NO-OBLIVION

Promoting Universal Jurisdiction while Evoking the Crimes Committed within Former Yugoslavia

CASE-LAW PRACTICAL BOOKLET

Funded by the European Union

Change Control

Document Properties

<table>
<tr><td>Deliverable No.</td><td colspan="3">D6.1</td></tr>
<tr><td>Work Package No.</td><td>WP6</td><td>Work Package Title</td><td>Case-Law Practical Booklet</td></tr>
<tr><td>Author/s</td><td colspan="3">SUBAŠIĆ-GALIJATOVIĆ, Sabina (UNSA); PRUŽAN, Mersudin (Prosecutors Office of BiH – State Prosecutor for War Crimes); FOČO, Adnan (UNSA)</td></tr>
<tr><td>Contributor/s</td><td colspan="3">PLEVLJAK, Benjamin (CSS); TADIĆ, Tomislav (CSS – FF UNSA)</td></tr>
<tr><td>Reviewer</td><td colspan="3">MURTEZIĆ, Arben (CEST FBiH); TADIĆ, Tomislav (CSS - UNSA); ŠLJIVO, Kenan (FF UNSA)</td></tr>
<tr><td>Name</td><td colspan="3">Case-Law Practical Booklet</td></tr>
<tr><td>Date</td><td colspan="3">February 2025</td></tr>
<tr><td>Dissemination Level</td><td colspan="3">Public</td></tr>
</table>

Revision Control

Version	Date	Comments
1	17.12.2024	Consortum

Funded by the European Union

Table of Content

Contents

Change Control 2
Document Properties 2
Revision Control 2
Table of Content 3
FOREWORD 5
SABINA SUBAŠIĆ GALIJATOVIĆ, PhD 8
Milosević Slobodan (Milošević, Slobodan, IT-02-54, "Kosovo, Croatia, Bosnia") 36
International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro) 55
Krstić Radislav (Krstić, IT-98-33, "Srebrenica - Drina Corps") 106
Stanišić & Simatović (Stanišić and Simatović, IT-03-69) 129
Professor ADNAN FOČO, PhD 148
MOMČILO KRAJIŠNIK 148
RADOVAN KARADŽIĆ 170
MILAN LUKIĆ 193
ZDRAVKO TOLIMIR 202
ANTE GOTOVINA 215
JADRANKO PRLIĆ and others 229
"Rape in war - case study of Bosnia and Herzegovina" 254
Rape in war 256
Prosecutor against Ante Furundžija - item no. IT-95-17/1-T 260
Prosecutor against Kunarac Dragoljub and others – item no. IT-96-23-T and IT-96-23/1-T 264
Prosecution of Bosnia and Herzegovina against Milan Todović - case no. S1 1 K 021644 275
Prosecution of BiH against Milomir Davidović - item no. S1 1 K 005151 18 279
The Prosecutor's Office of the Federation of BiH against Đ. Q. - item no. 09 0 K 022246 283
Proving war rape 289
Prosecutor against Ante Furundžija 294
Prosecutor against Kunarac Dragoljub and others 296
Prosecutor's Office of Bosnia and Herzegovina against Milan Todović 303
Prosecutor's Office of Bosnia and Herzegovina against Milomir Davidović 308
The Prosecutor's Office of the Federation of BiH against Đ. P. 313

Funded by the European Union

Mitigating and aggravating circumstances when sentencing 318
Prosecutor against Ante Furundžija 321
Prosecutor against Kunarac Dragoljub and others 323
Prosecutor's Office of Bosnia and Herzegovina against Milan Todović 327
Prosecutor's Office of Bosnia and Herzegovina against Milomir Davidović 328
The Prosecutor's Office of the Federation of BiH against Đ. P. 329
Literature 331
BIOGRAPHICAL NOTES OF AUTHOR AND OTHER CONTRIBUTORS 333

Funded by
the European Union

FOREWORD

The texts collected here represent, in essence, an analysis of the court judgments of international and regional courts regarding the prosecution of war crimes in the territory of the former Yugoslavia. Viewed in themselves and in the context of world-historical relations, judgments are not intended as factors that should contribute to reconciliation between the warring parties.

In essence, judgments should establish and satisfy the criteria of justice, which in the circumstances of war and war crimes cannot be articulated as some kind of abstraction. In this sense, the booklet presented to the readers seeks to problematize in a broad sense the most important aspects of what in general reception can be considered a kind of hermeneutic and epistemological undertaking based on a better understanding of the devastating consequences of war and cultural trauma.

Wars produce "cultural traumas" (Jeffrey C. Alexander) - they destroy the fabric of society, destroy the cultural substance of the community and create new forms of rigid and "anchored identities" (Nijaz Ibrulj) that leave permanent and irreparable consequences in relation to the subject they affect. In this sense, the issue of the analysis of court rulings in this practicum is not posed within the framework of a narrow phraseology well known to the international and local public, which, in its final form, becomes unproductive and blocking from the point of view of the possibility of building social equilibrium and homeostasis again.

The authors of this booklet, quite clearly, in the central sense analyze the court verdicts that were in the most intense focus of the international criminal mechanisms established with the aim of satisfying justice towards the victims, but in a broad and lateral framework (the layered implications of comprehensive lateral rationality) they talk about the fundamental problems and possibilities of society after cultural trauma. In the state of the contemporary world, the state of the global risk society (Ulrich Beck) and the postmodern agenda of life in fragments (Theodor W. Adorno), these very implications of lateral rationality are, in a certain sense, more important than what is in the central focus. If the reader opens the manuscript in this way, then he will find in it a constellation of complex algorithms and schemes within which the state of the global military, security, economic and cultural crisis can be adequately suppressed, and thus better determined.

The authors of the booklet, legal professionals, researchers and professors of the University of Sarajevo, in this sense, do not allow the issue of the analysis of court

Funded by
the European Union

judgments to be reduced to the dangerous trap of self-confirming and self - refuting claims (Hilary Putnam) which from time to time acquire their own and autarkic life within which practical and intellectual expediency cannot be achieved. Their heuristic strategy consists in moving the boundaries of possible experience (Kant) towards that mental index which questions things in a certain transcendental manner: what are the potentials of the judgments being analyzed and what is their use in the circumstances of the contemporary state of the world.

It is in this sense that the central intention of the NO-OBLIVION project, within which this booklet is being published, should be addressed. Its fundamental aim is: It looks back at the conflicts of the former Yugoslavia to, through a victim-centric and jurisprudential lens, preserve the lessons learnt in the aftermath of this war and ultimately safeguard a European legacy of respect for human rights, rule of law and peace.[1]

The Centre for Security Studies Sarajevo, for the production of this booklet, engaged prominent professionals with many years of experience in war crimes research, namely: Sabina Subašić-Galijatović, PhD (University of Sarajevo), Mersudin Pružan, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Prof. Adnan Fočo, PhD (University of Sarajevo), and as a consultant Ms. Iris Čevra (Georgetown University).

The authors, using different methodological positions, extensively problematize the fundamental judgments of international and local courts, from the judgment against Dušan Tadić, the first judgment pronounced before the ICTY, which in a certain way established the jurisprudence of the international Court, for acts tried for the first time after World War II, or the case of the trial of Slobodan Milošević, who was not sentenced due to death. The authors also touch, with particular detailed attention, on the criminal act of war crime of rape of men, women and children, articulating it as a separate case study, bearing in mind that in this aspect, special atrocities were committed on the territory of Bosnia and Herzegovina with the aim of complete dehumanization and deprivation of even a minimum of dignity from the victims.

The booklet, in this sense, provides a comprehensive insight to judicial professionals, but also to the general public, into the fundamental problems and challenges related to trials and judicial practice in dealing with war crimes. As such, it is the result of the overall activities of the NO-OBLIVION project, funded by the European Union. The booklet was preceded by multidimensional meetings with judicial professionals, co-

[1] https://www.no-oblivion.eu

Funded by
the European Union

creation laboratories, a series of monthly meetings at the level of the NO-OBLIVION project consortium, which consists of: European Association for Social Innovation, IPS_Innovative Prisons Systems, CAMINO, Victim Support Europe, DOCUMENTA, Center for Security Studies of Bosnia and Herzegovina, Helsinki Committee for Human Rights in Serbia and Kosovo Center of Diplomacy, as well as consultations with independent legal researchers who contributed their knowledge to the booklet's final form.

Benjamin Plevjak, Tomislav Tadic

Sarajevo, November 2024

Funded by
the European Union

SABINA SUBAŠIĆ GALIJATOVIĆ, PhD

The analysis of the judgments that follow is placed in chronological order. In a certain way that shows the development of legal practice of international criminal law and international contractual and customary law. In each of the analyzed judgments, emphasis was placed on certain legal issues in order to gain a broader picture regarding the established legal practice, the dilemma faced by the international judiciary, which in many segments made historic revolutionary strides precisely in those areas, and certain legal issues which still remained open.

The analysis contains judgments passed on the determination of individual responsibility, but also treats the only judgment passed so far on the responsibility of states for the violation of the Convention on the Prevention and Punishment of the Crime of Genocide. These trials before two different international court instances took place almost in parallel, and they dealt with the same crimes on a large scale - crimes in the area of Prijedor, Srebrenica, as well as the responsibility of high officials of the military and civilian authorities. That's exactly why it's interesting to look at them together.

The importance of determining individual responsibility, which was founded by the Nuremberg Tribunal, received its additional support in the judgments of the International Criminal Tribunal for the former Yugoslavia. In the field of responsibility of states for crimes of international law before the International Court of Justice, only the first significant steps have been taken in many segments, when it comes to basic legal postulates on these issues.

Today, the international judiciary is at one of the biggest turning points in its history. Examples of the fight against impunity, especially when it comes to the head of state and the highest civil and military officials, which were appointed by the prosecutors and judges of the ICTY, and the long struggle to determine the jurisdiction of the ICJ so that impunity for the most serious crimes of international law does not gain a foothold, are examples that deserve to be the driving force towards the further struggle for compliance with international legal norms and their further development.

Funded by
the European Union

Tadić Duško (Tadić, ICTY, IT-94-1, "Prijedor")

Legality of the International Criminal Tribunal for the former Yugoslavia Primacy of jurisdiction
Matters of jurisdiction
Determining the nature of the armed conflict for the purpose of applying the applicable

Factual and procedural basis of the case

From around 25 May 1992, Serbian forces, supported by artillery and heavy weapons, attacked areas inhabited by Bosnian Muslims and Bosnian Croats in the municipality of Prijedor, Bosnia and Herzegovina. After the attack, most Muslims and Croats were driven from their homes and captured by Serbian forces. Serbian forces then illegally imprisoned thousands of Muslims and Croats in Omarska, Keraterm and Trnopolje camps. The accused Duško Tadić, also known as "Dule", "Dušan", participated in the attacks, capture, killing and mistreatment of Bosnian Muslims and Bosnian Croats in the municipality of Prijedor, inside and outside the camp, in the period between May 23, 1992 and 31 December 1992.[2]

Living conditions in Omarska were harsh. Prisoners were kept in confined spaces with little or no possibility of maintaining personal hygiene. They were fed once a day with barely enough rations to survive. They had three minutes to go to the canteen, eat and leave. The little water they got was usually dirty. The prisoners were not given a change of clothes or bedding. No medical care was provided to them. Brutal beatings were common. The camp guards, as well as others who came to the camp and physically abused the prisoners, used a variety of objects as beating weapons including wooden clubs, metal rods and tools, pieces of thick industrial cables of various lengths that had metal balls attached to the ends, rifle butts and knives. Both male and female prisoners were beaten, tortured, sexually abused and humiliated. Many prisoners, both of known and unknown identities, did not survive the camps. After thousands of Bosnian Muslims and Bosnian Croats were taken away in the first wave at the end of May 1992, groups of Serbs, including the accused, continued to enter villages where the remaining Muslims and Croats still lived and killed some of the inhabitants, and some were taken from their houses to camps.[3]

---

[2] ICTY, IT-94-1-T, *Prosecutor of the court against Duško Tadić, also known as "Dula" and "Dušan" and Goran Borovnica*, Indictment (extended), December 14, 1995, par.1, http://www.icty.org/x/cases/tadic/ind/bcs/tad- 2ai951214b.htm
[3] Indictment, para. 2.5 - 2.6.

Funded by the European Union

The Keraterm camp was located on the site of the former ceramics factory in Prijedor. The prison conditions were similar to those in the Omarska camp, physical and psychological abuse, including assaults and killings, were a daily occurrence. The Trnopolje camp was established on the site of a former school in the village of Trnopolje. Men, women and children were imprisoned in the Trnopolje camp; most of those who were imprisoned in the camp were then expelled from the municipality of Prijedor. In the Trnopolje camp, women prisoners were sexually abused, prisoners were killed and abused in various physical and psychological ways.[4]

During the time period to which this indictment refers, the state of armed conflict and partial occupation lasted on the territory of Bosnia and Herzegovina. All wrongdoings and omissions, which Article 2 of the Statute of the Court lists as grave violations, occurred during the aforementioned armed conflict and partial occupation. All prisoners of Omarska, Keraterm and Trnopolje camps, as well as Bosnian Muslims and Bosnian Croats from the municipality of Prijedor who are mentioned in this indictment, were all persons protected by the Geneva Conventions from 1949. All the accused under this indictment were obliged to act in accordance with the laws and customs of war, including the Geneva Conventions from 1949.[5]

The accused Duško Tadić, at the time of the crime, was the president of the local committee of the Serbian Democratic Party in Kozarac, Prijedor municipality, and a member of the Serbian armed forces.[6] He was arrested two years after the committed crimes, while the armed conflict was still going on in the territory of Bosnia and Herzegovina. After he was arrested by the German police on February 12, 1994 in Germany and spent some time in custody, on April 24, 1995 he was transferred to the International Criminal Tribunal for the former Yugoslavia in The Hague.[7] Duško Tadić was charged on the basis of individual criminal responsibility (Article 7(1) of the ICTY Statute)[8] for:

- persecutions on political, racial and religious grounds; rape; murder;

[4] Indictment, para. 2.7.

[5] Indictment, para. 3.1-3.4.

[6] Duško Tadić was originally charged together with Goran Borovnica on February 13, 1995, and the first amended indictment was confirmed on September 1, 1995. The second amended indictment dated December 14, 1995 also charged Duško Tadić and Goran Borovnica. In April 2005, the indictment against Goran Borovnica was withdrawn with the possibility of its re-introduction. In the order on the withdrawal of the indictment, the judge considered the documents presented by the Prosecution, from which it followed that Goran Borovnica had been listed as a missing person since March 20, 1995, and was officially declared dead on November 22, 1996.

[7] UN, ICTY, Case Data, "Prijedor" (IT-94-1) uško Tadić, https://www.icty.org/x/cases/tadic/cis/bcs/cis_tadic_BCS.pdf

[8] Individual criminal responsibility, Article 7 - paragraph 1 of the Statute of the ICTY: "A person who planned, encouraged, ordered, committed or otherwise helped and supported the planning, preparation or execution of any of the criminal acts listed in Articles 2 to 5 of this Statute bears individual responsibility for that criminal act"., UN, International Court for the Criminal Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia Since 1991, *Updated Statute of the International Criminal Court for the former Yugoslavia,* September 2009, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf

Funded by the European Union

inhumane acts (crimes against humanity, Article 5 of the Statute),

- intentional deprivation of life; torture or inhumane treatment; intentional infliction of great suffering or serious injuries to body or health (serious injuries in accordance with the Geneva Conventions of 1949, Article 2 of the Statute), cruel treatment; murder (violations of the laws and customs of war, Article 3 of the Statute).

In one of its first trials, the ICTY dealt in detail with the question of the legality of the court, questions of primacy of the international court over national courts, and questions of general and substantive jurisdiction. The decisions of the Trial and Appeals Chambers, made in response to the defense's objections to jurisdiction, thus became the basis for the further action of the ICTY, as well as significant legal practice in the field of international law in this area.

On May 7, 1997, the ICTY issued a first-instance verdict on the merits.[9] Duško Tadić was found guilty on the basis of individual responsibility for crimes against humanity (persecutions on political, racial and religious grounds; inhumane acts) and violations of the laws and customs of war (cruel treatment),[10] with the Trial Chamber finding that Tadić was not guilty of certain counts of the indictment since the elements of the offense were not established beyond reasonable doubt.[11] Also, the Trial Chamber acquitted Tadić of several counts of the indictment with the explanation that the accusations made on the basis of Article 2 of the Statute of the ICTY were not applicable to the municipality of Prijedor during the relevant period covered by the indictment since it was not proven that the victims were protected persons according to the Geneva Conventions, that is, that in the period to which the indictment refers, the existence of an international armed conflict was not proven, so that these provisions could be applied.[12] The Trial Chamber sentenced Tadić to 25 years in prison.

---

[9] ICTY, IT-94-1-T, *Prosecutor against Duško Tadić aka "Dule"*, before the Trial Chamber, Opinion and Verdict, May 7, 1997, p. 275, http://www.icty.org/x/cases/tadic/tjug/bcs/970507.pdf

[10] Count 1 of the Indictment (persecutions as crimes against humanity under Article 5 (h) of the Statute (persecution on political, racial and/or religious grounds) and under Article 7(1) of the Statute; Counts 10, 13, 16, 22, and partially 33, Indictments (violation of the law of war and customs of war from Article 3 (Article 3(1)(a) cruel treatment and Article 7 (1) of the Statute (individual responsibility); Counts 11, 14, 17, 23 and partially 33 and 34 of the Indictment (crime against humanity under Article 5(i) (non- human acts) and Article 7(1) of the Statute).

[11] *Ibid.*, paragraphs 373 and 761. (violation of the laws of war and the customs and customs of war under Articles 3 and 7(1) of the Statute of the Court and Article 3(1)(a) (murder) of the Geneva Conventions (paragraphs 6, 19, 25, 30, and partially 33 of the Indictment); crime against humanity under Articles 5(a) (murder) and 7(1) of the Statute of the Court (item ke 7, 26, 31 of the Indictment); a crime against humanity under Articles 5(i) (inhuman treatment) and 7(1) of the Statute of the Court (count 20, 28, and partially 34, of the Indictment).

[12] "Since Article 2 of the Statute is applicable only to acts committed against "protected persons" within the meaning of the Geneva Conventions, and since it cannot be said that any of the victims, all of whom were civilians, were at any relevant time in the hands of a party to conflict of which he is not a citizen, the consequence of this conclusion, as far as

Funded by the European Union

On July 15, 1999, the Appeals Chamber issued a verdict rejecting the appeal of Duško Tadić on all grounds. However, accepting the prosecution's counter-appeal, the Appeals Chamber reversed the Trial Chamber's verdict, explaining that the Trial Chamber erred when it found that the victims were not protected persons within the meaning of the provisions of the Geneva Conventions, and established the existence of an international armed conflict during the entire period of the armed conflict in the area of Bosnia and Herzegovina thus declaring the accused guilty on the basis of individual criminal responsibility for serious violations of the Geneva Conventions from 1949, as well as for crimes against humanity and violations of the laws and customs of war. The sentencing procedure for the additional nine counts on which the Appeals Chamber found Duško Tadić guilty was sent back to the Trial Chamber for a decision.

On November 11, 1999, the Trial Chamber pronounced its verdict on the sentence on the additional counts of the indictment. Considering that all the sentences should be served simultaneously, and in connection with each of the sentences that were pronounced in the Judgment on the sentence of July 14, 1997, Duško Tadić was sentenced to 25 years in prison.[13] On November 25, 1999, the defense filed an appeal against the sentencing verdict. On January 26, 2000, the Appeals Chamber sentenced Dusko Tadić to the maximum sentence of 20 years in prison. Duško Tadić was transferred to Germany to serve his sentence, and on July 17, 2008, he was granted early release.[14]

Legality of the Court

On June 23, 1995, after the first indictment was filed, the defense of Duško Tadić filed a preliminary objection based on the lack of jurisdiction and requesting the dismissal of all charges against the accused. The defense's objection was the question of the jurisdiction of the ICTY to trial the accused on a threefold basis: the alleged improper establishment of the International Tribunal, the alleged improper assignment of primacy to the International Tribunal and the challenge to *the subject-matter* jurisdiction of the International Tribunal.

---

this trial is concerned, is that the accused must be found not guilty on the counts of the indictment based on that article, namely counts 5, 8, 9, 12, 15, 18, 21, 24, 27, 29 and 32, Opinion and Judgment, paragraph 608.

[13] It-94-1-T *bis* -R117, *Prosecutor v. Duško Tadić,* Sentencing Judgment, November 11, 1999, couple 32. [14]ICTY, IT-94-1-A, *Prosecutor v. Duško Tadic aka "Dule",* before the Appeals Chamber, Judgment, July 15, 1999, http://www.icty.org/x/cases/tadic/acjug/bcs/ 990715.pdf

[14] UN, ICTY, Case Information, "Prijedor" (IT-94-1) Duško Tadić.

