

WAR CRIMES TRIALS IN MONTENEGRO 2009 - 2015

WAR CRIMES TRIALS IN MONTENEGRO (2009-2015)

Publisher

NGO Human Rights Action
Podgorica, Montenegro
Tel: +382 20 232 348, 232 358
Fax: +382 20 232 122
hra@t-com.me
www.hraction.org

For the publisher

Tea Gorjanc Prelević

Authors

Bogdan Ivanišević
Tea Gorjanc Prelević

Author of cover photo

Tomaž Bovha
(thanks to Fotorepublika.com)



The project was funded by the *Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL)* through the U.S. Embassy in Podgorica



and *Human Rights & Governance Grants Program* of the *Open Society Foundations* - OSF

War Crimes Trials in Montenegro

2009-2015

Bogdan Ivanišević
Tea Gorjanc-Prelević

Human Rights Action

Podgorica

2016

CONTENTS

Introductory remarks	1
Summary	3
General Overview of Trials and Investigations.....	7
Trials before the independence of Montenegro.....	7
Trials following declaration of independence of Montenegro.....	8
Potential investigations.....	11
Dubrovnik battlefield.....	11
"Weekend warriors" from Montenegro on the battlefield in BiH.....	13
Competent judicial bodies and education	14
State prosecutors office.....	14
The courts.....	14
Education for state prosecutors and judges acting in war crimes cases	15
Legal principles	17
Command responsibility and crime against humanity.....	17
International organisations on the prosecution of war crimes in Montenegro	20
United Nations	20
The Council of Europe	21
The European Union	21
Case analysis	23
Morinj camp	23
Bukovica case.....	30
Deportation of refugees	38
Kaluđerski laz case	53
Conclusion	59

Introductory remarks

The analysis of judgments in the war crimes trials published in this report were written by Bogdan Ivanišević, expert in international humanitarian law and lawyer at *BDK Attorneys at Law* office in Belgrade. Tea Gorjanc-Prelević, executive director of the NGO Human Rights Action (HRA) wrote the rest of the text. Together they wrote chapters Summary and Conclusion and edited the report.

As the only lawyers, Ivanišević and Gorjanc-Prelević were members of a working group that in 2011 drafted the Statute of the Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia from 1991 to 2001 (RECOM). Both graduated at the Belgrade University Faculty of Law, and completed postgraduate studies in International Law at the American University Washington College of Law.

In May 2013, Human Rights Action published the first edition of the report *War Crimes Trials in Montenegro* with the financial support of the Open Society Foundation through the Human Rights & Governance Grants Program.

This revised edition was created in 2016 with the support of the Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) through the U.S. Embassy in Podgorica.

Summary

Six criminal trials for war crimes related to the armed conflicts in former Yugoslavia during the nineteen-nineties (“the 90s”) took place in Montenegro from 1995 to 2016. Thirty-six persons have been indicted, while ten were finally convicted.

Before Montenegro gained independence in 2006, two war crimes trials were conducted in the Republic of Montenegro, in the Klapuh and Štrpci cases, in which all six defendants were finally convicted. Four of them were members of the Army of Republika Srpska (RS) from Bosnia and Herzegovina (BiH) and one of their aider from Montenegro, convicted of killing three members of Klapuh family on the territory of Montenegro, and one RS Army member who participated in the abduction and murder of passengers from a train in Štrpci on the territory of BiH.

Following the independence of Montenegro, in the period from 2009 to the end of 2015, there were four trials against a total of thirty men accused of war crimes committed on the territory of Montenegro from 1991 to 1999. Only four of those indicted were convicted, all four in one case of crimes in the military prison camp in Morinj, the case Republic of Croatia delivered to Montenegro for prosecution. Twenty-six men were acquitted of all charges in the cases of Morinj, so-called Deportation of refugees, Bukovica and Kaluđerski laz.

The reasons why there were not more convictions for war crimes in Montenegro lie in the lack of readiness of the State Prosecutor’s Office and competent courts to adequately implement national and international criminal law that was binding on Montenegro at the time the crimes were committed.

This conclusion is based on arguments presented below, which are explained in more detail in the analysis of the judgments in four cases prosecuted in the independent state of Montenegro - Morinj, Kaluđerski Laz, Bukovica and Deportation of Refugees.

1. **The defendants were solely accused for direct commission of crimes or ordering commission of crimes.** The State Prosecutor’s Office **did not use in any indictment the institute of co-perpetration or aiding and abetting**, as a form of responsibility of persons at middle to higher positions in the military, police or political hierarchy, nor did it treat such persons as organizers of criminal associations, although in some cases there were grounds for the use of these modes of responsibility. The failure of the Prosecutor’s Office was also in **not implementing the institute of command responsibility**, involving responsibility of the superiors who knew or had reason to know about the crime and did nothing to prevent or punish it.¹ Such approach led to a very limited number of defendants, as no person of a middle or high rank in the military or political hierarchy had been accused and hence also not convicted for war crimes on that basis.
2. **Neither the Higher Court in Podgorica, as the first-instance court, nor the Appellate Court of Montenegro, in the second instance, used their authority to examine potential forms of responsibility that were not present in the indictment.**

¹ For more details please see the next chapter Legal Principles.

The court is not bound by the prosecutor's proposals regarding mode of responsibility², and therefore has the right to, for example, convict as an aider and abettor the person who has been indicted as a perpetrator. This kind of passivity of the Higher Court and the Appellate Court particularly came to the forefront in the Morinj case. Also, the court refrained from legally characterising the facts presented in the indictment, that it itself had established, and that clearly indicated the acts of an offense additional to the one the State Prosecutor's Office highlighted in the indictment (Deportation case), or avoided to modify legal characterisation of the crime (Bukovica case, where the Appellate Court, having found no ground for a conviction of a crime against humanity, could have examined whether the defendants had committed a war crime against the civilian population).³

3. Regarding crimes committed within the armed conflict in BiH, **the Appellate Court of Montenegro and Supreme Court of Montenegro upheld the legally unfounded position of the Higher Court in Podgorica (in the Deportation of refugees case) that a war crime may exist only if committed by members of armed forces of parties to the conflict or by those who were "in service" of such parties**, and went on to conclude that the accused police officers in the case did not belong to any of the categories, and therefore could not be held responsible for a war crime. In relation to the allegedly required capacity of perpetrators of war crimes, this legal position is arbitrary and has no grounds in domestic or international law. **The conclusion that the charged Montenegrin civil servants were not in the service of a party to the conflict in BiH, despite the fact that they handed refugees over to one of the parties to that conflict – the Bosnian Serb army – to be used for the exchange of prisoners of war, is contrary to the facts which the Court itself established as well as elementary logic. This position of the Courts can only be explained by the motivation to support, by all means necessary, the position of the political authorities according to which the Republic of Montenegro and the FRY were not supporting the Bosnian Serbs in the armed conflict in BiH.**
4. In the Deportation of Refugees and Bukovica cases, **the Higher Court of Podgorica, the Appellate Court of Montenegro and the Supreme Court of Montenegro interpreted the rule on the identity of the charge and the judgment in an unjustifiably restrictive manner.** According to these Courts, when an indictment indicates that a certain international legal standard has been violated by the conduct of the defendant, but fails to do so correctly or sufficiently accurately, it is deemed that the international legal standard "was not embedded in the description of the facts contained in the indictment", i.e. that it was "not described in the description of the facts", and that the Court is thus not allowed to refer in its judgment to the relevant international legal standard and convict the defendant, as this would exceed the charges. Such a position of the Courts shows a misunderstanding of the rule on the objective identity of the charge and the judgment, according to which the court is not tied to the legal

² In this regard, see Tihomir Vasiljević and Momčilo Grubač, *Commentary of the Criminal Procedure Code* (Belgrade, 1999), p. 546 (citing judgements of the Supreme Court of the Republic of Croatia SCC Kz. 3477/65. and 2477/55, and the decision of the Supreme Court of Vojvodina VSAVP Kz. 807/56); also Goran P. Ilić and others, *Commentary of the Criminal Procedure Code* (Belgrade, 2012), p. 868 (citing the judgement of the Supreme Court of the Republic of Serbia SCS Kzz. 20/02 of 12 November 2003).

³ Article 369, p. 2, CPC MNE: "The court is not bound by the proposal of the prosecutor's legal qualification of the offense."

characterisation of the act that was presented by the Prosecutor's Office in the indictment.⁴ **The court is free to provide a legal characterisation of the facts different from the one presented by the Prosecutor's charges, as long as both the charges and the judgment refer to the same event, i.e. to the same relevant facts concerning the said event.** In such a case, there is no change to the objective identity of the charges.

5. **The Appellate Court gave its contribution to impunity by promoting unfounded stance (in the Bukovica case) that the crimes committed during the 90's cannot be prosecuted as crimes against humanity, because at the time of the crimes there were no international legal acts ratified by FR Yugoslavia which prohibited crimes against humanity.** This position of the Appellate Court, supported by the Supreme Court of Montenegro, is unfounded, because it is sufficient that the illegality of crimes against humanity and elements of those crimes are established by the rules of *customary* international law, and these rules do not need to be codified in an "international act", or "regulation", as erroneously determined by the Appellate Court.⁵ Unlike the Montenegrin Court, a Special Department for War Crimes of BiH, which has been resilient to local political influence due to the involvement of the international community in the establishment and operation of the court, and has been led in adjudication primarily by legal considerations, for years conducted trials and rendered convictions for the crimes against humanity. Also, as the court is not bound by the prosecutor's legal qualification (characterisation), the Appellate Court could have examined and concluded that the actions characterised as crimes against humanity in the Bukovica case were consistent with those of war crimes against civilians, but had not dealt with it at all.
6. **The state prosecutor's office did not prosecute any of the four cases - Morinj, Bukovica, Refugee Deportation and Kaluđerski laz - upon their own initiative.** The only case resulting in conviction, of the four prosecuted following the independence of Montenegro, was the case of the military concentration camp in Morinj, delivered to Montenegro for prosecution by the Republic of Croatia. The other cases were initiated by the victims, through criminal charges and lawsuits filed in the course of civil proceedings, while the State Prosecution then made a limited contribution to their investigation and qualification. In addition to cases in which criminal proceedings were initiated, it is known, for example, that Montenegrin nationals committed crimes in the wider Dubrovnik area in the Republic of Croatia during the siege of Dubrovnik in 1991, and that as "weekend warriors" they fought in eastern Bosnia and participated in crimes against civilians in and around Foča. However, the state prosecutor's office did not show any interest in investigating these cases, although an expert of the European Commission had warned them about those cases, and although the international organizations called for a more proactive approach in investigations of war crimes.⁶
7. Unlike the usual practice of state prosecutors to propose custody when filing a request for investigation in far less serious cases than war crimes, **in all war crimes**

⁴ *Ibid.*

⁵ More detailed legal arguments on this conclusion see below in the analysis of case Bukovica.

⁶ See chapters Potential investigations and International organizations on the prosecution of war crimes in Montenegro.

proceedings the prosecution proposed detention (because of seriousness of the offense and prescribed sentence) only with the lifting of the indictments, i.e., once the investigations had already been completed. This led to nearly half of the defendants in the case Deportation of Refugees being tried *in absentia*, just like the first defendant in the case Kaluđerski Laz and one of the defendants in the Morinj case. The period of detention of seven defendants was the longest in the case of Kaluđerski Laz - 36 months. In the Deportation of Refugees case, four persons were detained in Montenegro for 27 months, while four persons, subsequently arrested in Belgrade, spent approximately four months in extradition detention. One defendant, former head of the State Security Service, was never arrested. In the Morinj case, detention lasted 21 months, and in the Bukovica case approximately eight months. Following the acquittals in the cases of Morinj, Deportation of Refugees, Bukovica and Kaluđerski Laz, all the persons who had been detained were compensated for unjustified deprivation of liberty, in the total amount of around EUR 2,000,000 (in the Morinj case defendants received EUR 123,000⁷; in the Deportation case 197,000 just based on three lawsuits, although five proceedings were pending⁸; in the case of Bukovica EUR 168,000⁹ and Kaluđerski Laz app. EUR 700.000¹⁰).

⁷ "Those who went to prison for Morinj collect 123.000 (*Robiju za Morinj naplatili 123.000*)", *Dan*, 30 July 2016.

⁸ "Persons accused of war crimes receive 200.000 for unlawful arrest (*Optuženima za ratni zločin 200.000 zbog nezakonitog hapšenja*)", *Dan*, 9 November 2015.

⁹ The Basic Court in Pljevlja, in all 7 cases for compensation for unjustified deprivation of liberty of the defendants, who spent 8 months and 10 days in custody, awarded the sums of € 24,000, which the Higher Court in Bijelo Polje upheld (e.g. judgments P. 28/13 of 25/6/2013 and Gž. 1921/2013 of 23/10/2013).

¹⁰ The Higher Court in Bijelo Polje awarded five defendants a total of € 504,600 (Gž. 531/2016, 25/03/2016; Gž. 308/2016, 14/04/2016; Gž. 307/2016, 19/04/2016; Gž. 26/16, 29/01/2016; Gž. 2303/16, 28/09/2016), and we estimate that in the remaining proceedings proportionate amounts have been awarded. The first accused, which was tried *in absentia*, was extradited from Serbia at the end of the trial and spent in custody a little less than four months.

General Overview of Trials and Investigations

Trials before the independence of Montenegro

In addition to the war crimes trials in Montenegro in the period 2009-2015, analysed in this report, two trials took place before Montenegro proclaimed independence in 2006.

Murder of the Klapuh family

In the first case, five members of the RS Army from BiH were convicted for war crimes against civilians for the murder of three members of the Klapuh family from Foča (BiH) in July 1992 in Plužine, Montenegro. The final judgment¹¹ was executed solely regarding the only defendant from Montenegro. The other four were tried *in absentia* and remain at large.¹² The defendant present at the trial was convicted to 8 months of prison for not reporting the criminal offence. The others were sentenced to 20 years in prison, initially, for aggravated murder, but the Supreme Court of the Republic of Montenegro changed this qualification of the lower court to war crime against civilian population, finding that the crime had been committed "in relation to the armed conflict".¹³

In January 2016 it was reported that one of those convicted *in absentia*, Zoran Vuković¹⁴, had been arrested in Serbia on the basis of the international arrest warrant filed by Montenegro.¹⁵ During the same month, Montenegro requested his extradition from the Republic of Serbia. If extradited, Vuković will be entitled to a re-trial as he had been tried *in absentia* (Article 431 CPC).

The abduction of passengers from the train at the Štrpci station

Montenegro convicted in 2003 Nebojša Ranisavljević from Serbia, a soldier of the RS Army from BiH Višegrad brigade, for participation in the abduction and subsequent murder of

¹¹ Judgement of the Supreme Court of the Republic of Montenegro, KŽ. no. 114/94.

¹² Vidoje Golubić was present at the trial in 1993, while Zoran Vuković, Janko Janjić, Radomir Kovač and Zoran Simović were at large.

¹³ Judgement of the Supreme Court of the Republic of Montenegro, KŽ. no. 114/94. The defendants were originally indicted for the war crime against civilian population, but the Higher Court in Podgorica changed the qualification to aggravated murder motivated by robbery. It was determined that the defendants on 6 July 1992 agreed to drive the family to Montenegro and be paid. When they arrived near the Mratinja dam, they stopped by the bridge, took the father, mother and daughter out of the car, shot them and pushed them off the cliff.

¹⁴ Zoran Vuković and Radomir Kovač were convicted by the ICTY to 12 and 20 years in prison due to torture and rape (violation of laws and customs of war and crime against humanity), Prosecutor against Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (IT-96-23 & IT-96-23/1-A), judgment of 12 June 2002. Vuković was released in 2008 after having served 2/3 of prison sentence (*Montenegro requests extradition of war crime perpetrator from Serbia* ("Crna Gora od Srbije traži izručenje zločinca")), *Al Jazeera*, 23 January 2006. Kovač, on the other hand, has also been released from prison in Norway in 2013 and returned to BiH ("Hague Frees Bosnia War Rapist Radomir Kovač", *Balkan Insight*, 4 July 2013, available at: <http://www.balkaninsight.com/en/article/another-hague-defendant-granted-early-release>).

¹⁵ "The slow hand of justice (*Spora ruka pravde*)", *Pobjeda*, 16 January 2016.

passengers from the train in Štrpci, BiH, on 27 February 1993.¹⁶ Among the victims of the crime were also citizens of the Republic of Montenegro.¹⁷ Ranisavljević was arrested by the Montenegrin police in October 1996 and put in custody. The trial was held in the Republic of Montenegro, as per the decision of the then Federal Court of the FRY on the conflict of jurisdiction between the courts of the Republic of Serbia and the Republic of Montenegro.¹⁸ Ranisavljević was sentenced to 15 years in prison for the war crime against civilian population. In the course of the investigation, he confessed to the crime by a detailed testimony, which he later claimed before the court was given under duress caused by police torture.¹⁹ The doctor who examined Ranisavljević testified that there were no traces of torture on his body. The judgment was based predominantly on the testimony of the defendant, but also on the testimony of several witnesses and other evidence.²⁰ The trial began in May 1998, the first instance verdict was reached only four years later, on 9 September 2002, and confirmed on 19 November 2003.²¹

Ranisavljević committed the crime as part of a group of twenty armed persons, who abducted passengers at the station in Štrpci (BiH) from a high-speed train traveling from Belgrade (Serbia) to the Montenegrin city of Bar. The passengers were killed in the village Mušići near Višegrad. It was stated in the Ranisavljević's judgment that the abduction was organised by Milan Lukić. For the crimes committed in Višegrad, Lukić was sentenced by the International Criminal Tribunal for the former Yugoslavia (The Hague Tribunal) to life in prison.²² However, he was not tried before any court for the crime committed in Štrpci.

In December 2014, 15 persons were arrested in BiH and the Republic of Serbia and charged with involvement in the above crime. The trial of ten defendants in BiH began in October 2015. In Serbia, the trial was still awaited by the end of 2016, as the Belgrade Higher Court has requested on two occasions, that the Office of the War Crimes Prosecutor supplement the investigation.²³

Trials following declaration of independence of Montenegro

In the independent Montenegro, four trials for war crimes or crimes against humanity that occurred on its territory had been initiated and finalized from March 2009 to the end of June 2015:

¹⁶ The judgment of the Higher Court in Bijelo Polje, K. 5/98.

¹⁷ Of the 20 victims, 19 were nationals of the FRY, 8 from Montenegro, and one person of undetermined origin (Judgment of the Supreme Court of the Republic of Montenegro Kž. 102/2003, 19/11/2003).

¹⁸ Ibid.

¹⁹ Supreme Court of the Republic of Montenegro, Kž. 102/2003, 19 November 2003.

²⁰ Ibid.

²¹ Ibid.

²² Summary of the Trial Chamber's judgment against Milan Lukić and Sredoje Lukić for crimes committed in Višegrad, 20 July 2009:

https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/bcs/090720_sazetak_presude.pdf. This judgment was upheld in 2012 in relation to Milan Lukić (<https://www.icty.org/bcs/press/milanu-lukicu-potvrđena-doživotna-kazna-zatvora-sredoju-lukicu-kazna-smanjena>).

²³ "Crime in Štrpci: Those arrested in Serbia still awaiting trial (*Zločin u Štrpcima: Uhapšenima u Srbiji još nije počelo suđenje*)", *Al Jazeera*, 27 February 2017.

- 1) The trial for war crimes against civilians and prisoners of war in the **Morinj camp** in 1991-1992;
- 2) The trial for war crimes against civilians - refugees from Bosnia and Herzegovina, the **Deportation of Refugees** in 1992;
- 3) The trial for crimes against humanity (crimes against the civilian population) in **Bukovica** region in 1992 and 1993; and
- 4) The trial for war crimes against the civilian population - refugees from Kosovo, at **Kaluđerski laz** in 1999.

Morinj

In the Morinj case, the trial began in March 2009, and finally ended on 27 February 2014 by acquittal of two and sentencing of four defendants, following three first-instance and three second-instance judgments. The first-instance judgement of the Higher Court in Podgorica was overturned two times, and at the second trial the Appellate Court overturned the first-instance judgment in the convicting part and upheld it in part in which the Higher Court acquitted two of the defendants. The third repeated trial against the remaining four defendants ended on 31 July 2013 by conviction of all four defendants. The Appellate Court upheld this third-instance judgment in February 2014.

Deportation of Refugees

In the Deportation of Refugees case, following two trials, the first of which began in November 2009, final acquitting judgement in relation to all nine accused has been handed down in May 2013. The Appellate Court then upheld the second acquitting judgement of the Higher Court in Podgorica. Supreme State Prosecutor filed in March 2015 an extraordinary legal remedy - a request for protection of legality against this final judgment. On 23 June 2015, the Supreme Court rejected the request as unfounded.

Bukovica

The trial for the crimes committed in the Bukovica area began in June 2010 before the Higher Court in Bijelo Polje and ended with a final judgment in March 2012. The judgement acquitted all seven persons indicted. In this case, the trial was repeated after the first acquittal was quashed. The Supreme Court refused in January 2013 the request for protection of legality filed by the Supreme State Prosecutor's Office against the acquitting judgment.

Kaluđerski laz

The trial for the crimes committed in Kaluđerski laz began in March 2009 before the Higher Court in Bijelo Polje, and was finalized on 8 December 2014 with the acquittal of all eight defendants. The first instance judgment was delivered after more than four years of trial, in December 2013 and was confirmed by the Appellate court of in 2014.

