance of the action of non-commission in committing a criminal offence, as well as the will with which one acts, are important for its existence", N. Delić, *Saizvršilaštvo – Zakonodavstvo, teorijski stavovi i sudska praksa*, Beograd, 2005, p. 344.

128 Lazarević, Srzentić, Stajić, op. cit, p. 248, Z. Stojanović, op. cit, p. 266. With regards to the objective element – a co-perpetrator is a person that has participated in the offence by the action which is most closely objectively connected to the action of commission, so that the action of commission makes a firmly connected entirety with the action of that person, Lazarević, Srzentić, Stajić op. cit, p. 249. A co-perpetrator is the one who, in the planned process of commission of the offence, undertakes an activity outside of the substance of the offence, but is an important part of the process of commission of the offence itself, F. Bačić, op. cit, p. 331. A subjective link (element) is mostly manifested in the agreement of two or more persons regarding their joint action. The agreement may take place prior to undertaking the action (previous agreement), immediately prior to proceeding to the action, even upon the initiated action of commission, or during the action undertaken by another person (the so-called successive co-perpetration).

129 *Ibid.* It may be taken into consideration that, up to a certain limit, a more strongly expressed subjective element may somewhat compensate for more weakly expressed objective element, but in that case the actions of non-commission should also have a significant importance for committing the criminal offence, they should be closely connected to the commission, Z. Stojanović, op. cit 2009, p. 240 – 241, Z. Stojanović, Krivično pravo, opšti deo, Beograd, 2003, p. 266.

130 N. Delić, *op. cit*, p. 255.

131 *Ibid.*

132 M. Đorđević, *op. cit*, p. 31, D. Jovašević, *op. cit*, p. 20, Z. Stojanović, *op. cit*. 2015, p. 257, I. Simović – Hiber, *op. cit*, p. 21. According to N. Delić, this theory was accepted in a part of case law. With that regard, see the judgments of the District Court in Belgrade Kž-2113/00 from 20 December 2000, of the Serbian Supreme Court Kž-2038/02 from 4 March 2003, the decision of the Serbian Supreme Court Kžm-64/02 from 14 January 2003, quoted according to N. Delić, *op. cit*, p. 256.

District Court in Belgrade finds in the judgment that a co-perpetrator in committing a criminal offence of inflicting a serious bodily injury is the second defendant who holds the injured party's neck with his hands while the first defendant simultaneously hits him and inflicts the injury on him. The court finds that the second defendant did not participate in the action of commission, but as his action was closely connected to the first defendant's action, and he contributed to the commission and wanted the criminal offence as his own, the court finds that his actions are actions of co-perpetration.[133]

Besides this theory, our case law accepts the theory of division of labour/work/roles[134] according to which a perpetrator or a co-perpetrator is the person that, together with another person/based on the agreement on division of labour/work/roles participates in committing a criminal offence.[135] Thus, in the judgment of the Serbian Supreme Court Kž-1520 from 18 November 2004, the court finds that there was co-perpetration in the situation in which three perpetrators participated in committing a criminal offence of robbery, where the role of the first two was to enter the apartment of the injured parties, and the role of the third one was to stand in front of the apartment of the injured parties, to turn the light on and off and to look out for someone coming.[136] The District Court in Belgrade, in the judgment Kž 142/05 from 3 March 2005, finds that the action of co-perpetration in committing the criminal offence consists in that the perpetrator, who drove the accused and the injured party in his vehicle to the side road going to the graveyard, at the moment when the accused attacked the injured party and committed violence towards him, who started to wail, turned the music in the vehicle louder in order to mask the wailing.[137]

As none of the two theories provided the criteria that were sufficiently reliable and precise for application in each specific case, the case law turned in some cases to the accumulation of various criteria taken over from the individual theories of

133 Judgment of the District Court in Belgrade Kž. 2113/00 from 20 December 2000, in I. Simić, *Zbirka sudskih odluka iz krivičnopravne materije, knjiga četvrta, Beograd, 2002*, p. 19 – 20.

134 This theory presumes meeting a subjective condition – agreement on the manner of committing a criminal offence, task assignment, and an objective condition – undertaking of certain actions based on the agreement reached. The agreement itself may be expressed in any understandable manner and may take place even during the commission of the already initiated offence. Thus a co-perpetrator is every participant who, based on the agreement on task assignment and joint commission of the offence plays his/her part in the process of commission of the offence, where he/she wants the commission of the offence to be his/hers and common, regardless of the quality of the action undertaken by him/her. This theory has been criticized for equating the complicity actions and rendering difficult distinguishing co-perpetrationfrom assistance: namely, one action gets a co-perpetrationquality only based on the agreement on task assignment, without taking into consideration of the extent to which some action has actually contributed to the commission of the offence. For more information: F. Bačić, op. cit, p. 328 – 329, N. Delić, *op. cit.* p. 258.

135 See the judgments of the Supreme Military Tribunal K II-2/81 from 6 March 1986, of the Serbian Supreme Court Kž-209/98 from 20 May 1998, Kž-799/05 from 13 April 2006. Quoted according to Delić, *op. cit.* 258.

136 I. Simić, A. Trešnjev, *Zbirka sudskih odluka iz krivičnopravne materije*, Beograd, 2005, p. 25 – 26.

137 *Ibid.*

co-perpetration. Thus, in the judgment of the Serbian Supreme Court Kž-1482/99 from 6 April 2000, the court finds that the defendant is *a co-perpetrator in the criminal offence of robbery if, according to the previous agreement with the other perpetrators based on the task assignment, he/she undertakes the actions that are outside the substance of the criminal offence, but make an important part of the process of its commission, where he/she wants the commission itself as his/her own and as common.*[138] The same court, in the judgment Kž-1328/94 from 20 January 1995, finds that *the actions undertaken by the defendant, starting from the stage of making agreements and connecting the other perpetrators, formation of the group and its gathering on the day of commission of the criminal offence, bringing the defendant and the minor accomplice to the location and giving the gun used by them at committing the criminal offence, their waiting in the taxi and facilitating of leaving the place upon committing the criminal offence, represent an important part of the process of commission, so that the conclusion of the first-instance court that the defendant acted as co-perpetrator, and not as assistant, cannot be questioned. All the more as it has been determined that there was a previous agreement of the perpetrators regarding the task assignment in the joint commission of the offence, and as each and every one of them, including the defendant, undertook within that agreement the actions necessary for its realization and wanted the committing of the offence as his own and common.*[139] In the judgment Kž-1711/98 from 18 May 1999, the same court finds that the person participated as accomplice in the robbery ''in another way'', *as his entire activity: giving full information of that the injured party has money, showing the injured party's place of living, giving information where the injured party keeps money, when the injured party will not be in his apartment, and, in accordance with the agreement, his personal engaging with being with the injured party outside of the apartment at the time of commission of the criminal offence – is present and joint to such an extent that one might say that the course of committing the offence and the actualization of the consequences significantly depend precisely on the contribution of this defendant. Without that engaging, this offence would not have been committed in such manner, and therefore one must take into consideration that he, together with the other two defendants, is also a decision-maker regarding the commission of the offence, and that he enforces such decision together with them, wherein each and every one of them realizes the action of commission in accordance with the agreement.*[140]

In the currently applicable Criminal Code of the RS, the legislator decides to set boundaries and to prescribe clear criteria for determining co-perpetration realized

138 I. Simić, *Zbirka sudskih odluka iz krivičnopravne materije*, Beograd, 2000, p. 20 – 21.

139 I. Simić, A. Trešnjev, *Zbirka sudskih odluka iz krivičnopravne materije*, Beograd, 1998, p. 27.

140 I. Simić, *Zbirka sudskih odluka iz krivičnopravne materije*, Beograd, 2000, p. 22.

by the action which is not the action of commission itself.[141] Thus, article 33 of the Criminal Code prescribes:

If several persons, by participating in the action of commission with intention or out of negligence, jointly commit a criminal offence, or by enforcing the joint decision by another action with intention significantly contribute to the commission of the criminal offence, each and every one of them will be punished with the penalty prescribed for that offence.

According to the mentioned provision, in the part regarding co-perpetration by undertaking the action of non-commission, co-perpetrators are the persons that, enforcing the joint decision by another action with intention, significantly contributed to the commission of the criminal offence. Therefore, three cumulative conditions have been set:

(1) Intention;

(2) Action that is not an action of commission, but significantly contributes to the commission of the criminal offence;

(3) Joint decision.

Besides the additional specification of the provision of co-perpetration, the known dilemmas regarding distinguishing co-perpetration and complicity in the narrow sense,

141 Nataša Delić, *Neposredno saizvršilaštvo, posredno izvršilaštvo i saizvršilaštvo – vlast nad delom* Zbornik na trudovi na Pravniot fakultet „Justinijan Prvi" vo Skopje: posveten na prof. d-r. Franjo Bačik, 2007, p. 463; Z. Stojanović, op. cit .2009, p. 254.

especially from assistance, have not been fully eliminated, so the theories of the notion of co-perpetration, [142] including the theory of power over offence, are still valid.[143]

The opinion prevalent in the theory is that this legal notion of co-perpetration lays upon a mixed, objective – subjective theory[144] with the influence of the theory of power over offence.[145]

In the case of co-perpetration when the action of commission has been undertaken, nothing more is required on the subjective plan than the general subjective condition for the existence of co-perpetration – awareness of the joint action. On the other hand, in the case of co-perpetration when the action of non-commission, therefore the action that can also be an action of assistance in itself, has been undertaken, the subjective element should be actualized in a more intensive form – the existence of the joint decision on committing the crime is required.[146] The objective element

142 Z. Stojanović, *Krivično pravo, opšti deo*, Beograd, 2015, p. 254 – 255.

143 It is about the so-called material-objective theory according to which a co-perpetrator is a person who plays a crucial role in each stage of the commission of the criminal offence, i. e. who can significantly influence the course of the commission of the criminal offence; in other words, a co-perpetrator is the participant who manages the process of commission through the action he/she undertakes. According to this theory, a co-perpetrator is a person who, in a leading and a decisive manner cooperates with the other person in the commission of the criminal offence, and his/her performed role in the joint commission is in the rank of the person that undertakes the very action of commission. The participant's contribution is connected with the activities of the others in such a functional way that it complements them in an important, decisive manner, so that the said contribution is a conditio sine qua non for the planned commission of the offence, and not merely backing up of that commission, a plain facilitating of the commission of the offence. Thus a co-perpetrator is the person that through his/her activity holds in his/her hands the causal course on which depends the possibility for commission of the criminal offence, F. Bačić, *op. cit*, p. 331, Z. Stojanović, 2009, *op. cit*, p. 240, D. Jovašević, *op. cit*, 14. This theory is not largely present in our theory and practice, Z. Stojanović, *op. cit*, p. 256.

144 Delić, *Saizvršilaštvo, op. cit*, p. 271.

145 According to Stojanović, a criterion of power over offence should have certain significance at determining co-perpetration, which would be in the spirit of the legal solution of co-perpetrationitself. According to N. Delić, the legal determination of co-perpetrationrealized by undertaking the action of non-commission departs from the theory of power over offence. See Z. Stojanović, *op. cit*. 2015, p. 256, N. Delić, *op. cit*, p. 271.

146 According to N. Delić, a joint decision presumes awareness of, and a will for, joint commission of the criminal offence, and it implies the existence of the joint agreement on the joint commission of the criminal offence, or a plan of task assignment in the process of the commission. Essentially, the joint decision *presumes that each participant in a permanently conscious coordination commits a criminal offence as an equal partner of the others, wherein the will should be thus directed so that the undertaken actions do not represent a significant contribution to some, but to all participants in the criminal offence, i.e. that the contribution to the actions of other participants represents a complement to their own offence*, N. Delić, *op. cit*, p. 267.

has been fulfilled by undertaking the action of non-commission which significantly contributes to commission of the criminal offence.[147]

The objective and subjective elements in each specific case should be observed in the interconnection and one can take that the more strongly expressed subjective element can compensate for more weakly expressed objective element up to a certain point.[148]

Considering that the determinative of a significant contribution in the legal provision has a descriptive nature, a question is what is and what is not to be deemed a significant contribution, or what the difference between the significant and the regular (irrelevant) contribution is. There is an opinion in the theory that the criterion for distinguishing these two contributions is searched for in the field of causal relation. Thus, there is a significant contribution to the commission *when, based on the circumstances of the specific case the nature of which can be objective and subjective, one may determine that the action of non-commission has a causal importance in terms that it represents a conditio sine qua non for commission of the criminal offence.*[149]

A practical importance of distinguishing co-perpetration from assistance is reflected in that the law envisages the possibility for mitigating the punishment for the assistant, i.e. measuring and pronouncing the punishment which is by type or by measure milder than the one prescribed for commission of the criminal offence, which is excluded for the co-perpetrator, who gets punished as the perpetrator.

147 According to Stojanović, the actions should objectively have a significant importance for commission of the criminal offence, they should be closely related to the action of commission, Z. Stojanović, *op. cit.* 2015, p. 257. According to N. Delić, the mentioned action should, objectively, be significant for commission of the criminal offence, it should be connected to the activities undertaken by other perpetrators or co-perpetrators by complementing them in a significant manner, and the action of non-commission, functionally, should be of great importance and of great value for committing the criminal offence, N. Delić, *op. cit.* p. 267.

148 Z. Stojanović, *op. cit*, p. 257.

149 N. Delić, *op. cit*, p. 268, Z. Stojanović, *op. cit.* 2015, p. 257. Therefore according to N. Delić, serving as a lookout shall be deemed co-perpetrationif in a specific case a given action is within the previous agreement based on which the task assignment has been performed – necessary for realization of a specific criminal offence. And vice versa, serving as a lookout is assistance if the commission of the criminal offence has been possible without a lookout, N. Delić, *op. cit*, p. 268 – 269. A different opinion is presented by I. Vuković in Vreme i kauzalnost bitnog saizvršilačkog doprinosa, Žurnal za kriminalistiku i pravo, Beograd, 2015, p. 127 – 145.