Funded by the European Union

The raising of the question of the legality of the International Court was based on the thesis that the act of establishment, as well as the adoption of the Statute under which the ICTY operates, is outside the competence of the UN Security Council, and that, accordingly, the ICTY was not established legally and as such cannot try the accused. The defense based its allegations on the fact that, in order to be established legally, the International Court had to be established through an agreement, a consensus of nations or an amendment to the UN Charter, and not by a Security Council resolution. This position was substantiated by the defense with various subtheses: that before the establishment of the International Court in 1993, the possibility that such an *ad hoc* criminal court could be established was never foreseen ; that the UN General Assembly, whose participation would ensure full representation of the international community, was not involved in the establishment; that the Charter does not provide that the Security Council under Title VII can establish a judicial body, much less a criminal court; that the Security Council was inconsistent in establishing this Court since it did not take similar measures in the case of other areas where conflicts occurred and where violations of international humanitarian law may have occurred ; that the establishment of the International Court did not promote and is not able to promote international peace, as can be seen from the current situation in the former Yugoslavia; that the Security Council cannot under any circumstances impose criminal responsibility on individuals, and that is precisely what it did with the establishment of the International Tribunal; that neither there was nor is there an international state of emergency that would justify the action of the Security Council; that no political body, such as the Security Council, can establish an independent and impartial court; that there is an inherent defect in the establishment, after the fact, of ad *hoc courts* for certain types of crimes and, finally, that giving primacy to the International Court over national courts is, in any case and in itself, fundamentally wrong.[15]

The prosecutor in this case believed that none of these remarks were justified and that the indictment against the accused was within the jurisdiction of the International Court.[16]

In the Decision on the defense's objection to jurisdiction dated August 10, 1995, the Trial Chamber stated that the issues of jurisdiction concern the time, place and

[15] UN, ICTY, IT-94-1-IT, *Prosecutor v. Duško Tadić, also known as "Dula"*, Decision on Defense Objection to Jurisdiction, August 10, 1995, par.1-2.
[16] UN, ICTY, IT-94-1-IT, *Prosecutor v. Duško Tadić, also known as "Dula",* Decision on Defense Objection to Jurisdiction, August 10, 1995, p.2.

Funded by
the European Union

nature of the criminal offense for which the accused is charged, and that the validity of the establishment of the court is not a real issue of jurisdiction but a question of the legality of its establishment, including the powers of the Security Council as well as the manner in which they are exercised. The Decision also stated that the ICTY is not a constitutional court established to review the decisions of UN bodies, but that, on the contrary, it is a criminal court with clearly defined powers, including a very specific and limited criminal jurisdiction.[17]

Nevertheless, noting that the effectiveness of criminal law is partially based on the fact that it reflects a consensus on what is required of human behavior, as well as that it is equally important that the body that judges the criminality of such behavior is considered legitimate, the judicial council took the position that "to be inappropriately dismiss without comment the accusations that the establishment of the International Court by the United Nations was beyond its powers and a bad political move whose goal was not to establish and maintain peace, and that the International Court was not validly established in accordance with the law".[18] This Trial Chamber accordingly stated that the International Tribunal was established in accordance with Article 24(1) of the UN Charter which provides that the member states of the UN entrust the Security Council with responsibility for the maintenance of international peace and security and agree that the Security Council acts on their behalf in carrying out their duties based on this responsibility, and that the basic responsibilities for the maintenance of international peace and security are set out in Chapter VII, in addition to Chapters VI, VIII and XIII of the Charter:

> The Security Council has a great deal of discretion in exercising its powers under Title VII and the restrictions are very few. As indicated in *the travaux préparatoires*, a great deal of discretion is left as to when (the Security Council) may decide to intervene and by what means, the only condition being that it acts in accordance with the goals and principles of the United Nations.[19]

The Trial Chamber stated that the Security Council established the ICTY as an executive measure in accordance with Chapter VII of the UN Charter, based on its competence to make recommendations or decide what measures to take in order to maintain or establish international peace and security, that is, that bearing in mind

[17] Ibid., para. 4.
[18] Ibid., para. 6.
[19] Statement of the Rapporteur of Committee II/3, Doc. 134, III3/3, 11 UNCIO Docs.785 (1945), in UN, ICTY, IT-94-1-IT, Prosecutor v. Duško Tadić, also known as "Dula", Decision on Defense Objection to Jurisdiction, 10 August 1995, par. 7.

Funded by the European Union

the commonly known conditions in the former Yugoslavia, only took steps to "mitigate the threat to international peace and security by prosecuting persons who violate established international law... (which is) considered the best legal medicine".[20]

Primacy of jurisdiction

According to the finding of the Trial Chamber in its Decision on the defense's objection to jurisdiction, the defense's argument that the primacy of jurisdiction of the International Court has no basis in international law "since the national courts in Bosnia and Herzegovina, or alternatively, in the entity called the Republika Srpska, have primary jurisdiction to try the accused", represented a renewed challenge to the legality of the actions of the Security Council. The Trial Chamber reiterated that it is not authorized to review resolutions adopted by the Security Council. Also, referring to earlier judicial practice,[21] this panel considered that the accused does not have *locus standi* to raise the question of primacy, a right that the accused cannot in any case take from the state, since only a sovereign state can raise that question or waive it and:

> In this sense, it is important to state that the primacy of the International Court is contested despite the expressed intentions of the two member countries that are most directly affected by the indictment against the accused: Bosnia and Herzegovina and the Federal Republic of Germany. The first, on whose territory the alleged crimes were committed, and the second, where the accused was staying at the time of his arrest. Both have unconditionally accepted the jurisdiction of the International Court and the accused cannot invoke the rights expressly waived by the interested member countries. To allow the accused to do so would be to allow him to choose the forum of his own choosing, contrary to the principles relating to compulsory criminal jurisdiction. And as far as the entity known as the Republika Srpska is concerned, the accused as an individual, for the reasons stated above, has no *locus standi* to raise the

---

[20] UN, ICTY, IT-94-1-IT, Prosecutor v. Duško Tadić, also known as "Dula", Decision on Defense Objection to Jurisdiction, August 10, 1995, para. 21-22, par. 18.
[21] Israel v. Eichmann, 36, LLR 5, 62, 1961.

Funded by the European Union

> issue of sovereign rights, even if the aforementioned entity were to be recognized with all the attributes of statehood.[22]

As an additional argumentation of its decision on this issue, the Trial Chamber stated that it is not about crimes of a "pure domestic nature", but about crimes that are universal in nature, which international law clearly qualifies as serious violations of international humanitarian law and which exceed the interest of each individual member country:

> The Judicial Council agrees that in such circumstances the sovereign rights of states cannot and must not take precedence over the right of the international community to act appropriately, since these crimes affect the entire humanity and shake the consciousness of all the nations of the world. Therefore, the International Court, which is validly constituted, cannot be questioned to judge these crimes on behalf of the international community.[23]

This panel additionally confirmed its argumentation by stating that the crimes for which the accused are charged are part of customary international law and that there are no crimes that fall under the exclusive jurisdiction of any individual member state, as well as that Article 2(7) of the Charter, prohibiting the intervention of the United Nations in matters that essentially fall within the internal jurisdiction of member countries, stipulates that "this principle must not prejudice the application of coercive measures from Title VII".[24]

In the end, the first-instance panel, having considered the objection of the defense, rejected the objection to the extent that it refers to the primacy of jurisdiction and real jurisdiction, and to the extent that it refers to the challenge to the establishment of the International Court, it declared itself incompetent.[25]

Duško Tadić's defense filed an appeal against this Decision of the Trial Chamber on August 10, 1995. Considering these issues in the appeal, the Appeals Chamber in the Decision on the interlocutory appeal of the defense on the court's jurisdiction dated October 2, 1995, and based on the development of the proceedings up to that point, concluded that the question of jurisdiction took on a double dimension: the

[22] UN, ICTY, IT-94-1-IT, *Prosecutor v. Duško Tadić, also known as "Dula",* Decision on Defense Objection to Jurisdiction, August 10, 1995, par.41.
[23] *Ibid.*, par. 42.
[24] *Ibid.*, par. 44.
[25] *Ibid*, Disposition

Funded by the European Union

jurisdiction of the Appeals Chamber to decide in this appeal, as well as jurisdiction of the International Court to decide in this case.[26]

Analyzing its Rules of Procedure and Evidence, the Appeals Chamber noted that the limited interpretation of the concept of jurisdiction, based on the distinction between the validity of the establishment of the International Tribunal and its jurisdiction, accepted by the Trial Chamber, does not correspond to the modern vision of administration of justice:

> A decision on a substantive issue such as the jurisdiction of the International Tribunal should not be left until the end of a potentially long, emotional and expensive trial. All grounds of objection relied on by the appellant result, in the final analysis, in the assessment of the legal capacity of the International Tribunal to conduct proceedings in this case. What is it but a matter of jurisdiction? (...) Nevertheless, in the Court, common sense should be respected not only when weighing facts, but also when reviewing laws and choosing adequate rules.[27]

The Appeals Chamber therefore analyzed the arguments of the appeal and the powers of the Security Council in accordance with Chapter VII of the UN Charter, the range of foreseen measures, and found that *prima facie* the international court responded perfectly and correctly fell under the measures under Article 41 of the UN Charter. Accordingly, the Appeals Chamber further analyzed the question of whether the establishment of the International Tribunal was an appropriate measure, especially in relation to its action towards achieving the goal of establishing peace. Arguing that it would be "a complete misunderstanding of the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure in achieving their objectives", this panel concluded that the International Tribunal was legally established as a measure under Title VII Charters.[28]

This appellate panel further considered the defense's appeal argument related to the primacy of the International Court over national courts, established as such by the Statute of the ICTY (Article 9 of the Statute of the ICTY - simultaneous jurisdiction and primacy), emphasizing that the appellant's submission is of material importance, all the more so it is expected that this International Court will try the appellant on the basis of the request for the transfer of the investigation and criminal

---

[26] ICTY, IT-94-1-AR72, *Prosecutor against Duško Tadić, also known as "Dula",* Decision on the interlocutory appeal of the defense on the jurisdiction of the court, October 2, 1995, pp. 1-2.
[27] *Ibid.*, par. 6.
[28] *Ibid.*, para. 34-40, 46-47.

Funded by the European Union

proceedings which the International Criminal Court handed over to the Government of the Federal Republic of Germany and which, respecting the same, extradited the appellant International court.[29] In its arguments, the Appeals Chamber stated that the Security Council, as an organ of the organization representing the community of nations, is authorized and mandated to consider issues beyond the borders of states as well as issues that, although national in nature, may affect international peace and security:

> To allow the concept of state sovereignty to be successfully used against human rights would be a caricature of rights and a betrayal of the universal need for justice. Borders should not be considered as a shield against law enforcement and protection of those who trample on the most basic human rights.[30]

The Appeals Chamber additionally stated that giving primacy to the international court over national courts is also important because of the danger that international criminal offenses are characterized as "ordinary criminal offenses" or that "procedures are devised that would protect the accused", or that the cases are insufficiently diligently tried by the courts to solve, and once again confirmed the principle of primacy of the International Court over national courts.[31]

Matters of jurisdiction

The objection of lack of substantive jurisdiction was considered in relation to the application of the norms of serious violations of the Geneva Conventions, violations of the laws and customs of war and crimes against humanity. In its argumentation, the Appeals Chamber referred to the teleological interpretation of the ICTY Statute, as well as the types of armed conflicts for the purpose of applying the appropriate legal norms:

> As the members of the Security Council well knew in 1993, when the Statute was drawn up, the conflicts in the former Yugoslavia could be characterized as both international and internal, or differently, as an internal conflict alongside an international conflict, or as an internal conflict that turned into an international one due to external support or

[29] *Ibid.*, para. 50.
[30] ICTY, IT-94-1-AR72, Prosecutor v. Duško Tadić, also known as "Dule", *Decision on the interlocutory appeal of the defense on the jurisdiction of the court,* October 2, 1995, para. 58.
[31] *Ibid.*, para. 58-59.

Funded by the European Union

> as an international conflict that was later replaced by one or more internal conflicts, or some combination of all these. The conflict in the former Yugoslavia became an international conflict with the participation of the Croatian army in Bosnia and Herzegovina and the participation of the Yugoslav People's Army (JNA) in the conflicts in Croatia, as well as in Bosnia and Herzegovina, at least until its formal withdrawal on May 19, 1992.
>
> As for the conflict between Bosnian government forces and Bosnian Serb rebel forces in Bosnia and Herzegovina, as well as the conflict between Croatian government forces and Croatian Serb rebel forces in Krajina (Croatia), they were internal (unless the direct participation of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven. It is significant that the parties in this case also agree that the conflicts in the former Yugoslavia since 1991 had aspects of both internal and international conflict. (Transcript of Hearing on Objection to Jurisdiction of July 26, 1995, para 47, 111).[32]

As the *Tadić* case referred, there was a state of international armed conflict as well as an internal armed conflict, depending on a certain period of time.[33]

Determining the nature of the armed conflict for the purpose of applying the applicable law

After the Trial and Appeal Chambers in the *Tadić case* deliberated and rendered Decisions on the defense's objection to jurisdiction, the merits of the case were considered. One of the key issues was the application of the applicable law, especially the application of the norms of serious violations of the Geneva Conventions and the related issue of the nature of the armed conflict and the status of protected persons. The findings of the Trial and Appeal Panels in this regard took into account different criteria and thus reached different points of view.

In order to apply the applicable law, the Trial Chamber in the *Tadić case* considered the general conditions for the application of the applicable law according to the Statute of the ICTY, primarily the existence of an armed conflict, that the acts of the accused were committed in the context of that armed conflict, and for the

[32] *Ibid.*, para. 58-59.
[33] ICTY, IT-94-1-AR72, Prosecutor v. Duško Tadić, also known as "Dule", *Decision on the interlocutory appeal of the defense on the jurisdiction of the court,* October 2, 1995, para. 72.

Funded by the European Union

application of serious violations of the Geneva Conventions - the existence of an armed conflict international character and criminal acts committed against persons or property that are considered "protected", especially civilians in the hands of the party to the conflict of which they are not nationals.[34]

The criterion applied by this Council for determining the existence of an armed conflict was its intensity and the organization of the parties to the conflict, in order to distinguish between armed conflict and banditry, disorganized and short-lived rebellions, and terrorist activities, which are not subject to international humanitarian law. Accordingly, this council considered the situation in the area of the municipality of Prijedor:

> The parties to the conflict in the area of the municipality of Prijedor and the main parties to the conflict in Bosnia and Herzegovina as a whole were the government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces, the latter controlling the territory under the banner of the Republika Srpska and, at least before 19 May 1992, had the support of or were under the command of the JNA. (...) The Republic of Bosnia and Herzegovina was admitted to the United Nations as a member state, following the decisions adopted by the Security Council and the General Assembly on May 22 1992, two days before the shelling and takeover of Kozarac. Bosnian Serb forces actually rebelled against the *de jure* state.[35]

The Trial Chamber further considered specific actions in the area of Kozarac, the villages around Prijedor and the municipality of Prijedor itself, to which the indictment refers. The council stated that hostilities did not stop in the municipality of Prijedor after the withdrawal of the JNA, and that at the end of May, the area southwest of Prijedor was attacked, and then on May 24, Kozarac and villages in the vicinity of Prijedor were committed, where the crimes that are the subject of the indictment were committed. The Trial Chamber considered these attacks in the context of the conflict between the government of Bosnia and Herzegovina and the Bosnian Serb forces as a whole, and stated that "before, during and after the attack on Kozarac on May 24, 1992, they took place and continued to take place throughout the territory of Bosnia and Herzegovina ongoing conflicts between the government of the Republic of Bosnia and Herzegovina on the one hand and, on the other, Bosnian Serb forces, elements of the VJ that operated from time to time on

[34] ICTY, IT-94-1-T, *Prosecutor v. Duško Tadić aka "Dule"*, before the Trial Chamber, Opinion and Verdict, May 7, 1997, para. 559-560, http://www.icty.org/x/cases/tadic/tjug/bcs/970507.pdf
[35] *Ibid.*, para. 563

Funded by
the European Union

the territory of Bosnia and Herzegovina, and various paramilitary groups, and all they occupied or were preparing to occupy a significant part of the territory of that country".[36]

According to the arguments presented, the Trial Chamber concluded that, taking into account the nature and scope of the conflict, and regardless of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces, there was an armed conflict of sufficient scope and intensity to be able to apply the law of war or the customs of war embodied in common Article 3 of the Geneva Conventions applicable to armed conflicts in general.[37]

Regarding the status of protected persons, and for the purpose of determining the applicable law related to the application of serious violations of the Geneva Conventions (Article 2 of the Statute of the ICTY), this panel considered whether at any relevant time the victims of the accused were in the hands of "a party to the conflict or an occupying power" of which they are not nationals":[38]

> The degree of application of international humanitarian law in different places in the Republic of Bosnia and Herzegovina depends on the specific character of the conflict with which the Indictment deals. This again depends on the degree of involvement of the VJ and the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA on May 19, 1992.[39]

The key question relied on by the Trial Chamber was "whether, after May 19, 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) with its withdrawal from the territory of the Republic of Bosnia and Herzegovina, and regardless of its continued support to the VRS, sufficiently distanced from the VRS that these forces cannot be considered *de facto* organs or agents of the VJ, and hence the Federal Republic of Yugoslavia (Serbia and Montenegro)?".[40]

> The occupation of Kozarac and the surrounding villages was part of a military and political operation that began before May 19, 1992, with the takeover of the city of Prijedor on April 29, 1992, with the aim of establishing control over this municipality as part of the land corridor of Bosnian territory that connected the Federal Republic of Yugoslavia

[36] *Ibid.*, para. 565-566.
[37] *Ibid.*, para. 568.
[38] *Ibid.*, para. 578.
[39] *Ibid.*, para. 571.
[40] *Ibid.*, para. 587.

Funded by
the European Union

> (Serbia and Montenegro) with the so-called Republic of Serbian Krajina in Croatia. The town of Kozarac was located on the supply route that passes through this corridor. The attack on Kozarac was carried out by elements of the army corps based in Banja Luka. This corps, formerly the corps of the old JNA, became part of the VRS and was renamed the "Banjalučki" or "Prvi Krajiški" corps after May 19, 1992, but retained the same commander, Lieutenant General Talić, a Bosnian Serb. For logistics, he relied, as before, on the rear service base in Banja Luka, which was commanded, as before, by Colonel Selak, a Bosnian Muslim.[41]

Furthermore, in the factual elements, the Trial Chamber presented the data that the government of the Federal Republic of Yugoslavia (Serbia and Montenegro), which also financed the VRS, continued to pay salaries to officers as well as pensions to those who, when the time came for it, left into retirement, "which was still done in 1996".[42] The Trial Chamber presented the data that "not counting the soldiers of the Rear Service Base, the 1st Krajina Corps numbered about 100,000 soldiers, expanded in relation to the peacetime numerical situation in the JNA of 4,500":

> These forces included or were supplemented by various paramilitary forces. Before May 1992. The JNA played a significant role in training and equipping the Bosnian Serb paramilitary forces. In 1991 and continuing throughout 1992, Bosnian Serb and Croatian Serb paramilitary forces cooperated with the JNA and operated under the command and within the framework of the JNA. (...) Some were even trained within the 5th Corps of the JNA in Banja Luka. The JNA's reliance on such forces was a reflection of the general shortage of manpower. According to one witness, "although the JNA was prepared to use its artillery in operations, it relied on paramilitary groups to enter built-up areas and act as infantry substitutes". Air support was provided to such paramilitary forces, which continued in 1992. Evidence was also presented that the Serbian Security Service gave instructions to at least one paramilitary leader, Vojislav Šešelj, about the deployment of his forces during 1991 and 1992.[43]

Issues of dependence and control - a criterion of effective control over military operations

[41] *Ibid.*, para. 590.
[42] *Ibid.*, para. 590
[43] *Ibid.*, para. 593.

Funded by the European Union

The Trial Chamber concluded that the JNA played a key role in "establishing, equipping, supplying, maintaining and staffing the 1st Krajina Corps, as it did with other units of the VRS", but also that "this in itself, however, is not enough: it is also necessary to show, as the Court required of Nicaragua in proving United States control over *the contras,* that the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) continued to exercise effective control over the military operations of the VRS after the transfer of personnel and combat equipment on or before May 19, 1992".[44] Considering this issue, a criterion was set that requires a degree of dependence and control so that the actions of the VRS, including the occupation of the municipality of Prijedor, can be attributed to the government of the Federal Republic of Yugoslavia (Serbia and Montenegro). For this purpose, this panel referred to the judgment of the International Court of Justice (ICJ) in the *Nicaragua case,* considering that "it is neither necessary nor sufficient to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) in terms of war supplies, but also that the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) "exercised the possibilities of control" i.e. that they had "effective control".[45] In this regard, the Council stated that coordination is not the same as leadership and control, and that the only evidence submitted by the Prosecution is that, in addition to channeling all communications of the VRS at a high level through secure connections in Belgrade, a daily communication link was established and maintained between the Main Staff of the VRS and the Main Staff of the VRJ in Belgrade, as well as that the Prosecution did not adduce additional evidence about the nature of this relationship.[46] The Trial Chamber further considered the relationship of the VRS and the Republika Srpska as a whole towards the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro), and stated that it was clear from the evidence that the military and political goals of the Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary:

> The Federal Republic of Yugoslavia (Serbia and Montenegro) which was heavily engaged in activities in Croatia against Croatian army forces, was interested in maintaining a supply corridor that would run from Serbia through northern Bosnia (where the municipality of Prijedor was located) to Serbian Krajina in Croatia. The political leadership of Republika Srpska - SDS - and their senior military commanders no doubt considered the

[44] *Ibid.*, para. 595.
[45] *Ibid.*, para. 588.
[46] *Ibid.*, para. 598.