No.	Name of the case	Trial period	Court decisions	Date of decision	No. of accused	No. of convicted
REPUBLIC OF MONTENEGRO IN THE FEDERAL REPUBLIC OF YUGOSLAVIA (1992-2003) AND SERBIA AND MONTENEGRO (2003 – 2006)						
1	Klapuh	1992 - 1996	1. Judgment, Higher Court in Podgorica	1993	5	5
			2. Decision, Supreme Court of the Republic of Montenegro, Kž. 114/94	15/6/1995		
			3. Judgment, Higher Court of the Republic of Montenegro, K. 20/96	16/12/1996		
2	Štrpci	1998 - 2003	1. Judgment, Higher Court Bijelo Polje, K. 5/98	9/9/2002	1	1
			2. Judgment, Supreme court of the Republic of Montenegro, Kž. 102/2003	19/11/2003		
MONTENEGRO (AS OF 2006)						
3	Morinj camp	2009 – 2014	1. Judgment, Higher Court Podgorica, K. 214/08	15/5/2010	6	4
			2. Decision, Appellate Court of Montenegro, Kž-S. 20/10	25/11/2010		
			3. Judgment, Higher Court Podgorica, Ks. 33/10	25/1/2012		
			4. Judgment, Appellate Court of Montenegro, Kžs. 24/12	6/7/2012		
			5. Judgment, Higher Court Podgorica Ks.19/12	31/7/2013		
			6. Judgment, Appellate Court of Montenegro, Kž-S. 44/13	27/2/2014		
4	Deportation of Refugees	2009 – 2015	1. Judgment, Higher Court Podgorica Ks. 3/09	29/3/2011	9	0
			2. Decision, Appellate Court of Montenegro, Ksž. 25/2011	17/2/2012		
			3. Judgment, Higher Court Podgorica, Ks. 6/12	22/11/2012		
			4. Judgment, Appellate Court of Montenegro, Kžs.18/2013	17/5/2013		
			5. Judgment, Supreme Court of Montenegro, Kzz. 4/15	23/6/2015		
5	Bukovica	2010 - 2012	1. Judgment, Higher Court Bijelo Polje, Ks. 9/2010	21/12/2010	7	0
			2. Judgment, Appellate Court of Montenegro, Kž-S 13/2011	21/6/2011		
			3. Judgment, Higher Court Bijelo Polje, K-S 6/2011	27.9/3.10.2011.		
			4. Judgment, Appellate Court of Montenegro, Kž-S 1/2012	22/03/2012		
6	Kaluđerski laz	2009 - 2014	1. Judgment, Higher Court Bijelo Polje, Ks. 1/08	6/12/2013	8	0

Potential investigations

Maurizio Salustro, a State Prosecutor from Italy and international judge in Kosovo, engaged by the European Commission to analyse the work of the Montenegrin State Prosecutor's Office in relation to war crimes, noted in his 2014 report that the State Prosecutor's Office did not launch any investigations into war crimes on its own initiative, and proposed that it should take a proactive approach and start investigating events such as the attack on Dubrovnik and "weekend warriors",²⁴ highlighted also in the previous report by HRA on the war crime trials from 2013.

Dubrovnik battlefield

No criminal proceedings for war crimes committed during the attack of Dubrovnik (from 1 October 1991 to 30 June 1992)²⁵ had been initiated against anyone in Montenegro, although the state officials had in principle accepted responsibility at least for the damage caused by organized looting on the territory of the Republic of Croatia in which Montenegrin citizens participated during the war operations on Dubrovnik.²⁶

The Hague Tribunal convicted for war crimes committed during the attack on Dubrovnik only the former General of the Yugoslav National Army (YNA) Pavle Strugar, and his subordinate Commander Miodrag Jokić. The retired Admiral Milan Zec was first found guilty, but in 2002 had been acquitted²⁷, while the YNA First Class Captain, Vladimir Kovačević – Rambo, who was also found guilty, was temporarily acquitted by the Tribunal in 2004 for medical treatment.²⁸ The

²⁴ "Some criminal phenomena that took place during the conflicts in the region are well-known, like the so called 'weekend fighters'. A starting point to develop a Strategy in order to detect, investigate and prosecute war crimes possibly committed by Montenegrins could be to create a list of events where the involvement of Montenegrins seems more likely (one could be the attack of Dubrovnik, the looting of civilian houses etc.) and to access all sources of information available (foreign prosecutions, ICTY database, NGO archives, field interviews, available official documents available...) targeting those specific events. In other words, instead of spreading around informal requests for cooperation, the search for information/evidence could be organized by selecting a number of target events and proactively checking them." *Peer-based Assessment Mission to Montenegro, on the Domestic handling of war crimes (by Maurizio Salustro)*, 2014, para. 25.

²⁵ The Supreme State Prosecutor's Office of Montenegro announced on 29 December 2009 that in addition to cases related to camp Morinj, other cases had not been initiated that relate to events in Dubrovnik area during 1991 and 1992, because the Prosecutor's Office has not received criminal charges against Montenegrin citizens (response to request for information, Human Rights Action archive).

²⁶ Minister of Agriculture of the Republic of Montenegro, Milutin Simović, stated in 2005 that on the basis of the signed document, Montenegro will pay to the municipality Konavle 375,000 euros in compensation for 268 milking cows and a number of calves and bulls that were taken from a farm in Gruda during the war in 1991. The presidents of Croatia and Montenegro have confirmed that negotiations are underway about the property of the airport of Dubrovnik, which was looted during the war and taken to the airport of Tivat. According to the Croatian state authorities, during the war in 1991 - 1992 in actions of the YNA and Montenegrin reservists only in the narrow area of Dubrovnik, 336 large and small vessels were destroyed ("No one is to blame (*Niko nije kriv*)", *Monitor*, 20 August 2010).

²⁷ "Milan Zec released of charges (*Milan Zec oslobođen optužbi*)", *B92*, 26 July 2002, available at: <http://www.b92.net>.

²⁸ Special Court in Belgrade in December 2007 dropped the charges against Vladimir Kovačević for war crimes against the civilian population of Dubrovnik, on the grounds that the defendant, due to illness, was unable to stand

question of command responsibility of Momir Bulatović, former President of the Presidency of Montenegro (December 1990 - December 1992), who had the authority over the Territorial Defence of Montenegro - the most massive component of the 2nd operational group of YNA made of Montenegrin reservists mobilized in the attack on Dubrovnik was often raised in public. The issue of possible criminal responsibility of Montenegrin police officers who took part in operations in Dubrovnik had also been raised.²⁹

The County State Attorney's Office from Dubrovnik at the end of 2009 filed charges against 10 officers of the former YNA³⁰ for not trying to prevent the conduct of subordinate units, during the aggression on Dubrovnik in 1991 and 1992 against the Geneva Conventions: shelling of residential areas; killing of civilians (116), imprisonment, torture and forcing civilians to flee; destruction of civil, cultural, religious and commercial properties, looting and burning.³¹ Two of the accused were Montenegrin citizens. As the agreement on extradition of nationals concluded between Croatia and Montenegro on 1 October 2010, does not include accused of war crimes³² (as opposed to the extradition treaty between Montenegro and Serbia³³), they could be tried for only in Montenegro.³⁴

trial ("the Court in Belgrade rejected the charges against Rambo (*Sud u Beogradu odbacio optužnicu protiv Ramba*"), *Radio Free Europe*, 5 December 2007, <http://www.slobodnaevropa.org/content/article/765255.html>).

²⁹ The documentary film "Attack on Dubrovnik: War for Peace" by Koča Pavlović, production company Obala 2004. The film shows the statement for TV by Milisav Marković, Deputy Minister of the Interior of the Government of Montenegro for the Office of Public Safety about military operations of Montenegrin police in Dubrovnik front, from October 1991. The Ministry of the Interior (MOI) was part of the government of the Prime Minister Milo Đukanović. MOI forces in Montenegro were mobilised to Dubrovnik upon the orders of the President of the Presidency, Momir Bulatović p. pov. no. 01-14 of 1 October 1991, on mobilization of a special police unit in strength of reinforced infantry unit, Titograd.

³⁰ General Jevrem Cokić (till 10 May 1992, Commander of the YNA 2nd operational group), General Mile Ružinovski (7-12 October 1991, Commander of the YNA 2nd operational group) General Pavle Strugar (from 13 October 1991, Commander of the YNA 2nd operational group) Vice Admiral Miodrag Jokić (Commander of the 9th military naval sector of YNA), Navy Captain/Navy Colonel Milan Zec (Chief of Staff of the 9th military naval sector of YNA), General Branko Stanković (Commander of the 2nd tactical group from the 2nd operational group of the YNA), Colonel Obrad Vičić (Commander of 472nd brigade of YNA) and Colonel Radovan Komar (Chief of Staff of the 472nd brigade of YNA). Two other YNA officers, I Class Captain Vladimir Kovacević (Commander of the 3rd battalion of the 472nd brigade of the YNA) and Lieutenant Commander/Naval Captain Zoran Gvozdenović (Commander of navy gunboats 403 of YNA Navy), are also accused by the indictment no. 46/09 for issuing direct orders for shelling "the historic old town of Dubrovnik, which as a whole is protected by UNESCO since 1979 and is a world heritage monument", then the shelling of residential areas "bombing Cavtat, Župa Dubrovačka, Zaton, Trsteno, hotels Croatia, Belvedere, Plakir, Tirena and Minčeta", "killing a number of civilians".

Source: Dubrovnik County Prosecutor's Office, "Indictment filed against ten senior former JNA officers for war crimes against civilians in concordance with the criminal act of destruction of cultural and historical monuments", available at: <http://www.dorh.hr/ZupanijskoDrzavnoOdvjetnistvoJDubrovniku>.

³¹ Ibid. Also see the article „The Dubrovnik indictments (*Dubrovačke optužnice*)“, *Monitor*, 7 May 2010.

³² Law on Ratification of the Agreement between Montenegro and Croatia on Extradition (Official Gazette of Montenegro - International Treaties, no. 1/2011). A group of Montenegrin and Croatian non-governmental human rights organizations demanded on 15 September 2010 that the agreement between Montenegro and Croatia included persons accused of war crimes (see [http://www.hraction.org/?p=394](http://www.hrraction.org/?p=394)).

³³ Law on Ratification of the Agreement between Montenegro and Serbia on Extradition (Official Gazette of Montenegro - International Treaties no. 4/09, no. 4/2011 - Agreement between Montenegro and Serbia on amendments to the Agreement between Montenegro and the Republic of Serbia on extradition signed in Belgrade on 30 October 2010).

³⁴ The last news about the process available to general public are from May 2010, when it was announced that the Prosecutor's Office in Dubrovnik proposed detention and arrest warrants for all the defendants, and the County Court appointed lawyers to defendants *ex officio* and sent them the indictments with a note on the right to appeal. Four appeals were received against the charges by lawyers, one appeal filed by a defendant ("Dubrovnik indictments (*Dubrovačke optužnice*)", *Monitor*, 7 May 2010).

In its response to the Supreme State Prosecutor's Office of Montenegro of 1 April 2015, the State Prosecutor's Office of the Republic of Croatia stated that county prosecutor's offices did not have any pending cases in which perpetrators were citizens of Montenegro residing in Montenegro.³⁵

At the conference "War for Peace - 20 years later", held on 6 December 2011 in Podgorica, organized by NGOs Human Rights Action and Center for Civic Education from Montenegro and Documenta from Croatia, in the presence of the state prosecutor Lidija Vukčević, one of the injured witnesses in the Morinj case, Metodije Prkačin, accused the then judge of the Appellate Court of Montenegro Milivoje Katnić that, as an YNA officer had been the most responsible person for looting and arson in Cavtat, Croatia.³⁶ Prkačin also said that on the battlefield, as a military police member, he saw the person for whom others claimed to be Vesna Medenica (he believes she is the President of the Supreme Court of Montenegro), that Lieutenant Colonel Ljubo Knežević used local population as human shields at the battlefield in Cavtat and that Captains Gojko Duračić, who lives in Bar and Nemanja Kordolija, who also lives in Montenegro, know everything about who did what.³⁷ Vesna Medenica, President of the Supreme Court of Montenegro denied those claims, saying that at the time she had worked as the basic state prosecutor, while the judge Milivoje Katnić confirmed he "exercised civil authority in Cavtat as one of 10 YNA officers", but denied responsibility for any crimes. On 23 June 2015 Katnić was appointed Chief Special Prosecutor³⁸, competent also for war crimes, while the public had not been informed by the Supreme State Prosecutor who proposed Katnić for the post, or the Prosecutorial Council which elected him to the function, whether the claims uttered by Prkačin against him had ever been properly investigated³⁹. Only later, the Supreme State Prosecutor, Ivica Stanković, explained in an interview that the suspicions against Katnić were investigated and that no grounds for further investigation of allegations by Prkačin had been established.⁴⁰

"Weekend warriors" from Montenegro on the battlefield in BiH

Although it has been well known that the so-called weekend warriors volunteers from Montenegro, especially from Nikšić, participated in the looting of civilian property and other war crimes in Foča and elsewhere in eastern Bosnia near the border with Montenegro in 1992-1993⁴¹, no one had been tried for these crimes in Montenegro until 2016.⁴²

³⁵ State Prosecutor's Office of the Republic of Croatia, A-482/2014, Zagreb, 16 March 2015.

³⁶ "Vesna Medenica as an officer at the Dubrovnik front? (*Vesna Medenica kao oficir na Dubrovačkom ratištu?*)" portal PCNEN, 11 December 2011. Information available at: <https://www.pcnen.com/portal/2011/12/02/vesna-medenica-oficir-na-dubrovackom-ratistu/>.

³⁷ Ibid.

³⁸ Prosecutorial Council, TS no. 50/15, Podgorica, 2 June 2015.

³⁹ NGOs Human Rights Action and Center for Civic Education reminded in a letter the Supreme State Prosecutor on 8 June 2015 of charges Katnić was publically exposed to, for which no information whether these charges were investigated has been published. The Supreme State Prosecutor never replied to this letter, nor could anything be learned from the decision on the election of Milivoje Katnić.

⁴⁰ On 8 October 2015, in the "Center" broadcast of RTCG, Ivica Stanković announced that, prior to proposing Milivoje Katnić, he checked all information about Katnić's alleged war engagement and determined "this is an honorable man of the Montenegrin judiciary".

⁴¹ For example, the crimes mentioned by Deputy Minister of Human Rights, Sabahudin Delić in TV show Prism, TV *Vijesti*, 25 May 2011.

Competent judicial bodies and education

State prosecutors office

The Department for the Suppression of Organised Crime, Corruption, Terrorism and War Crimes was established within the Supreme State Prosecutor's Office in 2008, headed by a Special Prosecutor until early 2015.⁴³ The Special Prosecutor had seven deputies and accounted for his/her work and the work of the Department to the Supreme State Prosecutor.⁴⁴

Ms. Đurđina Nina Ivanović served as the Special prosecutor from 2008-2015. The Supreme State Prosecutor from July 2003 to December 2007 was Ms. Vesna Medenica, who was then appointed president of the Supreme Court. Until April 2008, Mr. Veselin Vučković was an acting Supreme State Prosecutor. From April 2008 to April 2013 Supreme State Prosecutor was Ms. Ranka Čarapić. From April 2013 to October 2014, acting Supreme State Prosecutor was again Mr. Vučković, and then Mr. Ivica Stanković, formerly a judge of the Supreme Court of Montenegro, was elected as a new Supreme State Prosecutor for a term of five years.

In March 2015, the Law on the Special State Prosecutor's Office has been adopted. The Special State Prosecutor's Office, competent for war crimes, is headed by the Chief Special Prosecutor,⁴⁵ and, pursuant to the Prosecutorial Council decision, is composed of ten special prosecutors who account for their work to the Chief Special Prosecutor. The Chief Special Prosecutor accounts for his work to the Supreme State Prosecutor.⁴⁶ In June 2015, Mr. Milivoje Katnić, formerly a judge of the Appellate Court of Montenegro was appointed Chief Special Prosecutor.⁴⁷

The courts

The specialised departments for the suppression of organised crime, corruption, terrorism and war crimes – comprising eight specialised judges and three investigation judges⁴⁸ – were established within the Podgorica and Bijelo Polje Higher Courts in 2008.

⁴² President of the "Women Victims of War" association from Bosnia, Bakira Hasečić, on 11 March 2008 sent an open letter to the President of the Parliament of Montenegro Ranko Krivokapić, in which she expressed a willingness of "delegation of violated women and men, camp prisoners, tortured and beaten citizens and families of those killed to witness in the Parliament about the conduct and actions of Montenegrin reservists and very particularly about certain names i.e. perpetrators and acknowledgements where some of them are hiding in Montenegro (see "Official Montenegro must apologize", Republika, 12 March 2008). The public is not aware if the President of the Parliament replied to this letter, and whether the Prosecutor's Office had taken any actions on this occasion.

⁴³ Article 66, Law on the State Prosecutor of Montenegro (Official Gazette of Montenegro, 69/2003 and 40/2008).

⁴⁴ Article 70, Law on the State Prosecutor of Montenegro (Official Gazette of Montenegro, 69/2003 and 40/2008).

⁴⁵ Law on the Special State Prosecutor's Office (Official Gazette of Montenegro, 10/2015) entered into force on 18 March 2015.

⁴⁶ Law on Special State Prosecutor's Office (Official Gazette of Montenegro, 10/2015 from 10 March 2015, Arts. 1 to 5.

⁴⁷ About Milivoje Katnić see above in the chapter on the Dubrovnik battlefield.

⁴⁸ Law on Amendments to the Law on Courts (Official Gazette of Montenegro, 22/08); Response of the Government of Montenegro to the Questionnaire of the European Commission, Chapter 23 - Judiciary and fundamental rights, 10 November 2009, p. 56 i 118.

The Law on Courts adopted in March 2015 abolished the special department of the Higher Court in Bijelo Polje, so there remained one single specialized department for the trial of war crimes, organized crime, corruption and terrorism at the Higher Court in Podgorica.⁴⁹

The special prosecutor and his/her deputies as well as the judges of the specialised departments, who dealt with war crimes, were stimulated by special supplements to their basic earnings.⁵⁰

Education for state prosecutors and judges acting in war crimes cases

State prosecutors and judges were provided with plenty of opportunity to specialize in the field of international humanitarian law and to consult more experienced colleagues from abroad.

In 2009, when the first trials for war crimes started following the independence of Montenegro, the judges from Montenegro visited the ICTY, the Chamber for War Crimes of the District Court in Belgrade, the Special Court for War Crimes in Bosnia and Herzegovina and War Crimes Department of the District Court in Rijeka.⁵¹ The same year several round tables on trying war crimes cases were organized in Montenegro by OSCE and ODIHR.⁵² Judges acting in war crime trials participated at regional seminars in Belgrade, Podgorica and Sarajevo.⁵³

Montenegrin judges and prosecutors participated in the regional project “War Crime Justice”, funded by the European Union with 4 million euros, conducted from 2010 to 2011 in partnership with OSCE - ODIHR (Office for Democratic Institutions and Human Rights - OSCE), ICTY (International Criminal Tribunal for the former Yugoslavia) and UNICRI (United Nations Interregional Crime and Justice Research Institute), aiming to “strengthen the capacity of judicial systems in the region for processing very complex war crime cases in a manner that is in accordance with international standards”.⁵⁴ The second phase of this project took place from July 2012 to December 2015 and included trainings solely for Montenegrin judges and prosecutors as well as regional seminars.⁵⁵

The Centre for Training in Judiciary and State Prosecution Service of Montenegro from 2013 to 2015 organized three conferences on investigations and prosecutions of war crimes for judges and prosecutors. In 2013 and 2014 seminars “International Humanitarian Law and War crimes” and “International Best Practices and Regional Cooperation in the Investigation, Prosecution and Adjudication of War Crimes”⁵⁶ were held in cooperation with the OSCE and the US Embassy. In June 2015, the seminar entitled “New Trends in the Investigation and Prosecution

⁴⁹ Law on Courts, Official Gazette of Montenegro, 11/2015 from 12 March 2015, Art. 16.

⁵⁰ Response of the Government of Montenegro to the Questionnaire of the EC, Chapter 23 Judiciary and fundamental rights, 10 November 2009, p. 117.

⁵¹ Yearly reports of the Centre for Education of Bearers of Judicial Functions, Judicial Council and Supreme Court for 2009.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ For more details on the project, see: <http://www.osce.org/bs/odihr/84407>

⁵⁵ Project “Justice and War Crimes” – phase two – support in transfer of knowledge in cases of war crimes between national courts from the former Yugoslav republics and ICTY, final report, Warsaw, July 2012- December 2015.

⁵⁶ Annual reports of the Judicial Training Centre of Montenegro for 2013, 2014 and 2015 (the difference in translation of the title of the Centre is the responsibility of the Centre).

of War Crimes" was organized in cooperation with the US Embassy and the Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL).⁵⁷

Legal principles

Montenegro is bound by all international humanitarian law conventions that were binding on the Socialist Federal Republic of Yugoslavia (SFRY) and the Federal Republic of Yugoslavia (FRY), as well as the State Union of Serbia and Montenegro.⁵⁸ Even before the armed conflicts broke out in the former Yugoslavia, provisions of these conventions, including those on the criminal offenses war crime against civilian population, war crime against prisoners of war, etc., were, to a large extent, part of the laws of SFRY and FRY.

Command responsibility and crimes against humanity

In order to fulfil the obligations from ratified conventions, the Criminal Code (CC) of Montenegro was amended in 2003 to include criminal offences Crime against humanity (Article 427) and Failure to take measures to prevent the commission of criminal offences against humanity and other values protected by international law (Art. 440).⁵⁹ The provision of this Article 440 prescribes the so-called command responsibility as a separate criminal offence. However, the description of offence unjustifiably left out one aspect relating to liability for *not penalising* subordinates for committing criminal offences under international humanitarian law.⁶⁰ The article 440 prescribes liability only for failing to prevent a criminal offence.⁶¹

⁵⁷ The Report on the Work of the Prosecutorial Council and the State Prosecutor's Office for 2015, page 8 (available at: http://sudovi.me/me_ME/web/justice/tzsv/c?id=BBdy) and the Report on the work of the Judicial Council and the Courts for 2015, page 9 (available at: <https://sudovi.me/sscg/report-of-report/>).

⁵⁸ By the Decision on the declaration of independence, Montenegro agreed to take over and implement the international treaties and agreements signed by the state Union of Serbia and Montenegro, that relate to Montenegro and that are in compliance with its legal order (Decision on Declaration of Independence of the Republic of Montenegro, 3 June 2006, Official Gazette of Montenegro, 36/2006). "The international legal basis for the punishment of war criminals in former Yugoslavia, mostly found in the Geneva Conventions on the Protection of War Victims (1949) and the Additional Protocols I and II (1977) to the Convention, it is necessary to amend the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention Against the Taking of Hostages (1979) and the Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954), bearing in mind the nature and types of crimes committed. All these conventions have been ratified by former Yugoslavia" (Report of the Commission of Experts established on the basis of the Security Council Resolution 780 (1992), Federal Government of the Federal Republic of Yugoslavia, ZU/SG-780/92/DOC-1/S, Belgrade, 1992).