II Cases of Co-Perpetration at War Crimes Trials in Serbia

As the competent courts in the war crimes cases applied the Criminal Law of the FRY (hereinafter referred to as: the CL of the FRY) as a more lenient law[150] for the accused,[151] a legally relevant definition of co-perpetration by which the competent prosecutors' offices and courts govern themselves in the war crimes cases is the provision of article 22 of the CL of the FRY.

Out of total of 54 criminal war crimes cases, including legally valid/non-valid cases, co-perpetration as a form of committing a war crime exists in total of 36 cases.[152] In two cases, the indictments of the War Crime Prosecutor Office (hereinafter referred to as: the WCPO) charge the defendants with the commission of the criminal

150 It is noticeable that the courts, at selecting a more lenient law in the rationales of the decisions, have analysed solely the provisions regarding the duration of the possible punishment for commission of the criminal offence, and that they have not considered the totality of all legal provisions that can be applied in a specific case.

151 *Official Journal of the FRY* 37/93.

152 It is about the cases of *Banski Kovačevac* (Pane Bulat and Rade Vranešević), *Beli Manastir* (Zoran Vukšić and others), *Bihać* (Đuro Tadić), *Bihać II* (Svetko Tadić), *Bijeljina* (Dragan Jović and others), *Bijeljina II* (Miodrag Živković), *Bosanski Petrovac* (Neđeljko Sovilj and Rajko Vekić), *Bitići* (Sreten Popović and Miloš Stojanović), *Bratunac* (Dalibor Maksimović), *Čelebić* (Samir Hondo), *Ćuška* (Toplica Miladinović and others), *Doboj* (Dušan Vuković), *Đakovica* (Anton Lekaj), *Gnjilanska grupa* (Fazli Ajdari and others), *Kušnin* (Zlatan Mančić and others), *Lički Osik* (Čeda Budisavljević and others), *Lovas* (Ljuban Devetak and others), *Ovčara* (Miloljub Vujović and others), *Ovčara II* (Milan Bulić), *Ovčara IV* (Damir Sireta), *Ovčara V* (Petar Ćirić), *Podujevo II* (Željko Đurić and others), *Prijedor* (Duško Kesar), *Prizren* (Mark Kašnjeti), *Sanski Most* (Miroslav Gvozden), *Sjeverin* (Milan Lukić and others), *Skočić* (Sima Bogdanović and others), *Škorpioni* (Slobodan Medić and others), *Slunj* (Zdravko Pašić and others), *Sotin* (Žarko Milošević and others), *Srebrenica – Kravice* (Nedeljko Milidragović and others), *Suva Reka* (Radoslav Mitrović and others), *Trnje* (Pavle Gavrilović and Rajko Kozlina), *Zvornik II* (Branko Grujić and others), *Zvornik I* (Dragan Slavković and others) and *Zvornik III and IV* (Goran Savić, Saša Ćilerdžić and Darko Janković).

offence in co-perpetration, and in the later stages of the procedure the office of the prosecutor re-qualified the form of commission.[153]

From 2003, when the specialized institutions competent for processing the war crimes cases were founded, until June 2016, 10 cases were registered in which the problem related to co-perpetration was one of the reasons for which the second-instance court quashed the first-instance judgments and returned the cases for the first-instance trial (it is about the cases with the final decision *Bitići, Gnjilanska grupa, Lički Osik, Prijedor, Sjeverin* and the cases without the final decision *Beli Manastir, Bijeljina II, Ćuška, Lovas and Skočić*). Namely, as the second-instance courts found, the problem of co-perpetration was included within the significant violations of the provisions of the criminal procedure – incomprehensibility of the enacting clause of the judgment[154] and self-contradiction of the enacting clause of the judgment, or failure to indicate the reasons for the facts subject to proving, or largely unclear and contradictory reasons for the judgment[155] - and within the wrongly or incompletely determined factual state.[156]

153 In the case of the *Scorpions*, of the War Crimes Prosecutor Office accuses five people of committing a war crime in co-perpetration, and then modifies the indictment during the first-instance proceedings and accuses two defendants of assistance in the commission of the war crime. In the first-instance judgment from 10 April 2007, the court convicts three persons of committing the war crime against civilians in co-perpetration, convicts one defendant of assistance and exonerates one defendant. Upon quashing of a part of the judgment towards the defendant convicted of assistance, at the repeated trial, the WCPO charges the defendant with assistance; the first-instance court pronounces the sentencing decision and finds the defendant guilty of the mentioned form of commission, and the second-instance court confirms the judgment. In the case of *Bitići*, by the indictment KTRZ 5/06 from 23 August 2006, the WCPO charges two defendants with the commission of the war crime against civilians under article 144 of the CL of the FRY, in co-perpetration. The first-instance judgment of the War Crimes Chamber of the District Court in Belgrade exonerates the accused, and the Appellate Court in Belgrade quashes the judgment. At the repeated trial, the WCPO modifies the indictment and by the modified indictment from 02 April 2012 it charges the accused with co-perpetrationand assistance, only to modify the indictment again, three days later, and to charge the accused solely with assistance.

154 The abovementioned significant violation is prescribed under Article 438 paragraph1 item 11 of the Criminal Procedure Code of the RS (*Official Gazette of the RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), or under article 368 paragraph 1 item 11 of the previously applicable Criminal Procedure Code (*Official Journal of the FRY*, No. 70/2001 and 68/2002 and *Off. Gazette of the RS*, No. 58/2004, 85/2005, 115/2005, 85/2005 – state law, 49/2007, 20/2009 – state law, 72/2009 and 76/2010).

155 A full wording of the violation is: "when the enacting clause of the judgment is self-contradictory or the reasons of the judgment are contradictory to the enacting clause, or if the judgment does not have any reasons at all or it does not mention the reasons for the facts subject to proving or these reasons are totally unclear or significantly contradictory, or if there is a significant contradiction regarding the facts subject to proving between the indications in the reasons for the judgment regarding the content of the documents or the minutes of the statements given in the proceedings and these very documents or minutes, and it is therefore not possible to examine legality and correctness of the judgment".

156 According to Article 440 paragraph 2 of the CPC, the factual state is wrongly determined when the court has wrongly determined a decisive fact subject to proving, and it is incompletely determined when the court has not determined a decisive fact subject to proving.

III Individualisation of the Action of Each Perpetrator or Co-perpetrator

In the majority of cases in which the appellate courts quashed the first-instance cases, a problem of individualisation, or specifying the actions of the perpetrators or co-perpetrators in committing the war crime, was largely present.[157]

In the opinion of the courts of appeal, the first-instance court should precisely determine the substance of the action of commission of the criminal offence when it comes to each participant, or determine the substance of co-perpetration of each participant in the commission of the criminal offence. Thus the Serbian Supreme Court, deciding in the appeal procedure in the case of *Sjeverin*, in the decision Kž I 494/04 from 27 September 2004, finds that a prerequisite for application of the provision of Article 22 of the CL of the FRY is to determine the substance of the action of commission of the criminal offence when it comes to each participant, or to determine the substance of co-perpetration of each participant in the commission of the criminal offence, and that, if the court fails to do so, the mentioned provision may not be applied.[158] Also, the Department for War Crimes of the Court of Appeal in Belgrade, in the decision in the case of *Lovas*, finds that the first-instance court is obligated, regardless of whether in each specific case it considers the actions of the accused to be the actions of direct commission or the actions of some existing forms of co-perpetration in the actions of commission, to clearly indicate the substance of a specific action of each accused person, and particularly its relation to the action of the direct perpetrator and the consequence occurred.[159] The same court, in the decision in the case of *Ćuška*, finds that it is above all necessary to specify the action of each accused person and to determine undoubtedly whether and how the accused participated in the actions of commission of the criminal offence, or whether they contributed to the commission of the offence by their actions, and whether they can be deemed co-perpetrators in terms of the provision of Article 22 of the CL of the FRY.[160] In the judgment in the case of *Beli Manastir*, the Court of Appeal finds that, in order for co-perpetration to exist, it is necessary to determine what

157 It is about seven out of ten cases: the cases of *Bitići, Prijedor, Sjeverin, Beli Manastir, Ćuška, Lovas and Skočić.*

158 Decision, p. 8.

159 Decision of the Court of Appeal Kž 1 Po2 3/13 from 9 December 2013, p. 15.

160 Decision of the Court of Appeal Kž 1 Po2 6/14 from 26 February 2015, page 6.

represents the action of co-perpetration.[161] In the decision of the court in the case of *Skočić*, the trial chamber establishes that it is not sufficient to merely indicate that the accused acted as co-perpetrators, but that it is necessary to mention each individual action of the accused person in the enacting clause of the judgment. The court further opines that the indictment does not clearly distinguish the actions undertaken by each accused person and that the first-instance court did not undoubtedly delimited individual actions during the procedure.[162]

Such opinion does not differ or deviate from the practice of the courts in other cases. Thus the Serbian Supreme Court in its decision from 1996 states that the incomprehensibility of the enacting clause of the judgment is reflected in that the two defendants were pronounced guilty for committing the criminal offence of aggravated robbery and robbery as perpetrators or co-perpetrators, and the enacting clause of the judgment did not indicate the actions of commission for each individual perpetrator, which is necessary for comprehensibility and correctness of the enacting clause.[163] The same court finds that, in the situation when two defendants together with three minors inflicted on the injured party the injuries of which he died, the court is obligated to determine and individualise the actions of each and every participant in the event.[164] The decision of the same court indicates that, in the case that several persons have been pronounced guilty of committing the criminal offence as perpetrators or co-perpetrators, the enacting clause of the judgment should indicate the actions of commission for each individual perpetrator or co-perpetrator.[165]

In its decision Kž1. 6811/2010 from 8 February 2011, the Court of Appeal in Belgrade finds that the actions of each perpetrator or co-perpetrator should be precisely, correctly and undoubtedly indicated in the enacting clause of the convicting judgment for the criminal offence committed in co-perpetration, or that it should be undoubtedly indicated which actions were undertaken by the accused person, or if he significantly contributed to the commission of the specific criminal offence by enforcing the joint

161 Judgment of the Court of Appeal Kž 1 Po2 7/12 from 29 March 2013, page 8.

162 Judgment of the Court of Appeal Kž 1 Po2 6/13 from 14 May 2014, page 10, paragraph 26. See also paragraph 27.

163 Decision of the Supreme Court Kž. 760/95 from 20 September 1996, in I. Simić, *Zbirka sudskih odluka iz krivičnopravne materije*, Beograd, 1998, knjiga druga, p. 25.

164 Judgment of the Serbian Supreme Court Kž. 1515/97 from 20 October 1999, in Simić, *Zbirka sudskih odluka iz krivičnopravne materije*, Beograd, 2000, knjiga treća, p. 21 – 22. As the court indicates "according to the stated facts, all participants quarrelled with the injured party, they all intercepted him, agreed on the attack, beat him and inflicted serious bodily injuries on him. Two defendants and three minors participated in the fight in which the injured party, now deceased, suffered serious bodily injuries due to which he died subsequently, and the court was also obligated, having enough data, to determine and individualise the role of each participant in the event. By generalising the roles, a possibility for determining psychological relationship of the participants in the event, as well as the role of the defendants according to the consequence occurred, has been avoided."

165 Decision of the Serbian Supreme Court Kž. 760/95 from 20 September 1996, in Jovašević, *op. cit*, p. 18.

decision by another action.[166] The Court of Appeal in Belgrade finds the same in its decision Kž1 1241/2014(2) from 31 October 2014.[167] The Higher Court in Valjevo has an equal opinion in its decision Kž1. 373/2014 from 22 October 2014.[168]

Precise definition or specification of the actions regards both the judgment and the indictment.[169]

One is under the impression that specifying of the actions is not the condition set absolutely restrictively in terms of being necessary to fully determine and indicate all actions of the perpetrators or co-perpetrators, and that otherwise the actions are not individualised. Thus, in the case of *Đakovica*, the War Crimes Chamber of the District Court in Belgrade, among other things, finds that "although the injured party B. Š. did not see how his brother R. Š. was killed, the court undoubtedly concludes that he was killed then and on that location, by being shot by both (the defendant and A. Š. *Zifa* towards which the procedure has been separated) or one of them in the area of the chest (heart) and the stomach...". The court further finds that "the fact that it cannot be determined whether the defendant fired any shots on that occasion does not acquit the defendant from liability, as under the presumption that only *Zifa* fired, the defendant accepts these actions as common and his own. They participate together in taking life of R. Š. as they, both armed, jointly brought him to the location

166 It is about the case related to the commission of the criminal offence of unauthorised keeping and marketing of narcotic and psychotropic substances.