Funded by the European Union

> success of the all-Serbian war effort a prerequisite for their stated political goal of unification with Serbia and Montenegro within the framework of Greater Serbia, which would unite the territories inhabited by Serbs in the former Yugoslavia. (...) In this sense, there was no great need for the VJ and the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to try to achieve some real degree of control over the VRS, as opposed to coordination with it. (...) In particular, based on the evidence presented to this Trial Chamber, it cannot be said that the relationship between the Main Staff of the VRS and the Main Staff of the VJ involved anything more than a general level of coordination corresponding to their relationship as allied forces in the Serbian war effort.[47]

Based on that, the Council took the position that the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the delivery of combat equipment by the VJ, had the possibility of exerting great influence and possibly even control over the VRS, but that there is no evidence of on the basis of which it can be concluded that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever "directed or, for that matter, ever felt the need to attempt to direct the existing military operations of the VRS, or to influence those operations to a greater extent than would naturally result from the coordination of military objectives and activities of the VRS and VJ at the highest levels".[48] On this basis, the Council concluded that after May 19, 1992, the armed forces of the Republika Srpska cannot be considered *de facto* organs or agents of the government of the Federal Republic of Yugoslavia (Serbia and Montenegro), and that the inapplicability of Article 2 of the Statute follows from this, and that the accused should be found not guilty on the counts of the indictment related to the application of this article.[49]

The Prosecutor's Office of the ICTY filed an appeal against the first-instance verdict, and the trial panel's conclusion that it was not proven that the victims were protected persons under Article 2 of the Statute of the ICTY was set as the first basis for the counter-appeal. The Prosecution based its appeal on the fact that the Trial Chamber erred when, in order to determine the applicability of the provisions on Grave Violations of the relevant Geneva Convention, it relied exclusively on the

[47] *Ibid.*, para. 603-604.
[48] *Ibid.*, para. 605.
[49] *Ibid.*, para. 607-608.

Funded by the European Union

"effective control" test derived from the International Court of Justice case concerning military and paramilitary activities in Nicaragua and against it (*Nicaragua v. United States*).[50]

Arguing that the situation considered before the International Court of Justice regarding the responsibility of states in the *Nicaragua case is* completely different from the situation in the *Tadić case,* where individual responsibility was primarily determined, the Prosecution argued that the Trial Chamber should have applied the provisions of the Geneva Conventions as well as the relevant principles and sources of international humanitarian law which, in the opinion of the Prosecutor's Office, prescribe the application of the "provable link" test.[51] On this basis, the Prosecution claimed that the Army of the Serbian Republic of Bosnia and Herzegovina had a "provable connection" with the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Army of the FRY, as well as that it was not "mere logistical support of the FRY- and VRS".[52] In addition, the Prosecution argued that the Trial Chamber erred in finding that the only test applied in Nicaragua was the "effective control" test, since the Court in Nicaragua also applied the "agency " test, which the Prosecution maintains is a more appropriate standard to determine the applicability of provisions on serious injuries.[53]

> In support of that claim, the Prosecution highlights, among other things, the fact that after May 19, 1992, when the Yugoslav People's Army formally withdrew from Bosnia and Herzegovina, VRS soldiers continued to receive salaries from the FRY government, which also provided funds for the payment of pensions to retired VJ soldiers who served in the VRS. The Prosecution also cites numerous other factors in support of its claim that after May 19, 1992, the FRY did not only provide logistical support. These factors include the fact that the structures and ranks in the VRS and VJ are identical, as well as the fact that even after that date the FRY exercised control over the VRS. From these facts, the Prosecution concludes that the FRY exercised effective military control over the VRS.[54]

For its part, the Defense argued that the Trial Chamber was correct in applying the "effective control" test from the *Nicaragua case* and considered the

[50] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* (Merits), Judgment, ICJ Reports (1986), p. 14.
[51] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, Judgment, July 15, 1999, para. 69-70, http://www.icty.org/x/cases/tadic/acjug/bcs/990715.pdf
[52] *Ibid.*, para. 72.
[53] *Ibid.*, para. 73.
[54] *Ibid.*, para. 74.

Funded by the European Union

"demonstrable connection" test to be inappropriate. The Defense considered that in the presented evidence there is no basis for the conclusion that after May 19, the VRS was under the effective control of the Government of the FRY, nor that it can be considered its agent, based on the fact that the FRY and the Republika Srpska acted in coordination, exclusively as allies. Therefore, the test that the Appeals Chamber, in the opinion of the defense, should apply, should be formulated by the Defense in the following way: "Did the Bosnian Serbs act as an organ of another state ?"[55]

The Appeals Chamber in the *Tadić case* set the conditions for the application of Article 2 of the Statute, distinguishing common legal elements of different categories of criminal offenses that include serious violations of the Geneva Conventions. Relying on the interpretation of the Appeals Chamber following the defense's interlocutory appeal on the Court's jurisdiction in this case, this Chamber stated that the international character of the conflict is a prerequisite for the application of Article 2 of the Statute of the ICTY, and in order to determine the status of the victims as protected persons under the Geneva Conventions.[56] The Appeals Chamber proceeded from the established fact that there was sufficient evidence in this case to justify the Trial Chamber's factual finding that the conflict before May 19, 1992 was of an international character, and that the question of whether after May 19, 1992 the conflict was still international or has become purely internal depends on whether the forces of the Bosnian Serbs - at whose hands the victims were in this case - can be considered *de iure* or *de facto* organs of a foreign power, i.e. the FRY.[57]

Relying on the corpus of legal norms of international humanitarian law, the Appeals Chamber therefore considered the conditions under which armed forces fighting against the central authorities of the same state in which they live and operate can be considered to be in fact acting on behalf of another state. In other words, the appeals panel identified the conditions under which these forces can be equated with the authorities of another state, different from the one on whose territory they live and operate:

> As a starting point for the discussion, we can take the standards for the status of legitimate combatants set out in Geneva Convention III of 1949. According to that Convention, militias or paramilitary groups or units can be considered legitimate combatants if they are "members of the armed

[55] *Ibid.*, para. 75-77.
[56] *Ibid.*, para. 80.
[57] *Ibid.*, par. 87.

Funded by the European Union

> forces" of a party to the conflict or "belong to a party to the conflict". and satisfy the other two conditions set out in Article 4A(2). It is clear that the main purpose of that provision is to determine the criteria for the status of legitimate combatants. Nevertheless, one of the logical consequences is that, if in an armed conflict paramilitary forces "belong" to a country other than the one they are fighting against, the conflict is international and therefore serious violations of the Geneva Conventions can be classified as "serious violations".[58]

The Council further reasoned that the content of the condition "belonging to a party to the conflict" is far from clearly and precisely defined and that the argumentation on which Article 4 rests is that after the Second World War it was universally decided that states should be responsible for the behaviour of paramilitary forces that support:[59]

> However, considering the experience of the two world wars, the nations of the world considered it necessary to add the basic condition of full responsibility of governments for the actions of paramilitary units and thus ensure that someone can be held accountable if they do not act in accordance with the law of war and customs.[60]

Concluding that from this, among other things, it follows that humanitarian law holds responsible not only those who are formally in positions of power, but also those who *de facto* exercise power, as well as those who have control over the perpetrators of serious violations of international humanitarian law, the Council considered that in in cases such as *Tadić,* any control exercised by one party in the conflict over the perpetrators, entails its criminal responsibility.[61]

The concept of control - the need to supplement international humanitarian law with general international norms on criteria when individuals are considered to act as *de facto* organs of the state

Starting from the statement that international humanitarian law does not contain any criteria that serve to determine when a group of individuals can be considered to be under the control of a state, i.e. when the individuals in question act as *de facto* officials of the state, the Appeals Chamber in the *Tadić case* considered this issue.

[58] *Ibid.*, para. 92
[59] *Ibid.*, para. 93.
[60] *Military Prosecutor v. Omar Mahmud Kassem et al.*, 42 *International Law Reports* 1971, p.470, p.477.
[61] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule"*, before the Appeals Chamber, Judgment, July 15, 1999, para. 96.

Funded by the European Union

Regarding the degree of control, the Appeals Chamber examined the legal practice of the International Court of Justice in the *Nicaragua case*, concluding that the ICJ in this case "authoritatively suggested a high degree of control" where it was required not only that "a party effectively controls a military or paramilitary group", but also that it "exercised control in relation to a specific operation during which a possible violation occurred".[62]

The Appeals Chamber, first of all, referred to the preliminary question of the conditions under which, according to international law, an individual can be considered to act as a *de facto* organ of the state, as well as the question of the interpretation of the Nicaragua judgment itself in relation to the agency test and the effective test controls.[63] Noting that the Trial Chamber in the *Tadić case considered the* "control effective" test formulated by the International Court of Justice to be correct and upheld, the Appeals Chamber came to the conclusion that it did not consider the test in the Nicaragua case convincing based on two grounds:

Proceeding from the thesis that the test from the *Nicaragua case* is not in accordance with the logic of law on state responsibility, the Appeals Chamber considered that a distinction should be made between the case when individuals act on behalf of the state without specific instructions and the case when individuals form an organized and hierarchically structured group, e.g. a military unit or, in case of war or internal strife, armed bands of irregular forces or insurgents. Namely, according to the opinion of the Council, it is clear that an organized group differs from an individual in that, as a rule, the group has a structure, a chain of command, rules of conduct, and often external symbols of authority. Furthermore, group members generally do not act on their own but adhere to the standards that apply in the group and are subject to the authority of the group leader. Accordingly, as stated by the Council, in order to attribute the acts of such a group to a state, it is sufficient to set the condition that the group as a whole was under the general control of the state.[64] The council further stated the position that according to the rules on state responsibility,[65] the

State bears international responsibility for acts or transactions of its organs and when they act *ultra vires*, i.e. the state bears responsibility for acts committed by its officials

---

[62] *Ibid.*, para. 98-101.
[63] *Ibid.*, para. 102-115.
[64] *Ibid.*, para. 120.
[65] "The behavior of a state authority or entity that has the authority to exercise elements of administrative authority, where such authority or entity acted in that capacity, will be considered under international law as an act of the state even if in the specific case the authority or entity in question exceeded its authority or acted contrary to the instructions on how to exercise those powers"., *First Report on State Responsibility by the Special Rapporteur J. Crawford,* UN Doc. A/CN/490/Add.5, p. 29-31. (UN Doc. A/CN/4/L. 569, p. 3).

Funded by the European Union

outside their area of jurisdiction or contrary to state orders. The logic, on which this provision is based, according to the Council, is that the entire body of international law on the responsibility of states is based on a pragmatic understanding of responsibility, which does not pay attention to legal formalities, but aims to ensure that states entrust certain functions to individuals or groups of individuals responsible for their actions, even when they are contrary to the instructions issued by the state:[66]

> International law takes such a position regardless of whether the state has issued specific instructions to those individuals. It is obvious that this legal regulation is guided by the logic that otherwise states could easily deny international responsibility, hiding behind their national legal system or using as an excuse that no specific instructions have been issued.[67]

The Chamber further presented another ground on which the ICJ jurisprudence test in the *Nicaragua case* may be considered inconclusive. Namely, the Council referred to the divergence between the "control effective" test, which the International Court of Justice takes as an exclusive and comprehensive test, and international judicial and state practice, which foresees the responsibility of states in circumstances where there was a lower degree of control than that required in to the case of *Nicaragua.* The Council referred to cases in which the courts apparently deviated from the concept of "effective control" established by the International Court of Justice, i.e. control that extends to issuing specific instructions related to various activities of individuals: Thus, for example, in the Stephens case, the Commission on General Claims between Mexico and the United States attributed to Mexico acts committed during the Civil War by a member of the Mexican "irregular auxiliaries" of the army, who, among other things, did not wear uniforms or insignia.[68] In that case, the Commission did not even examine whether specific instructions were issued to kill United States citizens by guardsmen.[69]

The Council also referred to the approach of the Düsseldorf court in the *Jorgić case*, in which the court considered that the Bosnian Serbs who fought against the central authorities in Sarajevo acted on behalf of the government of the Federal Republic of Yugoslavia.[70] The panel added that this court emphasized in support of its

---

[66] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, Judgment, July 15, 1999, para. 121.
[67] *Ibid.*, para. 123.
[68] United States v. Mexico (Stephens case), Reports of International Arbitral Awards, vol. IV, p. 266-267.
[69] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, Judgment, July 15, 1999, para. 125.
[70] *Ibid.*, para. 129, fn.155-156, "The court stated the following: "The conflict in Bosnia and Herzegovina was international for the purposes of Article 2 of Geneva Convention IV. With the declaration of independence and referendum on February 29 and March 1, 1992, and international recognition on April 6, 1992, Bosnia and Herzegovina became an independent state,

Funded by the European Union

conclusion that Belgrade financed, organized and equipped the army and paramilitary units of the Bosnian Serbs and that there was a "close personnel, organizational and logistical connection (Verflechtung)" between the JNA and the Bosnian Serbs, for which was considered to be a sufficient basis for the conflict to be qualified as international. The panel further emphasized that this court did not examine whether the specific acts committed by the accused or other Bosnian Serbs were ordered by the FRY authorities.[71]

Exactly what degree of state control is required under international law for organized military groups? In this matter, the Council stated the position that in order to attribute the acts of a military or paramilitary group to a state, it must be proven that the state exercises general control over that group, not only by equipping and financing it, but also by coordinating or assisting in the general planning of its military activities, but that it is not necessary for the state to issue instructions to the leaders or members of the group for the execution of specific acts against international law.[72] The Council further added that the courts adopted a different approach with regard to individuals or groups that are not organized as a military structure:[73] "when it comes to such individuals or groups, the courts did not consider the existence of a total or general degree of control sufficient, but insisted on the existence of specific instructions or directives for the commission of specific acts, or they sought public approval of those acts after they had already been committed".[74]

In addition to the test of general control that applies to armed groups and the test of specific instructions (or subsequent public approval) that applies to individuals and groups without a military organization, the Appeals Chamber identified that international law recognizes a third test - equating individuals with state authorities

---

autonomous from Yugoslavia. The armed conflict that took place on its territory in the period that followed was not an internal conflict (conflict) in which one ethnic group tried to separate itself from the existing state of Bosnia and Herzegovina and which (therefore) was not of an international character. (...) The council established that in early May, officers of the JNA, which at that time was entirely Serbian, began to occupy Doboj and the surrounding villages. Therefore, there is no doubt about the existence of an international armed conflict at that moment. However, this Council also established that after May 19, 1992, when the JNA officially withdrew from Bosnia and Herzegovina, the officers of the JNA were still employed in Bosnia and Herzegovina and receiving salaries from Belgrade, and that at the end of May, material and technical means, weapons and vehicles were still arriving from Belgrade to Bosnia and Herzegovina. The result was the maintenance of a close personnel, organizational and logistical connection (Verflechtung) of the Bosnian Serb army, paramilitary groups and the JNA. The headquarters of the Bosnian Serb army had a liaison office in Belgrade". (pp. 158-160 of unpublished typescript; unofficial translation). The judgment of the Higher Court in Düsseldorf was upheld on appeal by the Federal Court of Justice (Bundesgerichtshof) in a judgment of 30 April 1999 (unpublished). One of the grounds of appeal was the incorrect application of substantive law. That ground also includes the question of whether the conflict was of an international character. The Bundesgerichtshof did not specifically address the issue, thereby implicitly supporting the judgment of the court in Düsseldorf. (See especially pp. 19-20 and 23 of the German typed transcript (3 StR 215/98) in the library of the International Court)".

[71] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, Judgment, July 15, 1999, para. 129.

[72] *Ibid.,* para. 131.

[73] In its examination of jurisprudence on this issue, the Chamber referred to the cases of *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports (1980), p. 3 et seq.; case ICJ *Nicaragua,* para. 75; *Alfred W. Short v. Islamic Republic of Iran,* Award No. 312-11135-3, 16 Iran-US Claims Tribunal Reports 1987, p. 76).

[74] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, Judgment, July 15, 1999, para. 132.

Funded by the European Union

on the basis of their actual behavior within state structures regardless of the eventual condition of the existence of instructions issued by the state.

As an example, the Council referred to the *Belsen case*[75] before the British military court in Lüneburg, Germany, where among the accused were not only Germans employed in the concentration camps in Belsen and Auschwitz, but also numerous inmates of Polish citizenship and an Austrian Jew "whom the camp administration appointed to the position of authority over other internees". Among other things, they are accused of murder and other criminal offenses against camp inmates. As stated in the official report on the case:

> Refuting the argument that the Poles could not have committed a war crime against other citizens of the Allied countries, the prosecutor said that by identifying themselves with the authorities, the accused Poles bear the same responsibility as the SS men themselves. Perhaps it could be argued that by the same process they came closer to belonging to the armed forces of Germany.[76]

Referring to similar practice before the Dutch courts[77] and the Tribunal for claims between Iran and the USA,[78] the Council concluded that private persons acting as part of the armed forces or connected with them can be considered *de facto* organs of the state.[79]

Necessary degree of control - conclusion of the Appeals Council

After finding that three tests can be applied in international law to determine whether an individual acts as a *de facto* organ of the State, the Chamber concluded that in the case of individuals belonging to the armed forces or military units, as well as in the case of all other hierarchically organized group, the test of general state control is applied:

---

[75] *Trial of Joseph Kramer and 44 Others,* British Military Court, Luneberg, September 17 - November 17, 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, ed. His Majesty's Stationery Office for the UN War Crimes Commission, London 1947, vol. II, p. 1.

[76] "Most of the accused civilians were found guilty and sentenced to prison terms. It is clear from this case that in the opinion of the court, Polish civilians can be identified with German state officials because they acted as *de facto* members of the German administration of the Belsen concentration camp", ICTY, IT-94-1- A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, Judgment, 15 July 1999, para. 142, fn 170.

[77] Menten, a Dutch national who had not previously served in the German forces, was charged with war crimes and crimes against humanity for killing a number of civilians, mostly Jews, in Poland on behalf of German special forces (SD or Einsatzkommandos). The court concluded that Menten had in fact acted as a member of the German forces and was therefore criminally responsible for these crimes (judgment of the Dutch Court of Cassation of 29 May 1978, *Public Prosecutor v. Menten, 75 International Law Reports* 1987, p. 331. and so on.)

[78] *Daley* case, where the Iran-US Claims Tribunal attributed international responsibility to Iran for the acts of five members of the Iranian "Revolutionary Guard" in "military-like uniforms" (18 *Iran-US Claims Tribunal Reports,* 1988, p. 238, para. 19).

[79] *Daley* case, where the Iran-US Claims Tribunal attributed international responsibility to Iran for the acts of five members of the Iranian "Revolutionary Guard" in "military-like uniforms" (18 *Iran-US Claims Tribunal Reports,* 1988, p. 238, para. 19).

Funded by
the European Union

> In the case before us, since the Bosnian Serb armed forces constituted "amilitary organization", the type of control of the FRY authorities over those armed forces required by international law for that armed conflict to be considered international is a general control that is not limited to funding and equipping such forces, but rather involves participating in the planning and supervision of military operations. On the contrary, international rules do not require this control to extend to issuing specific orders or instructions for individual military actions, regardless of whether these actions are in conflict with international humanitarian law.[80]

The Council then determined whether, in the circumstances of the *Tadić case*, the Yugoslav Army exercised the necessary control over the Bosnian Serb army in 1992:

> The Trial Chamber found beyond doubt that the command structure of the JNA did not change even after 19 May 1992, when it was renamed and transformed into the VJ. (...) The creation of the VRS by the FRY/VJ did not, therefore, indicate Belgrade's intention to relinquish control of the FRY/VJ over the Bosnian Serb army. On the contrary, the VRS was formed in order to continue achieving the FRY's own political and military goals, and it is clear from the evidence that these goals were achieved through military and political operations controlled by Belgrade and the JNA/VJ. There is no evidence that on May 19, 1992, those goals changed. (...) The renamed army of Bosnian Serbs still consisted of one army under the command of the VJ General Staff in Belgrade. It was obvious that even after May 19, 1992, the Bosnian Serb army continued to act to achieve the military goals formulated in Belgrade.[81]

In its further reasoning, the Appeals Chamber referred to the key findings of the Trial Chamber in the *Tadić case* regarding general and effective control and their deficiencies:

> In the opinion of the Appeals Chamber, the Trial Chamber's conclusion that the relationship between the FRY/VJ and the VRS was one of cooperation and coordination, rather than general control, has the weakness of uncritically accepting the characteristics that Belgrade deliberately established in order to create the appearance that Belgrade

[80] *Ibid.*, para. 145.
[81] *Ibid.*, para. 150 – 152.

Funded by the European Union

> and Pale linked only as partners acting in cooperation. Such an approach is not only wrong in the specific circumstances of this case, but can lead to harmful consequences if it is adopted as a general approach. Giving undue importance to the visible structures and public statements of the belligerents, rather than a careful analysis of the actual relationship that exists between them, may tacitly suggest to groups exercising *de facto* control over military forces that responsibility for the actions of those forces can be avoided by superficial restructuring of those forces or by facile declarations that are restructured forces now independent of their previous sponsors.