⁵⁹ Criminal Code, Official Gazette of the Republic of Montenegro, 70/2003.

⁶⁰ The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Art. 7, para. 3 prescribes the responsibility of the superior for the failure to prevent and punish the commission of the criminal offenses of his subordinates, if he knew or had reason to know that the subordinate was about to commit such acts or had done so. Also, the Statute of the International Criminal Court, Article 28, Responsibility of Commanders and Other Superiors (Law on Confirmation of the Rome Statute of the International Criminal Court, "Official Gazette of the FRY - International Treaties", No. 5, from 27 June 2001).

⁶¹ The same omission is in the Criminal Code of Serbia (Art. 384), but not in the Criminal Code of BiH (Arts. 172, 180), which contains a detailed and complete definition of command responsibility. A possible reason for such position of legislators in Montenegro and Serbia lies in the fact that both states prescribe a criminal offense Failure to report a criminal offense and offender (see Siniša Važić, "Command Responsibility - Towards Clear Answers and

Command responsibility and the prohibition of crimes against humanity were part of the internal legal order during the armed conflict in the `90s in the territory of the former Yugoslavia, based on the ratified international treaties (command responsibility)⁶² and international customary law (command responsibility and crimes against humanity).⁶³

The application of the subsequently specified criminal offences to crimes committed in the context of armed conflicts in the territory of former Yugoslavia was made possible by the rule contained in Article 15, paragraph 2 of the International Covenant on Civil and Political Rights,⁶⁴ and Article 7, paragraph 2 of the European Convention on Human Rights,⁶⁵ according to which the trial or punishment of a person guilty of an act or omission would not be considered a violation of the principle of legality (*nulla crimen sine lege, nulla poena sine lege*) if such an act or omission constituted, at the time of its commission, a criminal offence *under the general legal principles recognised by civilised nations, i.e. general legal principles recognised by the international community*.

The Human Rights Committee called upon Montenegro to implement this provision of the Covenant and establish responsibility for all war crimes, including crimes against humanity, in the final observations on Montenegro's first report on the implementation of the International Covenant on Civil and Political Rights in 2014.⁶⁶ The European Court of Human Rights

Precise Positions", *Justice in Transition*, 2010; the author was a judge and president of the District Court in Belgrade). However, the statute of limitation applies to that offense, unlike to the war crimes, and therefore the incomplete definition of command responsibility remains unjustified. When the specific criminal offense of command responsibility was introduced, it should have been prescribed in a way recognised by the international law in order to avoid any risk of improper use.

⁶² Additional Protocol (I) to the Geneva Conventions of 12 August 1949 on the Protection of Victims of International Armed Conflicts, "SFRY Official Gazette", International Agreements no. 16/1978 Art. 86 and 87, as well as the IV Hague Convention respecting the Laws and Customs of War on Land, with the Regulations concerning the Laws and Customs of War on Land, of 1899 and 1907 (Preamble), all four of the Geneva humanitarian conventions on the protection of war victims, of the 1949th (Article 1), the Additional Protocol to the Geneva humanitarian conventions on the protection of victims of international armed conflicts, from 1977 (art. 1, 58, 86 and 87) and in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict from 1954 (Article 4).

⁶³ Institute of command responsibility, as part of customary law applicable in internal armed conflicts (which are not of an international character), was confirmed by the explicit guidance of the Statute of the International Criminal Tribunal for the Former Yugoslavia (art. 7, para. 3), the Statute of the International Criminal Tribunal for Rwanda (Art. 6, para. 3) as well as in the Rome Statute of the International criminal Court (Art. 28). The International Tribunal for the Former Yugoslavia took the stance that command responsibility was a generally accepted rule of customary law at the time when the armed conflict began in the former Yugoslavia (Appeals Decision on Interlocutory Appeal has contested the jurisdiction in Hadžihasanović and others, July 16, 2003 pp. 32-36). The European Court of Human Rights has confirmed that the crime against humanity was valid customary law at the time of the armed conflict in BiH (decision in the case *Boban Simšić v. BiH* (Application no. 51552/10), in 2012. Among the first authors in the former Yugoslavia who reminded that the command responsibility was legal institute known since the first Hague codification of the law of war in 1899 and 1907 is Dr Milivoj Despot, a judge of the Supreme military Court of Yugoslavia - see eg. his article "Awakened cynicism," Republic, no. 163, 1997, available in Montenegrin language at: http://www.yuope.com/zines/republika/arhiva/97/163/163_23.HTM. Also, see the "Command responsibility and contemporary law", Iavor Rangelov and Jovan Nicić, Humanitarian Law Center, 2004; Siniša Vazić, "Command Responsibility - Towards Clear Answers and Precise Positions", op. cit; Human Rights Watch, Justice at Risk: War Crimes Trials in Bosnia and Herzegovina, Croatia and Serbia and Montenegro, the 16, no. 7, October 2004, pp. 24.

⁶⁴ "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

⁶⁵ "No punishment without law" (Article 7 of the European Convention on Human Rights).

⁶⁶ *Human Rights Committee, Concluding observations on the initial report of Montenegro*, 21 November 2014, par. 9.

expressly affirmed that the above rule applies to the retroactive application of the criminal offence 'Crimes against humanity' listed in the Criminal Code of BiH.⁶⁷ Moreover, it has long been established in the practice of Yugoslav courts that criminal law can be applied retroactively if it specifies something that has already been recognised in international criminal law. Namely, it is on the basis of the Zagreb County Court's judgment of 1986, which was upheld by the Supreme Court of the Republic of Croatia, that Andrija Artuković, commander of the concentration camp "Jasenovac", was convicted of war crimes against prisoners of war during World War II, regardless of the fact that these crimes were not expressly prescribed by domestic criminal law. The judgment confirmed that the principle of legality will not be violated if the offence is not provided by the Criminal Code if it is designated as such in the international law (in this case, the court referred to the IV Hague Convention of 1907 and the Geneva Conventions of 1929).⁶⁸

In 2010, the Higher Court of Bijelo Polje held a trial on the same grounds based on an indictment for crimes against humanity in the Bukovica case (more information to follow). However, the Appellate Court and Supreme Court of Montenegro later found that the indictment for that crime had no legal basis, as at the time of the events in Bukovica the crime against humanity had not been prohibited "by a ratified international act binding on Montenegro". This position was without foundation in international law as well as in the then applicable Constitution of the Federal Republic of Yugoslavia (for additional information, see the analysis of the Bukovica case below).

The State Prosecutor's Office in Montenegro has not yet charged anyone with command responsibility for failure to prevent a crime and/or for the impunity of subordinates for crimes committed, nor is there any information as to whether any such investigation has been initiated.

Unlike such practice in Montenegro, the state prosecutors and courts in BiH, Kosovo and Croatia apply command responsibility to events from the armed conflicts on the territory of former SFRY during the '90s, taking into account the fact that at the time of commission of the acts it was prescribed by the ratified Additional Protocol (I) to the Geneva Convention on the Protection of Victims of International Armed Conflicts of 12 August 1949 (Arts. 86 and 87), i.e. that it constituted an integral part of customary international law that also applied to non-international conflicts, and that war crimes could also be committed by failure to act (pursuant to Article 28 of the 1993 Criminal Code of the Republic of Croatia and Article 30 of the 1992 FRY Criminal Code, which is the same).⁶⁹

In addition, the responsibility of the superior for the commission of a war crime caused by his failing to prevent a crime or ensure that his subordinates who committed it are punished was prescribed also in the Instruction on the Application of the Rules of International War Law in the

⁶⁷ Decision on the admissibility of the application in *Boban Šimšić v. BiH*, Application no. 51552/10, 2012.

⁶⁸ Zagreb County Court, Case K-91/84-61, first instance verdict from 14 May 1986 and the Supreme Court of the Republic of Croatia, Case Kz-706/1986, appeal judgment from 24 July 1986, p. 30-35 (cited from International Criminal Law Services, "Application of International Criminal Law in Domestic Legal Systems, International Criminal Law and Practice - Practical Training Materials", part of a project Justice and War Crimes funded by the European Union (<https://www.icty.org/bcs/documents/international-criminal-right-and-practice-materials-for-training>)).

⁶⁹ See, for example, the judgment of the Supreme Court of the Republic of Croatia I Kž 1008/08-13 of 18 November 2009; judgment of the District Court of Priština C. 425/2001 of 16 July 2003; Chamber judgment of the Appellate Division of the Court of BiH, Section I for War Crimes X-KRŽ-07/422 of 4 October 2010.

Armed Forces of the SFRY, adopted in 1972 and amended in 1988, prior to the dissolution of the SFRY.⁷⁰

⁷⁰ Article 21 (Responsibility for the actions of subordinates): "A military commander is personally responsible for violations of the rules of war if he knew or could have known that his subordinates or other units or individuals were preparing to commit such violations, at a time when it was still possible to prevent their execution does not take measures to prevent such violations. The military officer who is aware that violations of the rules of war law have been committed is also personally liable and does not initiate disciplinary or criminal proceedings against violator or if it is not competent to institute proceedings, offenders do not report to the competent military officer. A military commander is liable as an accomplice or instigator if, by failing to take action against subordinates who violate the rules of war law, he has contributed to the subordinate units and individuals committing such acts repeatedly." Quoted from the article "Command Responsibility - Clear Answers and Accurate Attitude", Siniša Važić, *op.cit.* Likewise, Dr. Milivoj Despot (Former Judge of the Supreme Military Court of Yugoslavia), Republic no. 163, 1997.

International organizations on the prosecution of war crimes in Montenegro

United Nations

The three committees operating under the auspices of the United Nations, the Committee Against Torture (CAT), Human Rights Committee (HRC) and Committee on Enforced Disappearance (CED) expressed concern regarding the impunity for war crimes in Montenegro and the reasons that led to it.

The CAT in 2009 observed "the climate of impunity surrounding war crimes" and recommended the State party "to expedite and complete its investigation of war crimes, and ensure that all perpetrators, in particular those bearing the greatest responsibility, are brought to justice."⁷¹ Upon considering the second report of Montenegro in 2014, the CAT expressed concern in view of the absence of final convictions in proceedings, and in relation to the cases Kaluđerski Laz, Morinj, Deportation of Muslims, and Bukovica, expressed "concern that the court failed to fully apply domestic criminal law and to comply with relevant international legal standards."⁷² It went on to recommend that Montenegro "should intensify its efforts to fight impunity for war crimes by: (a) ensuring that relevant domestic criminal law is fully applied and that decisions by the domestic courts on war crimes cases are in line with international humanitarian law, including the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia; (b) completing its investigation of all allegations of wartime crimes, and prosecuting the perpetrators and punishing them with appropriate penalties commensurate with the grave nature of the crimes..."⁷³

The HRC in 2014 expressed concern regarding the lack of prosecutions, lenient sentences in Morinj case and the final verdict for all defendants reached in the Bukovica case "in which it was found that the acts perpetrated did not constitute a criminal offence by the law at the time when it was committed, despite the exception contained in article 15, paragraph 2 of the Covenant ... The Committee recalls that ... article 15 permits the State party to employ retroactive criminal statutes to bring those responsible for such violations to trial when the acts were criminal according to the general principles of law recognized by the community of nations at the time when they were committed."⁷⁴

In October 2015, the CED expressed concern at the acquittals of most of the defendants tried for war crimes and emphasized "the absence of investigation into the matter of command responsibility, co-perpetration, aiding and abetting, which resulted in few of the high-level

⁷¹ *Consideration of Reports Submitted by State Parties under Article 19 of the Convention*, Concluding observations of the Committee against Torture - Montenegro, 19 January 2009: <https://www.refworld.org/docid/4986bc0d5.html>

⁷² *Concluding observations on the second periodic report of Montenegro*, Committee against Torture, 17 June 2014, para. 13: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/054/80/PDF/G1405480.pdf?OpenElement>

⁷³ Ibid.

⁷⁴ *Concluding observations on the initial report of Montenegro*, Human Rights Committee, 21 November 2014: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsuf%2BluEXvpntMfW3oTXRoDuioDI4HlwDVlrcrL9lUnwGgLxjrJ7TEmRrE6dr1BCbq3XfkY7jJXW3eGQpKmwLoRDOUXOTcKEM5zCG%2F9ocMeql>

perpetrators being held accountable, and the leniency of the sentences imposed on the defendants, which in some cases were shorter than the statutory minimum based on mitigating factors...”⁷⁵

The Council of Europe

Montenegro has been invited to become a member state of the Council of Europe in 2007 after accepting “to carry out effective investigations, in accordance with the case-law of the European Court of Human Rights, into unsolved cases connected with the armed conflicts in the former Yugoslavia.”⁷⁶

The Commissioners for Human Rights of the Council of Europe expressed concern about the lack of proper investigations and judgments on war crimes in Montenegro. First, in 2008, the Commissioner Hammarberg was “concerned” for delaying investigations despite numerous written evidence on crimes,⁷⁷ and then, in 2014, Commissioner Muižnieks expressed “serious concern” in particular because of the misapplication of the relevant law in the prosecution of the war crimes: “The Commissioner notes with serious concern a number of reported shortcomings in war-related criminal proceedings in Montenegro. Domestic and international experts have argued, inter alia, that in certain cases the interpretation by the domestic courts of the applicability of crimes against humanity is not in line with the international standards of humanitarian law and the case-law of the ICTY. One such case that has been cited is *Deportation* where the Appellate Court characterised the war in Bosnia and Herzegovina as a non-international armed conflict, which led that court to conclude that the civilians’ deportations and subsequent murders did not constitute breaches of international humanitarian law.”⁷⁸

The European Union

The European Commission (EC) in the last progress report about the federation of Serbia and Montenegro in 2005, estimated that “the overall political climate is such that there is no guarantee that any high-profile war crimes trials could be conducted in a fair and transparent

⁷⁵ *Concluding observations on the report submitted by Montenegro under article 29 (1) of the Convention*, Committee on Enforced Disappearances, 16 October 2015:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAgKb7yhsnrXlqCGLRRQaGZq8MfWm0jJYHQopJVvG5yvSUO2ykV/m1z2C%2FpSvw0De%2BNtFyUrK3UaNrQ%2Bk3EZ2bHEHgg45snpP6CL7xW5aoTW%2FTzvzJn6J>

⁷⁶ Council of Europe, Parliamentary Assembly, Accession of the Republic of Montenegro to the Council of Europe, Opinion 261 (2007), 17 April 2007.

⁷⁷ Council of Europe, Commissioner for Human Rights, Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg on his visit to Montenegro 2-6 June 2008, Strasbourg, 8 October 2008.

⁷⁸ Council of Europe, Commissioner for Human Rights, Report by Nils Muižnieks following his visit to Montenegro from 17 to 20 March 2014, Strasbourg 23 June 2014, point 23.

manner.”⁷⁹ In its annual reports on independent Montenegro, EC has regularly raised concerns regarding investigation and prosecution of war crimes indictees.

The EC in its report on Montenegro in 2007 expressed concern about the length of the criminal investigations and the conflicting role of the state prosecutor who had been defending the state from the victims’ civil claims in civil proceedings while leading the criminal investigation in the same case at the same time.⁸⁰

In *Montenegro 2011 Progress Report*, the EC raised concerns regarding the first judgment in the case of Deportation because the “treatment by the Montenegrin court of the case of deportation of Bosniaks in 1992 is not fully aligned with International Criminal Tribunal for the former Yugoslavia (ICTY) case law.”⁸¹

In 2012, the EC explicitly warned Montenegro to respect international law: “The processing of war crime cases needs to be stepped up and fully aligned with international human rights and humanitarian case law.”⁸²

In 2013, the EC referred to the low sentences for convicts in Morinj case, again urged for application of international humanitarian law and ICTY’s case law and noted that charges of command responsibility, co-perpetration or aiding and abetting had not been used by the state prosecution.⁸³

In 2014, the EC repeated its finding from the previous year and concluded that Montenegro “demonstrated no serious efforts to tackle impunity” and urged Montenegro to step up efforts “and effectively investigate, prosecute, try and punish war crimes in line with international standards.”⁸⁴

In 2015, the EC repeated its findings from the previous years, urged state prosecution to be more proactive and noted that the courts decisions “contained legal mistakes and shortcomings in the application of international humanitarian law.”⁸⁵

⁷⁹ *Serbia and Montenegro 2005 Progress Report*, European Commission, November 2005, p. 23

⁸⁰ *Montenegro 2007 Progress Report*, Commission of the European Communities, November 2007, p. 11.

⁸¹ *Montenegro 2011 Progress Report*, European Commission, October 2011, p. 21.

⁸² *Montenegro 2012 Progress Report*, European Commission, October 2012, p. 16.

⁸³ *Montenegro 2013 Progress Report*, European Commission, October 2013, p. 38.

⁸⁴ *Montenegro 2014 Progress Report*, European Commission, October 2014, p. 39.

⁸⁵ *Montenegro 2015 Progress Report*, European Commission, November 2015, p. 52.

Case analysis

Morinj camp

Between October 1991 and August 1992, app. 270 Croats⁸⁶, half of them civilians from the area of Dubrovnik, were held and ill-treated in the Morinj camp (called the Collection Centre Morinj in the indictment) near Kotor, established and operated by the Yugoslav National Army (YNA).

In late March 2007, the Croatian State Prosecutor's Office (DORH) forwarded to the Montenegrin Supreme State Prosecutor evidence against ten Montenegrin nationals suspected of war crimes against the civilian population and prisoners of war in Morinj in the period 3 October 1991–2 July 1992.⁸⁷

The former Superior State Prosecutor Ranka Čarapić on 7 July 2007 filed a motion with the Podgorica Higher Court for the investigation of six people on the reasonable suspicion of having committed war crimes against the civilian population and against prisoners of war in the Morinj Collection Centre.⁸⁸ Čarapić stated that year that the list of suspects was not final, that one of the other four people DORH sent evidence about had died and that the Montenegrin authorities could not assess whether reasonable suspicion existed with respect to the other three.⁸⁹ The following six former reservists of the YNA were indicted on 15 August 2008: Head of the Security Unit of the Navy Base Administrative Command and interrogator Mlađan Govedarica, interrogator Zlatko Tarle, reserve officer charged with administrative and quartermaster duties Ivo Gojnić, MP Špiro Lučić, cook Ivo Menzalin and guard Bora Gligić.⁹⁰ All of them were detained in custody, except for Menzalin, who was at large and tried *in absentio*.

The trial opened before the Higher Court in Podgorica on 12 March 2010. On 15 May 2010, the Court found all the defendants guilty and sentenced them for criminal offence war crime against prisoners of war: Govedarica to two years, Tarle to a year and a half, Gojnić to two and a half years, Lučić to three and a half years, Gligić to three years, and Ivo Menzalin to four years in prison.

The State Prosecutor and five of the six defendants filed appeals to the judgement. On 25 November 2010, the Appellate Court accepted the appeals of the defendants and returned the

⁸⁶ According to the list published in the book "*Monografija dubrovačkih logoraša*", published by Hrvatsko društvo logotrača srpskih koncentracijskih logora, Podružnica Dubrovačko-neretvanske županije, Dubrovnik 2011, p. 127-133 there were 269 prisoners in the camp, but the list does not contain a name of Zlatko Blagoje, who testified before the court. The indictment Kts. 7/08, of 15 August 2008 does not contain the total number of damaged parties – prisoners, but 161 of them were listed to be heard as witnesses. The judgments also do not contain the total number of prisoners.

⁸⁷ "Ten citizens of Montenegro under suspicion (*Pod sumnjom deset državljana Crne Gore*)", *Vijesti*, 29.3.2007.

⁸⁸ "Morinj worries the six (*Morinj mori šestorku*)", *Dan*, 08.07.2007. "Persons accused in the Morinj case", *Vijesti*, 08.07.2007.

⁸⁹ "The Morinj list is not final (*Spisak za Morinj nije konačan*)", *Dan*, 16 November 2007.

⁹⁰ "Raised charges for Morinj (*Podignuta optužnica za Morinj*)", *Pobjeda*, 16 August 2008.

procedure for retrial. The part of the judgment in which the Higher Court found Mlađan Govedarica and Zlatko Tarle responsible for ordering physical abuse of prisoners, was overturned.⁹¹ In regard to other defendants, the Appellate Court held that the first-instance court had exceeded the charges that accused the defendants for actions taken only against certain prisoners, as the indictment did not involve actions taken against those particular individuals.⁹²

The Appellate Court did not accept the prosecutor's appeal. The prosecutor appealed because the Higher Court found the defendants guilty only of war crimes against prisoners of war, and not of war crimes against the civilian population. The prosecutor considered that the judgement of the Higher Court in this part was "incomprehensible, contradictory to itself or to reasons of the judgement or that the judgment did not have any reasons or it did not state reasons concerning the decisive facts", and that the Court thus substantially violated the provisions of the Criminal Procedure Code under Art. 376, para. 1, item 11 of the Criminal Procedure Code from 2003 (*Official Gazette of Montenegro*, no. 71/03). However, the Appellate Court considered that if the Higher Court made a substantial violation of the provision of the Criminal Procedure Code, the violated provision is item 7 (rather than item 11) in Art. 376, para. 1 of CPC: namely, "the court in its judgment did not entirely resolve the charges". Since the Prosecutor's Office did not appeal on the violation of item 7, and since the violation of item 7 is not under the competence of the Appellate Court, the Court ruled that, in the part of first-instance judgment in which the Higher Court had failed to determine the possible commission of war crimes against the civilian population, the case cannot be returned for retrial.⁹³

After the retrial, the Higher Court rendered the judgment on 25 January 2012, which acquitted Govedarica and Tarle. Prison sentences were reduced for two defendants, Gojnić to two years (from two and a half), and Lučić to three (from three and a half). Gligić and Menzalin were sentenced to the same prison sentence as after the first trial.