167 As stated by the trial chamber in the rationale *(...) Namely, the provision of Article 33 of the CC prescribes that co-perpetrationis participation of several persons in the action of commission with intention or out of negligence, that jointly commit the criminal offence or significantly contribute to the commission of the criminal offence by realizing a joint role by another action with intention, and in this specific case the individualization of actions of each accused person and their objective contribution are missing (...) Therefore, the first-instance court has not clearly determined the actions of the accused (...)*

168 In the opinion of existence of co-perpetration, *the court finds that the role of each individual accused person participating in the commission of the criminal offence should be precisely determined in order to undoubtedly draw the conclusion that, at committing the criminal offences they have been charged with, the accused acted as co-perpetrators.*

169 Thus in the decision of the Higher Court in Nis Kž. 346/2014 from 22 April 2014, the court mentions in the rationale that the indictment should contain the description of the action of each co-perpetrator in the commission of the criminal offence, that, in the specific case, three persons have been charged as co-perpetrators in the criminal offence Causing of bankruptcy that can be committed in several ways as the act of the criminal offence has been prescribed alternatively, and that, according to the court, the first-instance court decided properly when it rejected the information of the injured party as plaintiff due to defaults in the description of the act of the criminal offence which had not been individualised.

of commission of the offence, with the intention of killing him there".[170] In the case of *Suva Reka*, the court finds, among other things, that the circumstance that it could not be determined whether both defendants fired and took lives of two people, or only one of them fired, does not question the existence of their criminal liability, as everything mentioned in the rationale indicates that, even in the situation that one of them does not fire, he accepts the actions of the other as his own, aware of the joint action, which makes the defendants perpetrators.[171]

Also, the Supreme Court in the case of *Sjeverin*, in the judgment at the repeated trial, finds that the defence attorneys of the defendants contest the first-instance judgment without any grounds[172] and indicates in the rationale that the enacting clause of the first-instance judgment is understandable and that in the enacting clause, in which several perpetrators or co-perpetrators have been pronounced guilty, the actions of commission by each of them individually are indicated *to the sufficient extent and volume* [author's comment].[173] Pursuantly, in the case of *Bijeljina*, the Court of Appeal opines that the appeal indications of the defence – that the first-instance court does not explain the course of action of the criminal event, its stages, what the participants in the event did individually – are groundless, as the first-instance court, explaining its decision that all the accused undertook the actions of commission of the criminal offence as perpetrators or co-perpetrators, presented concrete, clear and argumentative reasons. Thus the court states that, in respect of the actions of rape of the

170 Judgment of the War Crime Chamber of the District Court in Belgrade K.V. 4/05 from 14 September 2006, p. 34. The Serbian Supreme Court rejected as ungrounded the lodged appeals and confirmed the first-instance judgment finding that the first-instance court correctly and fully determined the factual state, properly applied the criminal law, that all legal criteria of the criminal offence of war crime against civilians in co-perpetrationhad been actualised in the defendant's actions, the valid reasons for which have been given in the first-instance judgment, and it found ungrounded the appeals of the defendant, his defence attorney and the defendant's mother in the part by which the judgment is contested due to significant violation of the criminal law. See above the judgment of the Serbian Supreme Court KŽ.I RZ 3/06 from 26 February 2007, p. 14.

171 First-instance judgment of the Department for War Crimes of the District Court in Belgrade K.V. 2/2006 from 23 April 2009, p. 110. The second-instance court fully accepts thus explained reasons of the first-instance court, see the judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 4/10 from 30 June 2010, p. 10.

172 According to the indications of the appeal, the enacting clause of the judgment was incomprehensible and the first-instance court did not act per objections of the Supreme Court, the objections in respect of the description of the actions of commission for each defendant individually were not eliminated, no reasons for decisive facts were mentioned, and the ones mentioned were totally unclear and contradictory to the significant extent, Judgment of the Supreme Court Kž. I 1807/05 from 13 April 2006, p. 4.

173 *Ibid.* In the first-instance judgment confirmed by the Supreme Court, the trial chamber states in the rationale, among other things, that all defendants knew that the purpose of taking the Muslims to one location, the Drina river bank, was to take their lives, and further states that, if all defendants were present together, at the same time, and participated in the joint venture, abuse, which is illegal, each and every one of them is criminally liable from the legal point of view, *although it was not proven correct for any of them* [author's comment] that he was the one who shot or inflicted the blows that caused the death of the civilians, but they were involved in taking lives, Judgment of the District Court in Belgrade K.1419/04 from 15 July 2005, p. 71.

injured parties, the first-degree court attempted to determine which actions had been undertaken on the critical occasion by the accused, but this *attempt, as stated by the first-instance court, was unsuccessful, as the injured parties talked only about the people that were present, without specifying any action undertaken by each and every one of them, which, however, does not cast any doubt on that the action of rape of the present injured parties had been undertaken by all the accused* [author's comment].[174]

174 Judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1.Po2. 6/12 from 25 February 2013, p. 4. Further, the court finds that the injured parties, in the parts of their statements in which they talk about rape and wrongful sexual acts, talk consistently, decisively and persuasively about all the persons that came to their house on the said occasion, or about all the persons that were in the vehicle, wherein the first-instance court gave a detailed and complex analysis of the statements of these injured parties, binding them with all other presented evidence during the criminal procedure with which they make a unity in respect of all facts related to the specific criminal event, p. 5.

IV Explanation of Co-Perpetration in Court Decisions

According to the Criminal Procedure Code, the court will state the reasons for each point of the judgment in the rationale of the judgment,[175] and in the rationale of the judgment which acquits the defendant of the charge or pronounces him/her guilty, the court will present the facts determined in the criminal procedure and the reasons for which it takes them as proven or not proven, the reasons for which it has not taken into account some proposals of the parties, giving a particular opinion regarding the credibility of the contradictory evidence, the reasons by which it governed itself at solving legal matters, especially at determining whether the defendant has committed a criminal offence and at applying certain provisions of the law to the defendant and the criminal offence.[176]

In accordance with the mentioned provisions, in the rationale of its judgment, the court is obligated to evaluate the presented evidence at the judge's own discretion and to explain why the actions the defendants are charged with are or are not actions of co-perpetration nature, and why it opines that the defendants are or are not perpetrators or co-perpetrators.

From the rationales of the decisions of the competent courts in the war crimes cases, one might see that the objective - subjective theory has been accepted in this part of the practice as well, and that in the rationales the courts explain the existence or absence of objective and/or subjective elements.[177] There are indications of

175 CPC, Article 428 paragraph 6.

176 CPC, Article 428 paragraph 8.

177 For example, see the judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 4/2006 from 12 March 2009, p. 254 – 245, the judgment of the Department for War Crimes of the Higher Court in Belgrade K-Po2 17/2011 from 16 March 2012, p. 59 – 60, the judgment of the Department for War Crimes of the Higher Court in Belgrade K-Po2 4/2011 from 28 November 2011, p. 29 – 35, the judgment of the Department for War Crimes of the Higher Court in Belgrade K.Po2 5/2013 from 6 February 2014, p. 111 – 113, the judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 1/12, p. 5 – 8, the decision of the Serbian Supreme Court Kž. I 494/04 from 27 September 2004, p. 7.

the theory of power over offence[178] and of the theory of division of labour[179] present in the rationales as well.

The opinion that the insufficient explaining of co-perpetration eo ipso will not lead to quashing of the court decision may be defended. Thus, the Department for War Crimes of the Court of Appeal in its judgment in the case of *Podujevo* finds that the shortened analysis of co-perpetration, and the omission of the first-instance court to make a reference to the provision under Article 22 of the CL of the FRY in its decision, do not mean in itself that the judgment does not indicate the reasons for the facts subject to proving.[180] On the other hand, in the case of *Gnjilanska grupa*, the same court finds that the first-instance court, at explaining the conclusion that the defendants committed the criminal offence as perpetrators, gave the generalized reasons, without linking concrete actions of commission by each accused person to their co-perpetration in the action of commission with awareness of the joint action of all the accused in committing the criminal offence, and for this reason the enacting clause of the first-instance judgment, as well as the reasons mentioned by the court in the rationale[181], are unclear.

178 For example, see the judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 5/2005 from 12 June 2008, p. 181, the judgment of the Department for War Crimes of the Higher Court in Belgrade K-Po2 23/2010 from 8 December 2011, p. 121, the judgment of the Department for War Crimes of the Higher Court in Belgrade K.Po2 3/2013 from 21 June 2013, p. 33.

179 See the judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 3/12 from 13 March 2013, p. 13, the judgment of the Department for War Crimes of the Court of Appeal in Belgrade, Kž1 Po2 2/15 from 28 September 2015, p. 5.

180 Judgment of the Department for War Crimes of the Court of Appeal in Belgrade, Kž1 Po2 3/2010 from 24 and 25 May 2010, p. 4. The trial chamber acknowledges the appeal indication of the accused person's defence attorney that the question of co-perpetrationof the defendants deserved a more clear and comprehensive analysis, but it also states that, bearing in mind the statements of the interrogated witnesses, the minutes of inspection and other evidence, it was undoubtedly determined that the defendants had acted as co-perpetrators. The court further states that all defendants participated in the act of execution, that they simultaneously fired the automatic rifles at the civilians, that they undoubtedly had awareness of the joint action, and awareness of the consequences of their actions, and it concludes that one cannot say that the judgment does not have any reasons for decisive facts in spite of the fact that the first-instance court analyses co-perpetrationof the defendants in shorter form and that it did not make reference to the provision of article 22 of the CL of the FRY.

181 Decision of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 8/11 from 7 December 2011, p. 10 – 11. This decision quashes the first-instance judgment due to a significant violation of the provisions of the criminal procedure under Article 368 paragraph item 11 of the CPC ad the court in its decision explains its findings in detail. A part related to explaining of co-perpetrationby the first-instance court is only one, the last finding mentioned by the second-instance court, due to which it concludes that there is a significant violation of the provisions of the criminal procedure.

V Action of Non-Commission in Co-Perpetration in the War Crimes Cases

As we have mentioned in the beginning hereof, co-perpetration according to the definition under Article 22 of the CL of the FRY is defined by the participation of several persons in the very action of commission, and in the case when several persons jointly commit the criminal offence in another way. According to the currently applicable Criminal Code, co-perpetration exists when several persons, participating in the action of commission (with intention or out of negligence), jointly commit the criminal offence, or when they, enforcing the joint decision by another action with intention, significantly contribute to the commission of the criminal offence.

It seems that the criteria, or the conditions for co-perpetration undertaken by the action that does not fall under actions of commission, do not differentiate from the previously determined opinions in the doctrine and the practice.[182] Thus, in the judgment of the District Court in the case of *Đakovica*, at explaining co-perpetration, the trial chamber indicates that, by the actions of the defendant, who together with Zifa participates in taking life of the injured party, who they, both armed, brought together to the location of commission of the offence, with the intention of killing him there, the defendant gives *significant contribution* [author's comment] to taking life of the injured party, is aware of the joint action and wants this offence as his own, and participates in the action of commission as perpetrator, armed, taking the injured party to the location where he was to be killed, which was done eventually.[183] In the case of *Lički Osik*, the War Crimes Chamber of the Higher Court in Belgrade indicates in the rationale that the defendants Č. B, M. B. and M. M. jointly participated in taking life of the injured party, by arriving together by car to the house where the injured party lived, where Č. B. took the injured party's life, while M. B. and M. M. were on the lookout, after which they jointly burned the body and the summer house, that all three defendants knew that the purpose of coming to the summer house was precisely to take the injured party's life, and that the defendants M. B. and M. M. give

182 See the part of the publication p. 3 – 6.

183 Judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 4/05 from 14 September 2006, p. 34.

a *significant contribution* [author's comment] to taking the injured party's life, aware of the joint action, and that they want the offence as their own.[184]

The same was the opinion of the court chambers of the Department for War Crimes of the Court of Appeal in Belgrade. Thus, in the case of Lovas, in the decision quashing the first-instance decision, this court finds it necessary for the first-instance court – if convinced that the accused person acted as perpetrators or co-perpetrators – to clearly explain the existence of the joint decision and the concrete other action undertaken by the perpetrator or co-perpetrator with intention, *by which he significantly contributes to the commission* [author's comment] of the criminal offence.[185] In the case of *Prijedor* the trial chamber states that the existence of co-perpetration requires both objective and subjective conditions, or participation in the offence and awareness of the joint action, to be satisfied, which is reflected in an adequate contribution to commission of the criminal offence in the form of undertaking the action of commission or some other action which is *closely connected to the action of commission and which significantly contributes to the commission* [author's comment] of the criminal offence.[186] In the case of *Beli Manastir,* the same court finds that, for co-perpetration, it is necessary to determine what represents the action of co-perpetration *that significantly contributes to the commission* [author's comment] of the criminal offence and that represents an objective element.[187] The same opinion is presented in the cases of *Skočić*[188] and *Ćuška.*[189]

184 Judgment of the Department for War Crimes of the Higher Court in Belgrade K-Po2 46/2010 from 8 March 2011, p. 60.

185 Decision of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 3/13 from 9 December 2013, p. 15.

186 Judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 1/12 from 30 November 2012, p. 5.

187 Judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 7/12 from 29 March 2013, p. 8. The court further mentions that the simultaneous existence of the subjective element is necessary and that both elements can be observed in interconnection, as co-perpetrationalso requires the existence of awareness of the defendants of the joint action, and in the situation when some participants do not undertake the actions of commission, but some other actions that *render possible and significantly contribute to the commission* [author's comment] of the criminal offence, they may be considered to be co-perpetrators only if the will of the defendants to jointly commit the offence is proven as well.

188 By the judgment of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 6/13 from 14 May 2014 by which the court quashed the first-instance decision and found that, if in the specific case the first-instance court had been convinced that the accused person had acted as co-perpetrator it was necessary for it to clearly explain, besides the existence of the joint decision, specific "other actions" undertaken by the co-perpetrator with intention, which *significantly contribute to the commission* [author's comment] of the criminal offence, paragraph 30. See also paragraph 42.

189 By the decision of the Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 6/14 from 26 February 2015 the trial chamber finds that, among other things, it was necessary to establish undoubtedly whether and how the defendants participated in the actions of commission of the subject-matter criminal offence, or whether their actions *contributed to the commission* [author's comment] of the offence, p. 6.