Finally, it should be noted that the Trial Chamber concluded that various forms of assistance to the armed forces of the Republika Srpska by the Government of the FRY were "of key importance" for the realization of their activities and that "those forces were almost entirely dependent on the material means of the VJ for conducting offensive operations". Despite this finding, the Trial Chamber did not find "general control". Great weight was given to the lack of concrete evidence of specific instructions. It was considered that there was not enough evidence for "effective control", again on the basis that no explicit evidence was presented to the Trial Chamber that Belgrade issued direct instructions. However, that conclusion was reached on the basis that the Trial Chamber applied the wrong test.[82]

The Appeals Chamber then concluded:

> It follows that in the circumstances of this case it was not necessary to show that the specific operations carried out by the Bosnian Serb forces and which are the subject of this trial (attacks on Kozarac and in general in the municipality of Prijedor) were specifically ordered or planned by the Yugoslav Army. It is enough to show that that Army exercised general control over the Bosnian Serb forces - which the accusation before the Trial Chamber showed. This control was reflected not only in financial, logistical and other assistance and support but also, more importantly, in participation in the general direction, coordination and supervision of the activities and operations of the VRS. That type of control is sufficient to meet the legal criteria required by international law.[83]

The council also referred to *ex post facto* confirmation of the facts:

[82] *Ibid.*, para. 154-155.
[83] *Ibid.*, para. 156.

Funded by the European Union

> *Ex post facto* confirmation of fact that for several years (in any case between 1992 and 1995), the FRY exercised general control over the Republika Srpska in the political and military domain can be found in the process of negotiations and the conclusion of the Dayton-Paris Agreement in 1995 (...) The agreement concluded On August 29 between the FRY and the Republika Srpska, which was mentioned in the preamble of the Dayton-Paris Agreement, it is foreseen that a single delegation will negotiate in Dayton. That delegation would consist of six people, three from the FRY and three from the Republika Srpska. The delegation would be led by President Milošević, who would have the deciding vote in case the votes were split in half. Later, when the various agreements concluded in Dayton had to be signed, it turned out again that the FRY was the one that largely acted as an international subject exercising authority over the Republika Srpska. The general framework agreement, by which Bosnia and Herzegovina, Croatia and the FRY acceded to the various agreements in the annex and undertook to respect and actively support the fulfillment of the obligations arising from them, was signed by President Milošević. That signature had the effect of guaranteeing that the Republika Srpska would respect those obligations. Furthermore, in a letter dated November 21, 1995 addressed to various countries (the United States, Russia, Germany, France and the United Kingdom), the FRY undertook to "take all necessary steps, in accordance with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and obeys the provisions of the Agreement on Military Aspects of the Peace Agreement (Annex 1 to the Dayton-Paris Agreement). Apart from that, on November 21, 1995, the Minister of Foreign Affairs of the FRY, Mr. Milutinović, for the Republic of Srpska.[84]

According to the Council's conclusions, although the conclusion of the Dayton-Paris Agreement in 1995 cannot represent direct evidence of the nature of the relationship that existed between the Bosnian Serb army and the FRY army after May 1992 and "therefore, it is by no means decisive for the issue of control in that period",[85] the entire process supports the claim that "in reality, the FRY exercised general political and military control over Republika Srpska (in this context, control includes

[84] *Ibid.*, para. 157-159.
[85] *Ibid.*, para. 157

Funded by the European Union

participation in planning and monitoring ongoing military operations), at least between 1992 and 1995".[86]

In the end, the court established that in the circumstances of the case there was an international armed conflict, which enabled the application of the applicable law - serious violations of the Geneva Conventions, concluded that the victims were protected persons[87] and accordingly pronounced the sentence in the *Tadić judgment*.

This legal approach, which places more emphasis on the essence of relationships than on formal ties, is becoming increasingly important in modern international armed conflicts. While in earlier times wars were mostly fought between established states, in modern inter- ethnic armed conflicts such as the one in the former Yugoslavia, new states are often created during the armed conflict, and the criterion of loyalty becomes ethnicity and not citizenship. In other words, loyalty to the state can be given by ethnicity. In such a situation, the condition of citizenship becomes even more inappropriate for defining protected persons. In such conflicts, not only the text and the history of the drafting of the Convention but, more importantly, the very goal and purpose of the Convention speak in favor of the fact that the key test should be considered loyalty to the party in the conflict, which corresponds to the control of that party over persons in the given territory.[88]

[86] *Ibid.*, para. 160.
[87] "In the case in question, it can be argued that the Bosnian Serbs, including the appellant, had the same citizenship as the victims, i.e. they were citizens of Bosnia and Herzegovina. However, it was shown above that the Bosnian Serb forces acted as *de facto* organs of another state, that is, the FRY. Therefore, the conditions from Article 4 of Geneva Convention IV were met: the victims were "protected persons", since they found themselves in the hands of the armed forces of a country of which they were not citizens. ", *Ibid.*, par. 167.
[88] *Ibid.*, para. 166.

Funded by the European Union

Milosević Slobodan (Milošević, Slobodan, IT-02-54, "Kosovo, Croatia, Bosnia")

The first trial before an international court against a sitting head of state
Application of Rule 98 *bis*

Existence of armed conflict Deportations and forced relocation, International armed conflict, Genocide and complicity in genocide

"This International Court and this trial itself represent the strongest evidence that no one is above the law and beyond the reach of international justice".[89]

The trial against Slobodan Milošević is one of the most significant trials before the ICTY, and was, as the International Residual Mechanism for Criminal Courts (IMRC) pointed out, a "turning point for international justice",[90] that is, "the most important thing is not the trial after Nuremberg", as the media labeled it.[91] Slobodan Milošević was the first head of state, at the time of the indictment and still in office, who was responsible for the most serious crimes of international criminal law committed on the territory of Croatia, then Bosnia and Herzegovina and then Kosovo. Namely, Slobodan Milošević served as the President of Serbia from December 26, 1990 to July 15, 1997, in which capacity he was accused of crimes committed on the territory of Croatia and Bosnia and Herzegovina, and from From July 15, 1997 to October 6, 2000, he served as President of the Federal Republic of Yugoslavia (FRY), and in that capacity was also President of the Supreme Council of the Defense of the FRY and the Supreme Commander of the Yugoslav Army, in which period the crimes were committed in the territory of Kosovo for which he was accused. Slobodan Milošević was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute of the ICTY) within the framework of a joint criminal enterprise, and on the basis of the criminal responsibility of a superior (Article 7(3) of the Statute of the ICTY) for the committed acts of war crimes, crimes against humanity and crimes genocide. Slobodan Milošević chose to represent himself before the ICTY. In the absence of a

---

[89] MRMKS, Prosecutor Carlo del Ponte in his opening statement at the trial of Slobodan Milošević, Trial of Slobodan Milošević, https://www.icty.org/bcs/content/su%C4%91enje-slobodanu-milo%C5%A1evi%C4%87u
[90] *Ibid.*
[91] BBC, Nataša AnĊelković, *Slobodan Milošević: Everything that marked the ``most important trial after Nuremberg",* July 3, 2021, https://www.bbc.com/serbian/lat/balkan-57682498

Funded by the European Union

professional defense lawyer, and with the aim of ensuring a fair trial, the Trial Chamber ordered the Secretary of the Court to designate the lawyers who will appear before the Chamber as so-called *amici curiae* (friends of the Court).[92]

Significant jurisprudence, used in later cases before the Hague Tribunal and beyond, emerged from this process. Although the process did not reach the stage of a final verdict, since Slobodan Milošević died shortly before the end of the presentation of the defense's arguments, numerous legal elements in the treatment of the most serious crimes under international law the individual responsibility of the head of state gained its footing. As the MRMKS stated, "the amount of evidence submitted during the trial of Milošević, many of which were seen for the first time, can be considered the greatest achievement of this procedure because remain part of the archive - available to the public as an obstacle to malicious attempts to rewrite history".[93]

Special interest in the professional public is directed towards the decision of the Trial Chamber in this case, which is colloquially called the interjudgment, and in which it was established that there is sufficient evidence that establishes beyond a reasonable doubt certain acts that were committed charged the accused. Also, one of the important segments of this process is the treatment of evidence - how to treat evidence key to the case if it has been declared a state secret? Can a state refer to internal legislation that allows it to protect certain documents if they are key evidence of committed crimes under international law?

Factual and legal basis of the indictment

Kosovo

The original indictment for crimes committed on the territory of Kosovo was filed on May 24, 1999, the amended indictment on June 29, 2001, and the second amended indictment on October 29, 2001. The operative indictment stated that between January 1, 1999 and June 20, 1999, Slobodan Milošević participated in a joint criminal enterprise (JCE) together with several other individuals, including Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Vlajko Stojiljković and other known and unknown persons. The purpose of the JCE, according to the indictment, was to expel from

[92] ICTY, IT-02-54-T, *Prosecutor of the International Tribunal against Slobodan Milosevic,* Second Amended Indictment, para. 6.
[93] See also: ICTY, "Milošević" (IT-02-54) Slobodan Milošević, Information on the case, p, 7, https://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf

Funded by the European Union

Kosovo a significant part of the Kosovo Albanian population in an effort to ensure further Serbian control over the province, and during that period, the forces of the Federal Republic of Yugoslavia (FRY) and Serbia, acting on instructions, at the instigation or with the support of the JCE, carried out a campaign of terror and violence directed against the Albanian civilian population in Kosovo. The consequence was the forced deportation of approximately 800,000 Albanian civilians in Kosovo. It was further stated that the forces of the FRY and Serbia deliberately created an atmosphere of fear and pressure through the use of force, threats of force and acts of violence, in order to enable expulsions and displacement - throughout Kosovo, the forces of the FRY and Serbia systematically shelled towns and villages, burned houses and agricultural farms, damaged and destroyed cultural monuments and religious buildings of Kosovo Albanians, killed Kosovo Albanian civilians and sexually abused Kosovo Albanian women. According to the indictment, during the relevant period, Slobodan Milošević was the president of the FRY, the president of the Supreme Defense Council of the FRY and the commander-in-chief of the Yugoslav Army (JAF), and in accordance with his position he had the authority to command the VJ and police forces subordinate to the VJ.

The indictment also stated that Slobodan Milošević, in addition to his *de jure powers*, also had broad *de facto* control over numerous institutions that were of essential importance or participated in the commission of the criminal acts listed in the indictment: deportations, murders, political, religious persecutions or on a racial basis and other inhuman acts/forcible transfer (crimes against humanity from Article 5 of the Statute of the ICTY), as well as murders (violations of the laws and customs of war from Article 3 of the Statute of the ICTY).[94]

Croatia

The original indictment for crimes committed in the area of Croatia was filed on October 8, 2001, amended on October 23, 2002, and the second amended indictment became operative on July 28, 2004. According to the second amended indictment, Milošević was accused of crimes committed in the occupied parts of Croatia ("Srpska autonomous region of Krajina", "SAO Zapadna Slavonia" and "SAO Zapadni Srem", for which the Serbian authorities from on December 19, 1991, they used the common name "Republika Srpska Krajina"). According to the operational indictment, Slobodan

[94] MRMKS, Prosecutor Carlo del Ponte in his opening statement at the trial of Slobodan Milosevic, Trial of Slobodan Milosevic.

Funded by the European Union

Milošević participated in a joint criminal enterprise that began before August 1, 1991, and lasted at least until June 1992. Among the individuals who, according to the indictment, took part in this joint criminal enterprise are Borisav Jović, Branko Kostić, Veljko Kadijević, Blagoje Adžić, Milan Babić, Milan Martić, Goran Hadžić, Jovica Stanisić, Franko Simatović (called "Frenki"), Tomislav Simović, Vojislav Šešelj, Momir Bulatović, Aleksandar Vasiljević, Radovan Stojiĉić (called "Badža"), Željko Ražnatović (called "Arkan") and other known and unknown participants. The purpose of this joint criminal enterprise, according to the indictment, was the forced removal of the majority of the Croatian and other non-Serb population from approximately one-third of the territory of the Republic of Croatia, the territory for which the accused planned to become part of a new state under Serbian domination. These areas included the areas referred to by the Serbian authorities under the names "Serbian Autonomous Region (SAO) Krajina", "SAO Zapadna Slavonija" and "SAO Slavonia, Baranja and Western Srem" (for which the Serbian authorities used from 19 December 1991 common name "Republika Srpska Krajina" (RSK), and "Republic of Dubrovnik". It was stated that during the relevant period, Slobodan Milošević was the president of the Republic of Serbia as well in his capacity exercised effective control or had significant influence on participants in a joint criminal enterprise and, alone or in agreement with others, effectively controlled or significantly influenced the actions of the federal Presidency of the Socialist Federal Republic of Yugoslavia (SFRJ) and later the Federal Republic of Yugoslavia (FRY), the Ministry of Internal Affairs of Serbia (MUP), the Yugoslav People's Army (JNA), members of the Territorial Defense (TO), which was led by Serbs in the relevant territories, as well as groups of Serbian volunteers.

Between August 1, 1991 and June 1992, according to the indictment, Serbian forces consisting of JNA units, local TO and TO units from Serbia and Montenegro, local police units and police units of the MUP of Serbia and paramilitary units, attacked and took over power in cities, villages and settlements in the mentioned areas. After the seizure of power, Serbian forces, in cooperation with local Serbian authorities, established a regime of persecution designed to drive the Croat and other non-Serb civilian population out of those areas. That regime included the extermination or killing of hundreds of Croats and other non-Serb civilians, including women and the elderly, the deportation and forced transfer of at least 170,000 Croats and other non-Serb civilians, and the detention or imprisonment under inhumane conditions of thousands of Croats and other non-Serb civilians. It was further stated that, in all relevant areas, public and private property, including houses, buildings of religious,

Funded by
the European Union

historical and cultural institutions, was being deliberately and recklessly destroyed and looted.[95]

Slobodan Milošević was accused of acts of persecution on political, religious or racial grounds, acts of extermination, murders, imprisonment, torture, inhumane acts, deportations, forced transfers (crimes against humanity). He was also accused of intentional deprivation of life, illegal detention, torture, intentional infliction of great suffering, illegal deportation or transfer, destruction or confiscation of property on a large scale that was not justified by military necessity and was carried out in an illegal and reckless manner (serious violations of the Geneva Conventions from 1949). Slobodan Milošević was also accused of crimes from the category of violations of the laws and customs of war for the following crimes: murder, torture, cruel treatment, reckless destruction of villages or devastation that is not justified by military necessity, destruction or willful damage to institutions intended for education or religion, looting of public or private property, attacks on civilians, destruction or intentional damage to historical monuments and institutions intended for education and religion, illegal attacks on civilian objects.[96]

Bosnia and Herzegovina

The original indictment for crimes committed on the territory of Bosnia and Herzegovina was filed on November 22, 2001, and the amended indictment on November 22, 2002. The indictment states that Slobodan Milošević participated in the JCE, which was created before August 1, 1991, and lasted at least until December 31, 1995. Among the individuals who took part in the JCE are Radovan Karadžić, Momĉilo Krajišnik, Biljana Plavšić, Ratko Mladić, Borisav Jović, Branko Kostić, Veljko Kadijević, Blagoje Adžić, Milan Martić, Jovica Stanišić, Franko Simatović (called "Frenki"), Vojislav Šešelj, Radovan Stojiĉić (called "Badža"), Željko Ražnatović "Arkan" and other known and unknown participants. According to the indictment, the purpose of that JCE was the forced and permanent removal of the majority of non-Serbs, primarily Bosnian Muslims and Bosnian Croats, from large parts of the territory of the Republic of Bosnia and Herzegovina. During the relevant period, Slobodan Milošević was the President of the Republic of Serbia and, according to the indictment, in that capacity exercised effective control or had significant influence over the participants in JCE, either alone or in agreement with other known and

[95] ICTY, "Milošević" (IT-02-54) Slobodan Milošević, Case Data, p, 4,6.
[96] ICTY, "Milošević" (IT-02-54) Slobodan Milošević, Case Data, p, 4,6.

Funded by the European Union

unknown persons, effectively controlled or to a considerable extent influenced the actions of the Federal Presidency of the SFRY and later the FRY, the MUP, the JNA (later the VJ), the Bosnian Serb Army (VRS), as well as Serbian paramilitary units.

According to the factual elements of the indictment, Slobodan Milošević, in the period from March 1, 1992 or approximately from that date until December 31, 1995, acting alone or in agreement with other JCE participants, planned, encouraged, ordered, committed or otherwise aided and abetted the planning, preparation and execution - of the widespread killing of thousands of Bosnian Muslims during and after the takeover of the territories in Bosnia and Herzegovina, as well as the imprisonment of thousands of Bosnian Muslims in detention facilities in Bosnia and Herzegovina in living conditions calculated to lead to the partial physical destruction of these groups, especially through starvation, polluted water, forced labor, inadequate medical care and constant physical and psychological violence. As a co-perpetrator of the JCE, Milošević was also charged with the extermination or murder and forced transfer and deportation of thousands of Bosnian Muslims, Bosnian Croats and other non-Serb civilians. The charges also include numerous acts of willful and wanton destruction of houses, other public and private property of Bosnian Muslims and Bosnian Croats, their cultural and religious institutions, historical monuments and other holy places and confiscation and looting of property of Bosnian Muslims, Bosnian Croats and other non-Serb civilians. Milošević was accordingly accused of individual responsibility and participation in the JCE, as well as superior responsibility for the legal acts of genocide, complicity in genocide (genocide - Article 4 of the ICTY Statute), persecution on political, racial or religious grounds, extermination, murder, imprisonment, torture, deportations, inhuman acts and forced transfers (crimes against humanity - Article 5 of the Statute), intentional deprivation of life, illegal detention, torture. intentional infliction of great suffering, unlawful deportation or transfer, destruction and confiscation of property on a large scale (serious violations of the 1949 Geneva Conventions - Article 2 of the Statute), murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, willful destruction or intentional damage to historical monuments and institutions intended for education and religion, looting of public or private property and attacks on civilians (violations of the laws and customs of war including – Article 3 of the ICTY Statute).[97]

[97] ICTY, "Milošević" (IT-02-54) Slobodan Milošević, Case Data, p, 6-7.

Funded by
the European Union

Application of Rule 98 *bis* of the Rules of Procedure and Evidence of the ICTY

On February 25, 2004, the Prosecution finished presenting its evidence and the Trial Chamber ordered*, inter alia*, that the accused or *the amici curiae submit* their possible proposal based on Rule 98 *bis* by March 8, 2004, and the prosecutor their possible response by the 22nd. March 2004. Namely, Rule 98 *bis* provides that the accused may submit a motion for acquittal for one or more criminal offenses charged in indictments within seven days from the completion of the presentation of the prosecution's evidence, i.e. before the beginning of the presentation of the defense's evidence. According to this rule and previous legal practice,[98] the trial panel issues a verdict of acquittal at the motion of the accused or *proprio motu* if it concludes that there is not enough evidence to convict him on that charge or charges. The necessary degree of provability of the allegation when it comes to a proposal based on Rule 98 *bis* is determined by means of a given criterion that can be established "whether there is evidence on the basis of which (if accepted) a reasonable trier of fact could be convinced beyond a reasonable doubt of guilt of the accused on the charge".[99]

Amici curiae, on the basis of Rule 98 *bis,* submitted on March 3, 2004, a Motion for acquittal. The proposal is based on the claims that there are no certain prerequisites and evidence, and that on that basis certain points of the accusation should be rejected, that is, an acquittal should be passed, for the following reasons:

- there was no "armed conflict" in Kosovo before March 24, 1999¸ so those parts of the Indictment for Kosovo that depend on that legal prerequisite should be deleted;
- it has not been proven that Croatia acquired statehood before the period January 15 - May 22, 1992. That is why the conflict in Croatia before that time was not international, and all counts of the Indictment for Croatia that charge the accused with serious injuries in connection with the crimes for which are claimed to have been committed before these dates;
- there was no evidence that the accused planned, incited, ordered, committed or otherwise aided and abetted the planning, preparation or execution of genocide and genocidal acts, nor that he was an accomplice

[98] See more about the procedure for dismissing charges due to insufficient evidence, *Ibid.* par. 11-13.
[99] ICTY, IT-95-10-A, *Prosecutor v. Jelisić,* Judgment, July 5, 2001, para. 37; Second-instance judgment in the *Jelisić case,* para. 37.

Funded by the European Union

in such acts, and the *mens rea condition* for proving the criminal act of genocide is irreconcilable with the condition of existence *of mens rea* for the third category of joint criminal enterprise and command responsibility, which are stated in the Indictment for Bosnia;

- for 185 separate allegations from three indictments, there was no or insufficient evidence.[100]

The prosecutor, in his answer, considered that there was sufficient evidence to establish beyond a reasonable doubt the state of the armed conflict in Kosovo, as well as that the conflict in Croatia was of an international character beginning on October 18, 1991, when Croatia, according to the provisions of international law, met the criteria for the acquisition of statehood, and that there is sufficient evidence of the commission of the act of genocide as well as the existence *of mens rea* for a joint criminal enterprise on the territory of Bosnia and Herzegovina. The prosecutor accepted that for some of the contested allegations from the three indictments, there was not enough evidence to meet the legal standard stipulated by Rule 98 *bis,* and that he has no objection to an acquittal based on those allegations, but also that he does not accept many of the objections to the indictments.[101]

Findings of the Trial Chamber

The existence of an armed conflict in Kosovo before March 24, 1999

Regarding the existence of the armed conflict in Kosovo, *the Amici curiae* stated that the Kosovo Liberation Army (KLA) did not represent a sufficiently organized armed group "under responsible command or an organized military force "responsible for its actions, operating within a certain territory and able to respect Convention (Article 3 of the Geneva Conventions, op.a.) and make sure that it is respected".[102] For its part, the Trial Chamber considered the question of the degree of organization of the KLA and concluded that there was sufficient evidence to show that the KLA was an organized military force, with an official joint command structure, headquarters, established operational zones and the ability to acquire, transport and distribute weapons. Based on the presented argumentation and evidence, the Council concluded that the conflict in Kosovo meets the elements of the criteria from the

[100] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 8 and 9,
https://www.icty.org/x/cases/slobodan_milosevic/tdec/bcs/040616-t.pdf
[101] *Ibid.,* par. 5.
[102] *Ibid.,* par. 6.