The State Prosecutor and the three defendants (Gojnić, Gligić and Menzalin) appealed the judgement. The Appellate Court rejected the appeal of the State Prosecutor as unfounded in the judgment from 6 July 2012, thus making the acquitting judgement for Govedarica and Tarle enforceable. At the same time, the Appellate Court accepted the appeal of the defendants and overturned the judgement of the Higher Court in the sentencing part, as well as in the official duty in relation to defendant Lučić, who did not appeal. The case, in relation to Gojnić, Lučić, Gligić and Menzalin, was returned to the first-instance court for retrial.⁹⁴

In the repeated proceeding, the Higher Court in Podgorica on 31 July 2013 issued a judgement that found the defendants guilty and sentenced them for criminal offense of war crimes against prisoners of war, namely: Gojnić Ivo to imprisonment for a term of two years, Gligić Boro to three years, Lučić Špiro to three years and Menzalin Ivo to imprisonment for a term of four years.⁹⁵

⁹¹ Judgment of the Appellate Court of Montenegro in the case KSŽ 20/10, 25 November 2011, p. 8-16.

⁹² Ibid, p. 18.

⁹³ Ibid, p. 6-7.

⁹⁴ Judgment of the Appellate Court of Montenegro in the case KSŽ 24/2012, 6 July 2012.

⁹⁵ Judgment of the Higher Court in Podgorica in the case K-S 19/12, 13 July 2013.

The Supreme State Prosecutor and all the defendants appealed against the above mentioned judgement. The Appellate Court on 27 February 2014 dismissed the appeals as unfounded and upheld the Higher Court's judgment.⁹⁶

Analysis

The prosecution failed to treat the crimes in the camp Morinj as an organized system of ill-treatment of prisoners and to charge persons who were superior to direct perpetrators of the abuse, although the case file shows that a basis for such charges existed.

Numerous testimonies given during the trial indicate that the Morinj camp represented a place of *systematic* torture, inhumane treatment, and infliction of great suffering or serious physical injuries to prisoners, by guards, military police officers, and, to a lesser extent, by investigators from the military security service. The Higher Court in its judgment concluded that "in the Collection Centre Morinj reigned an atmosphere of terror and fear for life that the victims were constantly exposed to".⁹⁷ It is reasonable to conclude that persons who had the authority and influence in the camp, or were on higher positions that included authority and responsibility in relation to the functioning of the camp, knew, or should have known about the situation in the camp. Despite this, these persons allowed the perpetration of the system of ill-treatment, by contributing to its daily functioning and/or by failing to prevent the commission of crimes or punish the direct perpetrators. Considering such acts and omissions, applicable legal provisions on modes of responsibility such as aiding and abetting aiding and abetting, co-perpetration, responsibility of organizers of a criminal association, or command responsibility, could be applied to persons with the authority and influence in the camp. However, no one was charged or convicted on the basis on any of the above mentioned modes of responsibility.

The circle of people with authority and influence in relation to direct perpetrators of crimes in camp Morinj potentially includes: commanders of the guards and military police in the camp; the first defendant Mlađan Govedarica; Director of special counter-intelligence group for interrogations in Morinj, Military Security Officer Mirsad Krluč; Camp Commander Ljubomir Knežević; heads of the Security of the Federal Secretariat for National Defence - YNA who were in position at the time of the operation of the camp: generals Marko Negovanović, Aleksandar Vasiljević and Nedeljko Bošković; Commander of the 2nd Operational Group Colonel General Pavle Strugar; commanders of the 9th Military Naval Sector (9th MNS) Navy Lieutenant Krsto Đurović (died on 5 October 1991) and his successor, Vice Admiral Miodrag Jokić; Chief of Staff of 9. MNS Navy Colonel Milan Zec and YNA Navy Commander, Admiral Mile Kandić.⁹⁸

Of all these persons, the Prosecutor's Office only filed charges against Mlađan Govedarica, for whom there were indications that he had *de facto* authority and influence in the camp, but he was only charged for the direct commission and ordering of few crimes, and not for the operation of the system of ill-treatment. The Prosecutor's Office did not file charges against other individuals who held top positions in in the hierarchy Prosecutor's Office.

⁹⁶ Judgment of the Appellate Court of Montenegro in case [Kž-S. 44/13](#), 27 February 2014.

⁹⁷ Judgment of the Higher Court in Podgorica in case Ks. 33/10, 25 January 2012, p. 174.

⁹⁸ See "Who established Morinj? (*Ko je osnovao Morinj?*)", *Monitor*, 20 March 2009, "Justice is distant (*Daleko je pravda*)", *Monitor*, 28 May 2010.

In this manner, **the judicial system of Montenegro approached the prosecution of crimes committed in camp Morinj very differently from the ICTY and the specialized War Crimes Chamber of the Court of Bosnia and Herzegovina in similar cases.** Those courts have held trials for a great number of persons who were not direct perpetrators, but who were nonetheless accused and/or convicted as participants or assistants of the so-called joint criminal enterprise.⁹⁹

The Criminal Code of the Federal Republic of Yugoslavia from 1993, applied in the proceedings, included modes of responsibility that were suitable for covering the acts or omissions of persons from the top of the hierarchical structure in the camp: the responsibility of the organizer of a criminal association, co-perpetration, and aiding and abetting.

The first of these institutes is *criminal responsibility and punishment of the organizers of criminal associations* (under Art. 26 of the Law). Three requirements for the existence of responsibility on this basis are: (1) the person established a new or used an existing organization, group, or other association with the aim of committing criminal offences, (2) there is a criminal plan, and (3) at least one criminal offence was committed by members of the organization or association. Criminal responsibility of the organizer of a criminal association is in its content very similar to the responsibility on the basis of the so-called participation in a joint criminal enterprise, institute applied in numerous cases before the ICTY, relating to the crimes committed in camps. Considering the widespread nature of, and impunity for, crimes committed in the camp, it may be reasonably assumed that persons who were on the top of the hierarchical structure, i.e. with authority and influence in the camp Morinj, used the structure of guards, military police and interrogators to commit criminal offences against prisoners.

For the existence of *co-perpetration* (Article 22 of the applied CC of FRY) there must be a prohibited aim that a number of persons wish to achieve by expressed or implied consent, the participation of the accused person in the attainment of the common aim, and decisive contribution of the person to the achievement of the joint aim (it is required that the accused has control over the act). These requirements can be met in relation to the activities of persons with authority and influence on the functioning of an organized system of ill-treatment at the camp.

It should be noted that the ICTY judges who considered that the institute of joint criminal enterprise is not applicable (because, according to them, it did not constitute a part of the customary international law at the time of the commission of crimes in the former Yugoslavia), still believed that the institute of co-perpetration could be applied to the acts of the defendants, since it “approaches th[e definition] of the aforementioned joint criminal enterprise and even overlaps in part”.¹⁰⁰ By applying the concept of co-perpetration, these judges found the political leader of Bosnian Serbs in Prijedor, Milomir Stakić, guilty and sentenced him to life imprisonment, with explanation that Stakić had decisive authority to influence the events in the municipality, and that the political authorities, led by Stakić, could have prevented crimes against non-Serbs if they had withheld their involvement in the criminal conduct.¹⁰¹ The Appeals Chamber of the ICTY later sentenced Stakić on the basis of participation in a joint criminal enterprise, rather than on the basis of co-perpetration, with explanation that joint criminal

⁹⁹ For example, see the judgement of the ICTY Appeals Chamber in the case *Prosecutor vs. Milorad Krnojelac*, IT-97-25-A, 17 September 2003, and the judgement of the Appellate Division of the War Crimes Chamber in Bosnia and Herzegovina in the case *Rašević and Todović*, X-KRŽ -06/275, 6 November 2008.

¹⁰⁰ Judgment of the Trial Chamber of ICTY in case *Prosecutor vs Milomir Stakić*, IT-97-24-T, 31 July 2003, para 441.

¹⁰¹ *Ibid*, para. 490.

enterprise (not co-perpetration, which is similar to it) is a part of international customary law applied by the ICTY. However, the general stance of the ICTY on what law that court may apply does not affect the fact that where national law undoubtedly recognizes the concept of co-perpetration, this concept allows the punishment of persons who are not direct perpetrators, but share the common criminal aim with direct perpetrators and give substantial contribution to its realization. It would be a matter of evidence whether the persons with authority and influence vis-a-vis the direct perpetrators in camp Morinj shared with the latter the goal to abuse the prisoners, and to what extent did the persons with authority and influence give contribution to the achievement of that unlawful aim.

When it comes to *aiding and abetting* (under Art. 24 of the applied CC of FRY), aider and abettor - as opposed to a co-perpetrator – does not have to share *mens rea* with the main perpetrator. Additional feature that differentiates aiding and abetting from co-perpetration is that the contribution of aider and abettor is lesser than that of the main perpetrator. It is possible that the application of the institute of aiding and abetting would have lead to a conviction in relation to some persons with authority and influence in relation to the functioning of an organized system of ill-treatment in camp Morinj.

Bearing in mind that, in criminal proceedings for war crimes, the Prosecutor's Office and the courts in Montenegro have at their disposal the institutes of co-perpetration, aiding and abetting and responsibility of the organizer of a criminal association, it is not necessary to apply the institute of command responsibility in order to indict and obtain conviction of those at the top of the hierarchical structure in the camp. However, this concept is available to the Prosecutor's Office and the court, as part of international customary and treaty law (Protocol I, from 1977, with the Geneva Convention), which obliged FR Yugoslavia at the time when the crime was committed in the camp Morinj.

In relation to defendants Mladan Govedarica and Zlatko Tarle, the Prosecution Office, the Higher Court and the Appellate Court unduly limited the possible form of their criminal responsibility only to direct commission and ordering. In its decision from 25 November 2010, the Appellate Court found that there was no evidence for the allegations in the indictment that the Govedarica and Tarle ordered the beating of prisoners, and thus the Higher Court released the two from all charges in retrial. However, the Appellate Court and the Higher Court did not consider whether the actions of Govedarica and Tarle, in relation to particular cases of beating of prisoners, constituted co-perpetration or aiding and abetting. Although the prosecutor did not qualify the actions of defendants as such, the Court is not bound by the prosecutor's proposal in regard to modes of responsibility, so there were no obstacles in examining potential responsibility of Govedarica and Tarle on this basis.

It should be borne in mind that in the judgment of the Appellate Chamber of the Court of Bosnia and Herzegovina in case of *Sreten Lazarević and others* from 22 September 2010, the factual basis was very similar to that from the relevant part of the indictment against Govedarica and Tarle, inasmuch that other persons beat the prisoners in presence of the defendant (former Deputy Commander of the Zvornik camp). By failing to do anything to prevent or stop the beating of Bosnian prisoners, Lazarević made a significant contribution to the commission of the crime, because as a person of authority he failed to protect the prisoners from illegal treatment,

which was his obligation. The Appellate Court thus convicted Lazarević as a co-perpetrator.¹⁰² The Chamber also declared Lazarević a co-perpetrator because he handed over a prisoner to third persons knowing that they will treat him inhumanely.¹⁰³ The described forms of acts and omissions are essentially identical to those of Govedarica and Tarle.

If in specific instances of beatings, that the Higher Court or the Appellate Court did not dispute occurred, in the course of or during a break of interrogation by Govedarica or Tarle, the Court could not have reached the conclusion that Govedarica and Tarle were co-perpetrators - because, for example, there is no evidence that they shared *mens rea* with the guards and military police in relation to the beating - the court would still have the possibility to find them guilty as aiders and abettors on the basis that they encouraged and gave moral support to direct perpetrators. Govedarica and Tarle did this – as persons with formal and/or factual authority – by allowing the guards or military police officers to beat prisoners, instead of preventing them from doing so.

The Higher Court, due to the misapplication of the principle of aggravating and mitigating circumstances, contrary to the practice of the ICTY, rendered inappropriately light sentences to the four defendants (Ivo Gojnić, Boro Gligić, Špiro Lučić, and Ivo Menzalin), bellow the minimum sentence prescribed by law.¹⁰⁴ The Court gave undue importance to mitigating circumstances and made an unfounded conclusion that there were no aggravating circumstances in cases of these defendants. Among the mitigating circumstances that the Higher Court has recognized, the most dominant are those that have little importance in the practice of the ICTY: absence of prior convictions, the fact that the defendants are married and have children, and poor health. The Higher Court even rated these circumstances as “especially mitigating”.¹⁰⁵ On the other hand, the mitigating circumstances did not include those of high importance in the practice of ICTY and the Court of Bosnia and Herzegovina: the admission of guilt, genuine remorse and efforts of the defendants to limit the suffering of prisoners.¹⁰⁶

The Higher Court did not find any aggravating circumstances on the part of the defendants, despite the fact that the commission of the crimes was accompanied by a series of such circumstances: vulnerability (helplessness) of the victim, because the prisoners in Morinj camp were deprived of any real opportunity to confront the abuse; a large number of victims; persistence in the commission of offences (expressed in great number of offences, i.e. commission of crimes over a long period of time); and the continuous suffering of survivors

¹⁰² Judgment of the Appellate war crimes chamber of the Court of Bosnia and Herzegovina in the case of *Sreten Lazarević and others*, X-KRŽ-06/243, 22 September 2010, paragraphs 131-32, 172-176, and 192.

¹⁰³ Ibid, para. 146 and para. 151.

¹⁰⁴ The 1993 CC of FRY (Art. 144) applied in this case prescribed 5 years in prison as a minimum sentence for the War crime against prisoners of war, and the convicted men were sentenced from 2 to 4 years in prison.

¹⁰⁵ Judgement of the Higher Court in Podgorica in the case Ks. 33/10, 25 January 2012, p. 267.

¹⁰⁶ Another judgement of the ICTY Trial Chamber in the case of *Dražen Erdemović* (IT-96-22-Tbis), 5 March 1998 para. 16 (ii); sentencing judgement of the ICTY Trial Chamber in the case of *Stevan Todorović* (IT-95-9/1-S), 31 July 2001 para. 80 and para. 81; sentencing judgement of the ICTY Trial Chamber in the case of *Duško Sikirica and others* (IT-95-8-S), 13 November 2001 para. 149; sentencing judgement of the ICTY Trial Chamber in the case of *Predrag Banović* (IT-02-65/1-S), 28 October 2003 para. 67; sentencing judgement of the ICTY Trial Chamber in the case of *Dragan Obrenović* (IT-02-60/2-S), 10 December 2003 para. 111 and para. 117; sentencing judgement of the ICTY Trial Chamber in the case of *Dragan Nikolić*, 18 December 2003 para. 233; sentencing judgement of the ICTY Trial Chamber in the case of *Momir Nikolić* (IT-02-60/1-S), 2 December 2003, para. 71, 72 and 150; sentencing judgement of the ICTY Trial Chamber in the case of *Miroslav Deronjić* (IT-02-61-S), 30 March 2004, para. 236 and para. 241; judgement of the Appellate Chamber of the Court of BiH in the case of *Mitar Rašević and Savo Todović*, 6 November 2008, p. 34; first-instance judgement in the case of *Željko Mejakić and others*, 30 May 2008, p. 214-215.

because of traumas.¹⁰⁷ In addition, Gligić and Gojnić, as commanders of guard shifts, abused their superior positions, which also constitutes an aggravating circumstance for the ICTY and the Court of BiH. Cruelty in the commission of the offense, another aggravating circumstance in the practice of the ICTY, was undoubtedly applicable to three of the four defendants in the *Morinj* case: Gligić, Lučić and Menzalin.

¹⁰⁷ A number of testimonies and documents presented before the Court shows that a large number of prisoners suffered physical injuries and other consequences of abuse at the camp, including: fracture of ribs of at least twelve prisoners; clavicle fracture; damage to the spinal cord; broken teeth; jaw injury; finger fracture; brain injury; paralysis of a body part; skin bruising and bleeding during urination. A significant number of witnesses-prisoners for years after the end of armed conflict in Croatia (1991-1995) suffered or continues to suffer from psychological problems, and it is reasonable to assume that the trauma is, in whole or in part, the result of the experience in Morinj camp.

Bukovica case

Bukovica is a mountainous area in northern Montenegro, in the Pljevlja municipality, bordering with Bosnia-Herzegovina and comprising 37 villages, which had been populated predominantly by Muslims until 1993. During the war in BiH, a large number of Yugoslav Army reservists, paramilitaries and Montenegrin policemen were deployed in the Bukovica area. They tortured, searched, plundered, abused and ill-treated the Bukovica Bosnians under the pretext of looking for illegal weapons. According to the data of the Association of Exiled Bukovica Residents, six people were killed, two committed suicide after they were tortured, 11 were abducted and 70 or so people were subjected to physical torture in this area in the 1992–1995 period. At least eight homes and a mosque in the village of Planjsko were set on fire, while 90 families, around 270 people altogether, were driven out of their homes. Most of the homes were plundered. Only one murder committed in this period has been prosecuted by the judicial authorities, while the others, which the Association claims had happened as well, were not even mentioned in the indictment that initiated the trial before the Higher Court in Bijelo Polje.¹⁰⁸

In the period from June 1992 to February 1994, if not longer, Yugoslav Army forces shipped ammunition and fuel to the Army of Republika Srpska across the border crossing at Pljevlja, with the knowledge and/or consent of the Federal Republic of Yugoslavia (FRY) Supreme Defence Council, the supreme command comprising the Presidents of the FRY, Serbia and Montenegro.¹⁰⁹

Testimonials about the persecution of the Muslim population from the Bukovica area were collected and published by the Sandžak Committee for the Protection of Human Rights and Freedoms from Novi Pazar¹¹⁰, Jakub Durgut in Montenegro¹¹¹ and the Belgrade-based Humanitarian Law Centre.¹¹² A documentary "The Gap", by Sead Sadiković, was produced by the *Nansen Dialogue Centre* in Montenegro in 2007.

It was only on 11 December 2007 that the Superior State Prosecutor filed a motion for the investigation of crimes committed in Bukovica to the Bijelo Polje Higher Court, acting upon the criminal charges filed by the NGO Sandžak Committee for Human Rights in Novi Pazar.¹¹³ The investigation was declared an official secret as soon as it opened¹¹⁴

It focused on seven former police and Yugoslav army reservists, suspected of crimes against humanity. The defendants were accused for criminal offence Crime against humanity (Art. 427 CC in relation to Art. 7, para. 2 of the European Convention on Human Rights).

¹⁰⁸ "Golubović: Trials is a kind of Trade Off (*Golubović: postupak je vrsta trgovine*)", *Vijesti*, 26 April 2010. "Mocking the Public (*Ruganje javnosti*)", *Monitor*, 30 April 2010.

¹⁰⁹ See the transcripts of the Supreme Defence Council 5th session on 7 August 1992 and 18th session on 7 February 1994 (available at: http://www.sense-agency.com/naslovna/tribunal_%28mksj%29.58.html).

¹¹⁰ "Testimonies from Sandžak", Sandžak Committee for the Protection of Human Rights, 2002: http://www.hlc-rcd.org/wp-content/uploads/2014/09/Svedocenja_iz_Sandzaka.pdf.

¹¹¹ "Bukovica 1992-1995: ethnic cleansing, crimes and violence (*Bukovica 1992-1995: etničko čišćenje, zločini i nasilja*)", Almanah, Podgorica, 2003.

¹¹² "Bukovica", edited by Biljana Mitrović and Đurđa Stanimirović, Humanitarian Law Centre, Belgrade, 2003.

¹¹³ *Peer-based Assessment Mission to Montenegro, on the Domestic handling of war crimes (by Maurizio Salustro)*, October 2014, pp. 6, items 14.

¹¹⁴ Nansen Dialogue Centre, Watchdog Report IV, 25 November 2008.

Over 40 witnesses and injured parties testified during the investigation.¹¹⁵ The prosecutor did not seek the detention of the suspects during the investigation. Although the law states that witnesses must be served with a subpoena at least eight days in advance, the witnesses, most of whom live in BiH, were summoned to testify one day before the hearing. Some were even brought in although the authorities may bring in a person who failed to appear before the court as summoned only if there is confirmation that the witness had been duly served with the subpoena.¹¹⁶ The investigation was slowed down because of the difficulties in obtaining the testimonies of persons living in BiH. Their questioning began only in 2009.¹¹⁷

The investigation was finally completed after more than two years, on 26 March 2010. An indictment was filed on 21 April 2010 charging brothers Radmilo and Radiša Đuković, Slobodan Cvetković, Milorad Brković and Đorđije Gogić, Yugoslav Army reservists, and Slaviša Svrkota and Radoman Šubarić, Montenegrin police reservists, of war crimes against humanity.¹¹⁸ The representatives of the Bosnian Party, the NGO sector and victims association assessed that the indictment includes persons who are not perpetrators, and that it did not include all perpetrators, as well as the persons who had ordered the crime.¹¹⁹ The Bijelo Polje Higher Court ordered the detention of the defendants on 22 April 2010.¹²⁰ Their trial opened on 28 June 2010, two and a half years after the initiation of investigation.

As the Special Prosecutor for Organised Crime, Corruption and War Crimes Đurđina Ivanović explained in the indictment that the defendants, were suspected of “having committed systematic ill-treatment of the Muslim population in Bukovica, thus forcing them to leave their homes”.¹²¹ The defendants are charged with ill-treating the Muslim population, subjecting them to grave suffering, jeopardising their health and physical integrity, applying measures of intimidation and creating a psychosis to force them to move out from the villages gravitating towards Bukovica, which resulted in the migration of the Muslim population.¹²²

Osman Tahirbegović testified on 26 October 2010 in the capacity of an injured party. He accused Milovan Soković and Bane Borović, who were not even indicted, as the main perpetrators of the crime.¹²³

The testimony of the head of the Montenegrin Police Directorate Veselin Veljović, who had been the chief of the Pljevlja militia station at the time covered by the indictment and, according to some witnesses, led the search of the homes in Bukovica, attracted particular interest.¹²⁴ One of

¹¹⁵ Information of Humanitarian Law Centre from Belgrade, 23 March 2008.

¹¹⁶ Ibid.

¹¹⁷ *Nansen Dialogue Centre*, Watchdog Report IV, 25 November 2008.

¹¹⁸ “They Intimidated Muslims to Drive Them out of Bukovica (*Zastrašivali Muslimane da bi selili iz Bukovice*)”, *Vijesti*, 22 April 2010.