VI Analysis of Individual Decisions

Case of *the Scorpions*

By the indictment of the WCPO KTRZ 3/05 from 7 October 2005, S. M, B. M, P. P, A. V. and A. M. were charged with committing a war crime against civilians under article 142 of the CL of the FRY in co-perpetration. During the court proceedings, the prosecutor's office modifies the indictment and charges S. M, P. P. and B. M. with the commission of the criminal offence in co-perpetration, while it charges A. V. and A. M. with assistance in the commission.[190] The War Crimes Chamber of the District Court in Belgrade passes the judgment by which it exonerates A. V., convicts four men, three of co-perpetration and the fourth defendant of assistance.[191] The Supreme Court confirms the judgment towards the three convicted of co-perpetration and the exonerating part of the judgment, while quashing the judgment towards A. M. convicted of assistance.[192] At the repeated trial, the WCPO charges the defendant with assistance, which the War Crimes Chamber of the District Court convicts him of.[193]

In the first-instance judgment of the District Court from 10 April 2007, the trial chamber in separate sections explains co-perpetration and assistance.[194] In the part related to co-perpetration, the court finds that the defendants S. M, P. P. and B. M. committed the criminal offence as perpetrators, quotes article 22 of the CL of the FRY, and explains the conditions that presume co-perpetration, accepting that the national theory and practice accepts the objective – subjective theory. Thus the court states that the existence of co-perpetration requires fulfilment of both objec-

190 The indictment was modified on 9 October 2006.

191 Judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 6/2005 from 10 April 2007.

192 Judgment of the Serbian Supreme Court Kž I r.z. 2/07, from 13 June 2008. The reason for appeal adopted by the court is a significant violation of the provisions of the criminal procedure under 368 paragraph 1 item 11 of the CPC. As the court finds, the reasons in respect of the mental relation of the defendant A. M. to the actions of assistance in committing the criminal offence are largely contradictory, which makes the judgment unclear in the part that regards him, p. 17.

193 Judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 8/08 from 28 January 2009.

194 Explanation of co-perpetrationis presented under point 13.10. of the judgment's rationale (p. 99 – 101), and of assistance under point 13.11 (p. 101 – 102).

tive and subjective components, that our case law and doctrine accept the objective - subjective theory, and that both objective and subjective conditions, namely participation in the offence and awareness of the joint action, should be met in co-perpetration."[195]

The trial chamber states that, on the subjective side, the existence of co-perpetration requires that the person participating in the offence is aware of the actions of the others, that he/she is aware that his/her acting is included in the actions of other persons, so that all these individual actions, including the actions of commission, represent a unity.[196] Explaining the objective element, the chamber states: "When it comes to the objective element, it represents an action. A certain activity is required for the person to be deemed perpetrators or co-perpetrators. It requires that the perpetrator or a co-perpetrator commits, even partially, the action of commission of the criminal offence".[197]

Further, the court explains that in the specific case, the defendants S. M, P. P. and B. M. acted as perpetrators, "as each undertook the actions of commission of the criminal offence of war crime against civilians, as itemised under article 142(1) of the CL of the FRY, meaning that the defendant S. M. ordered the defendants P. P, A. M, B. M, M. M. and D. S, to shoot the captured people, while P. P. and B. M. shot the captured people, and the defendant A. M. assisted in commission of this criminal offence by his presence, serving as a lookout. On the subjective plan, awareness of the joint action exists in the defendants, each perpetrator is aware of the actions of the other perpetrators, so that there is a subjective connection among them. When it comes to the objective element of co-perpetration, it has also been *fulfilled, as these perpetrators or co-perpetrators undertake precisely the actions of commission of the criminal offence of war crime against civilians, itemised in the law* [author's comment],[198] and by undertaking any of the itemised actions, the defendants commit this criminal offence, in the specific case with the defendant S. M. issuing the order to perform shooting of the captured people, while the defendants P. P. and B. M. execute this order, by performing shooting of the injured parties, and the causal relation between the actions of the defendants and the occurred end consequence – death of the injured parties has been determined. In all defendants there was a unique

195 Judgment, page 99.

196 It is further stated that co-perpetrationrequires awareness of the joint action, in order for a person to be a co-perpetrator, from the subjective point of view, it requires merely that he/she is aware of the actions of the perpetrator or other co-perpetrators, and that the subjective attitude of the participants is expressed in the will to commit the criminal offence together with another person, p. 100.

197 The passage thus formulated implies a deductive conclusion that co-perpetrationnecessarily presumes undertaking (even partial) of the action of commission, which entirely contradicts the governing opinion of the doctrine and the practice, and is contrary to the legal formulation of co-perpetrationunder article 22 of the CL of the FRY.

198 If one would draw conclusions *a contrario*, a question comes up whether the objective element would have not been satisfied if the co-perpetrators or anyone of them had undertaken the action which is not the action of commission.

intention to take lives of the injured parties and all defendants worked on that task and actively participated in the action with such consequence, hence the actions of each defendant are individually and precisely determined, and together they all represent a unique entirety and contribute to the common consequence of this criminal offence. Therefore, both objective and subjective elements of co-perpetration in the specific case have been fulfilled in interconnection".[199]

The part of the rationale regarding assistance, of which the defendant A. M. was convicted, indicates that the court in an undoubted manner determined that the defendant had committed the criminal offence of war crime against civilians in assistance, quotes the legal provision regarding assistance (Article 24 of the CL of the FRY) and clarifies the conditions for existence of assistance as the form of complicity.[200] The court clarifies what represents the action of assistance and states the opinion presented in the international practice, stating as well that "in the case of assistance, no evidence of the existence of the joint organized plan, or of the previous existence of such plan, is required, no plan or agreement are required".[201] The court further concludes: "Therefore, in the specific case, at committing the criminal offence of war crime against civilians under article 142 paragraph 1 of the CL of the FRY, the defendant A. M. committed this criminal offence in assistance by escorting, together with the other defendants, the captured people to the location of subsequent execution, by being on spot with the rifle in his hand, and by contributing to the commission of the criminal offence by its presence, serving as a lookout in order to prevent these people from escaping. This action undertaken by the defendant A. M – serving as a lookout – is an action of assistance. Our legal theory and practice present the opinion that serving as a lookout is in itself an action of assistance that can become co-perpetration only on the additional conditions depending on the circumstances of the specific case".[202] The court finds that the "contribution in assistance should have a causal relation with the committed criminal offence, therefore the fact that the defendant A. M. finds himself at the location of execution, to attend the killing of the civilians by the defendant P. P, the defendant B. M. and the others, serving as a lookout with an automatic rifle in his hand, totally fulfils the action of assistance. Here the explanation is missing regarding the determined facts based on which the trial chamber is convinced that these actions of the accused person are not the actions of co-perpetration, i.e. regarding the circumstances of the specific case based on which the trial chamber draws such conclusion.

However, in the part where the court evaluates extenuating and aggravating circumstances for the defendant A. M, the court takes into account the fact that on the disputable occasion, although he has the automatic rifle, the defendant does not shoot the captives, unlike the others that do it, by which he expresses his attitude towards

199 *Ibid*, p. 100 – 101.

200 *Ibid*, p. 101.

201 *Ibid.*

202 *Ibid*, p. 102.

the entire situation and the criminal offence. Further, the trial chamber explains that, with the defendant not shooting and not killing anyone of his own free will, he shows his decision and his attitude towards the criminal offence and event, because if the other defendants had behaved in the same manner (if they hadn't shot), no one would have been killed and the injured parties would have been alive. The court states that it particularly appreciates this fact at deciding on the punishment for the defendant, not questioning thereby the existence of the criminal offence of which the defendant is pronounced guilty and convicted. [203]

Such explanation cannot be accepted – from the fact that the defendant does not shoot one cannot conclude that he expresses his attitude towards the entire situation and event, especially taking into account the other relevant facts undisputedly determined by the court (that the defendants were entrusted with the shooting,[204] that the defendant, together with the others, escorted the civilians to the location where their lives would be taken, that he served as a lookout in order to prevent the injured parties from escaping,[205] that he was aware of the fact that would happen and that he wanted it to happen[206] and that there is a unity of intentions among them as the defendants wanted to take the lives of the civilians).[207]

Upon the repeated trial for the defendant A. M., the War Crimes Chamber of the District Court in Belgrade convicted the defendant of committing the war crime against civilians in assistance.[208]

In the rationale of the judgment, the court indicates that, from the defendant's defence, from the statements of the interrogated witnesses, and by inspecting the VHS recording, it determined that the defendant had participated in transporting the captured civilians, that he had guarded them from escaping, that he had been armed, that he had escorted the injured parties to the location where they would be

203 *Ibid*, p. 117. As the court states: "Namely, regardless of the fact that the defendant A. M. assisted other defendants in committing this criminal offence, the court considered such attitude of the defendant in the given circumstances, when he himself could have been shot due to such behaviour of his, to be brave ad clearly expressed in that situation, and above all as his choice and will to act like that in that situation."

204 *Ibid*, p. 79.

205 *Ibid,* p. 101.

206 Judgment, page 105.

207 *Ibid,* p. 107. This is one of the reasons why the Supreme Court quass the judgment in the part regarding the defendant. Namely, the court finds that the reasons in respect of mental relation of the defendant to the action of assistance in the commission of the criminal offence mentioned by the first-instance court are contradictory, so it remains unclear whether the defendant was aware or not that the action of assistance in the described manner contributed to the commission of the criminal offence, to shooting and killing of the captured civilians by the other defendants and whether he wanted such consequence or not, Judgment of the Serbian Supreme Court Kž I r.z. 2/07, from 13 June 2008, p. 18.

208 Judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 8/08 from 28 January 2009.

killed and that he had stood with a rifle in his hand while the other defendants had been shooting four civilians, and after that the remaining two.[209]

The court further explains that, by the mentioned actions, "the defendant assisted to commission of the offence, they *significantly contributed* to the commission of the offence, and that he is an active participant, and not the mere observer of the events, as claimed by the defence. *The defence of the defendant stating that everything would have happened without him as well is unacceptable,*[210] as, according to the court, the described actions of the defendant *significantly contributed* to the commission of the offence [author's comment], according to the court, but judging by the behaviour recorded on the VHS tape as well, he participated actively, guarded the captured civilians and undertook other actions, and together with his accomplices created a sense of fear and hopelessness in the civilians."[211]

The court further finds that the "behaviour of the defendant on spot at undertaking all the mentioned actions does not differentiate or differ in anything from the behaviour of the other members of the unit, the other participants to this event. Each action undertaken by him is necessary, logical and purposeful at the given moment, and it is therefore logical that the defendant undertakes it with awareness and a will to assist the commission of the offence. Besides that, the defendant talks with the civilians, and does not differ in his treating of these persons from the others from the unit. It was him who addressed the captives with the words: "I didn't fuck because of you", which is heard in the recording, and which is explained by the defendant himself directly, at watching the recording at the hearing. The defendant utters these words smiling, and they are followed by the conversation among the other soldiers. In escorting the captured civilians to the summer house where they will be killed, they walk in a single file, which he led in one part of the road. One might conclude from it that he knows where they are headed to and why and that the civilians are escorted to the location of their execution. Thus from the defendant's demeanour and behaviour registered on the VHS recording, as well as from the statements of the witnesses, the court concludes that he, at undertaking the actions, acts intentionally aware of assisting with his actions to the shooting of the captured civilians and that he wants it, as his entire behaviour registered on the recording is such that it is undoubtedly concluded that he knows what he needs to do and why he is there, as well as what is going to happen".[212]

From the judgment's rationale, one is under the impression that the trial chamber explains co-perpetration as the form of committing the criminal offence, and not

209 *Ibid*, p. 10.

210 This is, therefore, not accepted by the court – *a contrario* the trial chamber opines that the event would not have happened without him, i. e. his actions (contributions), which is clearly a condition without which there is no committing of the criminal offence.

211 *Ibid*, p. 12.

212 *Ibid.*

assisting, so that all necessary elements of co-perpetration – intention, objective element in the form of significant contribution to the commission of the offence and subjective element in the form of the presence of the intentional will, can be clearly and precisely delimited. From the judgment thus explained at the repeated trial, a clearly determined attitude of the perpetrator towards the offence, i.e. the will for commission materialized by the actions of the defendant, is seen.

It is clear that the court chambers of the District Court, at passing both first-instance judgments, were bound with the allegation and with the qualification formulated by the prosecutor's office in the indictment, so that the hypothetical presumption of passing the judgment, where the accused A. M. would be convicted of co-perpetration, would represent exceeding of identity of the allegation under Article 351 of the CPC and as such a significant violation of the provisions of the criminal procedure under article 368 paragraph 1 item 8 of the CPC. It is not known from the available documents what changed qualitatively in the factual state determined during the main hearing in the course of the first-instance trial to such extent that the prosecutor's office opines and concludes that the defendant A. M. did not act as perpetrator, but as assistant, and that it pursuantly modifies the indictment and charges the defendant with assistance.[213]

Case of *Lički Osik*

In this case, the WCPO charges the defendants Č. B, M. M, M. B. and B. G. with committing the criminal offence of war crime against civilians in co-perpetration. The indictment encompasses two events in which lives of five civilians were taken, so that the defendant Č. B. is charged with that, as a commanding officer of the special unit of the MI of the SAR Krajina and the deputy commanding officer of the police station of Teslingrad, he received a verbal order from his direct report D. O. to take lives of five members of a Croatian family suspected of possessing a radio-station and of cooperating with the Croatian formations.[214] Thus, in the night between 20 and 21 October 1991, by the previous agreement, the accused Č. B. went with M. M. and M. B. to the summer house where the injured party lived, and while the accused M. M. and M. B. served as lookouts in the yard, the accused Č. B. entered the summer house and took the injured party's life by firing shots from the firearm, after which they all together burned her corpse and the summer house. A few days later, the accused Č. B. along with the accused M. B, M. G. and G. N. (the procedure towards

213 The prosecutor is not obligated to explain why he/she modifies or extends the indictment. According to Article 341 paragraph 1 of the then applicable CPC: "If the prosecutor during the main hearing estimates that the presented evidence indicate that the factual state presented in the indictment has changed, he/she may modify the indictment verbally at the main hearing, and may suggest the suspension of the main hearing for preparation of the new indictment".