Funded by the European Union

Tadić case,[103] the purpose of which is to distinguish between armed conflict and banditry, unorganized and short-lived rebellions or terrorist activities, which are not subject to international law, and that for the purposes of Rule 98 bis, there is sufficient evidence that an armed conflict existed in Kosovo at the relevant time.[104]

Deportations and forced relocation (Kosovo, Croatia, Bosnia and Herzegovina)

Prosecution and *Amici curiae*, in this case, had different understandings about what elements constitute the crimes of deportation and forcible transfer - *the Amici curiae* were of the opinion that in relation to some allegations in the indictments there was sufficient evidence for forcible transfer, but not for deportation. Along with the analysis of Nuremberg jurisprudence, the Geneva Conventions and the positions of the International Law Commission, the Trial Chamber referred to definitions from earlier legal practice according to which deportation is defined as "forcible displacement of persons by expulsion or other coercive actions from the area where they legally reside, outside state borders and without a legal basis",[105] and forced relocation as "forced emigration or displacement of people from one area to another, within the same state borders", and then analyzed the elements of these criminal acts (relocation outside borders, involuntary nature of emigration and the intention of the perpetrator). [106]

In its considerations, the Council referred to its legal practice from the *Simić case*, based on the premise that, in both of these criminal acts, the protected goods are essentially the same, namely "the victim's right to remain in his home and community and the victim's right not to be deprived of her property by forceful displacement",[107] stating that the Appeals Chamber expressed the same principle in the *Krnojelac case*:

Forced displacement is prohibited in order to guarantee the right and aspiration of the individual to live in his community and in his hearth without outside interference. The criminal responsibility of the person who committed the displacement and

[103] *Ibid.*, par. 23.
[104] First-instance verdict in the *Tadić case*, para. 562.
[105] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević*, before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 23-25, par. 40.
[106] ICTY, IT-95-9-T, *Prosecutor v. Simić and others*, Judgment, October 17, 2003, para. 122; IT-98-34-T, *Prosecutor v. Nalatelić and Martinović*, Judgment, March 31, 2003, para. 670; IT-97-25-T, *Prosecutor v. Krnojelac*, Judgment, March 15, 2002, para. 476; IT-98-33-T, *Prosecutor v. Krstić*, Judgment, August 2, 2001, para. 521, 531-532.
[107] ICTY, IT-95-9-T, *Prosecutor v. Simić et al.*, Judgment, October 17, 2003, para. 122; IT-97-25-T, *Prosecutor v. Krnojelac, Judgment, March 15, 2002, para. 474, 476; IT-98-33-T, Prosecutor v. Krstić, Judgment, August 2, 2001, para. 521.*

Funded by the European Union

forced uprooting of the inhabitants from a certain territory arises from their forced character, not the destination to which the inhabitants are directed.[108]

Regarding the element of involuntary nature of emigration, *the Amici curiae* argued that emigration across borders based on the free will of the individual is legal, while the Prosecutor argued that the essential element is that emigration is involuntary and that the persons concerned had no real choice. The Trial Chamber considered earlier jurisprudence, according to which it is the absence of real choice that makes displacement unlawful, and that it cannot be concluded that a person really had a choice based solely on the fact that he gave his consent when the circumstances are such that that consent it has no significance.[109] The Council also stated the views that the term "forced" should not be limited to physical coercion, and cited the views from the *Kunarac case* that the circumstances of the coercion led to the fact that "real consent was not possible", and concluded that the possibility of "real choice" must be determined in the context of all relevant circumstances and separately for each case.[110]

The element of the perpetrator's intent in proving the act of deportation and forcible transfer was also considered. *Amici curiae* argued that it must be proven that the forces of the FRY and Serbia had the goal of deportation, and that the behavior of the victims was a consequence of the actions and behaviour of those forces. The prosecutor, on the other hand, claimed that deportation as a crime against humanity does not require any specific intent of the perpetrator, i.e. all that is required is that the perpetrator either had the immediate intention that the victims would leave or that he acted with the awareness that his actions would very likely lead to until that. The prosecution also stated that the forces of the FRY and Serbia actually wanted to get the victims to leave Kosovo, so it is unnecessary to determine which destination the perpetrator had in mind. The Trial Chamber took the position that in connection with forced relocation or deportation there must be evidence of the intention to move the victim from his home or community, that it must be proven that the perpetrator had either an immediate intention for the victim to leave or that it could reasonably be foreseen that he would his actions lead to it. The Council further stated that the criminal acts of deportation and forced relocation have the same elements, except for the destination - if the relocation of the victim resulted in the crossing of

[108] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 49-58.

[109] ICTY, IT-98-34-T, *Prosecutor v. Naletilić and Martinović,* Judgment, March 31, 2003, para. 519; IT-96-23 and IT-96-23/1-A, *Prosecutor v. Kunarac et al.,* Judgment, June 12, 2002, para. 130.

[110] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 76.

Funded by the European Union

the state border, it is a criminal offense of deportation, and that if no such crossing occurs, it is a criminal offense the act of forced displacement. The Trial Chamber therefore concluded that for the criminal acts of deportation and forced transfer from the territory of Kosovo,[111] Croatia,[112] and Bosnia and Herzegovina[113] presented by the prosecution, there was sufficient evidence that they were committed.

International armed conflict and Croatian statehood

In relation to the counts of the Indictment for Croatia that refer to grave violations of the Geneva Conventions, *the amici curiae* argued that the Prosecution must prove that the armed conflict during the entire period in question was international, that is, otherwise the counts of the Indictment for Croatia that refer to grave violations from Article 2 of the ICTY Statute, committed in the period from October 8, 1991 to between January 15, 1992 and May 22, 1992, they would have to reject. The prosecutor's thesis was that the armed conflict had an international character since October 8, 1991, the day Croatia's declaration of independence came into force. *Amici curiae* argued that the conflict took on an international character only between January 15, 1992, when Croatia was recognized by the European Community and May 22, 1992, when it became a member of the United Nations.[114]

In order to determine the basis of the applicable law,[115] the Trial Chamber considered the definition of the state according to the Montevideo Convention and its criteria, which, according to the Chamber, have become part of customary international law,[116] and which is in accordance with the definition of the Arbitration Commission of the International Conference on the former Yugoslavia "that the state is most often defined as a community consisting of territory and population over which there is organized political authority and such a state is characterized by sovereignty". *Amici curiae,* for their part, argued that Badinter's commission was not independent. The Council examined these allegations and concluded that although Badinter's

---

[111] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 77-79 and table 4.
[112] *Ibid.*, para. 116, table p.43.
[113] *Ibid.*, Annex D, p. 133.
[114] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 83-84.
[115] "In the Decision on the objection to jurisdiction in the *Tadić case,* the Appeals Chamber was of the opinion that the existence of an international armed conflict is a condition for the application of Article 2 of the Statute, that is, that there must be a conflict between two or more states; in other words, this article does not apply in cases of civil war", IT-94-1-A, Prosecutor v. Tadić, "Decision on the interlocutory appeal of the defense on the jurisdiction of the court", October 2, 1995, para. 84; IT-94-1-A, Prosecutor v. Tadić, Judgment, July 15, 1999, para. 84, *in* ICTY, IT-02-54-T, *Prosecutor against Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, par. 83.
[116] "A state as a subject of international law should have the following attributes: (a) permanent population; (b) a clearly defined territory; (c) the government; and (d) ability to establish relations with other states", ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 85.

Funded by the European Union

commission was obviously not a judicial body, it considers this commission a body of independent and competent lawyers and its opinions as material that can be referred to when judging the issue of Croatian statehood. The council then considered the criteria of statehood, and concluded that as of October 8, 1991, Croatia had a permanent population and a defined territory.[117]

The issue of the criterion of the existence of an effective government as an important criterion of statehood formed an interesting part of the legal positions *of the amici curiae* and the Council. Namely, *the amici curiae* claimed that the government of Croatia "did not have sufficient control over a significant part of its territory to be considered an independent state", and that "the armed conflict continued in many areas in Croatia". In this regard, the prosecution referred to the evidence that in August 1991 Croatia controlled over 70 to 75 percent of its territory, while the Serbs controlled 25 to 30 percent, as well as that "the principle of effective control should not be approached using purely mathematical calculations, but that the key criterion is the power that the government has over its territory and population". The Council, noting the inconsistency in *the amici curiae's claims* regarding control over the territory, since Croatia neither at the time of its recognition by the European Community on January 15, 1992, nor its admission to the United Nations on May 22, 1992, had control over a considerable part of its territory, concluded that the Croatian authorities had sufficient control over their territory to satisfy the condition of an effective government, which functioned effectively[118] under the criterion that is considered crucial for statehood, the Council considered that it is best proven by the state's ability to establish relations at the international level, and based on the presented evidence, it concluded that Croatia gained independence on October 8, 1991.[119]

Genocide and complicity in genocide (Bosnia and Herzegovina)

In relation to the crimes committed on the territory of Bosnia and Herzegovina, *the Amici curiae* presented the following claims, on the basis of which a release from the charges from points 1 and 2 of the Indictment (genocide and complicity in genocide) was requested:

- that there is no evidence that the accused possessed a "special intention"

[117] *Ibid.*, para. 88-101.
[118] *Ibid.*, para. 102-106.
[119] *Ibid.*, para. 109-114.

Funded by the European Union

necessary to commit the crime of genocide;

- that no evidence was presented about the acts and/or behavior of the accused that could be interpreted as an indication of the intention to commit genocide;
- even if the crimes from annexes A, B and C of the Indictment for Bosnia was proven, they do not prove, by their scale or context, which was primarily of a territorial nature, that there was a specific intention to commit genocide;
- that there was no evidence that the accused planned, encouraged, ordered, committed or otherwise aided and abetted the planning, preparation or execution of genocide or genocidal acts;
- that there was no evidence that the crime of genocide was part of the goal of the alleged joint criminal enterprise, and the condition that there must be a specific intent for genocide cannot be reconciled with the condition that there must be *mens rea* necessary for a conviction based on the third category of joint criminal enterprise; before the accused is convicted, the Prosecution must prove that the accused had a special intention necessary for genocide;
- that the condition of existence of special intent for genocide is incompatible with the simple condition of existence *of mens rea* for command responsibility;
- that, alternatively, there was insufficient evidence that the accused had "effective control" over the perpetrators of the alleged crime of genocide. In addition, there is no evidence that: (1) a person subordinate to the accused took the lives of individuals, Bosnian Muslims or Bosnian Croats, with the intention of destroying them as a group and that (2) the accused "knew or had reason to know" that one of his subordinates was preparing to commit genocide or has already committed it, and has not taken necessary and reasonable measures to prevent such acts or punish the perpetrators;
- and that, in relation to count 2 (complicity in genocide), there was no evidence that the accused knowingly aided and abetted one or more

persons in the commission of genocide.[120]

The Trial Chamber, considering the applicable law, started from the definition according to the Convention on the Prevention and Punishment of the Crime of Genocide, the acts that constitute it and the specific intent that forms the basis of this crime. The intent, according to the position of the Council, must be the physical destruction of the group: "As can be clearly seen from the preparatory works for the Convention, the destruction in question is the physical destruction of a group, either by physical or biological means, and not the destruction of the national, linguistic, religious, cultural or other identity of a specific group".[121] The Council further stated the position that since the acts referred to in Article 4(2) of the Statute are only required to be committed with the intention of destroying a protected group, it is clear that the destruction of that group does not have to actually occur - but also that the degree actual destruction, if it occurs, will most often be a factor on the basis of which it can be indirectly concluded whether the acts underlying the crime were committed with the specific intent to destroy, in whole or in part, a specific group as such:

> From the point of view of the legal conditions for genocide, what matters is the goal that the perpetrator intends to achieve. In its *Advisory Opinion on the Legality of Nuclear Weapons*, the International Court of Justice examined whether the use of atomic weapons could be considered genocide. That Court stated that "the prohibition of genocide would be relevant.
>
> … if the pursuit of nuclear weapons does include an element of intent directed against a group as such". In order to determine the presence of intent to commit genocide, one must consider "the specific circumstances of each individual case".[122]

A more complex question, according to the Council, would be how much part of a certain group the perpetrator must intend to destroy in order to fulfill the legal requirements for the act of genocide, as opposed to the question of how much part of the group must be physically destroyed. The Council then referred to different points of view: "one of the first theoreticians to comment on the Convention on Genocide, Nehemiah Robinson, claims that genocide aims to destroy "many persons

[120] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 117.
[121] *Ibid.*, para. 124.
[122] *Ibid.*, para. 125-126.

Funded by the European Union

from the same group," provided that there is a "substantial" number of them; in the expert study of the United Nations on genocide, the position is expressed that the term "partially" implies "a reasonably large number in relation to the total number of individuals in the entire group or a significant segment of the group, such as its leadership"; dealing with the same issue, the Commission for International Law stated the following: it is not necessary to have the intention to completely destroy a group in the sense of wiping it off the face of the planet. However, the criminal offense of genocide by its very nature requires the existence of an intention to destroy at least one significant part of that group".[123] The Council further referred to earlier legal practice in which it was interpreted that the expression "partially" requires the intention to destroy a significant number of individuals from the group, i.e. a "significant" or "essential" part of the group,[124] such as its leadership:

> In addition to the large size of the targeted portion, its importance within the group may also be a factor to consider. If some part of the group represents that group or if it is crucial for its survival, this may support the finding that that part qualifies as essential in the sense of Article 4.[125]

One of the key questions that the Trial Chamber put before itself based on the *amicus curiae Motion* and the Prosecution's positions in this case was whether there was evidence on the basis of which the Trial Chamber could be convinced beyond a reasonable doubt that the accused was a participant in a joint criminal enterprise whose the intention was to destroy the Bosnian Muslims, in whole or in part, as a group. Considering the territorial framework of the Indictment for Bosnia and Herzegovina and various submissions of the Prosecutor's Office of the ICTY, the Council determined to which specific geographical areas the accusations of genocide refer, and further considered the evidence concerning the seizure of power in municipalities and accusations of genocide in the area of Brĉko, Sanski Most, Prijedor, Srebrenica, Bijeljina, Kotor Varoš, Ključ and Bosanski Novi, and within the JCE which aimed to destroy the group of Bosnian Muslims in that part the territory of Bosnia and Herzegovina, which was supposed to become an integral part of the Serbian state.[126] In order to establish the existence of the JCE and the commission of genocide, the Council presented a series of evidence, such as evidence concerning

[123] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 127-129.
[124] ICTR-95-1-T, *Prosecutor v. Kayishema and Ruzindana,* Judgment, 21 May 1991, para. 96; ICTR-95-1-T, *Prosecutor v. Bagilishema,* Judgment, 7 June 2001, para. 64;
[125] Second-instance judgment in the case Prosecutor v. Krstić, p. 4, footnote 22.
[126] ICTY, IT-02-54-T, *Prosecutor against Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, par.133-140.

Funded by the European Union

the takeover of power in the municipalities included in the accusation,[127] and evidence of the genocidal intent of the Bosnian Serbs.[128]

Based on the findings from the evidentiary material, the Council concluded that it could be convinced beyond a reasonable doubt that there was a joint criminal enterprise, in which Bosnian Serb leaders were also involved, and whose goal was to partially destroy the Bosnian Muslim population, as well as that genocide was really committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi. The Council stated that the conclusion about the genocidal intent of the Bosnian Serb leadership can be derived from the entire evidentiary material:

> The scale and pattern of the attacks, their intensity, and the large number of Muslims killed in those seven municipalities, the detention of Muslims, their cruel treatment in detention facilities and elsewhere, and targeted attacks on people crucial to the survival of Muslims as a group - these are all factors that point to genocide.[129]

The council further stated that it found no evidence of genocide in Kotor Varoš. Also, the Council stated that the number of murders and other acts of abuse in Bijeljina, Kljuĉ and Bosanski Novi is lower than in the other four territories, but based on the geographical proximity of those three territories and the other four territories and the relatively similar period when both groups of territories were occupied, The Council concluded that there is sufficient evidence of genocidal intent in relation to those three territories as well.[130]

The Council then examined whether there was evidence on the basis of which it could be convinced that the accused was a participant in a joint criminal enterprise and that he shared the necessary intention of its participants. For this purpose, the Council presented various testimonies that proved Milošević's role as "the leader of all Serbs" and "creator of the policy of creating Greater Serbia", including its implementation on the ground.[131] The Trial Chamber then concluded that it could be convinced beyond a reasonable doubt that the accused was a participant in a joint criminal enterprise that included the leadership of the Bosnian Serbs, and that he

[127] Existence of a plan or policy to take over power in municipalities: Variants A and B and crimes committed in the area of Brĉko, Sanski Most, Prijedor, Srebrenica, Kotor Varoš, Kljuĉ, Bosanski Novi and Bijeljina, Ibid., par. 145-237.
[128] ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 238-245.
[129] *Ibid.,* para. 246.
[130] *Ibid.,* para. 247-248.
[131] *Ibid.,* para. 249-287.

Funded by the European Union

shared with its participants the goal and intention to partially destroy the Bosnian Muslims as a group:

> Based on evidence related to the following : the general leadership position of the accused among the Serbian people, including the Bosnian Serbs in Bosnia and Herzegovina; the defendant's commitment to the idea of Greater Serbia and his support for that idea; logistical and financial support to Bosnian Serbs from Serbia, which can reasonably be concluded to have been provided with the knowledge and support of the accused; logistical support is illustrated by the close relations of members of the VJ with the VRS; the nature of the relationship and the involvement of the accused on the side of the Bosnian Serb political and military leadership, as evidenced by Karadžić's request that the accused remain in contact with him and that it is very important for him to hear his assessment; the authority and influence of the accused on the Bosnian Serb leadership; personal familiarity of the accused with "everything that is done"; his insistence on being informed "about everything happening at the front"; committed crimes, the scale and pattern of attacks on the aforementioned four territories, their intensity, the large number of Muslims killed, the cruel treatment of Muslims in detention facilities and other places and targeted attacks on persons who were important for the survival of Muslims as a group, the trial panel can conclude that the accused not only knew about the genocidal plan of the joint criminal enterprise, but also that he shared with its participants the intention to partially destroy the Bosnian Muslims as a group in that part of the territory of Bosnia and Herzegovina which was supposed to be covered by the Serbian state according to the plan.[132]

The council further presented its conclusions regarding aiding and abetting genocide:

> Based on the above evidence in relation to the first issue, the Trial Chamber could be satisfied beyond a reasonable doubt that the accused aided and abetted the commission of the crime of genocide or was an accomplice in the commission of that crime by knowing of the joint criminal enterprise and providing its participants with significant help,

[132] *Ibid.*, para. 288.

Funded by the European Union

> aware that his goal and intention is the partial destruction of Bosnian Muslims as a group.[133]

The panel then examined whether there was evidence on the basis of which it could be convinced beyond a reasonable doubt that the accused knew or had reason to know that his subordinates were preparing to commit or had already committed genocide, in whole or in part, against Bosnian Muslims as a group in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi, and did not take the necessary measures to prevent genocide or punish its perpetrators?

Namely, in connection with this issue, *the Amici curiae* argued that there is insufficient evidence that the accused had "effective control" over the perpetrators of the alleged crime of genocide and that there was no evidence that any person subordinate to the accused killed individuals, Bosnian Muslims or Bosnian Croats, with the intention of destroying them as a group, and that the accused "knew or had reason to know" that one of his subordinates was preparing to commit genocide or had already committed it, and did not take necessary and reasonable measures to prevent such acts or to punish perpetrators. For its part, the Prosecution claimed that it had enough evidence that the accused had "effective control" over General Adžić, Chief of the General Staff of the JNA, Ratko Mladić, Chief of the Main Staff of the VRS, and Franko Simatović and Jovica Stanišić from the State Security of Serbia.[134]

The panel considered the evidence related to the responsibility of the superior, and stated that the funds for financing the VRS and VJ came from a single source of financing and that the accused exercised de *facto* control over the JNA through his influence on the Presidency of the SFRY, the Chiefs of the General Staff (Kadijević, Adžić and Panić), financing of the JNA and the appointment of loyal JNA officers. The panel also presented evidence that the VRS and VJ were created by the JNA and that throughout the war the VRS received logistical support from the VJ. The panel further stated that the accused had both *de jure* and *de facto* control over the Ministry of Interior of Serbia and the State Security Service (DB), and that through the DB he controlled and supported the "Red Berets" and Arkan's "Tigers" and that he knew for their activities in Bosnia and Herzegovina. In the end, the panel concluded on the

[133] "In the absence of anything to indicate that complicity is broader than aiding and abetting in the circumstances of this case, the Trial Chamber finds that the Prosecution's contention that the two offenses are essentially the same is valid". The Prosecution also submitted that, given the similarities between the charges, the Trial Chamber should limit itself to a decision on aiding and abetting under Article 7(1) of the Statute. It appears to the Trial Chamber that, since complicity in genocide based on Article 4(3)(e) of the Statute, according to the judgment of the Trial Chamber in the case *Prosecutor v. Stakić, lex specialis* in relation to responsibility under Article 7(1) of the Statute, is an appropriate qualification of responsibility the accused in this case may be complicity in genocide. However, a position on the matter need not be taken at this stage. The final position, if necessary, will be taken at the sentencing stage ", ICTY, IT-02-54-T, *Prosecutor v. Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004, para. 297.
[134] *Ibid.,* para. 298.