¹¹⁹ “Bukovica Indictees Detained (*Optuženi za Bukovicu u pritvoru*)”, *Vijesti*, 23 April 2010: “Indictments for crimes against Bosnians near Pljevlja (*Podignute optužnice za zločin nad Bošnjacima kod Pljevalja*)”, *Radio Free Europe* 22 April 2010, “Within three years of opening the investigation procedure was indicted for crimes in Bukovica (*Tri godine od otvaranja istražnog postupka podignuta optužnica za zločin u Bukovici*)”, *Forum of Bosnians/Muslims of Montenegro*, May 9, 2010: (<http://www.forumbosnjaka.com/web/index.php/43-tri-godine-od-otvaranja-istranog-postupka-podignuta-optužnica-za-zločin-u-bukovici>).

¹²⁰ Ibid.

¹²¹ “Only the Accused Are Suspected (*Sumnjivi samo optuženi*)”, *Vijesti*, 17 April 2010.

¹²² “All of Them Denied Guilt (*Svi negirali krivicu*)”, *Dan*, 20 September 2010.

¹²³ “Svrkota Did No Evil (*Svrkota nije činio zlo*)”, *Dan*, 27 October 2010, “Citizens Harassed by Reservists (*Građane maltretirali rezervisti*)”, *Vijesti*, 27 October 2010.

¹²⁴ Veselin Veljović has been running the Police Directorate since 2005 to 2011. He began his career as a YNA officer, after graduating from the Military Academy of the Armed Forces in Belgrade, and joined the Montenegrin

those who testified of his involvement was Jakub Durgut, who in his book entitled *Bukovica* quoted a witness who said that Veljović had threatened to tear his ears out.¹²⁵ Defendant reserve policeman Slaviša Svrkota said in court that “nearly 100 of his colleagues, headed by Veselin Veljović and Vuk Bošković” took part in the search of three homes in the Bukovica area.¹²⁶

Veljović testified at the main hearing on 7 December 2010 and said that no war crimes had been committed in the Bukovica region during the war and that everything was done by the book. He said he knew policemen Svrkota and Šubarić and that he never heard any complaints about their work at the time of the events.¹²⁷

The main hearing ended with the closing arguments on 25 December 2010. The Bijelo Polje Higher Court acquitted the defendants due to lack of evidence and released them from detention on 31 December 2010. The Court stated that no evidence was presented to corroborate the allegation from the indictment that the defendants committed crimes against humanity. In the reasoning explanation of the verdict, the judge wrote that the injured parties’ testimonies had not corroborated the charges and that the testimonies of others in court differed from the statements they made during investigation.

The first instance verdict was revoked in June 2011 for procedural reasons, because the Chamber was improperly composed of two judges per call and three lay judges instead of three judges per call, so the case was returned for a re-trial.¹²⁸ After the re-trial, the Higher Court in Bijelo Polje on 3 October 2011 rendered a judgement acquitting defendants of crimes against humanity, as it had not been proven they committed the criminal offense for which they had been accused.¹²⁹

The judgment concluded that of the ten victims who were heard as witnesses, four did not confirmed that they had been abused by the defendants, while statements of others had not been supported by other witnesses or material evidence. Some of the injured parties also changed the statements previously given to the prosecutor or the investigating judge or during the main trial. Contrary to the indictment, first instance court determined that Muslims from the Bukovica area had not moved out because of ill-treatment of the defendants, but voluntarily, and that Serbs and Montenegrins had also moved out of this area.¹³⁰ Everything that the military did in the Bukovica area was, according to the Higher Court, in accordance with the Rules and

police in October 1992, when he was appointed chief of the militia station in Pljevlja. From December 1995 to October 2005, he commanded the Special Anti-Terrorist Unit of the Montenegrin MIA. After 2011, Veljović was advisor to the President of Montenegro for national security and defense. In November 2014, Prime Minister Milo Djukanović appointed him as Secretary of the National Security Council (<http://www.rtcg.me/vijesti/drustvo/74178/veljovic-sekretar-vijeca-za-nacionalnu-bezbjednost.html>).

¹²⁵ “Durgut: I Kept a Gun out of Fear (*Durgut: držao sam oružje iz straha*)”, *Vijesti*, 22 September 2010. “Victims not Blaming Defendants (*Žrtve ne krive optužene*)”, *Dan*, 22 September 2010.

¹²⁶ “Denied Crime Had Been Committed in Bukovica”, *Dan*, 29 June 2010. Vuk Bošković was Assistant Minister of Internal Affairs charged with the police in the late 1990s and the Montenegrin President’s national security adviser in the 2002–2011 period. He was relieved of duty in early 2011 “to assume another office” (“Vuk Bošković Dismissed”, *Dan*, 11 January 2011).

¹²⁷ “Veljović: No Crime Was Committed in Bukovica (*Negirali da se u Bukovici desio zločin*)”, *Dan*, 8 December 2010; “Montenegrin Police Director Veselin Veljović Heard in Bijelo Polje Higher Court”, *Vijesti*, 7 December 2010.

¹²⁸ The judgment of the Appellate Court of Montenegro Kž-S 13/2011 from 21 June 2011, available at www.sudovi.me (Chamber of the judge Milić Međedović, Seka Piletić and Miliwoje Katnić).

¹²⁹ The judgment of the Higher Court in Bijelo Polje, K-S 6/2011, from the 27 September / 3 October 2011, available at: www.sudovi.me (Chamber of the judge Radmila Mijušković, Milić Međedović, Svetlana Vujanović).

¹³⁰ Judgment of the Higher Court in Bijelo Polje, 27 September / 3 October 2011, p. 50.

Regulations of the Army of Yugoslavia and Rules and Regulations of the Border Units.¹³¹ Defendants who belonged to the police during the period specified in the indictment, also acted in accordance with the rules of duty.¹³² The search of houses was justified because there were reports that a few houses of injured parties had hidden weapons, which was confirmed by the discovery of weapons.¹³³ The Higher Court also concluded that there was no evidence of a widespread or systematic attack against the civilian population, which is a prerequisite for the existence of crimes against humanity.¹³⁴

The Appellate Court on 22 March 2012 rendered a judgment dismissing the allegations from the appeal of the Prosecutor's Office and confirmed the first-instance judgement.¹³⁵ The Appellate Court did not address the factual and legal issues that take central place in the indictment and the judgment of the Higher Court in Bijelo Polje, because, according to the Appellate Court, the offence that the defendants are charged with does not constitute a criminal offense, i.e. does not have all the essential elements of the crime against humanity in Art. 427 of the Criminal Code or other criminal offense prosecuted *ex officio*.¹³⁶

According to the Appellate Court, a crime against humanity under Art. 427 of CC of Montenegro "as most of the criminal offences against humanity and other values protected by international law... has a blanket provision, which means that the legal description of these offences refers to another regulation which completes the content of the criminal offense".¹³⁷ When Art. 427 CC refers to the rules of international law that criminalize crimes against humanity, "what is meant under such rules are the rules laid down by international acts that have been ratified at the time specified in the indictment as the time of commission. It is an axiom that cannot be questioned".¹³⁸ According to the Appellate Court, criminal offence from the indictment in the Bukovica case misses "an essential element - an international regulation contrary to which the defendants undertook activities for which they are charged".¹³⁹ The court found that the Rome Statute of the International Criminal Court, which the prosecutor referred to in the indictment, is not such a regulation because the offences from the indictment were committed in 1992 and 1993, before the Rome Statute entered into force (2002).¹⁴⁰

The Supreme State Prosecutor's Office filed a motion for protection of legality against the final judgment of the Appellate Court. The Supreme Court on 21 January 2013 rejected this motion as unfounded.

¹³¹ Ibid, p. 55.

¹³² Ibid, p. 57.

¹³³ Ibid, p. 58.

¹³⁴ Ibid, p. 54 and p. 57.

¹³⁵ Judgment of the Appellate Court of Montenegro, KŽ-S 1/2012 from 22 March 2012, available at www.sudovi.me.

¹³⁶ Judgement of the Appellate Court, *ibid*, p. 7-8.

¹³⁷ Ibid, p. 7.

¹³⁸ Ibid.

¹³⁹ Ibid, p. 8.

¹⁴⁰ Ibid.

Analysis

The position of the Appellate Court and the Supreme Court that a person accused of this criminal act cannot be held liable because the crime against humanity was not envisaged as a criminal offence in a ratified and therefore binding international regulation on the territory of Montenegro at the time covered by the Indictment, was unfounded. The Appellate Court and the Supreme Court wrongly concluded that when the legal description of a crime against humanity from Art. 427 of Montenegrin Criminal Code refers to the rules of international law, these rules must take the form of "international *regulation*", i.e. "International *act*" ratified at the time of the offence. In fact, the binding rules of international law may exist in the form of customary international law, as was recognized in the Constitution of the Federal Republic of Yugoslavia, and this customary law does not need to be codified in an international regulation/act.

The Constitution of the Federal Republic of Yugoslavia, in force at the time of the crime in Bukovica, prescribed that "international treaties that have been ratified and published in accordance with the Constitution and the *generally recognized rules of international law* are an integral part of the internal legal order".¹⁴¹ Therefore, the constitutional provision obviously differentiated between international agreements, on one side, and customary international law ("generally recognized rules of international law") on the other. Some customary rules of international law are not codified in treaties, but only manifested through official announcements by the state, decisions of international and national courts, military manuals, national legislation, and official statements of ICRC or resolutions in international organizations adopted with major support.¹⁴² If a custom rule is expressed in a convention, it obliges - as a rule of customary international law - even those countries that have not acceded to the convention and have not ratified it.

Therefore, a part of international law - customary law - obliges states regardless of whether it is codified in ratified international treaties, contrary to what the Appellate Court concluded. Crimes against humanity, as also stated by the Appellate Court, constituted a criminal offence under *customary* international law at the time of the events in Bukovica.¹⁴³ Rules of customary international law also included the elements of crimes against humanity, and the International Criminal Tribunal for the former Yugoslavia, relying itself on the customary law, articulated those elements in a series of judgments.¹⁴⁴ Thus, **the rules of international law to which the Constitution of Yugoslavia referred to, included the customary rules on prohibition and elements of the crime against humanity.**

Therefore, the Court of Appeal's reductionist claim that Art. 427 CC under the rules of international law "implies rules established by international laws that have been ratified at the time that the indictment defines as execution time" is unfounded. By such a claim, the Court in

¹⁴¹ Constitution of FR Yugoslavia (1992), Art. 16, para. 2.

¹⁴² Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I, Rules* (in Serbian) (Cambridge University Press, 2005), Introduction, p. xxx-xxxiii.

¹⁴³ Judgement of the Appellate Court of Montenegro, 22 March 2012, p. 5-6.

¹⁴⁴ Particularly important, in this regard, is the judgement of the ICTY Appeals Chamber in case of *Tadić*, 15 July 1999, para. 238-272 and judgment of the ICTY Appeals Chamber in case of *Kunarac and others*, 12 June 2002, para. 71-105. Also see materials for practical training - Crimes against humanity - part of the "War Crimes Justice" project, funded by the European Union, page 47.

fact reduced the provision of the FRY Constitution on international law as being an integral part of the internal legal order to only part of that provision referring to international treaties. This is contrary to what the said constitutional provision explicitly stated: that generally recognized rules of international law (customary law) also form part of the internal legal order. Such rules include those that were not materialized in an international instrument ratified in the FRY at the time covered by the indictment in this case.

By a way of comparison, the War Crimes Chamber of the Court of BiH, acting within the legal framework and relevant legal tradition identical to that of Montenegro, rendered a number of convicting judgements against perpetrators of crimes against humanity. The position of the Court of BiH is that at the time of the commission the crimes against humanity were an integral part of customary international law, and that if a conduct constituted a criminal offence at the time of its commission under customary international law, the principle of legality (*nullum crimen, nulla poena sine lege*) does not prejudice the trial or the punishment of the responsible person.¹⁴⁵

Even if, hypothetically speaking, the Appellate Court rightfully found that the offence for which the accused were charged "did not have all the essential elements of the criminal offence of Crimes against Humanity under Art. 427 of the Criminal Code", the Appellate Court still falsely stated below in quoted sentences from the judgment of 22 March 2012, that the offence with which the accused had been charged did not have all the essential elements of "other criminal acts prosecuted ex officio".¹⁴⁶ The Appellate Court did not explain why the offence for which the accused have been charged with did not constitute a war crime against the civilian population, which had undoubtedly been prescribed by the Criminal Code at the time of commission. The Appellate Court should have ventured into examining whether the defendants, based on the evidence, should be convicted for that crime. The identity between the charges and the judgement would have been preserved because the judgement would have still referred to the defendants, the same offence would have constituted the subject of the indictment as well as the judgment, and the protected value (humanity and international law) would have been identical in both the indictment and the judgment. Therefore, the Appellate Court should have examined whether the first-instance court was right when it determined that the actions of defendants did not contain criminal elements, i.e. that the Muslims voluntarily moved out of the Bukovica area, and that the defendants acted by the rules of the Army of Yugoslavia, rules of border units, and rules of the police.

The Supreme Court, in its decision rejecting the request for protection of legality of the Prosecution Office¹⁴⁷, joined the Appellate Court in what in our assessment is a wrong stance that the provision of Article 427 of the Criminal Code "can only be complemented with rules of international law, set forth in international acts which have been ratified at the time determined in the indictment as the time of the commission of the criminal offense referred to". In doing so, the Supreme Court did not spend a word examining the option that the provision of Article 427 of the CC may be complemented with norms of customary law that had not been codified in any "international act".

¹⁴⁵ For example, see the judgement of the Appellate War Crimes Chamber of the Court of BiH in case of *Bundalo and others*, X-KRŽ-07/419, 28 January 2011, p. 214-230. The Court referred to Art. 7, para. 2, of the European Convention of Human Rights and Art. 15, p. 1, of the International Covenant on Civil and Political Rights.

¹⁴⁶ The judgment of the Appellate Court of Montenegro, 22 March 2012, pp. 8.

¹⁴⁷ The judgment of the Supreme Court of Montenegro Kzz. 11/2012, Chamber composed of the Court President Vesna Medenica, as the Presiding Judge, Radule Kojovic and Stanka Vučinić, as the Chamber members.

The Supreme Court in its judgment used another incorrect argument on the basis of which it rejected the request for protection of legality. According to the Supreme Court, when, as in this case, the defendants are indicted for a crime prescribed in the Criminal Code with a “blanket” provision, the norm to which the provision of the Criminal Code refers to (in this case, the rule of international law) must be correctly specified in the indictment. A court, in the opinion of the Supreme Court, “may not change or amend” the norm referred to in the indictment. In this case, the Prosecutor’s Office in the indictment wrongly referred to a norm from the (non-applicable) Rome Statute, and until the end of the main trial failed to modify the indictment; therefore, the courts that ruled in the case (Higher Court in Bijelo Polje, and then the Appellate Court of Montenegro), according to the Supreme Court, could not have corrected the Prosecutor’s Office by stating in the judgment what rule of international law had (possibly) been violated by the actions of the defendants.

The Supreme Court here referred to Article 369, paragraph 1 of the Criminal Procedure Code of Montenegro. This article of the Law is titled “Identity of the Judgment and Charges” and in the relevant part of paragraph 1 it prescribes that “the judgment may refer only to... an act which is the subject of the charges contained in the indictment that has been brought, or amended at the main hearing.” Referring to this provision, the Supreme Court held that by “changing” or “adding” an international norm to which Article 427 of the Criminal Code of Montenegro (crime against humanity) refers the court would violate the so-called objective identity of the judgments and charges.

This approach of the Supreme Court to the issue of objective identity of the judgment and charges is wholly formalistic and contrary to the rationale behind the rule of objective identity. Namely, the purpose of that rule is to prevent the court to deviate beyond the boundaries of factual description from the indictment by burdening the defendant with essential facts that the prosecutor did not include in the description of the offence. In other words, by respecting the objective identity of the judgment and charges, the court decides on the event specified in the indictment and not on some other event. In this case, if the court held that the norm of international law referred to by Article 427 of the Criminal Code of Montenegro (crime against humanity) is in fact to be found in Convention A, or in the customary law, and not in Convention B (the Rome Statute) as wrong stated in the indictment, the court would not deviate beyond the boundaries of the factual description of the offence, because it would still decide about the same events specified in the indictment, in which the defendants were allegedly involved.

Human Rights Action pointed out fault in the legal reasoning of the Appellate Court (the identity of judgment and accusation) initially in the first version of the report on war crimes in March 2013 (in the analysis of case Bukovica)¹⁴⁸ and our interpretation received confirmation in the report European Union expert, Maurizio Salustro. The expert in the analysis of the Deportation of refugees case, said the following:

„Once the Prosecution has clearly specified the facts the accused is charged with all the rest belongs to the “legal domain” and can certainly be corrected by the court without violating article 369 CPC, which prohibits just changes to the facts brought to the court’s attention with the indictment. This is not only self-evident but it is also a well-established jurisprudence of Serbian courts, which for years applied the same old Yugoslavian CPC as Montenegrin Courts. In conclusion, nothing impedes the court to give a different

¹⁴⁸ Human Rights Action, *War Crime Trials in Montenegro*, March 2013, p. 21.

qualification to the facts or to identify the right international provision that criminalizes the same facts".¹⁴⁹

In the analysis of the judgment in case Bukovica Salustro spotted another misinterpretation of crimes against humanity. The Higher Court in its judgment of 3 October 2010, claimed that crime against humanity means *only acts that were committed during the armed conflict* and widespread attacks defined as those *who are spontaneous and not located on a very narrow area*, which is in contravention of paragraph Appeals Chamber of the ICTY in the cases Tadić, Kunarac, paragraph 94 and Blaškić, paragraph 101.

¹⁴⁹ *Peer-based Assessment Mission to Montenegro, on the Domestic handling of war crimes (by Maurizio Salustro)*, October 2014, p.15.

Deportation of Refugees

At least 66 Bosnian Muslim refugees were unlawfully arrested in Montenegro and then handed over to the army of their enemy, the Bosnian Serbs¹⁵⁰, in May and June 1992. Most of them were executed. Only twelve survived the concentration camps.¹⁵¹

The 33 Bosnian Serb refugees¹⁵² arrested by the Montenegrin authorities were also deported back to the Republika Srpska to be mobilised into the army. As opposed to the Bosnian Muslim refugees, the deported Bosnian Serb refugees were not treated as hostages. It remains unknown whether any of them died due to deportation.¹⁵³

Most of the arrested refugees were taken to the Herceg Novi Security Centre which served as a collection centre; they were then transported on 25 May by buses to the concentration camp in the Foča penitentiary¹⁵⁴, or on 27 May to unidentified locations in eastern BiH in the territory of the then Serbian Republic, which was subsequently named Republika Srpska. All the Muslims deported on 27 May 1992 were probably killed the same or the following day and their bodies were thrown into the Drina River.¹⁵⁵ The remains of all the victims have not been found to date. The other Muslim refugees were arrested in Bar, Podgorica and near the border with BiH and were also deported in late May 1992 to the camp in Foča and other locations in the Republika Srpska, where they were handed over to Bosnian Serb agents and never seen again.¹⁵⁶

Although both the state authorities and public were aware of the police campaign against refugees conducted in 1992 “with the consent of the competent state prosecution office”¹⁵⁷, the

¹⁵⁰ In the criminal proceedings before the Higher Court in Podgorica the defendants were tried for the deportation of 79 citizens of the Republic of BiH, specifically: 50 Bosniaks - Muslims and 29 Serbs from BiH. Immediately before the end of the re-trial, on 14 September 2012, Deputy Special Prosecutor Lidija Vukčević reduced the number of injured persons to 34 (Judgment of the Higher Court in Podgorica, Ks. 6/12, p. 3 and 4). Others deported to number 66 are listed on the list of Minister Nikola Pejaković in reply to a parliamentary query from 1993, or in the statements of the survivors, who mentioned persons who are not on the list in the proceedings for damages before the Basic Court in Podgorica. Journalist Šeki Radončić, researcher of the crime, based on his research, mentioned a number of 105 Muslim refugees (“Fatal Freedom - Deportation of Bosnian Refugees from Montenegro”, Šeki Radončić, Humanitarian Law Centre, Belgrade, 2005, p. 145).

¹⁵¹ Information provided by attorney Dragan Prelević, who represented the survivors in civil proceedings for compensation of damages held before the Basic Court in Podgorica. Only one woman, Jasmina Begović, was the victim of deportation, and she survived (see Indictment KTS no. 17/08 of 19 January 2009, and Š. Radončić, *op.cit.*).

¹⁵² This number of persons is stated in the Reply to a parliamentary query of Minister Nikola Pejaković from 1993, and the same number is stated in the indictment. The final judgment mentions the testimony of several witnesses who said that several arrested Serbs and one Croat were released in the vicinity of Užice after the officers from the Srebrenica Secretariat of Internal Affairs took all their money (judgment of the Higher Court in Podgorica Ks. 6/12, pp. 13, 29, 32 and 47).

¹⁵³ Šeki Radončić, „Fatal Freedom - Kobna sloboda – Deportation of Bosnian Refugees from Montenegro“, Humanitarian Law Centre, Belgrade, 2005, p. 145.

¹⁵⁴ This fact, in addition to the Basic Court in Podgorica, was also determined by the ICTY in its judgement in case no. IT-97-25-T, *Prosecutor vs. Milorad Krnojelac*.

¹⁵⁵ Conclusion after the autopsy of those who were found in June 1992, and buried at a cemetery in Sremska Mitrovica, where the bodies were brought ashore by Sava river. (See: “Fatal Freedom”, p. 92). In the request for investigation, the decision to initiate investigation and the Indictment it was stated that the bus was „shelled on the way to Foča.”

¹⁵⁶ Š. Radončić, Fatal Freedom, *ibid.*

¹⁵⁷ Office of the Montenegrin Minister of Internal Affairs Nikola Pejaković, Ref. 278/2, of 8 April 1993.