214 Indictment of the WCPO KTRZ 6/10 from 25 June 2010.

whom is separated), by the previous agreement, went to the premises of the police station of Teslingrad, where they used the adhesive tape to bind the hands and seal the mouths of the injured parties M., D., M. and R. R. who were locked there, and afterwards they transported them to the *Golubnjača* pit, where they took their lives by firing shots from the firearms and threw them in the pit.[215]

By the first-instance judgment from 8 March 2011, the Department for War Crimes of the Higher Court in Belgrade convicts all defendants of committing the criminal offence in co-perpetration. The court clearly explains the actions of each defendant, individualising each action of the accused persons, states the required conditions for the existence of co-perpetration, presents the conviction of fulfilment of the conditions in the specific case, and explains them. The court first states the necessary presumptions of co-perpetration – objective and subjective conditions, defines them, and then states: "By careful tracking of the order of the actions undertaken by the defendants, it has been undoubtedly determined that the defendants acted by the agreement, in a synchronized manner, with a common goal of taking lives of the family of five members ... suspected of possessing a radio-station and of cooperating with the Croatian armed forces. The defendants Č. B, M. B. and M. M. jointly participate in taking the injured party's life by coming together by a vehicle to the house where she is staying, Č. B. takes her life, and M. B. and M. M. serve as lookouts, and together they burn the body and the summer house. All defendants knew that the purpose of coming to the summer house to... is precisely to take her life. The def. M. B. and M. M. give a significant contribution to taking life of... aware of the joint action and want this offence as their own, and participate in the action of participation as co-perpetrators. The fact that the def. Č. B. took the injured party's life by shots from the firearm does not exonerate the def. M. B. and the def. M. M, as the defendants accept all actions as common, and therefore as their own, so the undertaken actions make a natural and logical entirety with the actions of the def. Č. B. Also, the defendants Č. B, M. M, M. B. and B. G, together with the accused N. G, the procedure towards whom is separated, jointly participate in taking lives of the other family members, by going together and armed to the custody where the... family members are held, take them together out of the custody, restrain their hands and seal their mouths, put them on the truck and take to the location of committing the criminal offence near the Golubnjača pit with the intention of killing them, where they take their lives. The defendants Č. B, M. M, M. B. and B. G., from coming to the custody to the execution of the... family members, were in a direct contact with them. All the time the injured parties were under a factual power of the defendants in order for the latter to take their lives by means of the firearms and to achieve their goal. In the specific case, the court found out that there was an objective connection among all defendants, as the unity of their actions is undoubted, and all these actions had as a consequence taking lives of all the injured parties, as described in more details in the enacting clause of the judgment. Namely, all the actions of the defendants Č. B, M. M and M. B. in taking the injured party's life are in a dialectical unity, are inter-

215 *Ibid.*

complementary, and make an entirety. Also, all the activities of the defendants Č. B , M. M, M. B. and B. G. and of the acc. G. N., the procedure towards whom is separated, at taking the injured parties' lives, are a result of the joint action of all defendants. Also, the subjective connection among the defendants undoubtedly exists, as they all knew of one another, they were aware of the joint actions, they were aware that each individual action of theirs represented a part of the integral action of committing the criminal offence, and that all the individual actions of the defendants had as a consequence taking the injured persons' lives".[216]

The shortcomings of the original judgment, among other things,[217] were reflected in the fact that, according to the finding of the Department for War Crimes of the Court of Appeal in Belgrade, no reasons were given in the rationale of the judgment for the decisive facts related to the agreement of the defendant Č. B. with the members of the TD of Teslingrad, the defendants M. M, B. M. and G. B, to take lives of the family together.[218] Upon the repeated trial, the Department for War Crimes of the Higher Court passed a convicting judgment and convicted all defendants of committing the criminal offence in co-perpetration.[219] The Department for War Crimes of the Court of Appeal in Belgrade altered the judgment of the Higher Court in the part of the decision on criminal sanction and confirmed the judgment in the remaining part.[220]

Case of *Slunj*

The indictment of the WCPO in the case of *Slunj* charges the defendant Z. P. with committing a war crime against civilians in co-perpetration, and with the fact that, in the night between 22 and 23 December 1991, at the territory of the municipality of Slunj (Croatia), by the previous agreement with M. G (finally convicted in Croatia) and together with him, came by car to the Healthcare Centre in Slunj asking from the doctor of Croatian nationality D. K. to come with them to Cetingrad in order to provide medical assistance to a larger number of the wounded, which was not true,

216 First-instance judgment, pages 59 – 61.

217 In the specific case, the court found that the absence of the reasons for these facts represents a significant violation of the criminal procedure under Article 368 paragraph 1 item 11 of the CPC. Besides that, the court found that the first-instance judgment violated the identity of the allegation, i.e. that the allegation was exceeded (significant violation under Article 368 paragraph 1 item 8 of the CPC), that there are numerous contradictions regarding the decisive facts in the rationale of the judgment (Article 368 paragraph 1 item 11) further explained by the court.

218 Decision of the Department for War Crimes of the Court of Appeal in Belgrade Kž Po2 7/11 from 9 November 2011, pages 5 – 6.

219 Judgment of the Department for War Crimes of the Higher Court in Belgrade K-Po2 17/2011 from 16 March 2012. In the judgment, the court explains in detail the reasons for decisive facts related to the agreement on taking lives of the family, p. 40 – 46.

220 Judgment Department for War Crimes of the Court of Appeal in Belgrade Kž1 Po2 3/12 from 13 March 2013.

so that, when he came with them carrying his medical bag, after driving in the car, they parked the vehicle at the parking lot in front of the inn where the wounded supposedly stayed, and when the injured party got out of the car and walked to the entrance of the building, they fired at him several shots from the firearms and took his life.

In the explanation of co-perpetration, the War Crime Chamber of the District Court in Belgrade finds that the defendant acted as perpetrator with M. G. from the facts that they undertook the actions of commission together.[221] The court further determines the existence of the previous agreement between the defendant and M. G. to take the injured party's life and states that the "circumstance that they went to the Healthcare Centre together, called the doctor, waited for him to prepare, talked about the wounded in the car on the way to Cetingrad, and then, upon his getting out of the car, instructed the doctor to go towards the catering facility and took his life, points out the conclusion that the previous agreement had existed between these two and that they acted as perpetrators".[222]

The Serbian Supreme Court altered the first-instance judgment in the part related to the duration of the punishment, whilst it confirmed it in the remaining part. Regarding the part of co-perpetration, the court states that from the entire order of events described in the enacting clause and in the rationale of the original judgment, it has been correctly determined that the defendant acted with intention and as perpetrator with M. G, and that the valid reasons for that are given in the rationale of the original judgment.[223]

Case of *Sanski Most*

In this case, the WCPO charged the defendant M. G. with the fact that, on 5 December 1992 in Tomašnica and Sasina (municipality of Sanski Most, B&H), by the previous agreement to avenge the fallen brother R. G, together with the members of the Army of the Republic of Srpska, M. G. (unavailable for the judicial authorities), O. G, B. G. and Z. Š, took lives of six civilians of Croatian nationality and attempted to take life of one person. According to the allegations, after five persons came to Tomašnica, they stopped in front of the house of Š. F. situated by the road, the defendant and M. G., armed, entered the yard where several persons were present, M. G. asked the present persons about their names, and when one injured party introduced himself, M. G. took his life by the shots from the firearms, while the defendant held the rifle pointed at the injured party; then M. G. took life of another person by firing shots from the firearms,

221 Judgment of the War Crimes Chamber of the District Court in Belgrade K.V. 4/2007 from 8 July 2008, p. 36.

222 *Ibid.*

223 Judgment of the Serbian Supreme Court Kž. I r.z. 2/08 from 11 February 2009, p. 5.

and afterwards he took life of the third person, while the defendant all the time held the rifle pointed at these persons. After that, they left the yard, and not far from there found three persons (two adults and one minor) on the horse cart, after which they stopped the cart, asked them about their names, and when one of them introduced himself, the defendant and M. G. fired shots at two persons and took their lives, while the minor escaped. After that they came to Sasina where they both entered the house of the injured party M. M, in which he was with his wife, and fired shots from the fire-arms at them, taking their lives. The prosecutor's office charged the defendant with committing a war crime against civilians in co-perpetration.[224]

The War Crimes Chamber of the Higher Court in Belgrade passed the convicting judgment and sentenced the defendant to 10 years in prison. The court found that it had not been proven that the defendant was guilty of taking lives of the three civilians in the yard of the house in Tomašnica, finding that there is no liability of his as perpetrator, and that the mentioned war crime was committed solely by M. G.[225] As found by the court chamber, at the moment of taking lives of the three civilians in the yard and immediately before that moment, no intention i.e. will was formed in the defendant as an element of intention to take lives of the mentioned persons. The court further states that it has been undoubtedly determined that the defendant did not fire any shots at them, out of which it concludes that the will for committing a murder did not exist. Out of the undoubtedly determined fact that the defendant came in the yard with M. G, took the rifle off of the shoulder and held it in his hands, the court concludes that the defendant had a possibility for firing shots at each of the three persons or at any one of them, but as he did not do it, the court concludes that the defendant did not want it.

That may be concluded based on the circumstances of this specific case, but the fact that the defendant did not shoot does not mean in itself that he did not want the commission of the criminal offence. If, hypothetically, two persons are involved in the commission of the criminal offence, and, according to the agreement, explicit or implicit, previous or current, one of them undertakes the action of committing the offence, and the other undertakes ''another action'', and if both of them want the commission of the offence as common, they have awareness of the joint action and the contribution of the other is sufficient (significant), it is irrelevant from the aspect of co-perpetration whether the other person had the possibility to undertake the action of commission, and so he/she did or did not undertake it.

Based on the witnesses' testimonies, the court concludes that the basic inciter of the five people going to the villages with arms was M. G, that he was openly saying over the grave of Crni that he would avenge him, saying that in plural, and that thus he gave an oath to do that, which in the other four persons, including the defendant, created a sort of moral obligation to follow him in such revenge. The court finds that

224 Indictment the War Crimes Prosecutor Office KTO 2/13 from 2 April 2013.

225 Judgment, p. 42.

there is no evidence of details of the revenge plan, and the court concludes that the four members of the Gvozden family had certain, but not specific idea of what they should do, towards whom and to what extent. The court finds it indisputable that the three family members had not a formed will to take anybody's life despite the loss of the close relative and the pressure exerted on them by M. G.[226] Thus the subjective element was not present in them. The court then concludes that, at the killing of the three civilians in the yard, the defendant did not want to be a perpetrator or a co-perpetrator: coming in the yard with M. G., taking off his rifle of the shoulders and holding it pointed at the persons that were killed immediately afterwards, does not represent a proof for the court that he undertook the mentioned actions to assist, enable or facilitate the acting of M. G. The court states that it is known from the statements of the witnesses that, at the moment of the event, there were several people in the yard fulfilling the working obligation of gathering the wood and that the majority of those people left the yard when these two armed men entered the yard, so that no one, not even the defendant, prevented them from doing it. The fact that the defendant had a rifle in his hands, pointed at the people that would be killed immediately afterwards, by the conclusion of the court ,"is not of any significance, nor it particularly contributed, to the smallest extent, to committing of the criminal offence at that location, so that this fact cannot make him [the defendant] a perpetrator or a co-perpetrator".[227]

From the specific circumstances and determined facts, one cannot defend the thesis that the actions i.e. act of the defendant significantly contributed to the killing of the civilians in the yard. On the other hand, a conclusion of the court that these acts were totally insignificant, without any contribution, and that it is not about the complicity in the narrow sense, namely about assistance, may be examined. Namely, the defendant enters the yard together with M. G, takes the rifle off of the shoulder and holds the rifle pointed at the persons whose lives will be taken by M. G. His actions and behaviour cannot be equated with the actions of the other three men that stayed in front of the yard and did not want to come in. The very coming in the yard and holding the rifle in the hands speaks about his intention to actively participate in the event, but it is questionable whether the defendant knows or *whether there is evidence* of that he knows what M. G. will do in the yard, whether he is aware of his offence and wants the commission, or whether he is aware that he will contribute with his actions to the killing of three civilians by M. G. and agrees to that. As far as the contribution is concerned, assistance does not require such contribution without which the offence would not be committed in any case – it is sufficient that the contribution influences the commission of the criminal offence in its form, it is sufficient that assistance leads to minor changes in the action of commission, or the manner of commission of the criminal offence. On the other hand, the mere presence at the location of execution cannot be deemed a support, unless there is a connection to

226 For more details, see the transcripts of the audio-recording from the main hearing from 12 June 2013 and from 14 June 2013.

227 *Ibid*, p. 43 – 44.

committing a criminal offence in its concrete form.[228] The argument that it causes an increased sense of security is not sufficient for the existence of assistance,[229] just as a mere supporting of the perpetrator does not represent it, so it is questionable how in this specific case the defendant influenced the commission of the criminal offence by his actions. In this case, and considering the manner in which M. G. took the civilians' lives, a short period of time in which the killing took place, even if it is accepted that the defendant acted with intention, the indications that anything different related to the manner of committing the offence would have happened without the presence of the defendant in the yard, could hardly be defended.