Funded by
the European Union

basis of this and other evidence that it was convinced beyond a reasonable doubt that the accused was the superior of certain persons whom he knew or had reason to know were preparing to commit or had committed genocide against a part of the Bosnian Muslims as a group in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi and that he did not take the necessary measures to prevent the commission of genocide or punish the perpetrators.[135]

[135] *Ibid.*, para. 304-309.

Funded by
the European Union

International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)

The standard of proving the responsibility of state

Determination of specific intent (dolus specialis)

Attribution of responsibility

The responsibility of states for the crime of genocide was, for the first time in history, the subject of a process before the International Court of Justice (ICJ) in the dispute related to the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).[136] Significant jurisprudence resulted from this dispute, which lasted a full 14 years. After long discussions on jurisdiction, the Judgment confirming the jurisdiction of the ICJ was passed in 1996. The judgment on the merits of this dispute was passed on February 26, 2007. The request for revision of the Judgment from 2007 was rejected for formal reasons in 2017. Since this dispute was the first ever initiated due to the violation of the Convention on the Prevention and Punishment of the Crime of Genocide, in the absence of clear norms and previous legal practice,[137] certain questions were raised that were the subject of discussion during the entire procedure: What is the nature of the responsibility of states in relation to the Convention on preventing and punishing the crime of genocide? What are the criteria for proving state responsibility? Is the evidence, that is, the procedure, presented according to the rules of criminal or civil law? What are the criteria for proving intent? What are the elements of the attribution of the act of genocide to one country?

In the end, with the legal practice arising from this dispute, did international law get the foundations for the fight against impunity when it comes to violating the

[136] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007,* p. 43, https://www.icj- cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf

[137] Although the principle of state responsibility in the international legal order is as old as the principle of the equality of states, which is clearly normative and includes both the rights and obligations of states as subjects of international law, the system of state responsibility itself was constituted very slowly in a normative sense, and even today The law of state responsibility remains basically customary. The normative basis for the interpretation of state responsibility is provided by the UN International Law Commission's Draft Provisions on International Responsibility for Illegal Acts, adopted in 2001, annexed to Resolution 56/83 of the UN General Assembly.

Funded by the European Union

obligations of states under the Convention on the Prevention and Punishment of the Crime of Genocide?

Initiation of proceedings and determination of provisional measures

On March 20, 1993, the Republic of Bosnia and Herzegovina filed a Request for the initiation of proceedings against the Federal Republic of Yugoslavia, for the purpose of establishing responsibility for the violation of the Convention on the Prevention and Punishment of the Crime of Genocide.[138] In the Request for Initiation of Proceedings, Bosnia and Herzegovina presented allegations of facts which, according to the Convention, constitute acts of genocide: murders of members of the group; serious injuries to the mental or physical integrity of group members; subjecting the group to living conditions calculated to bring about its total or partial physical destruction; and measures aimed at preventing births within the group.139 In accordance with the presented facts, Bosnia and Herzegovina in the Request itself, and later in the course of the procedure, asked the Court to adopt temporary measures in order to stop these violations.[140] For its part, the Government of Serbia and Montenegro, in its response to the request for temporary measures of Bosnia and Herzegovina, presented a preliminary objection in which it questioned the legitimacy of the applicant for temporary measures, and rejected responsibility for all the acts of genocide that Bosnia and Herzegovina accused it of asking the Court to reject the Motion of Bosnia and Herzegovina. By the same act, the Government of Serbia and Montenegro sought to determine the responsibility of the Government of Bosnia and Herzegovina for the "genocide perpetrated against the Serbian people in Bosnia and Herzegovina",[141] as well as the adoption of temporary measures for that purpose.[142]

---

[138] "It is evident that long-term plans for the creation of a 'Greater Serbia' are being implemented in Bosnia and Herzegovina. Since the beginning of the aggression, hundreds of thousands of citizens have been killed; hundreds of thousands of them have been seriously wounded; hundreds of thousands have been imprisoned in concentration camps and extermination camps ; millions were expelled from their homes – 'ethnically cleansed' – to other regions and other countries (...), ICJ, *Application Instituting Proceedings filed in the Registry of the Court on 20 March 1993, Application of the Convention on the Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Application of the Republic of Bosnia and Herzegovina (hereinafter referred to as: Request for initiation of proceedings).*

[139] ICJ, *Application of the Republic of Bosnia and Herzegovina,* "Allegations of precise facts constituting the act of genocide", para. 34-83.

[140] ICJ, Application Instituting Proceedings submitted by the Republic of Bosnia and Herzegovina, 30 March 1993, Annex 2, https://www.icj-cij.org/sites/default/files/case-related/91/13275.pdf ; ICJ, Supplementary submission in support of the Application of the Republic of Bosnia and Herzegovina instituting legal proceedings against Yugoslavia (Serba and Montenegro) on the basis of the 1948 Genocide Convention and in support of its Request for an Indication of Provisional Measures of Protection, 1 April 1993, https://www.icj-cij.org/sites/default/files/case-related/91/13671.pdf

[141] ICJ, *The Response of the Government of the Federal Republic of Yugoslavia to the Request for the indication of provisional measures of protection submitted by the Government of the "Republic of Bosnia and Herzegovina",* 1 April 1993, https://www.icj- cij.org/sites/default/files/case-related/91/13277.pdf

[142] ICJ, *Request for the Indication of provisional measures made 9 August 1993 by the Federal Republic of Yugoslavia in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,*

Funded by
the European Union

On April 8, 1993, the court ordered temporary measures:

> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in accordance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, take all measures in its power to prevent the commission of the crime of genocide; (...) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should ensure in particular that any military, paramilitary or irregular armed units under their authority or supported by them, or any organization or person that may be under their control by power, authority or influence does not commit the crime of genocide, does not join together for the purpose of committing genocide, does not directly and publicly encourage the commission or complicity in genocide, whether such crime is directed against the Muslim population in Bosnia and Herzegovina or against any other national, ethnic, racial or religious group; (...) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action, and ensure that no action is taken, which may aggravate or prolong the existing dispute on the prevention and punishment of the crime of genocide, or make solving even more difficult.[143]

The temporary measures were confirmed once again on September 13, 1993.[144]

Procedure on the merits of the dispute

In the continuation of the dispute, referring to the acts prohibited by the Convention and the obligation to prevent and punish the crime of genocide - with the statement that such acts "are committed and continue to be committed even though they are explicitly prohibited in international law", the Government of the Republic of Bosnia and Herzegovina on April 15 In 1994, she filed a lawsuit with this Court, which started the procedure on the merits of this dispute.[145] In the factual basis, it was stated that

---

instituted by the Application, dated 20 March 1993 of the so-called Republic of Bosnia and Herzegovina, 10 August 1993, https://www.icj-cij.org/sites/default/files/case-related/91/10833.pdf

[143] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993,* para. 52, https://www.icj-cij.org/sites/default/files/case- related/91/091-19930408-ORD-01-00-EN.pdf

[144] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Order of 13 September 1993,* par.61, https://www.icj-cij.org/sites/default/files/case-related/91 /091-19930913-ORD- 01-00-EN.pdf

[145] "Bosnia and Herzegovina believes that it was a victim of genocide and acts related to it, that these acts are prohibited by international law, that they were committed by the Federal Republic of Yugoslavia (Serbia and Montenegro) or are attributable to it, and that this state is obligated under treaty law stop such acts and desist from them, compensate the victims and compensate Bosnia and Herzegovina for all the damage caused by these illegal acts", ICJ, *Memorial of the*

Funded by the European Union

the Serbian forces "in their desire to 'clear ' strategically important parts of Bosnia and Herzegovina in order to establish pure Serbian territory" used different ways and methods.[146] Examples of acts of murder, torture, rape, expulsion of the population and destruction of their property, homes, religious and cultural buildings, and the establishment of destructive living conditions through bombing, robbery, starvation and intimidation are given.[147] As the basis of these claims, UN documents, especially those of the Security Council and the General Assembly, are most often used.[148] With the explanation that the acts committed were not the "result of the blind coincidence of the war", but with a "precise goal" directed against the population for reasons of belonging to an ethnic or religious group, and in order to cleanse entire regions of the Muslim population, the reasons for the attribution of these acts to the FRY are listed:

> Although a certain proportion of these acts were committed by Bosnian Serbs, a large proportion of these persons or groups acted under the authority, direction or influence of the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) and those authorities may rightly be held responsible for tolerating, supporting or encouraging of these acts specifically prohibited by Article III of the Convention.[149]

When it comes to the necessity of proving intent from the Convention, it is stated that "state authorities, as well as natural persons, should be presumed to have the intent to cause the natural consequences of their actions, especially when such consequences have already occurred and have been repeated".[150]

On July 22, 1997, the Government of the Federal Republic of Yugoslavia submitted its counterclaim to the Court in which it gave its observations on the Claimant's allegations, facts relevant to the imputability of the act to the state, the policy of the Federal Republic of Yugoslavia towards the Republic of Serbia and Bosnia and

Government of the Republic of Bosnia and Herzegovina, 15 April 1994, para. 1.3.0.9, https://www.icj-cij.org/sites/default/files/case-related/91/8616.pdf

[146] "Statistics that are generally accepted indicate that the total number of people killed, mostly Muslims, but also Croats, is about a quarter of a million of the total number of four million and five hundred thousand inhabitants. These numbers imply the fact that the bodies of numerous victims have not yet been Documented data collected by the Institute for Public Health of Bosnia and Herzegovina and other bodies up to February 1994 (starting from April 1992) give an idea of the extent of suffering caused by the actions of the Serbs. strength: 142,334 killed (including 16,510 children), 161,755 wounded (including 33,734 children), 72,282 seriously wounded (including 18,056 children), at least 20,000 rapes, at least 2.6 million refugees, at least 500 destroyed mosques, *Ibid.*, par. 2.1.0.8-2.1.0.9.

[147] Ibid., para. 2.2.2.1- 2.2.6.10.

[148] Ibid., para. 3.2.0.1-3.2.0.23.

[149] *Ibid.*, para. 1.3.0.4-1.3.0.5.

[150] *Ibid.*, 15 April 1994, para. 1.3.0.3.

Funded by the European Union

Herzegovina, as well as factual elements crimes of genocide against Serbs in Bosnia and Herzegovina.[151]

The issue of genocidal intent

Presenting arguments for the criteria for proving genocidal intent, Bosnia and Herzegovina in its lawsuit referred to direct interpretations of the Convention on Genocide and the legal practice of the ICTY. Referring to the thoughts of Jean-Paul Sartre, who pointed out that "the Convention tacitly recalls the still living memories of the proclaimed intention to exterminate the Jews", and that "few governments would be so demonic as to proclaim such an intention", Bosnia and Herzegovina started its lawsuit precisely from Sartre's conclusion that it is necessary to "objectively consider the facts in order to conclude whether they implicitly show the intention to commit genocide".[152]

The intent to destroy a group, in whole or in part, as prescribed by Article II of the Convention, is a key element of the crime of genocide that needs to be proven in order for responsibility, in this case the responsibility of states, to be established. Genocidal intent is precisely the element that makes it possible to distinguish the crime of genocide from other forms of crime - what is special about proving the crime of genocide is that the intent must be specific, that is, the act must be committed with the aim of destroying the group as such, in whole or in part.[153] On the issue of intent and its proof, Bosnia and Herzegovina referred in the lawsuit to the instructions given by the International Court of Justice in its consultative opinion from 1951 regarding the interpretation of the Convention on Genocide, where it was stated that "the Convention should be interpreted in the light of its higher moral goals and its main objective",[154] as well as the interpretations of the UN International Law Commission and the reports of the UN General Assembly, and in this regard it was stated:

[151] "The facts and evidence presented in Chapter VII of the counterclaim prove the intentional killing of members of the Serbian nationality because of their affiliation; (...) inflicting serious injuries on the body or health; (...) deliberate imposition of living conditions on Serbs as a group with the intention of physical destruction in whole or in part; (...) that acts of genocide were committed in Bosnia and Herzegovina against Serbs as a group; (...) in the territory under the control of the authorities of Bosnia and Herzegovina; (...) by members of state bodies of Bosnia and Herzegovina; (...) that Bosnia and Herzegovina did not prevent acts of genocide; consequently, Bosnia and Herzegovina is responsible for the above violations of its obligations arising from the Convention on the Prevention and Punishment of the Crime of Genocide", ICJ, Case concerning Application of the Convention on the prevention and punishment of the Crime of genocide, *Counter-Memorial,* 23 July 1997, par.7.5.1-7.5.13, https://www.icj-cij.org/sites/default/files/case- related/91/10503.pdf

[152] Jean-Paul Sartre, "On genocide", *in Crimes of war,* ed. Falk, Kolko and Lifton, New York 1971, p. 534, Annex 5-VII, *in* ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 5.3.5.3.

[153] Article II of the Convention on Genocide. See also: ICTY, IT-95-5-R61 and IT-95-18-R61, *Prosecutor v. Karadžić and Mladić, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence,* Trial Chamber, 11 July 1996, para. 92.

[154] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para, 5.3.2.5.

Funded by the European Union

> The participants in the adoption of its text /Convention/ tried to make it clear that they wanted to avoid any loophole in the text that would allow the perpetrators of these horrible systematic crimes to avoid sanctions simply by refraining from showing their intent.[155]

It was further stated that with respect to the group, it cannot be any group but only groups that have common religious, national or ethnic characteristics,[156] as well as that the degree of destruction of the group, either completely or partially, is not a decisive criterion, but rather it is necessary that it is a substantial *part* of the group, i.e. a part of the group of significant, vital importance "whose disappearance would have an effect on the survival of the group as such".[157] According to international legal theory and practice, the criterion of "substantiality" encompasses various aspects. On the one hand, a part of a group can be considered as substantial because in quantitative terms it represents a large part of a given group. On the other hand, part of the group may be "substantial" in the qualifying sense. As stated in the *Jelisić case*:

> Therefore, genocidal intent can manifest itself in two ways. It can consist of the desire to exterminate a very large number of members of the group, in which case it is the intention to destroy the group en masse. However, the intention may also consist of the desire to destroy a more limited number of individuals selected for the effect their disappearance would have on the survival of the group as such. This would constitute an intention to destroy the group 'selectively'.[158]

In this regard, it was stated that international law and practice allow the qualification of genocide in an area where an attempt is made to eliminate a group as such, regardless of the size of the given geographic area.[159]

For its part, the Government of the Federal Republic of Yugoslavia, proceeding from the element of intent, which implies "acts committed with the intent to destroy... the group, as such", in its counterclaim stated that this element of intent is explicit: "there is no genocide without the intent to destroy the group in whole or in part, and

---

[155] *Ibid.*, par, 5.3.5.5.
[156] Article II of the Convention on Genocide.
[157] "Reafael Lemkin clarified in this regard that the intention to partially destroy must be interpreted as a desire for destruction that must be of an essential nature (...) in order for the whole to be affected", in ICTY, IT-95-10-T, *The Prosecutor v. Goran Jelisić,* in the Trial Chamber I, 14 December 1999, para. 82.
[158] ICTY, IT-95-10-T, *Prosecutor v. Goran Jelisić,* before Trial Chamber I, December 14, 1999, para. 82. [164]ICTY, *The Prosecutor v. Dragan Nikolić a/k/a "Jenki",* in the Trial Chamber, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 34; ICTY, IT-95-10-T, *Prosecutor v. Goran Jelisić,* before Trial Chamber I, December 14, 1999, para. 82.
[159] "As the Republika Srpska authorities have released almost all persons held in the detention centers following the agreement reached on the release of detainees on 1 October 1992, it is clear that the detention centers were not organized nor were individuals held there for the purpose of committing genocide", *Ibid.* couple 4.4.1.8.

Funded by
the European Union

without the destruction of group members committed because of their belonging to the group", as well as that the intention implies that the actions of the direct perpetrator are directed towards such destruction.[160] As an example of the lack of intent, the claim was made that the authorities of the Republika Srpska released the prisoners after the agreement to release them, and that therefore these detention centers were not organized with the aim of causing genocide. One of the arguments of the Government of the FRY was also that the Applicant's theses are not acceptable because they are not based on the Convention on the Prevention and Punishment of the Crime of Genocide from 1948, since "the Convention does not provide that a state can be a perpetrator of genocide".[161]

Criteria of proof – rules of criminal or civil law?

In the course of the procedure for this dispute, questions were raised about the criteria of proof, i.e. whether they are presented according to the rules of criminal or civil law. In its lawsuit, Bosnia and Herzegovina stated that Article IX of the Convention on Genocide clearly establishes the principle of civil responsibility of states, where the generally accepted rule followed by civilized states is that it is considered that every person wants the natural consequences of his acts, and that the punishable intent of a state accused of genocide according to Article IX of the Convention, it can be proven "by a combination of acts the natural and effective consequence of which is the destruction, in whole or in part, of a national, ethnic, racial or religious group as such". In this regard, it was concluded that such an "implicit intention" is assumed, and that accordingly the plaintiff is not obliged to prove it, but that it is up to the party in dispute, whose acts have been established, to disprove that assumption.[162]

Namely, when it comes to responsibility, the Convention defines this crime as a crime of international law where states undertake to prevent and punish persons who commit these crimes. In this regard, in national criminal trials, the courts in principle seek to establish that the accused "beyond reasonable doubt" committed the acts charged against him. This approach is explained by the serious punishments that the accused can receive if he is proven guilty, and by the fact that he is in opposition to

---

[161] "The Convention does not envisage a state as the perpetrator of genocide. A state is responsible according to the 1948 Genocide when a breach of an international obligation, stemming from the 1948 Genocide Convention may be attributed to it. Such attribution is carried out in conformity with the general rules on the responsibility of the state for international wrongful acts. In order to determine the violation of an international obligation of a state it is necessary previously to establish that a crime of genocide has been committed", *Ibid.* par.4.4.1.9.

[162] ICJ, *Memorial of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 5.3.5.7.

Funded by
the European Union

the sovereign power of a state. However, as stated in the Lawsuit of Bosnia and Herzegovina, the evidence criteria for violation of contractual law, i.e. a convention, do not require the criterion "beyond reasonable doubt", since the parties in a dispute between states are not in a more favorable position than one another, and are exposed to the rules of civil law in relation to the evidentiary procedure. In this regard, it was concluded, since the dispute in question is not a criminal dispute, that the rules on procedure and evidence of this nature do not apply.

As prescribed by Articles II to VI of the Convention, it is the states that have the obligation to determine the responsibility of the perpetrators of these acts according to the rules of criminal law, while the International Court of Justice must apply the law of civil responsibility to the states that violated the contractual obligations, i.e. those that did or did not commit prevent crimes and punish perpetrators under their control or jurisdiction.[163] Namely, in the case of state responsibility under the rules of civil liability, after the party filing the claim presents convincing evidence of the commission of the crime; the court can draw conclusions from the facts through deduction, while it is up to the defendant to prove that such conclusions or assumptions are unfounded. Furthermore, all legal systems make it possible in certain cases, and especially in the civil law procedure, to draw conclusions based on an established fact, the proof of which is impossible to present.[164] Regarding the issue of concrete evidence for acts committed with the intent to destroy, and their attribution, Bosnia and Herzegovina provided a number of examples in its oral presentations. This is also the statement of Biljana Plavšić before the ICTY, where it was stated that the goal was "to realize the ethnic separation by force if a solution is not found through negotiations", and that the preparations for the implementation included "the arming of the Serb population in Bosnia in cooperation, among other things, with the JNA, the Ministry of Internal Affairs of Serbia and Serbian paramilitary formations".[165] The Complaint further states that such a goal - separation by force - ended with the crime of genocide, that is, the "road to hell" that Radovan Karadžić spoke of in his public threats from October 1991.[166] In order to prove the intention in the Complaint of Bosnia and Herzegovina, the numerous pieces of

---

[163] "Civil or criminal action", para. 5.3.2.1- 5.3.2.2, ICJ, *Memorial of the Republic of Bosnia and Herzegovina,* 15 April 1994, see more widely: par. 5.3.2.3- 5.3.2.6.
[164] "Onus of proof and inferences in civil actions", *Ibid.*, para. 5.3.3.1- 5.3.3.10.
[165] ICTY, IT-00-39& 40-PT, Ex parte Confidential and Filed Under Seal, *The Prosecutor v. Momcilo Krajisnik, Biljana Plavšić,* Factual basis for Plea of Guilt, 30 September 2002, para. 12, *in* Van den Biesen, "General picture of the Genocide hitting Bosnia and Herzegovina 1992- 1995", ICJ, CR 2006/2, Public sitting held on 27 February 2006 at 10.30 am, at the Peace Palace, President Higgins presiding, in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Verbatim record, p. 33, para. 14.
[166] Van den Biesen, "General picture of the Genocide hitting Bosnia and Herzegovina 1992-1995", ICJ, CR 2006/2, *Public sitting held on 27 February 2006 at 10.30 am.*, at the Peace Palace, President Higgins presiding, in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Verbatim record, See more widely: Van den Biesen, p. 28-77.