State Prosecutor's Office did not initiate criminal investigation until 18 October 2005, when it filed a motion to investigate five former officers of the Ministry of Interior Affairs (MIA) suspected of war crimes against the civilian population – Milorad Ivanović, Chief of the Herceg Novi Police Security Center, Duško Bakrač, Operative Officer of the Herceg Novi State Security Service Center, Milorad Šljivančanin, Commander of the Herceg Novi Police Station, Milisav Marković, Deputy Minister of Internal Affairs for Public Security of the Republic of Montenegro, Branko Bujčić, Chief of the Security Center Bar and Damjan Turković, Assistant Chief of the Herceg-Novi Security Center.¹⁵⁸ The motion was filed only two days prior to the first hearing on the compensation claims of the victims' families in the civil court. The state prosecutor first introduced it on 20 October 2005, by filing it to support the request of the state for discontinuation of the proceedings for reparations, initiated by the victims' families, until the completion of criminal proceedings, the initiation of which the state prosecutor had only just requested by the motion.¹⁵⁹

Although Montenegrin state prosecutors have had the habit of seeking detention of the suspects as soon as they submit motions for their investigation to prevent them from influencing witnesses, tampering with evidence or from absconding, and for much lighter crimes, the state prosecutor proposed detention of the suspects only when once they were indicted and cited only the gravity of the crime and the possible penalty in support of his motion.¹⁶⁰ This in turn led to trials in absentia for the five defendants who remained in Serbia. One of them was never arrested and extradited to Montenegro, while the remaining four were arrested and spent several months in extradition detention.¹⁶¹

In the investigation opened in February 2006, not a single action had been undertaken during the first six months,¹⁶² but later dozens of witnesses were heard.

The highest state officials also testified during the investigation: former Montenegrin Presidency President Momir Bulatović, the then Montenegrin Prime Minister Milo Đukanović and the then Montenegrin Presidency member Svetozar Marović.¹⁶³ Nikola Pejaković who, at the time of the deportation was Deputy to the Minister of the Interior (now deceased) Pavle Bulatović, and subsequently became the Minister of the Interior, testified in Belgrade during the investigation process. All of them denied having known anything about the arrests of the refugees at the time.

The investigation was subsequently expanded to include Boško Bojović, former Deputy Minister of Internal Affairs of the Republic of Montenegro for State Security, Radoje Radunović, former Chief of the State Security Service (SDB) Sector in Herceg Novi and Sreten Glendža, former Chief of the Ulcinj Security Centre.

¹⁵⁸ Senior State Prosecutor, Novak Ražnatović, Kt. 263/05, Podgorica, 18 October 2005.

¹⁵⁹ "Deportation of Bosnian Refugees from Montenegro – the Role of the State Prosecutor (May 1992 - February 2007)", Prelević Law Office, 23 February 2007.

¹⁶⁰ Indictment with motion for detention, KTS. 17/08, of 19 January 2009, Supreme State Prosecutor's Office, Department for Suppression of Organized Crime, Corruption, Terrorism and War Crimes, Deputy Special Prosecutor Lidija Vukčević.

¹⁶¹ Boško Bojović, former head of the State Security Service (assistant Minister of Internal Affairs of the Republic of Montenegro for State Security), was never arrested. See the decision of the Higher Court in Podgorica ordering custody for all nine defendants Kv. 37/09, of 21 January 2009.

¹⁶² Ibid.

¹⁶³ Lawyer of one of the defendants, Branimir Lutovac, said that the statements of Đukanović and Marović are 'monologues, because the judge did not ask them anything, „Đukanović and Marović will not testify (*Đukanović i Marović neće svjedočiti*)“, *Vijesti*, 9 February 2011.

In January 2009, Special Prosecutor's Office filed the indictment¹⁶⁴ with the Podgorica Superior Court and the motion for detention of the following eight former and one, at the time current, MIA officers: Bojović Boško – Assistant MIA charged with the SDB; Marković Milisav – Assistant MIA in charge of the police; Radunović Radoje, chief of the SDB Sector in Herceg Novi; Bakrač Duško – SDB operations agent in Herceg Novi; Stojović Božidar – head of the SDB Sector in Ulcinj;¹⁶⁵ Ivanović Milorad – chief of the Herceg Novi Security Centre; Šljivančanin Milorad – commander of the Herceg Novi militia station; Bujić Branko – Bar Security Centre chief and Glendža Sreten – chief of the Ulcinj Security Centre.

They were charged with unlawfully transferring civilian population – BiH nationals, Muslims and Serbs with the status of refugees under the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees. They were charged with war crimes against the civilian population, since they unlawfully deprived of liberty 79 nationals of BiH and turned them over to the Sokolac police, the Foča police and prison and Srebrenica police officers, at the request of the then Montenegrin Interior Minister Pavle Bulatović (now deceased) to follow up on the requests by the MIA of the Bosnian Serb Republic (then officially called the Serb Republic of BiH), to deprive of liberty and return to BiH persons who had come to Montenegro from BiH territory. The indictment was changed twice; the first time with regard to the nature of the conflict in BiH – which was initially characterised as an international conflict and then changed to non-international; and the second time, when the number of injured parties was reduced to 34 for unknown reasons.¹⁶⁶

The questions – why none of the superior state officials were indicted and why none of them, apart from Momir Bulatović, were summoned to testify – have been publicly raised a number of times. At the time of the deportations, Momir Bulatović was the President of Montenegro, Milo Đukanović was its Prime Minister, Zoran Žižić was the Deputy Prime Minister charged with internal affairs and directly with overseeing the work of the police, while Nikola Pejaković was the Deputy to the then Minister of Interior Affairs Pavle Bulatović. Furthermore, the indictment did not even suggest that the then Supreme State Prosecutor Vladimir Šušović¹⁶⁷ should be summoned to testify, although an MIA 1993 document stated that the arrest and deportation of refugees had been conducted “with the consent of the competent prosecution office”.¹⁶⁸ Notwithstanding this piece of evidence from 1993, prosecutor Lidija Vukčević in her closing speech qualified as untrue allegation of Momir Bulatović, former president that the police indeed continuously consulted with the Supreme State Prosecutor during deportations.¹⁶⁹

¹⁶⁴ KTS 17/08, 19 January 2009, Deputy Special Prosecutor, Lidija Vukčević.

¹⁶⁵ No investigation was conducted against Stojović, but he was directly indicted (see the approval of the Higher Court in Podgorica, Ki. 239/05, 27 December 2008).

¹⁶⁶ See the judgment of the Higher Court in Podgorica Ks. 6/12, p. 3 and 4.

¹⁶⁷ Vladimir Šušović has still been a member of the Prosecutorial Council at the time, and was thus in charge of nominating prosecutors and rendering decisions on their accountability in disciplinary proceedings and on motions for their dismissals, wherefore “the career of prosecutor Vukčević (prosecuting the Deportation case), nolens volens, depended also on Šušović’s vote”, “Medenica Suing, Medenica Adjudicating (*Medenica tuži, Medenica sudi*)”, *Monitor*, 25 February 2011.

¹⁶⁸ Office of the Montenegrin Minister of Internal Affairs Nikola Pejaković, Ref. No. 278/2, of 8 April 1993, Reply to a parliamentary query.

¹⁶⁹ “Prosecutor Says Guilt Proven without Doubt (*Za tužioca krivica nesporno dokazana*)”, *Pobjeda*, 23 February 2011; “Medenica Suing, Medenica Adjudicating (*Medenica tuži, Medenica sudi*)”, *Monitor*, 25 February 2011; “State to Blame (*Država je kriva*)”, *Dan*, 13 November 2010.

The trial before Podgorica Higher Court judge Milenka Žižić and two jurors opened on 26 November 2009.¹⁷⁰ Duško Bakrač, Boško Bojović, Milorad Ivanović, Milisav Marković and Radoje Radunović, who were at large, in Serbia, were tried *in absentio*. After Serbia and Montenegro signed the Extradition Agreement on 29 October 2010, the Belgrade court ordered that Milorad Ivanović, Duško Bakrač, Radoje Radunović and Milisav Mića Marković be placed in extradition detention not to exceed one year. Boško Bojović was not arrested.¹⁷¹ All the defendants were released from detention after their acquittal in the first instance.

A large number of witnesses, including the injured parties who had survived the deportations, the relatives of the killed victims, and Montenegrin police officers, testified at the trial. Nikola Pejaković, the then Deputy Interior Minister, was summoned to testify but did not appear in court because he was ill. Pejaković himself asked to be heard in court after Momir Bulatović's testimony, but the judge then no longer thought it necessary to question him. The judge also dismissed the defence motions to call to the stand Milo Đukanović, Zoran Žižić and Vladimir Šušović, as well as Svetozar Marović and Milica Pejanović – Đurišić, who were members of the Montenegrin Presidency headed by Bulatović at the time of deportations.¹⁷²

The defendants pleaded not guilty, saying they had only been following orders and acting in accordance with the order in telegram No. 14–101 of 23 May 1992, to act in accordance with the Republika Srpska MIA request and bring in all BiH nationals aged 18–65 and have them returned to BiH. The defence was of the view that those who had ordered the deportation and not those who had carried it out should be held accountable for this crime.

Momir Bulatović, the then President of Montenegro, asked the Higher Court to request of the competent institutions to relieve him from the obligation to preserve the confidentiality of official documents so that he could present the key evidence in this case.¹⁷³ Given that Bulatović did not specify which document was at issue, it was impossible to establish which state authority was to relieve him of the obligation to preserve its confidentiality. The Montenegrin Assembly¹⁷⁴ and the Government of Montenegro relieved Bulatović from the obligation to preserve the confidentiality of the documents within their remits.¹⁷⁵ Bulatović testified on 12 November 2010 and said that the deportation was not a one-off action, but a regular activity of the police. He handed over to the court ten or so documents, including an original cable ordering the arrest of 161 people from BiH suspected of terrorism.¹⁷⁶ He said that the "extradition of the refugees was

¹⁷⁰ "Šljivčanin: I Don't Expect Absolution (*Šljivčanin: Ne očekujem oprost*)", *Pobjeda*, 27 November 2009.

¹⁷¹ Judgment of the Higher Court in Podgorica Ks. 6/12, p. 5; "Men Arrested for Deportation to Spend up to One Year in Prison (*Uhapšeni za deportaciju u pritvoru do godinu*)", *Vijesti*, 17 December 2010.

¹⁷² "Medenica Suing, Medenica Adjudicating (*Medenica tuži, Medenica sudi*)", *Monitor*, 25 February 2011

¹⁷³ "Momir Bulatović: I Asked Milo What Was at Issue (*Momir Bulatović: Pitao sam Mila o čemu se radi*)", *Vijesti*, 27 September 2010; "Assembly or Government to Draw the Next Move (*Na potezu Skupština ili Vlada*)", *Dan*, 28 September 2010; "State Secrets Puts off Testimony (*Državna tajna odložila svjedočenje*)", *Dan*, 28 September 2010.

¹⁷⁴ "Momir Relieved of Preserving Non-Existent Secret (*Momir oslobođen nepostojeće tajne*)", *Dan*, 15 October 2010; "Bulatović Relieved of Keeping Secrets within Assembly's Remit (*Bulatović oslobođen čuvanja tajne iz Nadležnosti Skupštine*)", *Dan*, 15 October 2010.; "Court to Submit a Precise Request (*Sud da dostavi precizan zahtjev*)", *Dan*, 12 October 2010.

¹⁷⁵ "Momir May Testify (*Momir može da svjedoči*)", *Dan*, 05 November 2010; "Government, Too, Relieves Momir of Preserving Confidentiality (*I Vlada oslobodila Momira čuvanja tajne*)", *Vijesti*, 5 November 2010.

¹⁷⁶ "Deportations Were the State's Task and the State's Mistake (*Deportacije bile državni posao i državna greška*)", *Vijesti*, 13 November 2010; "Deportations Were the State's Mistake (*Deportacija su bile greška države*)", *Pobjeda*, 13 November 2010; "State to Blame (*Država je kriva*)", *Dan*, 13 November 2010.

the mistake of the state, not of an individual” and confirmed that the police and Supreme State Prosecutor were “non-stop” in touch at the time.¹⁷⁷

The State Prosecutor’s Office has not taken any action regarding the testimony of Momir Bulatović. Professor of the Faculty of Law of the University of Montenegro, Milan Popović, Editor in Chief of weekly “Monitor”, Esad Kočan, and member of the Movement for Changes Koča Pavlović filed criminal charges to the Supreme State Prosecutor’s Office on 3 May 2012 against Milo Đukanović, who at the time of the deportation was the President of the Government, and the “then and for the most part, today’s top of Montenegrin authority” for the war crime of deportation, as well as against the Supreme State Prosecutor Ranka Čarapić and her associates in the Supreme State Prosecutor’s Office “for co-perpetration by helping the perpetrators of this crime to escape justice”.¹⁷⁸ The charges referred to the “self-incriminating testimony” of the former president of the Republic of Montenegro Momir Bulatović, before the Higher Court in Podgorica on 12 November 2010 as “direct evidence of highest evidentiary value”. The State Prosecutor’s Office did not announce it has undertaken actions in regard to these charges.

On 29 March 2011 the Higher Court rendered the judgement to acquit all nine defendants because it found “no evidence that the defendants as members of MIA belonged to the armed forces of the FRY nor that they were in service of any of the parties in conflict and thus actively participated in the armed conflict. In that case the rules of international law would be binding to them, and therefore their activities cannot be considered and evaluated in terms of the commission of actions referred to in Article 142 of the CC of FRY that violate the rules of international law, because it does not appertain to a certain capacity - membership in the armed forces or acting in service of one of the parties in conflict”.¹⁷⁹ In addition, the judgment contained contradictory findings according to which, on one hand, at the time of the commission of crime the FRY was in armed conflict with forces of the Government of BiH, and on the other hand, the armed conflict in Bosnia and Herzegovina was allegedly not international.¹⁸⁰

On 17 February 2012 the Appellate Court overturned this judgement finding it vague and contradictory, especially regarding the nature of the conflict in Bosnia.¹⁸¹ The Appellate Court particularly questioned the conclusion of the Higher Court that the FRY was in armed conflict with forces of the government of BiH, i.e. that the conflict on BiH territory was an international armed conflict.¹⁸²

¹⁷⁷ Ibid.

¹⁷⁸ “Filed charges against Đukanović and Čarapić for deportation (*Podnijeli krivičnu prijavu protiv Đukanovića i Čarapićke zbog deportacije*)”, *Vijesti*, 3 May 2012.

¹⁷⁹ Judgment of the Higher Court in Podgorica, Ks. 3/09, 29 March 2011, p. 94.

¹⁸⁰ Ibid, p. 90 -91.

¹⁸¹ Ksž. 25/2011.

¹⁸² Ibid. It is worth noting that the investigative judge of the Higher Court in Podgorica, Miroslav Bašović was of a different opinion; in his decision to conduct the investigation in the Refugee Deportation case, he unequivocally wrote: “Also, it is a well-known fact... that the then FRY, and therefore also the Republic of Montenegro as its member, was involved in armed conflicts in the territory of BiH, assisting one side, regardless of the fact that these acts of war did not extend to the territory of the FRY. Therefore, the activities that were ordered and conducted by the defendants constitute unlawful deprivation of liberty for the purpose of displacement from the territory of the Republic of Montenegro to the territory of BiH, in violation of the international standards referred to in the operative part of this decision, which constitutes realisation of the substance of the crime in question.” Higher Court in Podgorica, Ki. 239/05, Podgorica, 18 February 2006.

After retrials, the Higher Court in Podgorica on 22 November 2012 rendered an identical decision as after the first trial, but removed the sentence from the overturned judgment, which stated that the FRY was in armed conflict with forces of the Government of BiH. The text of the judgment of the Higher Court from 22 November 2012 undoubtedly implies that the defendants conducted illegal deportation or transfer of civilians from the territory of Montenegro to the territory of the so-called Republic of Srpska in Bosnia and Herzegovina, that they took hostages in order to exchange prisoners of war, and that they illegally detained them and deprived them of the right to trial.¹⁸³ However, according to the first-instance court, all of these actions did not have the character of war crimes, and in that context the defendants cannot be charged with them, because as members of the Ministry of the Interior Affairs (MIA) of the Republic of Montenegro in the Federal Republic of Yugoslavia, they apparently did not *have the necessary capacity* to be legally responsible for the crime. Namely, the first-instance court claimed that membership in the military, political, or administrative organization of a party in conflict or acting in the service of a party in conflict constitutes the capacity that the defendants must have had in order to be responsible for the war crime.¹⁸⁴ According to the Court, neither MIA of the Republic of Montenegro was a party in conflict, nor the defendants were acting in the service of any party in conflict in BiH.

The Appellate Court on 17 May 2013, upheld the judgment of the Higher Court in Podgorica.¹⁸⁵

On 20 November 2013, Human Rights Action submitted the initiative to the Acting Supreme State Prosecutor, Veselin Vučković, to file a request for protection of legality in relation to the final judgment of the Higher Court from 22 November 2012. The Supreme State Prosecutor's Office, headed by Ivica Stankovic from 15 October 2014, then filed such request on 25 March 2015 – i.e. almost two years after the judgment of the Appellate Court that made the judgment of the Higher Court in Podgorica final - request for protection of legality for violation of the Criminal Procedure Code (2009) and Criminal Code of Montenegro.¹⁸⁶

The request of the Supreme State Prosecutor's Office for protection of legality was based on two arguments. According to the first argument, the Higher Court and the Appellate Court applied an incorrect legal stance that Protocol II to the Geneva Conventions from 1977, does not prohibit forced return of civilians to their country. According to the Prosecutor's Office, Art. 17 of Protocol II prohibits forcing civilians to leave their territory for reasons related to the armed conflict - in this case the territory of Montenegro, where civilians lived as refugees. The second argument is that the affiliation to armed formation is not a precondition for the execution of war crimes, and even if such legal standard existed, it would have been satisfied in this particular case, since the defendants did act in the service of one party in conflict.¹⁸⁷

The Supreme Court of Montenegro on 23 June 2015 rejected the request for protection of legality as unfounded. The Supreme Court concluded that the act which by the indictment was attributed to the defendants, namely was the act of returning civilian population in Bosnia and

¹⁸³ As regards four indicted former members of the State Security Service - Boško Bojović, Radoje Radunović, Duško Bakrač and Božidar Stojović - no evidence was found of their having committed the acts for which they were charged, i.e. that they acted on the order of the Minister of the Interior of the Republic of Montenegro late Pavle Bulatović, in which he ordered compliance with the Mol of the Serb Republic in BiH which requested that persons who came from the territory of BiH to Montenegro be deprived of their liberty and returned to the territory of BiH, etc. (Ks. 6/12, p. 98).

¹⁸⁴ Judgment of the Higher Court in Podgorica in case Ks. 6/12, 22 November 2012, p. 214.

¹⁸⁵ Judgment of the Appellate Court of Montenegro in case Kžs.18/2013, 17 May 2013.

¹⁸⁶ Supreme State Prosecutor of Montenegro, Ktz. 112/13, 25 March 2014.

¹⁸⁷ Supreme State Prosecutor of Montenegro, Request for protection of legality, Ktz. 112/13, 25 March 2015, p. 4-6.

Herzegovina, is not prohibited by international and domestic legal sources that lower instance courts applied in this case - the Criminal Code of the Federal Republic of Yugoslavia Common Article 3 of the Geneva Conventions (1949), and Article 17 of Additional Protocol II (1977) to the Geneva conventions. According to the Supreme Court, acts prohibited by the relevant rules of international law – deportation and forced displacement of the civilian population – do not encompass the prohibition of forced return of civilian population “to their home state” (a term from the Supreme Court’s judgment): “deportation” is forced movement of civilians beyond the national borders, and “displacement” (under Article 17 of Additional Protocol II) represents displacement of civilians within the current borders and/or forced displacement from the territory in which they live.¹⁸⁸

The Supreme Court hence joined the Higher Court and the Appellate Court in advancing the arbitrary legal standard whereby “the perpetrator of war crimes against civilians can only be a member of the military, political and administrative side to the conflict or any other person in their service, regardless of whether he was a member of the armed forces or any unarmed organization, who aligns with a party to the conflict by his activity.”¹⁸⁹

Analysis

The legal standard which was applied by the Higher Court in Podgorica, Appellate Court and Supreme Court of Montenegro in the case of “Deportation” in order to conclude that a war crime had in fact not been committed is arbitrary and legally unfounded. None of these courts referred to any source of law to support their position that the accused must have belonged to a military, political, or administrative organization of a party to the conflict or acted in the service of such a party, in order to be held responsible for a war crime. In his analysis of the processing of war crimes in Montenegro from December 2014, European Union expert Maurizio Salustro wrote that such a position was “unprecedented” and “clearly incorrect”.¹⁹⁰

The Article 142, para. 1 of CC of FRY (War crimes against the civilian population), as a provision whose violation is attributed to the defendants in the indictment, does not condition the responsibility of the perpetrator of the war crime by his/her membership in the armed forces or his/her acting in the service of one of the parties to a conflict. Instead, this Article of the Law uses a broad formulation “Who... orders... or commits”, that does not limit the capacity of the person who may commit a war crime against civilians to membership in the armed forces or acting in service of a party to the conflict.

The requirement that the executor belongs to the armed forces or acts in the service of a party to the conflict does not exist in the authoritative sources of international law nor in comparative law. Whether a crime amounts to a war crime or an “ordinary” crime is determined by entirely different factors.

¹⁸⁸ Judgment of the Supreme Court, Kzz. 4/15, 23 June 2015, p. 7-8.

¹⁸⁹ Ibid, p. 9.

¹⁹⁰ *Peer-based Assessment Mission to Montenegro, on the Domestic handling of war crimes (by Maurizio Salustro)*, 2014, p. 14 and 16.

According to the practice of ICTY, an offence constitutes a war crime if “the existence of an armed conflict played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.¹⁹¹ On the basis of the Statute of the International Criminal Court, even a milder standard than that in the practice of the ICTY Appeals Chamber to constitute a war crime: the only requirement is that the war crime was committed in the context of and in connection with the armed conflict.¹⁹²

In the case of Deportation of refugees, the basis for the existence of a war crime in laws applied by international courts is undoubtedly present. The *ability* of the Ministry of the Interior of the Republic of Montenegro to carry out unlawful imprisonment stemmed from the existence of an armed conflict. The *decision* to illegally detain, deport (“transfer by force”) the refugees, and to hand them over to be abused as hostages, was also directly related to the existence of an armed conflict – if there had been no conflict, the imprisonment and deportation of refugees, particularly Muslims, to Serbian forces from the area would not have happened. The *aim* of the commission of prohibited actions was directly related to the armed conflict, because the civilians were taken hostage and subsequently deported to BiH to exchange them for captured Serbian soldiers, the fact that the court established from the presented evidence.¹⁹³

Even if the Higher, Appellate and Supreme Courts were right to arbitrarily introduce higher threshold requirement for the existence of a war crime than the one existing in international and comparative law, i.e. if acting “in service of a party to the conflict” - in whatever meaning - indeed constituted a prerequisite for the commission of a war crime, in this case the prerequisite would have been met. Namely, the defendants apparently were “in service of a party to the conflict” in BiH.