Then the court states that, analysing further behaviour of the defendant, it concluded that, at the moment when the three innocent civilians (a man and two women), much older than him and harmless for him and for M. G. were killed in front of him, "a turning point occurred in the defendant". Thus the court concludes that "after this first bloodshed, the awareness and will regarding the further actions, as well as the intention to avenge his brother by himself, were formed in him". From that moment on, the defendant acts with a direct intention, aware of the action that he undertakes and of the commission which he wants, and when it comes to the two civilians they met on the horse cart, the court obviously concludes that the defendant and M. G. acted accordingly and harmoniously, in the manner that each of them shot one civilian and the defendant shot one civilian in the head with an obvious intention of killing him, and that the injured party survived due to adequate and swift medical assistance. According to the court, although there is no special evidence of a precise agreement between M. G. and the defendant regarding what will be done, by who and towards whom, it is obvious that such task assignment happened implicitly on spot where both of them were aware of the action of the other, accepted the actions as their own, out of which this segment of the criminal offence was entirely committed in co-perpetration.[230] The court concluded the same regarding the killing of the spouses in the house in the village of Sasina.[231]

The Court of Appeal in Belgrade altered the first-instance judgment in the part related to the duration of the punishment and confirmed the judgment in the remaining part.[232] Evaluating the appeal indications of the WCPO related to the existence of intention of the defendant to take lives of the civilians in the yard in Tomašnica, the trial chamber opined that there were not enough facts indicating that the defendant manifested a clear intention of taking lives of the three civilians. According to the finding of the court chamber, the fact that the defendant went armed to the village prevalently inhabited by the Croatian inhabitants to avenge the fallen brother is not

228 Z. Stojanović, Komentar Krivičnog zakonika, Beograd, 2006, p. 160 – 161.

229 *Ibid.*

230 *Ibid,* p. 44.

231 *Ibid,* p. 44 – 45.

232 Judgment of the War Crimes Chamber of the Court of Appeal in Belgrade Kž1 Po2 7/15 from 22 February 2016.

sufficient, as the statements of the witnesses to the circumstance of the revenge differed, and two witnesses stated that they had opined that on the critical day they were going to scare some Croats, while one witness stated that the revenge was supposed to consist in taking lives of the Croats. [233]

233 *Ibid*, p. 3 – 4.

VII Powers, Duties and Practice of the Courts related to Actions of Prosecution Office

As we have already mentioned, specifying the actions of each perpetrator or co-perpetrator in co-perpetration in the war crimes cases presumes a necessary condition for examining a court decision by the appellant court, and as such does not differ from other criminal cases. In relation to that, the need for specifying the actions of commission and the actions that (significantly) contribute to the commission goes equally for the indictment and for the court decision.

Pursuantly, the court has significant powers in relation to the actions of the prosecutor's office. The WCPO under Article 333 obligates the pre-trial chamber to examine, immediately upon receiving the indictment, whether the indictment has been duly drafted, and, if it establishes that it is not the case, to return the indictment to the prosecutor for correction of the faults. Article 337 prescribes the duty of the pre-trial chamber to examine the indictment and to order complementing or enforcement of the investigation, or gathering of certain evidence, if it determines that a better clarification of facts is required in order to examine the grounds for the indictment.

In relation to that, the competent trial chamber is obligated, in the case when the indictment does not determine and specify the actions of the defendants to the sufficient extent, to order to the prosecutor's office to undertake concrete actions and correct the observed faults. One gets the impression that the practice of confirming the indictments in the war crimes cases changes and that the competent court chambers use more and more procedural powers and act in accordance with the legal obligations. Thus in 2015 the pre-trial chamber of the Department for War Crimes of the Higher Court in Belgrade in the case of *Štrpci* acted on five occasions in accordance with the mentioned powers[234], out of which on three occasions due to insufficient comprehensibility and specifying of the actions undertaken by the

234 On three occasions the trial chamber returned the indictment with a view to correction of the observed faults (decision of the Department for War Crimes of the Higher Court in Belgrade K-Po2 3/15 Kv-Po2 14/15 from 6 March 2015, decision K-Po2 3/15 Kv-Po2 16/15 from 12 March 2015 and decision K-Po2 3/15 Kv-Po2 73/15 from 19 October 2015), and on two occasions the chamber passed the order on complementing the investigation (decision K-Po2 3/15 KV Po2 34/15 from 9 April 2015 and decision K-Po2 3/15 Kv-Po2 76/2015 from 20 November 2015).

defendants according to the allegations.[235] In the case of *Srebrenica*, the competent trial chamber acted on three occasions in accordance with the legal powers[236] out of which on two occasions the court returned the indictment to the prosecutor's office for correction and due to the faults in respect of precisely defining and specifying the actions of the defendants.[237]

235 Thus, in the decision from 6 March 2015, the trial chamber indicates the faults that, in the context of the entire indictment, lead to incomprehensibility of the descriptions of the actions, out of which the legal features of the criminal offences that the defendants are charged with, should arise p. 2. In the decision from 12 March 2015, the trial chamber finds that the indictment does not describe in a clear and unequivocal manner the actions of commission of the defendants, p. 2. In the decision from 20 November 2015, the court chamber, among other things, finds that a better clarification of things is required in respect of the existence of the facts proving the indications that represent a ground for the indictment regarding the participation of the defendants in the killing of 20 people; the court also finds it necessary to eliminate the contradictions and obscurities in respect of the specific actions undertaken by the defendants, mentioned in the disposition of the indictment, p. 3 – 4.

236 On two occasions, the trial chamber returned the indictment with a view to correction of the faults (decision K-Po2 8/15 Kv-Po2 67/15 from 14 September 2015 and decision K-Po2 8/15 Kv-Po2 03/16 from 19 January 2016) and passed the order on complementing the investigation (decision K-Po2 8/15 Kv-Po2 75/15 from 27 October 2015).

237 In the decision from 14 September 2015, the trial chamber finds that the factual description of the criminal offence represents an objective element of the indictment by which the prosecutor defines the subject of the procedure and the topic of the trial, which is why it is necessary to ensure the defendants in this stage of the procedure know exactly what they are charged with, in order for them to be able to defend themselves from the factual and legal allegations. Further, the court states that it is necessary to precisely determine the identity of the people - injured parties whose lives were taken by the defendants, and to specify unequivocally the actions of the defendants, p. 2. In the decision from 19 January 2016, the trial chamber finds that the obscurities in the indictment indicate the fault that, in the context of the entire indictment, leads to incomprehensibility of the descriptions of the actions, out of which the legal features of the criminal offences which the defendants are charged with, should arise, p. 2.

VIII Conclusion

The effective right to defence on one hand presumes that the accused person in each stage of the criminal procedure must know what he/she is charged with in order to plan and organise his/her defence. On the other hand, a lack of material evidence as differentia specifica of the trials for the war crimes committed at the time of the breakup of the ex-Yugoslavia causes that the witnesses' statements are basic and central means of evidence. It is not reasonable and human to expect from the witnesses to remember and testify in details about the events that took place 20 or more years ago, including clear specifying of the actions and behaviours of the defendants, particularly in the cases that include several criminal events of a mass scale with a large number of defendants. It appears that the acting court chambers mostly managed to find a right measure between the procedural requirements and the factual state regarding the available means of evidence.

The procedural requirement of specifying the actions of (joint) participation should not be seen as isolated and exclusive, but quite the contrary, in the context of interconnection of the presented evidence and the determined factual state, of the things stated by the parties in the procedure, of the efforts made by the defence and the prosecutor's office to prove, and by the court to determine, the relevant facts – and all of that in each specific case.

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Media Reporting on Crimes in Srebrenica and Indictment of the War Crimes Prosecutor's Office in the Proceedings

This text tends to explain the dominant media approach in reporting on the crime in Srebrenica, and the procedure for indicting persons who participated in the said crime. Reporting through the media has never been independent, especially when we are talking about war crimes. The positions of political actors, their voice and attitude towards events in the past, but also the message sent to citizens, always read through them. This is why the analysis of media speech can also significantly contribute to the detection of political constant, i.e. a better understanding of the political relation which, despite the change of 'form', basically maintains its so-called 'long lasting' policies appearing from the beginning of the very wars in 1990s. Media discourse is also important for informing the citizens themselves, because as the media bear a major role in forming public opinion in democratic societies, the weight of the media word is becoming much more significant. Citizens mainly hold agnostic position towards the crime in Srebrenica, devoid of clear knowledge of the events that took place, which necessarily gives the media important role and the need to report on sensitive issues as professional and objective as possible. The media in their speech are never uniform, which raises the question of motives of certain media, and reasons for wilful creation of confusion by those actors that know, or at least should know on the account of their profession, the facts about sensitive issues, such as major crimes like Srebrenica.

The media should be viewed in the context of a regional approach, not only to war crimes and reconciliation, but also through the improvement or deterioration of relations of politicians in some countries in the region, in this case, Bosnia and Herzegovina and Serbia, with the inevitable mention of the Republic of Srpska.

The problem of media coverage on Srebrenica is closely accompanied by that political aspect, i.e. accompanied by the way of comprehension of the crime in Srebrenica, its identification and general division in its understanding. This way the media do not differ significantly from political actors, and the reporting is based on the division in understanding of the role of victims and criminals. We are witnessing constant political ambiguity towards the very character of the war that had been taking place in this region, and thus to the resulting consequences. On the one hand, politicians are forced to accept certain declarative forms of reconciliation on their path towards the European Union, while on the other hand confusion is being maintained in society by blurring the situation and releasing information saying that actors from Serbia were in no way responsible and that their policy was essentially

correct[238] This always brings to the question having been raised for decades, and that is the denomination of the crime itself, i.e. whether the crime is referred to as genocide or mass crime, thereby attempt to circumvent qualification of genocide in the dominant discourse. The motive of such circumvention has as a goal to ask amnesty from responsibility, if only a partial one that it is not the most serious crime. For although the recognition of crime itself cannot be circumvented, due to extensive documentation and its obviousness, then full responsibility that this is the most serious crime implied by the term genocide can be avoided, if nothing then by avoiding exact qualification.

What constitutes real progress in the media comprehension of issue of Srebrenica is the fact of not denying the committed act. The crime in Srebrenica is accepted as a crime, as something that truly happened. Readiness to accept description of the crime as 'big' and 'horrible' is often seen, but the distinctive line of what presents a key definitional divider, if the crime is genocide or not, is not exceeded. It seems that a narrow legal definition of this term, or its clear elements of 'intention', or even rulings by the ICJ and ICTY, is of no great help in the denomination of the crime as genocide for media discourse. The only thing that is relevant in this discourse are positions already taken at the start, by those media ready to call the crime by its name, and those that exhaust its readiness to accept the crime in a reduced scope with the word 'crime'.

On 9 December 1948 the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which stipulates that genocide constitutes "pursuant to the international law, a crime, which they (signatories), undertake to prevent and punish... and which presents actions aimed to completely or partly destroy a national, religious, ethnic or racial group as such"[239]. In a judgment in 2004 the International Criminal Tribunal for the former Yugoslavia declared General Krstić guilty of aiding and abetting genocide, extermination, murder and persecution, which was the first Hague judgment for genocide in the Bosnian war and the first judgment of genocide pronounced by the international court, after the Nuremberg trials.[240] The judgment of the International Court of Justice in the lawsuit of Bosnia and Herzegovina against Serbia and Montenegro for genocide, of 26

238 "The Hague tribunal has been tasked to bring us, countries in the region, to a peace, to put us all in one plane. This they failed to do. Well, when such a tribunal recognizes that Milosevic had not participated in organized criminal enterprise, then it is clear that Serbia was right." (Aleksandar Vulin, *VULIN: Hag potvrdio ispravnost Slobine politike!*, Informer 13. 08. 2016) http://www.informer.rs/print/86423/vesti/politika/86423/VULIN-Hag-potvrdio-ispravnost-Slobine-politike
"Neither Milošević nor the Federal Republic of Yugoslavia nad Serbia are guilty, lies of genocide and war crimes have been toppled down, which served as bases for punishing Serbia and the Serbian people."(Ivica Dačić, DAČIĆ: *Haški tribunal priznao da nema krivice Srbije u ratnim zločinima*, Informer, 13. 08. 2016.) http://informer.rs/print/86473/vesti/politika/86473/DACIC-Haski-tribunal-priznao-nema-krivice-Srbije-ratnim-zlocinima.

239 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Article 1 and Article 2, 1948.

240 http://www.icty.org/x/cases/krstic/acjug/bcs/krs-aj040419b.pdf

February 2007„[241] determined that Serbia is responsible for violating the Genocide Convention by failing to do all that was in its power to prevent genocide, and then failing to punish perpetrators, or surrender them to the Hague tribunal.

Despite these facts, the qualification of the crime itself as a genocide is often problematized as inaccurate and malicious, which is supported by arbitrary comparative examples from the recent or distant past, most frequently ignoring its narrow legal definition. This way numerous "evidence" why this type of crime cannot possibly be classified as the genocide are placed through various media.

"*In other words, Srebrenica is a crime, since prisoners must not be killed. It was a crime of revenge, but not genocide if we look at strictly legal definition of genocide... Why would 1,500, or 7,000, or 8,000 Muslims killed in Srebrenica be the genocide and 3,000 Serbs killed around Srebrenica an accident?"* [242](Miroslav Lazanski, Politika, 21 June 2015)

"*It is absurd to compare the Holocaust, the Rwandan genocide and crimes in Srebrenica... I wish that the Nazis took away the women and children before their bloody march.*"[243]. (Efraim Zuroff, Politika, 18 June 2015)

The image of media division per character of crime may be clearly seen from review of a series of texts in all the media that raised the issue of Srebrenica as the main topic, whether it was a memorial celebration, passing a resolution or a war crimes trial. In their writings the media often, in accordance with the mentioned motives, seek to balance the crime and global equivalence, since having been guided by the idea of searching for crimes of others, they at the same time arguably justify the crimes committed by the Serbian side.