Funded by the European Union

evidence and their sources, including video materials, witness statements and ICTY documents, as well as reports of UN bodies and institutions adopted by the time the oral hearing was scheduled (February 2006). Among other things, the conversation between Slobodan Milošević, Radovan Karadžić and Milan Babić from July 1991 is mentioned, in which Karadžić explains his vision of Greater Serbia, where during the conversation Milošević informs Babić "not to stand in Karadžić's way". In this regard, it was stated that Milošević's words make it possible to see his complete implication, as well as that of his collaborators, in the massacres of the non-Serb population committed by Belgrade in Bosnia.[167] The acts committed in the camps are also listed, as well as evidence that the Bosnian Serb leadership knew about these detentions. The crimes committed in the camps in Vlasenica,[168] Foca,[169] Sanski Most,[170] Prijedor,[171] Banja Luka,[172] Bosanski Samac,[173] and Brĉko[174] are listed in detail.[175]

Imputability of criminal acts

Regarding the determination of state responsibility, Article III of the Convention on the Prevention and Punishment of the Crime of Genocide defines as punishable acts: (a) genocide; (b) association to commit genocide; (c) direct and public incitement to commit genocide; (d) attempted genocide; and (e) complicity in genocide.

In order to determine the state's responsibility for genocide according to Article III paragraph (a), it is necessary to determine whether the committed acts from Article II of the Convention (serious violations of the physical and mental integrity of the group, intentional subjection of the group to conditions calculated to lead to its complete or partial destruction, murder members of the group, introduction of measures aimed at preventing births within the group, forced transfer of children from one group to another) can be attributed to the Defendant according to the rules of international of customary law on the international responsibility of states. The question that arises is whether those acts were committed by persons or bodies whose behavior can be attributed to the Defendant, i.e. whether the acts were committed by the bodies of the Defendant or by persons who, although they do not represent the bodies of the Defendant parties, however, the act was performed on

[167] ICJ, Frank Tom, "Reliable evidence acknowledging facts or conduct unfavorable to the State", CR 2006/3, CR 2006/5, p. 19, par. 13.

[169] *Ibid.*, p. 22, par. 22.
[170] *Ibid.*, p. 26-28, par. 35-40.
[171] *Ibid.*, p.28-34.
[172] *Ibid.*, p. 34-35.
[173] *Ibid.*, p. 36-37.
[174] *Ibid.*, p. 38-39.
[175] *Ibid.*, p. 20, par. 37.

Funded by the European Union

the instructions or under the direct control of the defendant sides. As for the determination of responsibility for association to commit genocide from paragraph (b) of Article III, direct and public incitement to commit genocide from paragraph c, attempted execution from paragraph d, complicity in genocide from paragraph e, they are determined according to the same rules on international state responsibility, if the violation of the Convention under Article III(a) - genocide is not proven.[176] In its lawsuit, Bosnia and Herzegovina stated that the facts presented in relation to the acts of genocide referred to in Article II of the Convention indicate that the act referred to in Article III(b) - association to commit genocide - was committed between persons under the jurisdiction of the FRY, Serbian paramilitary forces and other persons in Bosnia.[177] When it comes to the act of incitement to commit genocide from Article III(c) of the Convention, Bosnia and Herzegovina referred to the importance of establishing this type of responsibility, relying on the arguments of the representatives of the states that participated in its adoption, both at the time of the discussion before Economic and Social Council (ECOSOC) and General Assembly of the UN:

> Genocide victims have little satisfaction when they see the perpetrators brought to justice; what is needed is to prevent the crime from being committed in the first place... Incitement to genocide is one of the typical cases in which the law must intervene very early.[178]

It was further emphasized that "punishment of propaganda is imposed as an absolute necessity" and that "history shows that most cases of genocide were preceded by a fierce campaign of incitement". It was concluded that persons in power or under the jurisdiction of the FRY, as stated in the facts on the commission of genocide, incited the commission of genocide.[179] As for the attempted commission of genocide referred to in Article III (d), the Complaint states that the facts of the committed acts clearly indicate that in many cases there was an attempted commission.[180] Complicity in genocide, as derived from the definition accepted during the adoption of the Convention, implies "incidental, secondary or useful assistance given to the perpetrator of the act".[181] Complicity can also be reflected in "assistance in the form of the delivery of weapons or other means whose purpose is

---

[176] See further: ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 5.4.1.1, 5.4.2.1, 5.4.3.1, 5.4.4.1 – 5.4.4.3.
[177] *Ibid.*, para. 5.4.1.1.
[178] *Ibid.*, para. 5.4.2.1.
[179] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 5.4.2.1.
[180] *Ibid.*, para. 5.4.3.1.
[181] *Ibid.*, para. 5.4.4.1.

Funded by the European Union

to assist another state in committing genocide".[182] Thus, in the Order on Temporary Measures of September 13, 1993, the MSP specified:

> The Government of the FRY (Serbia and Montenegro) should ensure that none of the military, paramilitary or irregular armed units that could be under its control or have its assistance, as well as any organization and person that could be under its control, directions or influence, n e commit the crime of genocide, conspiring to commit genocide, directly and publicly abetting the commission of genocide, or complicity in genocide, whether such a crime is directed against the Muslim population of Bosnia and Herzegovina or against any other nation onal, ethnic, racial or religious groups.[183]

Referring to the above-mentioned position of the Court, Bosnia and Herzegovina pointed out in its lawsuit that the Court had a clear idea of the meaning of these concepts and their application. In the Lawsuit of Bosnia and Herzegovina, the context of the commission of the crime from Article III of the Convention is given (the ideology of Greater Serbia, the war in Slovenia and Croatia, the so- called RAM plan, the war in Bosnia and Herzegovina and the continuous presence and engagement of the JNA, public confirmations of the FRY / Serbia and Montenegro Gora/ about their participation in the conflict).[184] Based on the report of the UN Security Council and various UN bodies, the elements of the attribution of these acts to the FRY were presented:

> The aggression committed against the sovereignty and territorial integrity of the Republic of Bosnia and Herzegovina, the violation of basic human rights, especially of ethnic and national minorities, in the regions controlled by the 'Yugoslav army' and Serbian irregular forces represent a serious threat to peace and security throughout Central and Southeastern Europe.[185]

It was stated that the UN Security Council itself demanded the withdrawal of these troops from the territory of Bosnia and Herzegovina:

> By adopting Resolution 752 (1992) of May 15, 1992, the Security Council responded to the continued involvement of the FRY (Serbia and

[182] Yearbook of the International Law Commission, 1978, vol. II, Pt. 2, p. 28, *in* ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 5.4.4.1.
[183] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 2.4.4.3.
[184] *Ibid.*, para. 2.3.1.1- 2.3.9.1.
[185] UN, Doc. S/23845, April 26, 1992. See also: UN, Doc. S/23900, par. 5, 12 May 1992; UN, Assoc. S/24000, par. 6, 26 May 1992; UN, Assoc. S/24007, May 27, 1992.

Funded by the European Union

> Montenegro) in the conflict. The council then officially demanded that 'all forms of external interference in Bosnia and Herzegovina, including the Yugoslav People's Army, as well as elements of the Croatian army', be stopped immediately and that Bosnia and Herzegovina's neighbors react very quickly to stop such interference, and to respect territorial integrity of Bosnia and Herzegovina.[186]

In this regard, it was emphasized that the Security Council in its resolution of May 26, 1992 "confirmed the existence of a genocidal campaign with the aim of extermination, especially of the Muslim population, which continues with the direct participation of the JNA", and that the Security Council then adopted Resolution 757(1992) which imposed economic sanctions on the FRY. Explaining the FRY's participation in the armed conflict in Bosnia and Herzegovina, the lawsuit also stated that the Security Council, by Resolution 781(1992) of October 9, 1992, decisively condemned the violation of the airspace of Bosnia and Herzegovina by the FRY and ordered a ban on the flights of military aircraft in Bosnia's airspace. and Herzegovina. However, even this resolution was not implemented, and on sixty-five occasions planes were spotted returning to the territory of the FRY after the attack. The Secretary General stated that the withdrawal of JNA troops "remained a dead letter", and the economic sanctions from Resolution 757 were further strengthened by Resolution 820(1993) of April 17, 1993.[187] As stated, "the seriousness with which the UN Security Council considered the air support of the FRY especially came to the fore when it authorized UN members to use force in order to comply with the ban on flights (Resolution 816(1993) of March 25, 1993)".[188] The situation in Srebrenica in 1993, as well as the various actions of the UN Security Council to prevent crimes against civilians is detailed.[189] The elements of imputability are given on the basis of various reports of the UN General Assembly, in which the Assembly "officially and explicitly stated that the campaign of ethnic cleansing constitutes genocide (Resolution 47/121), for which the JNA and the political leadership of the Republic of Serbia bear primary responsibility (Resolution 47 /147)".[190] It was also stated that the UN General Assembly, in its resolution 48/153 of December 20, 1993, confirmed these facts, gave their legal classification and determined the international responsibility

[186] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 3.2.0.5. [193]UN, Assoc. S/24000, par. 5, 26 May 1992, *in* ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 3.2.0.7.
[187] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 3.2.0.11.
[188] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 3.2.0.13.
[189] See especially paragraphs 3.2.0.19-3.2.0.20, ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994.
[190] ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para. 3.3.2.3.

Funded by the European Union

of the perpetrators.[191] Parts of the reports of the UN Human Rights Committee and the Committee for the Elimination of All Forms of Discrimination were also cited, which themselves in their reports confirmed the factual acts and stated the existence of links between the FRY and militias and paramilitary Serbian troops responsible for mass, serious and systematic violations. of human rights in Bosnia and Herzegovina.[192] As an important *opinio juris,* the lawsuit cited the conclusions of the International Conference on Human Rights in Vienna in 1993, which concluded in its declaration that "ethnic cleansing, as a result of Serbian aggression against the Muslim and Croat population of the Republic of Bosnia and Herzegovina, constitutes genocide and violation of the Convention on the Prevention and Punishment of the Crime of Genocide", as well as that "the International Conference resolutely condemns Serbia and Montenegro, the Yugoslav People's Army, Serbian militias and extremist parts of the Bosnian Croat militia, which responsible for these crimes".[193] When it comes to the elements of attribution, the Provisions of the Commission for International Law of the UN, which were adopted in 2001, were established in international public law. It is interesting to note that in the comments of these provisions, the legal practice of the ICTY Appeals Chamber from the *Tadić case* (Article 8 – conduct under the direction or control of the state) was discussed in detail, and it was stated that "the conduct of one person or a group of persons, according to international law, is considered an act of the state if that person or group of persons, applying such behavior, acted on the instructions, directives or control of that state".[194] In the *Tadić case,* namely, the doctrine of imputability of responsibility to states for acts committed by individuals was elaborated in detail:

> The condition set by international law for the state to be ascribed /responsibility for/ the actions of private persons is that the state exercises control over these private persons. The degree of control may, however, vary depending on the facts and circumstances of each individual case. The Appeals Chamber does not see why, in all conceivable circumstances, international law would require a high threshold of scrutiny.[195]

In this regard, the Appellate Panel in the *Tadić case* concluded:

---

[191] *Ibid.*, para. 3.3.2.5.
[192] *Ibid.*, para. 3.3.7.0 and 3.3.8.0.
[193] United Nations, Assoc. A/Conf. 157/24 (partie 1), p. 49, *in* ICJ, *Memorial of the Government of the Republic of Bosnia and Herzegovina,* 15 April 1994, para 3.3.6.1- 3.3.6.2.
[194] United Nations, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* 2001, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).
[195] ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić aka "Dule",* before the Appeals Chamber, July 15, 1999, para. 117.

Funded by the European Union

> The Appeals Chamber believes that when determining whether an individual who does not have the status of a state official under national laws can be considered a *de facto* state organ, international rules do not always require the same degree of control. The required degree of control over armed groups or private individuals varies. If it is necessary to determine whether a private person or a group that is not militarily organized acted as a *de facto* organ of the state in the execution of a certain act, it should be established whether that state issued specific instructions to the individual or group in question for the execution of that specific act; alternatively, it should be determined whether the state ex *post facto* supported or approved the illegal act. On the contrary, state control over subordinate military forces, militias, or paramilitary units may be general in nature (and must include more than the mere provision of financial aid, military equipment, or training). This condition, however, does not go so far as to require the issuing of specific orders or the management of every single operation by the state. According to international law, it is by no means necessary for the controlling authorities to simultaneously plan all the operations of the units that depend on them, to choose targets or give specific instructions for the conduct of military operations and possible violations of international humanitarian law that are claimed to have occurred. It can be considered that there is control as required by international law when the state (in the context of an armed conflict) plays a role in organizing, coordinating or planning the military actions of a military group, while also financing, training and equipping the group or providing it with operational support. Acts committed by a group or its members may be considered acts of *de facto* state authorities regardless of whether the controlling state has issued any specific instructions for the commission of each of those acts.[196]

In connection with the attribution of responsibility to the Respondent, Bosnia and Herzegovina referred to the recognition of its official bodies. Namely, after showing a video showing the execution of six captured Bosnian Muslims committed by members of the "Scorpions" unit, the Council of Ministers of Serbia and Montenegro, in its declaration on June 15, 2005, stated:

---

[196] *Ibid.*, para. 137.

Funded by
the European Union

> The "Scorpions" did not represent Serbia or Montenegro, but an undemocratic regime of terror and death, against which the citizens of Serbia and Montenegro provided the strongest about tp or. Our condemnation of the crimes in Srebrenica does not end with the condemnation of the immediate perpetrators. We demand the criminal responsibility of all those who committed war crimes, who organized them or who issued orders for them, not only in Srebrenica but also elsewhere. Criminals must not be treated as heroes. Any protection of war criminals for any reason is also a crime.[197]

Judgment on the merits

Fourteen years after the submission of the Request for the initiation of proceedings against Serbia and Montenegro, a verdict was rendered in this dispute. This was also the first judgment passed before the International Court of Justice regarding the violation of the Convention on the Prevention and Punishment of the Crime of Genocide. After the Court, in the first part of the Judgment, recalled the procedure[198] and the claim from this dispute,[199] the final submissions were presented.[200] In its final submission, at the hearing of April 24, 2006, Bosnia and Herzegovina requested the International Court of Justice to rule and pronounce that Serbia and Montenegro, through its organs, i.e. bodies under its control, violated its obligations which derives from the Convention of the UN on the prevention and punishment of the crime of genocide by the intentional partial destruction of a non - Serb national, ethnic or religious group within, but also outside the territory of Bosnia and Herzegovina, including the personal Muslim population, by acts from Article II of the Convention.[201] Bosnia and Herzegovina also demanded that Serbia and Montenegro must immediately correct the consequences of their internationally illegal actions and that due to the international responsibility arising for the aforementioned violation of the Convention on the Prevention and Punishment of the Crime of Genocide, pay

---

[197] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 377.
[198] "The dispute relating to the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)", para. 1-64, *u Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* Institute for Research on Crimes Against Humanity and International Law of the University of Sarajevo, Sarajevo, 2008. Further in the text: ICJ, Judgment of the International Court of Justice: Bosnia and Herzegovina against Serbia and Montenegro, February 26, 2007.
[199] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 65.
[200] *Ibid.,* par. 65.
[201] *Ibid.*, para. 66.

Funded by the European Union

full compensation to Bosnia and Herzegovina for the damage caused and losses caused.[202]

Identification of the Respondent

In the continuation of the Verdict, the Court focused on the question of the identification of the Defendant. Namely, after February 4, 2003, the Federal Republic of Yugoslavia changed its name to "Serbia and Montenegro", and then, after the declaration of independence of Montenegro on June 3, 2006, to "Republic of Serbia". As the successor of the former joint state union, Serbia assumed all rights and obligations from international agreements concluded by the FRY. The Court's question was whether Bosnia and Herzegovina, as the plaintiff, "wants to stick with its original accusation, which includes Serbia and Montenegro, or whether it will choose otherwise".[203] The response of Bosnia and Herzegovina in this regard was that, although the definition of Serbia as the successor of the former Serbia and Montenegro was accepted by both Montenegro and the international community, such acceptance cannot and cannot have any effect on the rules that apply on state responsibility:

> It is obvious that it (rules on state responsibility) cannot be enforced bilaterally or retroactively. At the time when the genocide was carried out, as well as at the time of the initiation of this dispute, Serbia and Montenegro represented is a member of the new state. Regarding Bosnia and Herzegovina, Bosnia and Herzegovina believes that both Serbia and Montenegro are jointly and individually responsible for them the legal finding that represents the reason for the lawsuit in this dispute.[204]

The Court reminded of the basic principle that no country can be subject to its jurisdiction without consent, that is, acceptance of the Court's jurisdiction:

[202] *Ibid.,* para. 66, paragraph 6(b), (c) and (d) and paragraph 7: "(i) damage caused to natural persons by the acts listed exhaustively in Article III of the Convention, including non-material damage suffered by the victims or their surviving heirs or successors, as well as members their families; (ii) material damage caused to the property of natural or legal persons, public or private, by acts listed in Article III of the Convention; (iii) material damage suffered by Bosnia and Herzegovina in terms of reasonable costs which arose with the aim of eliminating or mitigating the damage resulting from the acts listed in Article III of the Convention; (c) in the event that an agreement is not reached one year after the Court's Judgment, the parties to the dispute will decide on the nature, form and amount of compensation. The Court, reserving the right to a subsequent procedure for that purpose; (d) that Serbia and Montenegro are obliged to provide concrete guarantees and guarantees that they will not repeat the illegal acts that are the subject of the Lawsuit, where the Court will determine the form of such guarantees and guarantees; That in the event of non-fulfilment of the Order for determining temporary measures

[203] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 67-70.

[204] *Ibid.*, para. 71.

Funded by the European Union

> As the Court observed in the case *of Certain Phosphate Lands in Nauru* (Nauru v. Australia), 'the *jurisdiction of the Court depends on the consent of the States*, therefore, the Court cannot compel a state to appear before it... ' (...) In its Judgment on the 11th ula 1996. (...) The Court considers that such an agreement, for the purposes of this Dispute, exists on the part of the FRY, which is late, and has been accepted In Serbia and Montenegro, there is no change in the legal subject of the activity.It clearly follows from the events referred to in paragraphs 67 to 69... that the Republic of Montenegro continues to be a legal entity of Serbs and Montenegrins.[205] Stating that Serbia accepted the continuity between Serbia and Montenegro and assumed responsibility for all obligations arising from international treaties, including obligations from the Convention on Genocide, the Court concluded that the Republic of Serbia remains the defendant issued by the Court on April 8, 1993 and September 13, 1993, it will be considered that Serbia and Montenegro have violated their international obligations and will have obligation towards Bosnia and Herzegovina to provide symbolic compensation for that violation, the amount of which will be determined by the Court".

The Court took part in the dispute and determined that "any the conclusions that the Court makes in the operative part of this Judgment addressed to Serbia":

> However, it should be kept in mind that any responsibility for the past events that will be determined at this Court will be related to in a given moment, the state of Serbia and Montenegro. The Court notes that the Republic of Montenegro is a member of the Convention on genocide. All members of e these Conventions took over and dealt with the issues that they highlighted, especially about cooperation in order to punish the perpetrators of genocide.[206]

In the following text of the Judgment, the Court presented in detail its views on the objection of Serbia and Montenegro to the jurisdiction of the court,[207] and recalled its previous decisions, and applying the principle of already decided legal matter from the Judgment from 1996 concluded that its jurisdiction *a frotiori* also extends to continuation of the dispute:

---

[205] *Ibid.*, para. 76.
[206] *Ibid.*, para. 77-79.
[207] See a couple. 80-139, ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007.*

Funded by the European Union

> The Court concluded that the principle *of res judicata* prohibits any questioning of the content of the Judgment from 1996, related to the argument that the Plaintiff, on the date of submission of the Request for initiation of court proceedings, was not a state which, in accordance with the Statute, had the capacity to appear before the Court as a party. The suing party also claimed that the Judgment from 1996 did not have the force of principle but of res *judicata* regarding the question of whether the FRY was a party at the time the proceedings were initiated the contracting party is the Convention on genocide tried to show that it is time she was not and could not be a party to the proceedings. Nevertheless, in the opinion of the Court, for the reasons mentioned above, it would be considered that the Judgment from 1996 clearly determines, with the force of the principle of *res judicata,* the question of its jurisdiction, also applies *a frotiori* to the subject of this discussion, since the 1996 Judgment was clear on the matter. (...) The Court, therefore, concluded, as was also decided in the Judgment from 1996, that it has jurisdiction in accordance with Article IX of the Convention, to rule on the dispute brought before him by a claim dated March 20, 1993.[208]

Furthermore, the Court explained in detail the applicable law from the Convention on the Prevention and Punishment of Genocide,[209] and in this regard considered the question of whether the Court can conclude that a state committed genocide in the absence of a previous verdict for genocide pronounced against an individual by a competent court. Namely, this issue was raised by the Defendant, who considered that the condition *sine qua non* for determining state responsibility is the prior determination, in accordance with the rules of criminal law, of the individual responsibility of the perpetrator.[210] The court made the following statement about it:

> The difference in procedure and authority that this Court has in relation to courts and tribunals that judge individuals for committed criminal offenses do not in themselves represent a legal obstacle for the Court to independently determine that genocide, that is, any crime listed in Article III, has been committed. Under its Statute, the Court has the authority to proceed in such cases and to apply a standard of proof appropriate to

[208] *Ibid.,* par. 140.
[209] See a couple. 142-179, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007.*
[210] *Ibid.,* par. 180.