If the term “in service of a party to the conflict”, which the Higher Court in Podgorica has not explained, refers to actions *preceding* the criminal conduct, the defendants were clearly in service of a party to the conflict - Republic of Srpska in Bosnia and Herzegovina. **The notorious fact, following the judgments of the ICTY and the International Court of Justice, is that the Federal Republic of Yugoslavia significantly and in various ways aided the military efforts of Bosnian Serbs, especially in the early months of the conflict in Bosnia and Herzegovina, when the deportation of refugees was committed.**¹⁹⁴ The International Court of Justice in its judgment in the case *Bosnia and Herzegovina v. Serbia and Montenegro* (2007)

¹⁹¹ Judgment of the ICTY Appeals Chamber in the case of *Kunarac and others*, 12 June 2002, para. 58: “What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.”

¹⁹² See Article 8 (2)(a)-1 Document Elements of Crimes (*Elements of Crimes*), to the Rome Statute of the International Criminal Court. The Elements of Crimes was adopted by the Assembly of States Parties to the Statute, on the basis of Art. 9, para. 2 of the Statute (Law on the Ratification of the Rome Statute of the International Criminal Court, “Official Gazette of FRY - International Treaties”, no. 5/2001 from 27 June 2001), Elements of Crime, available at: <http://www.unhcr.org/refworld/docid/4ff5dd7d2.html>.

¹⁹³ Judgment of the Higher Court in Podgorica in the case Ks. 6/12, 22 November 2012, p. 179-80 (“Therefore, in this case, it is undoubtedly confirmed that the victims were civilians, that they were illegally detained and returned to BiH, persons of Serbian nationality to avoid military service, and Muslims to be exchanged for captured Serbian soldiers”). Page 211-12 of the judgement states more testimonies and documents of the Ministry of the Interior of Montenegro, which show that Muslims were detained to be exchanged.

¹⁹⁴ Judgment of the ICTY Appeals Chamber in the case of Tadić (15 July 1999), paragraphs 150-160;

determined that the FR Yugoslavia "provided substantial military and financial support to the Republika Srpska, and the denial of this support would greatly limit the options that were available to the authorities of the Republic of Srpska".¹⁹⁵ The defendants in the case of Deportation represented a part of the state apparatus that decisively helped the military efforts of Bosnian Serbs. The investigating judge who decided to open an investigation in this case stated that "it is a well-known fact that the then FRY, and therefore also the Republic of Montenegro as its member, was involved in armed conflicts in the territory of BiH, assisting one side."¹⁹⁶

If the term "in service of a party to the conflict" would be interpreted as assistance, service and support to a party to the conflict by virtue of *the very criminal act* at issue in the trial, then members of the police and State Security Service of the Republic of Montenegro (within FR Yugoslavia), evidently acted in service of a party to the conflict - Republika Srpska in Bosnia and Herzegovina, by arresting and handing back to them deserters to be drafted and by delivering them civilians - Muslims in order to exchange them as hostages for captured Serbian soldiers.

The Appellate Court and the Supreme Court of Montenegro tried to dispute the fact that the defendants took the side of Serb Republic of BiH by arguing that the defendants acted on the order of the then Interior Minister Pavle Bulatović.¹⁹⁷ According to these Courts, therefore, if a defendant acts on the order of a superior (from a formation that is not directly hostile to any of the warring parties), said defendant is not in the service of a party to the conflict, that is, he did not take the side of a specific party to the conflict. The Appellate Court and the Supreme Court of Montenegro tried to reinforce this argument by referring to the provision of the Rome Statute of the International Criminal Court, according to which – at least according to the interpretation of the Appellate Court and the Supreme Court - the perpetrator is exonerated if he had a statutory obligation to act upon an order of his superior.

Relying on the argument that involved acting on the orders of a superior, the Appellate Court and the Supreme Court resorted to three arbitrary positions:

- (1) First, the Appellate Court and the Supreme Court basically falsified the content of Article 33, paragraph 1 of the Rome Statute by citing only the first of the total of three requirements that must be fulfilled - all three - under this provision in order to exclude a person's liability. Namely, the Courts cited only point (a) under Article 33, paragraph 1 - that a person was legally obliged to act on a given order.¹⁹⁸ However, to exclude a person's liability, according to Article 33, paragraph 1, conditions (b) and (c), which the Appellate Court and the Supreme Court did not mention, must also be fulfilled: (b) that the person did not know that the order was unlawful, and (c) that the order was not manifestly unlawful. The Appellate Court and the Supreme Court kept silent about these requirements, thus avoiding the only possible conclusions, unfavourable for the defendants. Specifically, an order to return refugees to the conflict zone was prohibited

¹⁹⁵ *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)*, judgement from 26 February 2007, para. 241.

¹⁹⁶ Higher Court in Podgorica, case Ki. 239/05, 18 February 2006, judge Miroslav Bašović.

¹⁹⁷ Judgment of the Appellate Court of Montenegro, case Kžs.18/2013, 17 May 2013, pp. 9-10; judgment of the Supreme Court of Montenegro, case Kzz. 4/15, 23 June 2015, pp. 9-10.

¹⁹⁸ Judgment of the Appellate Court of Montenegro, case Kžs. 18/2013, 17 May 2013, p. 9; judgment of the Supreme Court of Montenegro, case Kzz. 4/15, 23 June 2015, pp. 9-10.

under international *refugee* law, while handing over Muslim refugees to the Bosnian Serb army as hostages to be used for exchange was prohibited under international *humanitarian* law. It is obvious that such orders were unlawful (point (c) of Article 33, paragraph 1 of the Rome Statute). Even if the unlawfulness was not obvious to everyone, it is certainly true that the defendants, as persons discharging office in the security service and the police, with adequate intellectual and educational capacity, were aware of this unlawfulness (point (b) of Article 33, paragraph 1).

- (2) Another reason why the Appellate Court and the Supreme Court's referring to the provision of the Rome Statute is unfounded is that the offence described in the indictment was committed in 1992, whereas the Rome Statute entered into force ten years later. Also, Article 33 of the Rome Statute cannot serve as an authoritative interpretation of the content of common international law in the period preceding the adoption of the Statute, since – according to the almost unanimous position of international legal experts – the Rome Statute departs from common international law as regards orders.¹⁹⁹ Namely, the Rome Statute lists only order to commit genocide or a crime against humanity as an order that is obviously unlawful (Article 33, paragraph 2), while common law also includes the order to commit a war crime.
- (3) Finally, the Appellate Court and the Supreme Court considered completely different issues as if they were identical: whether the person took or did not take the side of the Serb Republic of BiH on the one hand, and whether the person was acting or not acting on the order of a superior in Montenegro, on the other. According to these Courts, if a person acted on the orders of a superior from the Ministry of the Interior of Montenegro, it means that the person did not take the side of the Serb Republic of BiH as a party to the conflict. Such reasoning is logically unsustainable, because a person can act upon an order and still take the side of a party to a conflict, as a result of the fact that the very formation upon the order of which the person was acting (Ministry of the Interior of Montenegro) had taken the side of a party to the conflict (Serb Republic of BiH).

Similar to the Bukovica case, in the Deportation case the Higher Court, the Appellate Court and the Supreme Court took the formalistic view in interpreting the relationship between the provisions of domestic law and relevant international legal standards, showing a misunderstanding of the requirement to respect the “objective identity of the charge”. In the view of the three Courts, when an indictment refers to a specific international legal standard that has been allegedly violated by the conduct of defendants, but fails to do so accurately or sufficiently precisely, the international law standard is “not embedded in the description of the facts contained in the indictment”²⁰⁰ i.e. “was not described in the description of the facts”.²⁰¹ Had the court referred in its judgment to a relevant international law standard and convicted the defendant, it would allegedly have violated the objective identity of the charge, that is, it would have exceeded the statement of claim and thereby substantially violated the criminal procedure.²⁰²

¹⁹⁹ See e.g. Paola Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law”, *European Journal of International Law*, vol. 10 (1999), pp. 172-191.

²⁰⁰ Judgment of the Appellate Court of Montenegro, case Kžs. 18/2013, 17 May 2013, p. 6.

²⁰¹ Judgment of the Supreme Court of Montenegro, case Kzz. 4/15, 23 June 2015, p. 8.

²⁰² Judgment of the Appellate Court of Montenegro, case Kžs. 18/2013, 17 May 2013, pp. 7-8.

This position of the Courts is incorrect. As explained in this report, in the analysis of the Bukovica case, the purpose of the objective identity rule is to prevent the court from going beyond the description of *the facts* contained in the indictment. HRA pointed to the error of legal reasoning of the Appellate Court in the first version of the War Crime Trials Report of March 2013 (in the analysis of the Bukovica case),²⁰³ and our interpretation was confirmed by the report of the European Union expert Maurizio Salustro.²⁰⁴

In the Courts' view, in the Refugee Deportation case the State Prosecutor's Office failed on several grounds to embed international legal standards into the description of the facts contained in the indictment. The Prosecutor's Office allegedly first failed to specify "which forms of violation of personal dignity and humiliating acts were committed", thereby failing to embed into the description of the facts contained in the indictment the international standards it referred to: Article 3, paragraph 1, of the IV Geneva Convention for the Protection of Civilians During War, and Article 4, paragraphs 1 and 2 of Additional Protocol II (1977) to this Convention. Furthermore, since the Prosecutor's Office allegedly failed to explain how the defendants violated Article 17 of Additional Protocol II, which prohibits the "displacement" of civilians by force, since in the indictment they were actually charged with "relocating" the civilians, and "displacement" and "relocation" are not identical concepts. Finally, while the Indictment alleges that the actions of the defendants served to unlawfully relocate "citizens of Bosnia and Herzegovina of Muslim and Serb nationality who were granted 'refugee' status in accordance with the Convention on the Status of Refugees - Article 1A, item 2, and Article 33, paragraph 1, and the Protocol on the Status of Refugees, Article 1, item 2", the Higher Court, the Appellate Court and the Supreme Court held that the Prosecutor's Office failed to specify "the category of refugees in question and the specific prohibitions of expulsion of such persons".²⁰⁵

There is no need to analyse in detail the merits of the position of the three Courts regarding the Prosecutor's Office's alleged referral to inappropriate international legal standards or failure to specify "the category of refugees in question and the specific prohibitions of expulsion of such persons" because, as explained above, there would have been no violation of the rule on the objective identity of the charge had the court accurately identified the international standard that had been violated by the defendants and thereby corrected any error contained in the indictment.

However, as an illustration of judicial pedantry that is self-serving and consequently absurd, we will mention, as an example, the alleged omission to specify "the category of refugees in question and the specific prohibitions of expulsion of such persons" in the indictment. As regards the *category* of refugees, one should take into account the definition of "refugee" provided in Article 1A, item 2, of the Refugee Convention, as supplemented by the Protocol on the Status of Refugees - Article 1, paragraph 2:

"For the purposes of the present Convention, the term "refugee" shall apply to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself

²⁰³ Human Rights Action, *Report: War Crime Trials in Montenegro* (March 2013), p. 21.

²⁰⁴ *Peer-based Assessment Mission to Montenegro, on the Domestic handling of war crimes* (by Maurizio Salustro).

²⁰⁵ Judgment of the Higher Court in Podgorica, case Ks. 6/12, 22 November 2012, pp. 208-09; judgment of the Appellate Court of Montenegro, case Kžs. 18/2013, 17 May 2013, p. 6; judgment of the Supreme Court of Montenegro, case Kzz 4/15, 23 June 2015, p. 8.

of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The position of the Higher Court, the Appellate Court and the Supreme Court of Montenegro concerning the need for “specification” could only be understood as follows: it should have been specified in the indictment on what grounds the citizens of Bosnia and Herzegovina of Muslim and Serb nationality, who were in possession of the status of “refugees”, had originally acquired such a status in Montenegro, i.e. what was the basis for their fear of persecution (religion, nationality, political opinion, etc.). However, it is unclear why the indictment would have to go into details of that nature. If the defendants committed a criminal offence against persons with a refugee status, it is irrelevant on what basis said persons previously acquired said status. To “embed” Article 1A, item 2 of the Convention “in the description of the facts” contained in the indictment, the fact that the persons in respect of whom the defendants were charged with the commission of a criminal offence had the status of refugee, regardless of the grounds, is sufficient.

With regard to the “forms of prohibition of expulsion”, which allegedly also had to be specified in the indictment, the Appellate Court and the Supreme Court are of the opinion that the indictment should have “specified... the forms of prohibitions of expulsion of such persons” referred to in Article 33, paragraph 1 of the Refugee Convention. Such a request presupposes that Article 33, paragraph 1 of the Convention lists several forms of prohibition of expulsion. This is not the case, however, because in Article 33, paragraph 1 the *prohibition* does not include different forms (e.g. there is no written versus oral prohibition, or temporary versus permanent prohibition, etc.). In addition, Article 33, paragraph 1 of the Convention does not list (describe, specify) various forms of *expulsion*, but generally prohibits expulsion “in any manner whatsoever”.

In their judgments, all three Courts go even beyond the allegation that the Prosecutor’s Office failed to embed international law standards into the description of the facts contained in the indictment, and that the Courts’ correcting the Prosecutor’s Office would be out of the question. The courts also state that Article 17 of Additional Protocol II was simply not violated, as this provision allegedly does not prohibit the act of returning civilians to their “home country” (in this case, in the Courts’ view, to Bosnia and Herzegovina).

In fact, the correct interpretation of Article 17 would be that this provision prohibits the forcible return of civilians in the country from which they fled. In addition, Article 17 of Additional Protocol II is violated in this case because the victims were forced to leave *Montenegro* as their territory.

For the existence of the crime of deportation (a term that applies to armed conflicts of an international character) or displacement (a term that applies to non-international armed conflicts), it is sufficient that persons are forcibly moved across *de jure* or *de facto* borders between certain countries, regardless of direction of forced movement or countries in question. The Appeals Chamber of the ICTY in 2006 in the Stakić judgment stated “the *actus reus* of deportation is the forced displacement of persons... from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border”.²⁰⁶

²⁰⁶ Judgment of the Appeals Chamber of the ICTY in *Prosecutor v Milomir Stakić*, IT-97-24-A, 22 March 2006, paragraph 278.

Therefore, forced deportation/displacement does not require proof that crossing of a national border from the direction of “home state” in the direction of another state had occurred. Instead, it is sufficient to prove that there has been a crossing of the state border. Even if the Supreme Court’s starting point was the fact that the most common situation in life, and in practice of war crimes trials, is one in which forced movement of the civilians across borders entails movement beyond the boundaries of a state where the civilians had lived for years or decades, this does not imply that international criminal law prohibits only the deportation from “home” state.

In addition, the Supreme Court and previously the Appellate Court arbitrarily read into Article 17 of Additional Protocol II words and content that do not exist in that provision. While Article 17 stipulates that “civilians shall not be compelled to leave their own territory”, the Appellate Court and now the Supreme Court presented Article 17 so as to read “civilians shall not be compelled to leave their own territory where they live”.²⁰⁷ Such arbitrary amendment, i.e. addition of words “where they live”, has enabled the Appellate Court and the Supreme Court to make an argument that Article 17 does not apply to refugees forcibly returned to Bosnia and Herzegovina, because these refugees did not live on the territory of Montenegro and thus Article 17 of Additional Protocol allegedly did not protect them. In fact, contrary to such conclusion of the Appellate Court and now the Supreme Court, according to the authoritative sources of international law “their own territory” as set forth in Article 17 of Additional Protocol – a territory that civilians cannot be compelled to leave – is a territory where the civilians are **lawfully present, and not the territory where they “live” in the sense of having long-term, willingly chosen residence, performing work activities during a long period, etc.** In the ICTY judgments, including the aforementioned Stakić judgment from 2006, the crime of forced displacement of civilians from the territory of one state to the territory of another exists if the civilians were forced to leave “the area where they are lawfully present”.²⁰⁸ The civilians in the Deportation case were lawfully present in the territory of Montenegro, and forcing them to leave the territory of Montenegro was in violation of Article 17 of Additional Protocol II.

Finally, **the Higher Court and Appellate Court applied wrong criteria to assess character of the armed conflict in Bosnia and Herzegovina. (Since the Supreme State Prosecutor’s Office did not ask in its request for protection of legality that the Supreme Court qualify the armed conflict in BiH at the time of the commission of the act as an international conflict, the Supreme Court of Montenegro did not comment on this issue.) According to the Higher Court and the Appellate Court, this was not a conflict of international character, because parties that participated in the conflict were representatives of people living within one state of Bosnia and Herzegovina: Serbs, Croats and Muslims.**²⁰⁹ **This standard is wrong, because the conflict in such a situation could also be international in case of particular form or intensity of involvement of other countries.** The fact that the Republika Srpska of BiH was established on a part of the territory of Bosnia and Herzegovina that had its armed forces, does not mean that the conflict was not international, because foreign troops may have also participated in the armed conflict within one state, or a “domestic” party to

²⁰⁷ Judgment of the Appellate Court of Montenegro in case Kžs.18/2013, 17 May 2013, p. 6; Judgment of the Supreme Court of Montenegro Kzz. 4/15, 23 June 2015, p. 8.

²⁰⁸ Judgment of the Appeals Chamber of the ICTY in *Prosecutor v Milomir Stakić*, IT-97-24-A, 22 March 2006, paragraph 278.

²⁰⁹ Judgment of the Higher Court in Podgorica, case Ks. 6/12, 22 November 2012, pp. 206-07; judgment of the Appellate Court of Montenegro, case Kžs. 18/2013, 17 May 2013, p. 8.

the conflict may have been closely connected with another state that it turns a seemingly non-international conflict to an international one.

In this sense, the judgment of the ICTY Appeals Chamber in the *Tadić* case (1999) concluded, using a number of arguments, that the FR Yugoslavia, particularly intensively in the early months of the conflict in Bosnia and Herzegovina, in many ways significantly helped the military efforts of the forces of Bosnian Serbs. In addition, the judgment of the International Court of Justice in the case *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), concluded that the FR Yugoslavia “provided substantial military and financial support to the Srpska Republika, and the denial of this support would greatly limit the options that were available to the authorities of the Srpska Republika”. The first-instance court did not state anything concerning these facts determined by the ICTY and the International Court of Justice, but the character of the armed conflict in Bosnia and Herzegovina cannot be credibly determined without that. Nonetheless, in its own judgment, the Appellate Court stated that the judgment of the Higher Court “provided clear reasons why the conflict at hand was an armed conflict between Serbs, Muslims and Croats who lived in the territory of BiH, and that it was therefore an armed conflict that did not have an international character.”²¹⁰

Despite the fact that the State Prosecutor charged the defendants only with the “illegal relocation of the civilian citizens of Bosnia and Herzegovina of Muslim and Serbian nationality who had the ‘refugee’ status,” during the first trial and the retrial the court unambiguously concluded that the defendants committed some other offences falling under the war crime against the civilian population (Art. 142, p. 1, CC of FRY): illegal detention²¹¹, hostage-taking²¹², and deprivation of the right to a fair and impartial trial.²¹³

The Court did nothing with these conclusions, even though the CPC expressly states that the Court is not bound by the prosecutor’s proposals regarding the legal qualification of the offense.²¹⁴ The rule of the identity of the judgment and charges (Art. 369 para. 2, CPC) does not bind the Court with legal qualification of determined facts of the prosecutor. The Court was required to ensure justice through correct and complete qualification in accordance with the *maxim iura novit curia* (the court knows the law).²¹⁵ The Appellate Court of Montenegro upheld the decision of the Higher Court in Podgorica, arguing that the first instance court would have otherwise exceed the charges and thus violated the objective identity of the charge.²¹⁶

The Prosecutor’s Office especially deserves criticism, as it failed to specify in the indictment the illegal relocation to concentration camps and other illegal detention, hostage-taking, and the deprivation of the right to a fair and impartial trial, as criminal acts through which the war crime against the civilian population of BiH was committed. Furthermore, the investigation, as well as the indictment, were selective in terms of identified perpetrators, who they were reduced to a narrow circle of people that, although included former heads of state security and public security sectors of the police, did not include the Deputy Minister of the Internal Affairs, the Supreme

²¹⁰ Judgment of the Appellate Court of Montenegro, case Kžs.18/2013, 17 May 2013, p. 8.

²¹¹ Judgment of the Higher Court in Podgorica in case Ks. 6/12, 22 November 2012, p. 179 and p. 184.

²¹² Ibid, p. 179-80 and 211-12.

²¹³ Ibid, p. 184.

²¹⁴ Art. 369 (2) of CPC.

²¹⁵ The Supreme Court of Montenegro in the case of Klapuh from 1994 determined on the basis of the facts established in this case, that brutal murder had not been committed, as the first-instance court qualified it in its judgement, but as a War crime against the civilian population.

²¹⁶ Judgment of the Appellate Court of Montenegro, case Kžs. 18/2013, 17 May 2013, pp. 7-8.

State Prosecutor, who, according to documented evidence and testimony of witnesses approved the actions of the police, and the President and the Prime Minister of the Republic of Montenegro who received ex-officio daily newsletters from the police and had legal authority to issue binding orders. After the testimony of the then President of the Republic of Montenegro, Momir Bulatović, who told the court that the case was a “State error” for which the defendants are not individually responsible, the Prosecutor’s Office remained passive. It has not been announced that any action had been taken in relation to the criminal charge filed in May 2012 against the former State leadership and former Supreme State Prosecutor.

The Supreme State Prosecutors office in its request for protection of legality filed in March 2015 failed to involve criticism towards the position of the courts that deportation and forced displacement need to be undertaken with discriminatory intent in order to be punishable. Furthermore, the Prosecution omitted to include to errors of courts it has also contributed to – omitting to convict the defendants for illegal arrest and hostage taking, as well as false categorization of the armed conflict in Bosnia and Herzegovina as a conflict non-international in character.