"*It is indeed a cynical and bizarre situation to have Croatia or Germany accusing us of the "genocide" or America and Britain for "conquering wars", but this has been our reality for the past two decades and will not be changed even in the forthcoming period."*[244] (Branko Radun, Politika, 27 June 2015)

"*Regardless of how great Serbian crimes are, there is silence and even celebration of the ones committed against Serbs."*[245] (Bojan Bilbija, Politika, 21 May 2015)

The balance of crimes is usually accompanied by performances of politicians who often initiate this kind of debate in order to give arguments supporting the continuity of old politics. The media also find their support in the political body, which so often

241 http://www.icj-cij.org/docket/files/91/13685.pdf

242 http://www.politika.rs/sr/clanak/331042/Srebrenica-u-Njujorku

243 http://www.politika.rs/rubrike/dogadjaji-dana/Efraim-Zurof-Srebrenica-se-nikako-ne-moze-poreditи-sa-holokaustom.sr.html

244 http://www.politika.rs/scc/clanak/331585/Globalna-Srebrenica

245 http://www.politika.rs/scc/clanak/328279/Oluja-i-Srebrenica

blurs boundaries between the voice of politicians and the voice of the media. Aligning the media to one side is never straightforward, leaving the illusion of journalistic objectivity in reporting. However, deeper conclusions confirming this thesis can be drawn by looking at the bigger picture, i.e. the whole concept of media editing, such as: choice of texts, raising themes (of the nation as a victim, and a conspiracy against it), pompous headlines and readers comments, without giving critical insight or opportunity to the other side to provide different arguments.

"*The condition is that the Bosnians admit the genocide against the Serbs. No one to remember 3,500 Serbian victims, but their 8,000 victims are used to make a spectacle. The persecution is endless, and clearly subjected to the goal of bringing down the Republic of Srpska."*[246] (Milorad Dodik, Kurir, 17 June 2015)

"*There was a mass crime against Muslims and Serbs committed in Srebrenica... The crimes have no nationality and therefore I believe – whoever committed them, and wherever they were committed, the responsible ones must be punished."*[247] (Momčilo Perišić, Kurir, 29 June 2015)

"*No one disputes that the crime in Srebrenica was terrible, but it is unacceptable to blame the whole nation as a collective criminal and Serbia cannot accept the word genocide for what happened in Srebrenica."*[248] (Aleksandar Vulin, Kurir, 10 July 2015)

"*Serbs are the people who experienced far more hardships than others during the two world wars, who were killed during the conflict in BiH... It is a terrible injustice to deny Serbs of the right to show respect for own victims, and what is more there are attempts directed towards labelling the Serbian people as a genocidal one."*[249] (Tomislav Nikolić, Informer, 29 June 2015)

What is observed as a dominant strategy in relativisation of the Srebrenica genocide is that even when tabloid media call the crime by its real name, relativisation mechanisms are designed in such a way to often lose the real culprits out of sight. In this way the media articles often use illustrative examples on the involvement of other actors in the chain of events (especially foreign factors), which results in getting an average reader to find it very unlikely to get a realistic image of primary responsibility for the committed crime. Such writing is clouding the real role of one

246 http://www.kurir.rs/vesti/politika/ekskluzivno-milorad-dodik-priznacu-da-je-bilo-genocida-u-srebrenici-clanak-1822405

247 http://www.kurir.rs/vesti/politika/general-perisic-otkriva-zasto-nisam-izvrsio-drzavni-udar-na-slobodana-milosevica-clanak-1837619

248 http://www.kurir.rs/vesti/politika/vulin-srbija-ne-moze-da-prihvati-rec-genocid-clanak-1853085

249 http://www.informer.rs/vesti/politika/20589/KABINET-NIKOLICA-Predsednik-je-spreman-da-ide-u-Srebrenicu

side in the events of the war, and often creates a completely opposite image, i.e. side actors seem as primary culprits for committing the crime.

"The Secretary-General of the UN Ban Ki-moon said today that the brutal murder of Muslim men and boys in Srebrenica will forever remain a stain on the collective conscience of the international community... The United Nations, established to prevent the recurrence of such crimes, failed in their responsibility to protect the lives of innocent civilians."[250] (Informer, 01 July 2015)

"The Dutch battalion– culprits or victims... For 20 years the Dutch public has been dealing with the responsibility of their state for the crime in Srebrenica."[251] (Informer, 11 July 2015)

"Alija Izetbegović agreed the war in advance with Clinton. Srebrenica is absolutely the agreed genocide. Alija Izetbegović knew the entire development of events in Srebrenica before it happened."[252] (Ibran Mustafić, Informer, 07 July 2015)

Given that members of the Serbian Ministry of Interior arrested eight people suspected of war crimes in Kravica, in connection with the genocide committed in Srebrenica in July 1995, the state bodies were pompously announcing through the media the start of prosecution for war crimes..[253] (BLIC, 18 March 2015, B92, 18 March 2015, N1, 18 March 2015, Telegraf, 18 March 2015, Kurir, 18 March 2015, etc)

The Serbian War Crimes Prosecutor's Office announced on 18 March 2015 that seven persons suspected of war crimes committed in Kravica were arrested. The eighth person, who was at large, was arrested some time later, which was confirmed to the media by the War Crimes Prosecutor Vladimir Vukčević.[254]

250 http://www.informer.rs/vesti/politika/20950/BAN-KI-MUN-Srebrenica-je-teg-na-savesti-covecanstva

251 http://www.informer.rs/vesti/politika/22376/SREBRENICA-NAKNADNA-PAMET-Holandski-bataljon-krivci-ili-zrtve

252 http://www.informer.rs/vesti/politika/21782/PREVARANTI-Evo-kako-je-Alija-s-Klintonom-dogovorio-genocid-u-Srebrenici

253 SLUČAJ SREBRENICA: U Srbiji 8 uhapšeno zbog ratnih zločina (SREBRENICA CASE: 8 people arrested in Serbia for war crimes) http://www.blic.rs/vesti/hronika/uhapsen-nedjo-kasapin-osmoro-privedeno-u-srbiji-zbog-ratnih-zlocina-u-srebrenici/6xvk45k; http://www.b92.net/info/vesti/index.php?yyyy=2015&mm=03&dd=18&nav_id=969798, http://rs.n1info.com/a43966/Vesti/Hapsenja-zbog-zlocina-u-Srebrenici.html, http://www.telegraf.rs/vesti/1482284-policija-u-akciji-uhapseno-sedam-osoba-zbog-zlocina-u-srebrenici http://www.kurir.rs/crna-hronika/slucaj-srebrenica-sedmoro-uhapseno-zbog-ratnih-zlocina-clanak-1707010.

254 Ibid.

Indictment

The decision of the Higher Court in Belgrade on 21 March 2016 confirmed the indictment of the War Crimes Prosecutor's Office against eight persons, due to existence of reasonable doubt that in co-perpetration they committed a criminal offence of War Crimes against Civilian Population, from the Article 142 of the Criminal Code of the FRY.

Passing of this decision was preceded by two decisions by which the Higher Court, in the procedure for regular examination of the indictment [255], asked the prosecutor's office to rectify the noted deficiencies, and preceded by one order to supplement the investigation[256], in order to clarify the facts of the case and thereby examine the merits of the indictment.

The deficiencies noted by the first decision of the Higher Court included the failure of the War Crimes Prosecutor's Office to state the names of all injured parties, i.e. all persons deprived of their life on 14 July 1995 in the hangar and around the hangar in Kravica, near Srebrenica. Although the Prosecutor's Office submitted evidence with the indictment from which the identity of the injured parties could unequivocally be determined[257], the Higher Court requested that the identity of persons deprived of life in this critical instance by the defendants was clearly and precisely defined and specified in the enacting terms of the indictment.

This did not have to be the reason to return the indictment to be supplemented, especially having in mind the practice of the International Criminal Tribunal for the former Yugoslavia. Due to the extremely large number of persons deprived of their

255 Article 333, Paragraph 2, CPC: Immediately upon receipt of the indictment the panel shall examine whether the indictment was properly made (Article 332), and if it finds that it is not, shall return it to the prosecutor within three days to correct the deficiencies. For justified reasons, at the request of the prosecutor, the panel may extend this deadline.

256 Article 337, Paragraph 3, CPC: When the panel determines that it is necessary to better clarify the state of affairs in order to examine the merits of the indictment, it shall order investigation to be supplemented, i.e. carried out or cetrain evidence collected.

257 The Prosecutor's Office attached to the indictment (on CD) the List of completely identified individuals in mass graves, the Minutes of identification, Death Certificates and DNA results for injured parties.

life in this period, it is quite logical to take as acceptable referencing their names in the enclosure, instead in the enacting terms of the indictment[258].

The courts in BiH before which proceedings were led in connection to war crimes committed in the territory of this country during the armed conflict of the nineties have a similar practice. The indictment states the number of persons deprived of life, while their names are attached as an annex, in the form of material evidence that presents the result of previously conducted investigations[259].

In addition, the Higher Court pointed out to the lack of precision in describing the actions of the defendants, which resulted in the death of the injured parties. According to the finding of the pre-trial chamber of the Higher Court, the defendants were not clearly familiarized as to for which specific actions is each of them charged with. Since each of them was charged with committing a crime against civilian population, it was necessary to make this criminal offence specific by entering special elements, i.e.to unambiguously specify actions of each of the defendants. This was also important from the standpoint of the right to defence, which implies the right of the defendants to be introduced to the allegations made against them. If they were not informed in detail of the nature and reasons of the accusation and they cannot adequately inform themselves from the indictment on the charges, the defendants cannot prepare a quality defence.

Likewise, pursuant to the Article 68 of the Criminal Procedure Code, all legally relevant facts on which the indictment is based must be presented with sufficient details so as to make charges against the defendant clear to him in order to be able to prepare his defence[260].

With reference to the response that the defence attorneys filed against the supplemented indictment of 17 September 2015, the Higher Court has issued the order to supplement the investigation. Specifically, in responses to the indictment, having referenced the evidence collected during the investigation stage[261], the defence at-

258 In the proceedings before international courts the identity of the injured parties is often submitted as an attachment to the indictment, through a separate annex.

259 For example, the enacting part of the indictment only states "Bosnian Serb forces executed several thousand Bosniak men. The total number of victims ranges most likely between 7000 and 8000 men" (Stupar, p. 29).

260 Article 68, Paragraph 1, Item 1, of the CPC: The defendant has the right to be informed promptly, but always before the first hearing, in detail and in a language which he/she understands of the offense he/she is charged with, the nature and causes of the accusation, and that any statement can be used as evidence in the proceedings; Item 10: to make a statement regarding all the facts and evidence incriminating him/her and to present facts and evidence to his/her favor, to examine witnesses of the prosecution and request that, under the same conditions as prosecution witnesses, defense witnesses are examined in his/her presence.

261 The defence attorneys have referenced the testimonies of witnesses and protected witnesses, who stated in their depositions given before the deputy prosecutor for war crimes, i.e. whose transcripts of testimonies before the International Criminal Tribunal for the former Yugoslavia were proposed to be read in the indictment, that there were also persons in uniforms among the killed people inside and in front of the Kravica hangar.

torneys insisted that it was necessary to reliably determine the status of the injured parties, in light of the Geneva Convention Relative to the Treatment of Prisoners of War or the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. This raised the question as to whether the persons deprived of their life in the hangar Kravica during the 13 and 14 July 1995 were civilians or prisoners of war (members of formal armed forces of BiH (army or police), volunteer units or population who armed themselves to provide resistance to enemy army).

Having in mind these defence arguments, the Higher Court took the stand that the prosecutor's office statements that in this specific case these were unarmed civilians cannot be accepted, and ordered the prosecutor's office to obtain data on whether someone from the list of injured parties was on official lists of fallen soldiers of the BiH Army, whether someone was in the military records of the Army or the Ministry of Interior of Bosnia and Herzegovina, i.e. in the list of members of the 28th Division of the Army of Bosnia and Herzegovina from Srebrenica, as well as to reliably determine through other evidence the status of the injured parties. Since some of the witnesses whose statements the defence lawyers referenced in the responses to the indictment stated that some of the men (Bosnian Muslims) in the column had weapons (which they threw away), that *"Muslim forces fired at us ..."* of which *"in my estimate about 250-300 people surrendered,"* and the like, it was necessary to check whether the injured parties enjoyed protection as civilians or prisoners of war. Although in several of its judgments the International Criminal Tribunal for the former Yugoslavia found that the attacks that took place in the period from 11 July to 1 November 1995 in eastern Bosnia affected about 40,000 people - civilians who at the time of the attack on Srebrenica lived in that enclave,[262], this does not rule out the possibility that during these attacks among victims in the hangar there may have been, apart from civilian population, people who took part in combats.

The decision of the Higher Court of 19 January 2016 repeated the request directed to the prosecutor's office with the order for additional investigation. The Pre-Trial Chamber identified obscurities in the indictment that were again related to the status of injured persons.[263]. Since the Higher Court already returned indictment for the same reasons to the Prosecutor's Office, to have the investigation supplemented[264], this omission brought into question an important feature of the criminal offense of which the defendants were charged.

262 E.g. judgment of the ICTY in the Blagojević case, Item 552 Case No. IT-02-60-T, 17 January 2005.

263 In the rationale of supplemented indictment (page 69) the prosecutor's office stated that "among Bosnian Muslim men there were members of the 28th Division of the Army of BiH".

264 Order of the Higher Court in Belgrade Kv-Po2 br. 75/15 as of 27 October 2015.

Confirmed indictment

For full six months after initial indictment, the Pre-Trial Chamber of the Higher Court confirmed the amended the indictment of 21 February 2016 by its decision adopted at the session held on 21 March 2016.

With the confirmed indictment all eight defendants are charged with having committed, in co-perpetration, in violation of rules of international law during the armed conflict, specifically the Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, a criminal offence of *War Crime against Civilian Population*. The following persons were charged based on the principle of **individual criminal liability**, Milidragović Nedeljko, as commander of the second platoon of the first troop of the Jahorina Training Center – with ordering and carrying out murders of civilians, while other defendants, members of the platoon, i.e. members of the first platoon of the first troop–with carrying out killings of civilians, as a mass liquidation of several hundreds of civilian Bosnian Muslim men.

The indictment unambiguously stated that the crime was committed during the **internal –non-international conflict**. The prosecutor's office has, therefore, taken a clear position with respect to the character of the armed conflict, as it represents a well-known fact. Apart from this, the conflict has been qualified as a non-international in all cases in connection with armed conflicts in the territory of BiH, with the exception of *Tuzla Column*[265], which are led or were finalized before domestic courts.[266] In certain number of cases the nature of the conflict has not been precisely stated, but only referenced *"...during the armed conflict in the territory of Bosnia and Herzegovina..."*[267]. In such cases, although not explicitly stated that it was a non-in-

265 In the Tuzla Column case (Kž1 Po2 br. 5/14), it was determined that perfidy was performed against soldiers of the JNA ,which is prohibited only in international armed conflicts.

266 For example, cases Maksimović (KTO 4/16), Svetko Tadić (KTO 2/14), Čanković (KTO 4/14), Milan Škrbić II (KTO 5/13), Bihać (KTO 3/13), Bosanski Petrovac (KTO 3/12) etc.

267 In these cases, the indictment alleged that the defendants violated the rules of international law from the Article 3 (position is different in relation to the crime of which they are charged) of IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as of 12 August 1949.This is the case in cases: KTO 2/16 (Dušan Vuković), KTO 7/14 (Dragišić), KTO 1/14 (Pop Kostić), KTO 2/13 (Miroslav Gvozden – Sanski Most), KTRZ 11/10 (Zvornik 5 - Alić) etc.

ternational conflict, the prosecutor's office referenced to the rules of international law contained in the Conventions regulating internal armed conflicts.

In responses to the indictment, the defence attorneys pointed out that the indictment was based on illegal evidence, on transcripts of testimonies of protected witnesses who gave their statements before the International Criminal Tribunal for the former Yugoslavia. The issue of procedural possibility of using evidence from the ICTY in domestic proceedings was resolved in the Article 14a of the Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings[268]. This rule was accepted by national courts through their practice. For example, the Supreme Court of Serbia, in the *Zvornik II* proceedings (Branko Grujić et al), determined that the decision of the first instance court to exclude these statements from the records presented a violation of the Article 14a of the Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings. The Court determined the following:

"In the present case, the first instance court finds that the evidence – witness statements, taken by the Prosecutor of the ICTY and competent authorities authorized by him in accordance with the Article 16 and Article 18 of the Statute of the ICTY and Rule 39 of the Rules of Procedure and Evidence of the ICTY, are, hence, obtained in a manner that is, as the only condition for their use in the proceedings before domestic courts, envisaged by the cited statutory provision (in the Article 14a). Therefore, the respective witness statements are not illegal evidence, and they are not isolated from the case file and may be used in the proceedings. Another question is their probative value that the court shall evaluate in accordance with the Article 16 of the Criminal Procedure Code, which is also prescribed by the Article 14a of the Law on War Crimes, i.e. in accordance with the principle of judicial discretion in assessing the evidence."[269]

Therefore, we're talking only about the admissibility of evidence, while their probative value is assessed during the proceedings, in accordance with judiciary discretion in each specific case, pursuant to the Article 16 of the Criminal Procedure Code[270].

268 Paragraph 4 of the Article 14a of the stated law prescribes: The evidence collected and presented by the International Criminal Tribunal for the former Yugoslavia may be, after the transfer, use as evidence in criminal proceedings before a national court, provided that they are collected and presented in the manner provided by the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia. The existence or non-existence of facts being proved by these evidence the court shall evaluate in accordance with the provisions of the Criminal Procedure Code (Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, "Official Gazette of the RS" no. 67/2003, 135/2004, 61/2005, 101/2007 abd 104/2009 101/2011 – other law and 6/2015).

269 Supreme Court of Serbia, case No. KZ.II P3 22/08, Decision as of 14 April 2008.

270 Paragraph 3 of the Article 16 of the CPC prescribes: *Performed evidence relevant for passing of judicial decision the court shall evaluate based on judicial discretion.*

Genocide?

Another issue being discussed among experts in anticipation of raising the respective indictment was the issue of qualification of the criminal offense. The issue has become particularly active regarding the Resolution on Srebrenica of the United Nations Security Council[271]. Apart from most heavily condemning the crime committed in Srebrenica, the draft of the stated Resolution, which in the end was not adopted since Russia vetoed, pointed out that the acceptance of events in Srebrenica as the *genocide* presents a precondition for reconciliation and political leaders on all sides were called upon to recognize and accept the fact on the proven crimes, in accordance with the decisions of the ICTY and the international Court of Justice.

The discussion was led in the direction of replying to the question whether it was genocide or not in the specific case.

The confirmed indictment, as already stated, has charged the defendants with war crimes against civilian population. According to the indictment, they committed premeditated murders of civilians, as mass liquidations of hundreds of civilian Bosnian Muslim men. The murder, as a specific act of which the accused were charged, also presents one of the actions in committing the criminal offence of genocide. However, the essential difference between the two criminal offenses is the existence of **genocidal intent** on the side of the perpetrator, i.e. the total or partial destruction of some protected (national, ethnic, racial or religious) group. Proving genocidal intent is not simple, but the court practice has developed certain criteria to facilitate that– the number of committed crimes and the number of victims, focus of crimes against civilians due to affiliation to a protected group, repetition or committing similar offences directed towards the same group, the incidence of the committed crimes, the overall context in which the offences were committed, etc.

If one would observe the context in which the criminal offences were committed, there was undisputedly room to consider the possibility of qualifying the offence differently, especially when one takes into account the practice of the ICTY in cases prosecuted before this court in connection with the wars in the territory of BiH. In the Krstić case[272], the ICTY determined: "*The Trial Chamber concludes from the evidence that the*

271 *Draft* resolution of the United Nations Security Council, S/2015/508, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/508.

272 Krstić case, first-instance decision, IT-98-33-T, August 2001.

VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica as a community. Within a period of no more than seven days, as many as 7,000- 8,000 men of military age were systematically massacred while the remainder of the Bosnian Muslim population present at Srebrenica, some 25,000 people, were forcibly transferred to Kladanj."

Similarly, in the Popović case[273] the ICTY stated: *"The Trial Chamber finds that the murder operation – from the separations to detention to execution and burial – was a carefully orchestrated strategy to destroy aimed at the Muslim population of Eastern Bosnia. As found earlier, through this murderous enterprise, the underlying acts of killing and the infliction of serious bodily and mental harm were committed. The Trial Chamber is satisfied beyond all reasonable doubt that these acts were perpetrated with genocidal intent."*

On the other hand, the courts in BiH have dealt in related cases with the issue of existence of genocidal intent, given that the prosecutor's office pointed out its existence, i.e. that the crimes were committed with the aim to eradicate a protected group, already in the indictment. Thus, in the Stupar case[274], the prosecutor's office stated as early as in the indictment: *"...And the intent to commit genocide stems from the fact that captured Bosniak men posed no serious military threat, and the decision of the defendants to carry out the their planned and organized killing did not come exclusively from the intention to eliminate them as the military threat. The killing of military able-bodied men presented, without a doubt, physical destruction and, given the scale of killing, their extermination was motivated by genocidal intent."*

In Paragraph 49 of the same indictment the prosecutor's office stated: *"The plan to ethnically cleanse the Srebrenica area escalated on 13 July, by including another much more insidious dimension: killing of all military able-bodied Bosnian Muslim men of Srebrenica. Transferring men after screening to determine whether there are war criminals, which was the alleged reason for their separation from women, children and elderly in Potočari, to the territory controlled by the Bosnian Muslims, or to prisons, in order to wait there for the exchange of prisoners, was at one point understood as an inappropriate way to achieve ethnic cleansing of Srebrenica. The goal of the newly created joint criminal enterprise of General Mladić and the people of the General Staff of the Army of the Republic of Srpska was that, with the forcible transfer of women, children and elderly, men were to be killed. The Trial Chamber found that this campaign of killing of all military able-bodied men was conducted in order to guarantee that the Bosnian Muslim population would be permanently erased from Srebrenica and, therefore, this constituted genocide."*

273 Popović et al, first-instance decision IT-05-88, June 2010.

274 Stupar case, Court of Bosnia and Herzegovina, Indictment No. KT-RZ 10/05 as of 12 December 2005.

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It may be said that the media reported on the entire event with enough objectivity, which gave the impression of optimism and hope that the process would soon begin and that the intentions of state bodies were serious. Most media reported the news of the initiation of proceedings concerning the crime in Srebrenica. The prosecution send messages through the media that neither Srebrenica victims nor perpetrators of war crimes will be forgotten. Serbia's War Crimes Prosecutor Vladimir Vukčević said that *"with this morning's arrests the state has clearly determined itself in relation to the crime which he called the biggest mass crime in Europe after World War II"*[275]. (N1, 18 March 2015)

War Crimes Deputy Prosecutor Bruno Vekarić said to the media that with the arrest of people suspected of war crimes Serbia has made a great progress in facing with the past: *"It is important to emphasize that this is the first time that the prosecutor's office is dealing with mass murders of civilians and prisoners of war in Srebrenica. We've never dealt with crimes of this magnitude. It is very important for Serbia to take a clear stand as far as Srebrenica is concerned through the judicial proceedings."*[276] (Telegraf, 18 March 2015)

Objectivity in media reports still remained on a short description of the event that has undoubtedly caused attention. However, apart from one-day news in the Serbian media, the issue of crime in Srebrenica left no deeper impression in the public and failed to start a social debate about the responsibility for the committed crimes. The impression is that the public reaction is not expressed as much in denial of the crimes, but more in a general lack of interest and indolence of the society regarding opening of problems of Srebrenica crimes. Although there was fairness in the coverage of the event, there were no further reactions on the commencement of the process itself.

However, public pressure on the work of prosecutor's office may also be seen through indirect actions in the reporting. Admission of Bruno Vekarić on the existence of public pressure, in an interview with Slobodna Bosna, is also indicative: *"The news of the arrest in Serbia was published in 64 countries of the world, in thousands of articles or information. It is interesting that from Indonesia, Malaysia, South Africa, to America and Australia, the action of prosecutor's offices of Serbia and Bosnia and Herzegovina was welcomed... When arrests for Srebrenica were carried out, it was the first news in the Croatian and Bosnian media. It is indicative is that the Public Service of Serbia - RTS, published it only in the tenth minute. This bothered me terribly... We have here a variety of things that can only confirm that we are working in very difficult*

275 http://rs.n1info.com/a43966/Vesti/Hapsenja-zbog-zlocina-u-Srebrenici.html

276 http://www.telegraf.rs/vesti/1482284-policija-u-akciji-uhapseno-sedam-osoba-zbog-zlocina-u-srebrenici

conditions and under great pressures." (Slobodna Bosna, 30 March 2015)"[277] (Slobodna Bosna, 30 March 2015)

In several interviews he gave after starting the process, Vukčević explained that pressures were reflected in obstructing the investigation by state bodies, as well as reducing the budget for the prosecutor's office. Looking at the headlines that accompanied the case of Srebrenica through the media, the impression is that the War Crimes Prosecutor's Office (WCPO) was under the greatest pressure to make a balance between doing the work conscientiously and satisfying majority of the public that was inclined to denying the crime.

In the wake of what was said the prosecutor Vukčević, one can rightfully raise the question of the role of the RTS public service, as well as plans that this media service must make in accordance with the Action Plan for Chapter 23, to have reporting on war crimes, especially on war crimes trials in the former Yugoslavia, objectively present all the circumstances of the tragedy with which we faced in the nineties.

However, objections can be made to work of the prosecutor's office itself. Although the raising of the indictment was being enthusiastically announced, it had been waited for an entire year. The speed in operation and raising of indictment by the War Crimes Prosecutor's Office (WCPO) has not been satisfactory in terms of expectations of victims, but also the need to establish the rule of law in relation to serious crimes committed during the 1990s, and particularly the one in Srebrenica, as well as Serbia dealing with its past.

Taking into account all of the above, the question of motives for prosecuting those responsible for these crimes remains. Pursuant to the judgment of the International Court of Justice (ICJ), the highest international judicial authority, Serbia has been found responsible for violating the Convention on the Prevention and Punishment of the Crime of Genocide, for not preventing the genocide in Srebrenica or punishing the perpetrators. What indisputably derives from this is Serbia's obligation to respect the victims of this crime, to work on a dialogue about all the events that preceded and led to the genocide, as well as about its consequences. Apart from that, the EU accession process implies constant verification of Serbia's progress in all areas, especially in meeting the international obligations of the country which has the candidate status. The critera that are also crucial in assessing the progress of candidate country is commitment to prosecute and punish all those responsible for war crimes, including cooperation with international bodies, as well as countries in the region.

On the other hand, there is a legal obligation of Serbia, undertaken by ratifying a number of international conventions and by the effective national legislation. It is now the responsibility of competent institutions of the Republic of Serbia to trans-

277 http://www.slobodnabosna.ba/vijest/20167/bruno_vekaric_za_sb_predsjednik_srbije_tomislav_nikolic_opstr uira_otvaranje_predmeta_srebrenica_i_strpci.html

parently and without further delay substantiate its declarative commitment to the truth, justice and reconciliation, as well as compassion with the families of Srebrenica victims, with specific actions. Without disregarding the importance of the EU accession process and the fulfilment of obligations established by the decision of the International Court of Justice, it is necessary to fulfil both moral and legal obligation, which should lead to establishing confidence in the institutions of the Republic of Serbia.