Kaluđerski laz case

Kaluđerski laz is a village in the Montenegrin municipality of Rožaje near the border with Kosovo. During the NATO air strikes on the FRY in 1999, in Kaluđerski laz and the nearby villages, where there were no clashes, Yugoslav Army (VJ) members killed 22 ethnic Albanian civilians, who had fled war torn Kosovo to Montenegro.²¹⁷ This crime is publicly known as “Kaluđerski laz”, although it was only one of the villages in which crimes were committed. Only 11 Albanian civilians were recognized as victims during criminal proceedings, six killed in Kaluđerski laz and the rest at other locations. The lawyer Velija Murić, who represented the victims' families, claims that other victims of this crime were not recognised in the indictment in the trial before the Bijelo Polje Higher Court.²¹⁸ Although the criminal complaint filed by Murić included the names of all victims, the Prosecutor's Office did not explain as to why individual victims were not included in the investigation and indictment.

It took the Bijelo Polje Superior Prosecutor eighteen months to act on the criminal complaint by the Montenegrin Committee of Lawyers for the Protection of Human Rights (CKP) submitted in June 2005 and file a motion for the investigation of 12 persons suspected of war crimes against the civilian population in Kaluđerski laz and the nearby villages from mid-April to early June 1999.²¹⁹

The investigation opened in early March 2007 against active Belgrade-born VJ officer Predrag Strugar residing in Podgorica and 11 members of the VJ Podgorica Corps reservists from the Berane municipality. It was immediately clear that there were no grounds for suspecting four of the men the prosecutor named in the motion for investigation of such a grave crime and the prosecutor subsequently abandoned their prosecution.²²⁰ Lawyer Velija Murić, who had filed the criminal complaint, claims that the State Prosecutor did not include all the perpetrators of the crime and all the victims. The prosecutor also failed to seek detention of the suspects until after they were indicted, when it was determined. The consequences of inertia of the Prosecutor's Office included the unavailability of the main indictee Predrag Strugar, prolonged keeping of seven defendants in detention (maximum three years) and the practical leading of investigation in the first-instance trial.

The Supreme State Prosecutor's Office filed the indictment on 1 August 2008 against Predrag Strugar, Commander of I Battalion III Brigade of Podgorica Corps II Army of Yugoslavia, Momčilo Barjaktarović, Commander of III Troop I Battallion, Petar Labudović, Commander of I Line III Troop I Battallion, Aco Knežević, Deputy Commander of III Troop I Battalion, and Branislav Radnić, Boro Novaković, Miro Bojović and Radomir Đurašković, members of the Reserve III Troop I Battalion, for the criminal offense War crime against the civilian population. Defendants were charged with inhumane treatment of ethnic Albanian civilians on 18 April 1999, in Kaluđerski laz, thus violating international law, and the indicted Predrag Strugar, that in the

²¹⁷ “What Are the Army Archives Concealing (*Šta kriju vojni arhivi*)”, *Monitor*, 16 February 2007; information also obtained from the attorney of the injured parties, Velija Murić.

²¹⁸ Lawyer Velija Murić, President of the Montenegrin Committee of Lawyers for the Protection of Human Rights, represented the injured parties in criminal proceedings.

²¹⁹ “Stojanka Taking over War Crime Cases (*Stojanka preuzima slučajeve ratnih zločina*)”, *Dan*, 23 May 2007.

²²⁰ Ranko Radnić, Veselin Čukić, Vesko Lončar and Zoran Knežević.

same capacity, from 18 April to 21 May 1999, in the municipality of Rožaje, that was his area of responsibility, he ordered the murder of Albanian civilians, who came to Montenegro fleeing from the conflict in Kosovo.

The indicted Predrag Strugar is the only defendant who was an active officer of the Yugoslav Army.²²¹ The territory where the crimes occurred had been under command of the Second Army of the Yugoslav Army, headed by Milorad Obradović. Eventually command responsibility was directed from him to the Commander of the Podgorica Corps Savo Obradović, Velimir Jovanović and the then commander of the Third Infantry Brigade (from the composition of the Podgorica Corps) Slavoljub Stojanović, until the suspected Commander of Battalion Predrag Strugar, whose area of responsibility included Kaluđerski laz.²²² Milorad Obradović and Savo Obradović are only referred to in the investigation as witnesses, and to date they have not been heard, because they all reside in the Republic of Serbia. In this case, the criminal prosecution was focused on the direct perpetrators and Pavle Strugar as the lowest positioned superior, provided that Strugar is accused of being the alleged issuer of the order and not on the basis of command responsibility for failing to prevent the commission of crimes and/or take the necessary steps to punish the perpetrators. The injured parties claim that only seven, out of thirty officers who obliged the orders to open gunfire at civilians, are accused. In addition, under command line no one except Strugar was included in the investigation.

The trial opened on 19 March 2009.²²³ The Judicial Panel of the Higher Court in Bijelo Polje, on 1 August 2011 released from detention the defendants Barjaktarović, Labudović, Novaković, Bojović and Đurašković, because the first-instance judgement had not been rendered until three years of detention.²²⁴ The indicted Predrag Strugar was extradited from Serbia at the end of July 2012, and on 15 November 2012 acquitted with a bail of EUR 575,000 (mortgaging his assets).²²⁵

During the procedure to date about 108 witnesses were heard and more than 80 trials held. The duration of the procedure is justified by the fact that for nine months the indictment could not be delivered to the indicted Predrag Strugar, and that documents from the military archives in Belgrade were late for month, even though they had been addressed several times with the request.²²⁶ Lawyer of injured parties, in addition to submitting evidence from Serbia, justifies the long duration of the proceedings in addition to the slow delivery of evidence from Serbia and examine a large number of witnesses from Kosovo, as well as the investigation was not carried out in due time, in high-quality and comprehensively.²²⁷

In the meantime, there has been a change in one of the three judges, so the re-trial started on 26 December 2012.

²²¹ "What Are the Army Archives Concealing (*Šta kriju vojni arhivi*)", *Monitor*, 16 February 2007

²²² *Ibid.*

²²³ "Summons to Strugar Sent to Serbia (*Strugaru poziv upućen u Srbiju*)", *Vijesti*, 3 February 2009; "Strugar Summons Sent to Serbia (*Strugaru poziv upućen u Srbiju*)", *Vijesti*, 4 February 2009.

²²⁴ Press release of the Higher Court is available at:

<http://www.visisudbp.gov.me/Aktuelnosti/Saop%C5%A1tenjazajavnost/tabid/59/Default.aspx>.

²²⁵ "Strugar: War Will End When I Win in Court (*Strugar: Rat će se završiti kada pobijedim u sudnici*)", *Dnevne novine*, 16 November 2012.

²²⁶ "Prime Minister rendered a judgement before the court (*Premijer presudio prije suda*)", *Dan*, 23 July 2011.

²²⁷ "Trial for Kaluđerski laz is too long (*Suđenje za Kaluđerski laz predugo traje*)", *Radio Free Europe*, 26 July 2011, available at: http://www.slobodnaevropa.org/content/sudjenje_za_kaluđerski_laz_predugo_traje/24277322.html.

Finally, after a year and a preliminary investigation, two years of investigation and four years of trial, on 6 December 2013 first instance verdict was adopted. By the adopted verdict the accused were acquitting of charges that they committed the criminal offense - war crimes against civilians.²²⁸ In addition, the prosecutor against the first accused Predrag Strugar withdrew from the charges in the part relating to the alleged ordering soldiers whose identity remained unknown in five separate cases of murder of Albanian civilians in April and May 1999 in the municipality of Rožaje.

After appeals by the Supreme State Prosecutor and the attorney of the injured parties, the Appellate Court on 8 December 2014 issued a judgment dismissing the appeal and upheld the acquittal of the Higher Court. The Appellate Court considered the proper conclusion of the first instance court concluded that there is no valid evidence that would reliably establish that the accused committed the offense for which they are accused.²²⁹

Analysis

The acquittal in Kaluđerski laz case is a third judgment passed by Montenegrin courts in four war crime trials conducted over the period of the past few years, releasing from charges all the accused. The opportunity to credibly establish the facts in this case relating to the allegations in the indictment was missed as early as April 1999, when investigative actions were taken by the competent military authorities. However, the court on its behalf - the Higher Court in Bijelo Polje - failed to provide answers to important questions it could have responded to despite the ineffective investigation. The most important such question was whether a war crime had even been committed on 18 April 1999 near Kaluđerski laz village?

The judgment of the Bijelo Polje Higher Court indicates that the said court considered there was no evidence that the accused had taken actions causing death of ten Albanian civilians and bodily harm to five of them. However, the Higher Court's judgment does not answer a question of whether an event taking the central place in the indictment - death of Albanian civilians on 18 April 1999 near Kaluđerski laz – even constitutes a criminal offense.

The testimonies of Albanian civilians before the Higher Court, on the one hand, and of former officers, military prosecutors and investigative judges, on another, offered diametrically opposed description of events. Conclusions about the existence of the crime depend on whether the first or second account of events is accepted. However, the court did not comment on which version of events it considered credible, i.e. whose testimony the court accepted.

According to Albanian witnesses, on the afternoon of 18 April 1999 members of the army - unprovoked and without warning - opened fire on the convoy of unarmed civilians. Some civilians testified that it was snowing at the time,²³⁰ confirming thus defence arguments that several suspects gave during the investigation. At the same time, several of these witnesses -

²²⁸ The judgment of the Higher Court in Bijelo Polje in the Ks. 1/08, 6 December 2013.

²²⁹ The judgment of the Appellate Court of Montenegro in the Kz-S 20/2014, 8 December 2014, available at: http://sudovi.me/odluka_prikaz.php?id=98433.

²³⁰ E.g. testimonies of Hatmona Bajraktari, Hadži Ahmeti (in the investigation), Husein Ljajić, and Nifa Brahimaj (in the investigation).

Albanians²³¹, as well as other witnesses who did not mention snow,²³² claimed that the visibility on the afternoon of 18 April was good, implying that the army members had been able to see who they were shooting at. Had the Court given credence to these statements, it would have likely concluded that the said event did constitute a criminal offence, i.e. a war crime.

In contrast, according to the testimonies of former Yugoslav Army (VJ) officers, as well as military prosecutors and military investigative judges, during the investigation of the scene of death of civilians on 19 April 1999 the casings of fired ammunition were found at the site, mostly Chinese-made, as well as some white substance that witnesses believed were drugs.²³³ According to the statements of the accused, as well as second hand statements of war commanders and military prosecutors given at the trial, at dusk of 18 April 1999 fire was opened at the members of III Troop from the convoy including both the civilians and armed persons.²³⁴ Convoys of refugees crossing into Montenegro during the armed conflict in Kosovo, allegedly, in addition to civilians, regularly included armed persons who accompanied them.²³⁵ (However, according to the verdict, witnesses Dema Ramović, head of the sector in the Rožaje Security Department in April 1999, and Suljo Škrijelj, member of the Department, told the court that the Security Department had no information on the movement and locating of the Kosovo Liberation Army members on the territory of Rožaje municipality during this period).

Such testimonies of former VJ members are in accordance with the statement released by II Army of Yugoslavia on 20 April 1999 - two days after the incident in question: "A large group of terrorists of the so-called KLA, which was moving in the convoy, came across the unit of II Army of Yugoslavia and attacked it near the village of Kaluđerski laz. The terrorist group was broken up by a decisive action of VJ and four persons were killed on that occasion."²³⁶ Had the Court given credence to the testimony of former members of VJ, it could have perhaps concluded that this was not a war crime, but rather a proportionate response of the army to the attack and civilian casualties from crossfire.

The verdict, whose digital version is nearly 170 pages long, encompasses the following text "there is a link between the *crime* committed and the armed conflict", which could be interpreted as the position of the court that in this case the crime had indeed been committed. However, it is more likely that this sentence in the present context only expresses the legal position that, *in the event that* the acts of the accused constituted a crime, it would not be a "regular" crime but a

²³¹ Testimony of Husein Ljajić.

²³² Testimonies of Lindita Kastrati, Braim Ljajić, Besim Azemaj, and Rifat Elšani.

²³³ Testimonies of Željko Bogavac, Slavoljub Stojanović (Commander of III Light Infantry Brigade in April 1999), Branislav Dašić (deputy military prosecutor in the Corps Command), and Miladin Joksimović (duty judge of the Military Court, who on 19 April 1999 conducted an investigation of the scene of killing of the civilians). The judgment states that in the minutes of the death scene investigation of investigative judge of the Military Court at Podgorica Corps Command on 19 April 1999 it was indicated that the "at the scene where the event occurred ... bullet casings of 7.62 mm caliber were found - eight for rifle and one machine gun casing".

²³⁴ Testimonies of Slavoljub Stojanović (Commander of III Light Infantry Brigade in April 1999), Milan Vujović (at the time military prosecutor in Podgorica Corps Command), and Miroslav Samardžić (the then military prosecutor in Podgorica).

²³⁵ Testimonies of Vlajko Knežević (Assistant Commander of I Battalion for morale) and Željko Bogavac (deputy commander of the battalion).

²³⁶ Quoted from Veseljko Koprivica, "A group of reservists from Berane suspects (*Osumnjičena grupa beranskih rezervista*)", *Danas*, (Belgrade), 15 February 2007: http://www.danas.rs/vesti/drustvo/terazije/osumnjicena_grupa_beranskih_rezervista.14.html?news_id=102886 (accessed on 30 March 2015). Also, a piece of evidence collected for the purpose of trial before the Higher Court in Bijelo Polje was a video recording titled "a recording of the Military Police searching a wider area at the site Kaluđerski laz on 20 April 1999, regarding the attacks of a terrorist group of the so-called KLA on VJ unit".

war crime (because of the link to the armed conflict). In its judgment the Court failed to unequivocally express the view that on 18 April 1999 a war crime had actually happened. In particular, the Court failed to note in the relevant parts of the judgment that it believed the testimonies given by civilians from the convoy and members of the Rožaje Security Department, in which case this court would have had to assess the testimonies of former officers and military prosecutors, i.e. military investigative judges, as calculated to protect the accused and avoid own responsibility in some future proceedings.

By focusing on whether or not there were evidence that the accused were indeed the persons that opened fire at civilians and killed them, the court opted for an approach to resolving a legal issue that bears certain legal and political risk. Upon considering available evidence, the Court took a fair conclusion that there were no indications that Predrag Strugar had ordered the killing of Albanian civilians, as well as a conclusion that it could not have been determined whether the Albanian civilians had been shot by the accused, or some other members of III Troop I Battalion. In this regard, the Court established the failure in the investigation due to the failure to exempt and examine weapons from the soldiers that were on duty, as well as find and exempt bullet casings from the scene where the soldiers opened fire. As a result, according to the judgment, it was not possible to determine during the trial who had actually fired shots at civilians.

It seems that the State Prosecutor's Office could have crossed the threshold of proof only had it had the "insiders" at its disposal, i.e. members of III Troop present at the scene on 18 April 1999 and willing to testify - under the assumption that the Troop had opened fire unjustifiably – about the details of the shooting and persons who opened fire on civilians. However, in this case the Montenegrin State Prosecutor's Office did not provide for cooperation of such witnesses.

Placing of focus on actions of the actually accused allowed the Court to circumvent deciding on the existence of a criminal offense, i.e. assessing the credibility of the testimonies of military officials, on the one hand, and Albanian civilians and local police officers, on the other. In doing so the court indirectly avoided a situation in which, following a possible rejection of the testimonies of former VJ members, it would have implicitly characterized a statement of the Yugoslav Army (of 20 April 1999) as untrue and designed to cover up the crime.

The reductionist approach of the court in relation to the question of execution of a war crime - though not in violation of certain legal provisions - is difficult to justify. Such an approach would make sense had the court wanted to save time and resources by determining whether there was evidence on the activities of the accused, and if it is clear that there were no such evidence, then the court, guided by reasons of procedural economy, withdraws from presenting evidence on whether a war crime had at all been committed. However, in this particular case the court did not follow such economical and rational approach. On the contrary, the court heard a large number of witnesses and presented other evidence precisely on the issues that in the end it did not provide an answer to: who opened fire at whom, what were the weather conditions and at what time of day the event occurred.

In addition, it appears that the State Prosecutor's Office has not done enough to obtain key evidence that would paint a complete picture of what had actually happened on 18 April 1999. **In addition to the ineffective investigation, which did not provide adequate material evidence of the use of firearms on the scene of killing of the civilians, the final finding of the court is also shadowed by the failure to clarify the circumstances that the VJ in its**

strictly confidential order the day after the killing of civilians on April 18 demanded consistent adherence to the rules of international law of war. The judgment mentions the Command's order *Strictly confidential 518/2*, dated 19 April 1999, stating that the "misconduct was observed in combat activities during which the provisions of the instructions on conduct in combat and provisions of international law of war were not fully applied", and the order "to fully comply with all provisions of international law of war in the course of combat operations." Such content of the order suggests that there was an awareness within military circles of the fact that on the previous day, 18 April, members of VJ had committed a war crime - contrary to an official statement of VJ of 20 April - recycled through the testimonies of witnesses-former VJ members a decade and a half later in the trial before the Higher Court in Bijelo Polje. This order was signed by Slavoljub Stojanović, wartime commander of III Light Infantry Brigade. Stojanović did not testify before the court in Bijelo Polje, but was questioned in February 2012 on the request made by the preliminary proceedings judge of the Higher Court in Belgrade. According to the questioning record of Stojanović, neither the prosecutor nor the president of the Bijelo Polje Court Council asked questions about the order of 19 April 1999.²³⁷

The Appellate Court of Montenegro in the judgment of 8 December 2014, same as the Higher Court, only considered whether the evidence pointed to the conclusion that the accused were indeed the ones who had fired shots and killed and injured persons, or had the shots been fired by other members of the troop and which ones. The Appellate Court concluded that the evidence did not indicate the guilt of the accused, which was the only possible conclusion given the evidence presented.

As the Higher Court failed to establish whether or not on 18 April 1999 near Kaluđerski laz any crime had been committed, the possibility to examine potential responsibility of superiors for some form of complicity or on the basis of command responsibility in the future, without further investigation, had been significantly reduced.²³⁸ The truth about what had actually happened in this case had not been established.

²³⁷ Pom. Ik. 2 Po. 2.3/2012 minutes of testimony before the investigating judge for preliminary proceedings, including the act of the Higher Court in Belgrade on 23 February 2012.

²³⁸ The circle of persons potentially responsible by virtue of their position in the military hierarchy would include: commander of II Army of Yugoslavia Milorad Obradović; commander of the Podgorica Corps Savo Obradović and the Chief of Staff of this Corps Velimir Jovanović; and, commander of III Light Infantry Brigade (from the ranks of the Corps) Slavoljub Stojanović.

Conclusion

In relation to the courts

As a whole, the courts in Montenegro, instead of interpreting humanitarian and criminal law in a manner that provides for protection of victims of war crimes and ensures punishment for war crimes committed - the direction provided by the contemporary international humanitarian and international criminal law – they applied the most restrictive interpretation of domestic and international legal norms, sometimes completely erroneous, and hence prevented punishing members of Montenegrin police and former Yugoslav Army for war crimes for which they were accused.

For example, the conditions required by the Higher Court in Podgorica in the Deportation of refugees case for a crime to be classified as a war crime, which relate to the status of the perpetrator, have not been required by the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Court, or by the legislation or courts in the region, nor the Criminal Code of Montenegro. The conclusion of the Montenegrin courts that the arrest and extradition of civilians as hostages to Bosnian Serbs by police officers of Montenegro was not a war crime, because Montenegrin officials allegedly did not have the necessary capacity as members of a party to the conflict in Bosnia and Herzegovina to be found responsible for the crime, is absurd, and focused on the protection of official policy that Montenegro did not participate in the war in BiH.

Similarly, while the Court of BiH largely allows prosecution of crimes against humanity committed in the territory of the former Yugoslavia in BiH, the Appellate Court of Montenegro prevents such prosecution by restricting the term customary international law, which prohibits crimes against humanity. In the Morinj case, the Appellate Court went so far in protecting the defendants, as to request from the Higher Court in Podgorica to explain in its retrial (third) why it considers that prisoners of war in camp Morinj can generally be put in the category of "military personnel who does not participate actively in hostilities", although this is obvious from their status of disarmed, detained prisoners!²³⁹

In relation to the State Prosecutor's Office

On the other hand, **serious deficiencies in operation of the State Prosecutor's Office were: lack of initiative, extremely slow pace of investigations, failure to initiate investigation against persons who occupied high positions in military or political hierarchy, avoidance of the command responsibility institute, failure to precisely qualify the offense that the accused is charged with, refusal to amend the indictments by specifying them during the proceedings.**

²³⁹ Judgement of the Appellate Court of Montenegro in case Kžs. 24/2012, 6 July 2012.

All investigations in the cases analysed in the report have been induced by pressure from the victims and the public, and by the State Attorney's Office of the Republic of Croatia in the Morinj case, so lack of proactive action in line with the commitment of state prosecutors to investigate and conduct criminal prosecution for this type of act *ex officio* is obvious. The lack of enthusiasm to prosecute marked the course of the investigations, which as a rule resulted in incomplete and imprecise indictments, which the courts then rejected instead of providing for convictions by modifying imprecise legal qualifications. This approach was retained despite of continued appeals of international organizations for a more proactive approach by the state prosecutor's office to ensure punishment for war crimes.

Finally, none of the state participants involved in the prosecution of war crimes - the State Prosecution Office, the first-instance court, the second-instance court - resorted to modes of responsibility on the side of defendants that would significantly increase the likelihood of their conviction - co-perpetration, aiding and abetting and criminal responsibility and punishment of the organizers of criminal associations and command responsibility, in contrast to the practice in the region.²⁴⁰ This approach was retained despite timely warnings from international organizations that the institutes mentioned should be applied, in accordance with the practice of the ICTY.

The incorrect or extremely narrow application of the institute of international humanitarian and domestic Criminal Law cannot be explained by insufficient expertise of Montenegrin judicial and prosecutorial staff. The chapter on education presents facts about the investments of international organizations and foreign states in the training of Montenegrin judges and prosecutors who handled these cases.

On the basis of all this, the conclusion can be drawn about the conscious effort of Montenegrin judicial bodies to ensure impunity for war crimes.

²⁴⁰ See the chapter Legal framework (Command responsibility and crime against humanity).