Funded by the European Union

> the charges of the most serious crimes. (...) A different interpretation would mean that there are no legal remedies in the Convention in conceivable cases: as a case where the leaders of a certain state allegedly committed genocide in that territory but were not tried because, for example, they are still in power and control the police, prosecutor's offices and courts, and there is no international criminal tribunal competent for the allegedly committed crimes... Bearing this in mind, the Court concludes that, according to the Convention, there can be state responsibility for genocide and complicity in genocide, and that for that or similar the crime was not convicted not a single individual.[211]

Standard and methods of proof

When it comes to the burden of proof, referring to his legal practice in the case of *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America*), where it was established that "it is a party's duty to try to prove a fact on which the burden of proof is attached",[212] The International Court of Justice pointed out that it is generally established that the plaintiff is the one who must prove the allegations raised in the dispute, and that the party to the dispute who asserts a fact must also prove the same. Referring to the claims of Bosnia and Herzegovina that "in certain cases, the burden of proof must be transferred to the Defendant, bearing in mind the refusal of the Defendant to submit the full text of certain documents, especially in connection with the attribution of alleged acts of genocide".[213] The court made the following statement:

> “The problem relates, in particular, to parts of the documents of the Supreme Defense Council of the Respondent which were blacked out to make them illegible. According to the statements of the assistant representative of the Defendant, those documents were, by the decision of the Supreme Council of Defense, classified as a military secret, and by the confidential decision of the Council of Ministers of Serbia and Montenegro, they were declared matters of interest for national security. The plaintiff claims that the Court should make its own conclusions based on the fact that the Defendant refused to provide a copy of the full

[211] *Ibid.*, para. 180-182.
[212] ICJ, *Jurisdiction and Admissibility,* Judgment, Report 1984, page 437, para. 101.
[213] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 204.

Funded by the European Union

> text of those documents. He refers to the authority of the Court, which was previously mentioned / par. 44 of this Judgment / [214] to require the submission of documents in accordance with Article 49 of the Statute, which stipulates that ' every refusal will be formally ascertained'. In the second round of oral arguments, the deputy agent of the plaintiff stated that: Serbia and Montenegro should not be allowed to respond to our citation of blacked out documents, if he does not simultaneously provide the plaintiff and the Court with the complete, unredacted text of all of them shorthand reports, as well as all VSO minutes. Otherwise, Serbia and Montenegro would be at a great advantage compared to Bosnia and Herzegovina when it comes to documents that are, obviously, only in the eyes of the Defendant, directly relevant for gaining or losing this dispute. We expressly request, Madam Speaker, that the Court order the Defendant to do so".

The court, however, rejected this request of Bosnia and Herzegovina, with the explanation:

> In connection with this issue, the Court points out that the Claimant has extensive documentation and other evidence, especially those from the easily accessible files of the ICTY. There was, to a large extent, the use of the same. In the month leading up to the oral hearing, the Claimant provided the Court with carefully selected documents from among the many available at the ICTY. The plaintiff called General Sir Richard Dannatt, who, relying on a certain number of those documents, testified about the connection between the authorities of the Federal Republic of Yugoslavia and Republika Srpska, and about the issue of control and command. Although the Court did not accept any of the Petitioner's requests to provide copies of the unredacted documents, it did not fail

[214] "In a letter dated December 28, 2005, the deputy representative of Bosnia and Herzegovina requested, on behalf of his Government, that the Court invite Serbia and Montenegro to comply with Article 49 of the Statute of the Court and Article 62 Paragraph 1 of the Rules of Court, filed by In a letter dated January 16, 2006, the representative of Montenegro informed the Court of his Government 's position regarding this request In 2006, the Registrar is, acting in accordance with the Court's instructions, asked Bosnia and Herzegovina to submit certain additional information regarding the request it submitted pursuant to Article 49 of the Statute and Article 62, paragraph 2, of the Court's Rules of 19 and January 24 In 2006, the deputy representative of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina made a decision to limit its request to the hidden parts of the assigned documents from January 31, 2006, the Assistant Representative of Serbia and Montenegro conveyed his Government 's position regarding that amended request. In letters dated February 2, 2006, the Registrar informed the parties to the dispute that the Court decided not to ask Serbia and Montenegro to submit the documents in question at this stage of the proceedings. However, the Court has retained the right, which is given to it by Article 49 of the Statute and Article 62, paragraph 1 of the Rules of Court, to subsequently, if necessary, use its powers to ex officio request the delivery of those documents".

Funded by the European Union

> to note the Petitioner's suggestion that the Court is free to draw its own conclusions.[215]

Furthermore, regarding the standard of proof, the Court emphasized that the parties in the dispute "do not have the same opinion" regarding the standard of proof, and reasoned:

> The plaintiff, stressing that this issue is not a question of guilt, says that the applicable standard is the standard of the strongest evidence or the hypothesis that is most likely, to the extent that the allegations constitute a breach of contractual obligations for. In the opinion of the Defendant, this procedure "concerns the most serious questions of state responsibility and... extremely serious accusations against a state, which requires an adequate degree of accuracy". The evidence should be such that it leaves no room for reasonable doubt'.[216]

In relation to the applicable standard, the Court, referring to its previous legal practice,[217] pointed out that "allegations made against a state, which imply extremely serious charges, must be proven on the basis of elements that have full probative value":

> "The court asks to be fully convinced that the allegations from this gp are violations, that the crime of genocide or other acts listed in Article III have been clearly established. The same standard applies to proof of attribution of such works".[218]

As for the methods of proof, the Court stated that "he must make his own judgment about the legally relevant facts that the Claimant claims to have been violated by the Defendant", and that this dispute has an "unusual character", since "many of the allegations that were brought before this Court were already the subject of ICTY processes and decisions".[219] In this regard, the ICJ referred to its previous legal practice[220] and particularly emphasized and cited its position in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda):*

[215] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 206.
[216] *Ibid.,* par. 208.
[217] ICJ, Corfu Channel Case *(United Kingdom v. Albania),* Judgment, Report 1949, page 17.
[218] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 209.
[219] *Ibid.*, para. 212.
[220] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, Report 1986, page 41, para. 59-73; ICJ, *United States Diplomatic-Consular Personnel* Dispute in Tehran, Judgment, Report, *1980,* para. 11-13; *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, Report 2005, para. 57-61.

Funded by the European Union

> "The court will carefully treat evidentiary elements specially prepared for this dispute, as well as those that flow from only one source. Preference will be given to information submitted at the time of the event by persons who had direct knowledge. The court will pay particular attention to reliable evidence or conduct that is unfavorable to the state represented by the person from whom such evidence comes. The court will also give weight to evidence that, prior to litigation, has not been disputed by impartial persons as to the accuracy of what it contains. Furthermore, the Court states that the evidence obtained from the examination of directly involved persons, who were later cross-examined by judges skilled in examination and experienced in evaluating large amounts of factual data, some of which are of a technical nature, deserve cf personal attention".[221]

The court further stated that this method is also applied to the facts from the legal practice of the ICTY, because the evidence obtained by directly involved persons was checked by cross- examination and their credibility was not subsequently disputed. It was stated that at the end of the oral proceedings, the parties in the dispute reached a "broad agreement on the importance of the ICTY material", and that the Claimant always attached great importance to this material, while the Defendant disputed the reliability of the ICTY's conclusions during the written phase of the proceedings as and the adequacy of the legal framework in which the Tribunal expressed itself, as well as the procedures and neutrality of the Tribunal, but that in the oral gp concession phase, the Defendant 's position " essentially changed ", and " actually the Defendant distanced itself from its previous opinions regarding the ICTY".[222]

The court concluded that, in principle, it accepts as "very convincing" the relevant facts, the conclusions reached by the ICTY at the trial panel, unless they were disputed on appeal.[223] Regarding the indictments of the ICTY, the ICJ concluded that "we should not give much weight to the fact that one allegation is in the indictment", but that what may be important is "the prosecutor's decision, either at the beginning or as an amendment to the indictment, not to include or exclude the accusation of genocide". A similar point of view was expressed by the MCA on the confirmation of the indictment, with the argument that "the accused was not involved in that

[221] International Court of Justice, *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, Report 2005, para. 61. See also paragraphs 78 to 79, 114 and 237 to 242.
[222] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 215.
[223] *Ibid.,* par. 223.

Funded by the European Union

phase".[224] When it comes to the stage of the ICTY proceedings concerning the motion for acquittal submitted by the defense at the end of the prosecution's presentation of arguments, the ICJ emphasized that "the accused has a role" in that stage of the process. However, it was further explained that the standard for making a decision "is not that the Council deciding on the facts *should be* convinced beyond any reasonable doubt based on the plaintiff's evidence, if they are accepted, but that the Council *could be"* and that considering that the judge, i.e. the Council, does not make final conclusions in to any of the previous stages, "the Court /MSP/ does not consider that it can give weight to those decisions".[225] Regarding the reports of official or independent bodies, the MSP stated that their value depends on: "1) the source of the evidentiary element (e.g. whether the source is biased or neutral); 2) the way in which it was obtained (e.g. an anonymous caption in the press or the product of a careful judicial or similar procedure); and 3) the nature or character of the evidence (whether it is statements to the contrary interest of their authors, accepted or undisputed facts)".[226]

Determination of specific intent (dolus specialis)

In its judgment, the ICJ emphasized that genocide, as defined by Article II, consists of "act" and "intent". It is stated, therefore, that the acts referred to in Article II must be committed with the intention and with the aim "to destroy the group as such":

> "It is not enough to establish, for example in terms of the provision from point (a), that premeditated unlawful killings of group members were committed. In addition, the existence of intent, which is defined in a very precise way, must be established. A special or specific intention, or dolus specialis, is always required; (...) It is not enough that members of a group are the target of an attack for the reason of belonging to that group, that is, for the reason of the discriminatory intent of the perpetrator. Furthermore, it is necessary that the acts listed in Article II must be committed with the intent to destroy the group as such, in whole or in part. The word 'as such' emphasizes the intention to destroy the protected group".

[224] *Ibid.,* par. 218AQ
[225] *Ibid.,* par. 219
[226] *Ibid.,* par. 227.

Funded by the European Union

Clarification of the required specific intent is given on the example of observing genocide in the context of other acts, that is, crimes against humanity, specifically acts of persecution. In this regard, the ICJ referred to the interpretation of the ICTY from the case of *Kupreškić and others:*[227]

> *The mens rea* requirement for persecution is greater than that required for ordinary crimes against humanity and less than that required for genocide. In this context, the trial panel would like to emphasize that persecution as a crime against humanity belongs to the same genus as genocide. Both persecution and genocide are acts directed against persons who belong to a certain group and who are targeted precisely because of that affiliation. For both categories, discriminatory intent is important: attacking people because of their ethnic, racial or religious characteristics (in the case of persecution and because of political beliefs). While in the case of persecution the discriminatory intent can take many inhumane forms and manifest itself in a greater number of actions including murders, in the case of genocide that intent must coincide with the intent to destroy, in whole or in part, the group to which the victims of genocide belong. Therefore, it can be said, from the point of view *of mens rea,* that genocide is an extreme and most inhumane form of persecution. In other words, when persecution escalates into an extreme form of intentional and voluntary execution of an act whose purpose is the destruction of a group in whole or in part, it can be considered that persecution constitutes genocide.[228]

It was emphasized that the specific intention must be different from other reasons or motives that the perpetrator may have, and that it is necessary, starting from the facts, to conclude a sufficient manifestation of such intention.[229]

Findings of the Court in relation to the acts referred to in Article II of the Convention on Genocide

Murders of members of a protected group

For the purpose of determining the material element, and the specific intent related to the violation of Article II(a) which refers to the killing of members of the group, the

[227] ICTY, IT-95-16-T, *Prosecutor against Zoran Kupreškić, Mirjan, Vlatko, Drago Josipović, Dragan Papić, Vladimir Šantić aka Vlado,* before the Trial Chamber, Verdict, January 14, 2000, para. 636.
[228] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 188.
[229] *Ibid.*, para. 188.

Funded by the European Union

ICJ referred to the evidence related to the murders in Sarajevo; Podrinje (Zvornik, Vlasenica - Sušica camp, penal correctional center in Foča, Batković camp); in the area of Prijedor (Kozarac and Hambarine, and Omarska, Keraterm and Trnopolje camps); in the area of Banja Luka (Manjača camp); and Brčko (Luka camp).[230] In connection with the determination of *the actus reus* element of this act, the Court concluded:

> The court finds that it has been established on the basis of indisputable evidence that, during the conflict, mass murders were carried out in certain areas and in detention camps more widely on the territory of Bosnia and Herzegovina. In addition, the elements of the sentencing point to the fact that the majority of the victims were members of the protected group, which leads to the opinion that they could be systematically selected as a target for destruction. The Court considers that, while the Plaintiff disputed the truth of the allegations and the number of victims or the motives of the perpetrators, as well as the circumstances under there are murders committed and their legal qualifications are, in fact, never disputed the fact that members of the protected group were actually killed in Bosnia and Herzegovina.In this connection, the court considers that it has been established on the basis of the concluding elements of the sentence that mass murders of members of the protected group took place and that they were it does not meet the requirements in terms of the material element, such as is defined in Article II (a)[231] of the Convention.

Regarding the specific intention (dolus *specialis)* in connection with the above-mentioned material element (actus *reus)*, the Court relied on the findings of the ICTY and concluded:

> "The court, however, is not convinced, based on the evidence in front of it, that it has been indisputably established that the perpetrators committed mass murders of members of a protected group with specific intent (dolus *specialis*) for the complete or partial destruction of the group. The Court carefully examined the criminal proceedings conducted by the ICTY and the judgments of its Councils, which are quoted above,

[230] See also: *ICJ, Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 246-275.
[231] *Ibid.,* par. 276.

Funded by the European Union

> and note that none of the convicted persons were found to have acted with specific intent (*dolus specialis*)".[232]

When it comes to the crimes from Article II (a) that refer to Srebrenica, the Court considered them separately from the other mentioned examples of killing members of a protected group,[233] and it is related to the material element of genocide, relying on the judgments of the ICTY in the case of *Krstić* and *Blagojević also* concluded:

> *The trial panels in the Krstić* and *Blagojević* cases concluded that Bosnian Serb forces killed over 7,000 Bosnian Muslim men after the capture of Srebrenica in July 1995. Accordingly, they concluded that the material element of murder was established under Article II (a) of the Convention. Both chambers also concluded that the actions of the Bosnian Serb forces constitute a material element of inflicting severe physical and psychological injuries, as defined in Article II (b) of the Convention - both to those who expected to be executed, and to others who were separated from them, in sense of their forced displacement and the loss suffered by those who survived.[234]

In this regard, the International Court of Justice cited parts of the appeal verdict from the *Krstić case*, i.e. its conclusions:

> The rigorous conditions that must be met in order to pronounce a decision on guilt for genocide show the gravity of this crime. The severity of the crime of genocide is determined by the state's strict requirements. These conditions - evidence of specific intent, which is difficult to find, and showing that there was a goal to destroy the group as a whole or a substantial part of it - eliminate the risk of light sentences for this kind of crime. However, when the above conditions are met, the right must not escape from calling the crime committed in this way by its true name. In an effort to eliminate the majority of Bosnian Muslims, Bosnian Serb forces committed genocide. Their goal was the destruction of forty thousand Bosnian Muslims who lived in Srebrenica, a group that symbolized Bosnian Muslims as a whole. They took away all Muslim men who were imprisoned, soldiers and civilians, old and young, their

[232] *Ibid.,* par. 277.
[233] See further: paragraphs 278-294, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007.*
[234] ICTY, IT-98-33-T, *Prosecutor v. Radislav Krstić,* before the Trial Chamber, Judgment, August 2, 2001, paragraphs 426-427 and 543, and ICTY, IT-02-60-T, *Prosecutor v. Blagojevića,* Judgment, January 17, 2005, paragraphs 643, 644-654, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 290.

Funded by the European Union

> personal belongings and identity documents, and deliberately and methodically killed them, solely on the basis of their identity. When they embarked on this genocidal enterprise, the Bosnian Serb forces were aware that the evil they had caused would continue to haunt Bosnian Muslims. The Appeals Chamber clearly confirms that the right to expressly condemn the severe and permanent injuries inflicted and calls the massacre in Srebrenica a true genocide. Those who are responsible will wear this mark of shame and it will serve as a warning to those who would possibly think of committing such a heinous act in the future. Concluding that the members of the Main Staff of the VRS intended to destroy the Bosnian Muslims in Srebrenica, the Trial Chamber did not waive the legal claims previously raised for genocide. The Defense's complaint regarding this matter is pending.[235]

Regarding specific intent, the ICJ stated that it was not established "until the change of the military objective and after the capture of Srebrenica, around July 12 or 13", and added: "The Court has no reason to depart from the conclusions of the ICTY that specific intent is necessary (*dolus specialis*) determined at that moment and only at that moment".[243]

Causing severe physical or mental harm to members of a protected group

In relation to Article II(b), the Court referred to the Claimant's claims that, in addition to mass murders, the non-Serb population of Bosnia and Herzegovina was "systematically inflicted with severe injuries, the practice of terror, the infliction of pain, as well as abuse and systematic humiliation, with with a special emphasis on the systematic rape of Muslim women as an act of genocide committed against Muslims in Bosnia during the war conflict", and also to the Defendant's claims that "rapes and sexual abuse committed during the conflict did not constitute acts of genocide, but were committed by all parties to the conflict, without specific intent (*dolus specialis*)".[236] In its reasoning, the Court relied on the verdicts of the ICTR in the *Akayesu case,*[237] and the ICTY in the *Stakić* case,[238] which classify the crimes of rape and sexual abuse as serious bodily or mental injuries under the Genocide

---

[235] ICTY, IT-98-33-A, *Prosecutor v. Radislav Krstić*, before the Appeals Chamber, Verdict, April 19, 2004, para. 37- 38, in ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 293.
[236] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 298-299.
[237] First Instance Verdict in the *Akayesu case,* para. 731.
[238] First-instance judgment in the *Stakić case,* para. 516.

Funded by the European Union

Convention. He also referred to the resolutions of the Security Council and the UN General Assembly, and specifically cited several examples from these documents:

> In its Resolution 48/143 (1993), the General Assembly stated that it was "*horrified* by the constant and documented reports on the widespread practice of rape and abuse of women and children in the areas of war conflicts in the former Yugoslavia, and especially because the Serbian forces systematically did this to the Muslim women and children of Bosnia and Herzegovina".[239] In several resolutions of the Security Council, concern is expressed about the "massive, organized and systematic detention and rape of women", particularly Muslim women in Bosnia and Herzegovina. As for inflicting other forms of serious injuries, Security Council Resolution 1034 (1995) deals most harshly with: violations of international humanitarian law and human rights by Bosnian Serbs and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sansko Most as described in the report of the Secretary General of November 27, 1995, which shows that there is a systematic policy of injuries - summary murders, rapes, mass expulsions, arbitrary detentions, forced work and mass disappearances of people. The Security Council continues to mention a 'persistent and systematic campaign of terror' in Banjaluka, Bijeljina and other areas under the control of Bosnian Serb forces. Concern was also expressed over reports of mass killings, illegal detention and forced labor, rape and deportation of civilians in Banja Luka and Sanski Most.[240]

The court then presented the facts of these acts. So, about the events in Zvornik, relying on various researches, it was stated that these documents talk about the "policy of terror, forced displacement, torture and rape during the occupation of Zvornik in April-June 1992", and that in the report to the Commission, the expert states "35 reports of rape committed in the area Zvornik in May 1992".[241] It was also stated that acts causing severe physical and psychological injuries were also committed in the municipality of Foĉa, and as examples data from the first-instance

[239] Preamble, paragraph 4, Resolution 48/143 (1993), UN General Assembly, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 301.
[240] Security Council Resolution 798 (1992), Preamble, paragraph 2; Resolution 820 (1993), Preamble, paragraph 6; Resolution 827(1993), Preamble, paragraph 3; Security Council Resolution 941 (1994), Preamble, paragraph 4; *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 302.
[241] Hannes Tretter *et al.*, "Ethnic Cleansing Operations in the City of Zvornik from April to June 1992"; Ludwig Boltzmann Institute for Human Rights Report (1994), p. 48; UN Commission of Experts, Volume V, Annex IX, p. 54, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 305.

Funded by the European Union

judgment of the ICTY in the case of *Kunarac and others* related to the claims that "soldiers or civilians Bosnian Serb forces repeatedly raped a large number of women in Foča".[242] Examples of these acts committed, among other things, in the Batković camp, where according to the report of the UN commission of experts, "prisoners were forced to have sexual relations with each other, and sometimes with the guards", as well as statements from the US State Department dispatch where the statements of the witnesses were transmitted that "he and the other prisoners, on several occasions, were forced to undress and commit fornication among themselves or with some guards". The case of Vlasenica,[243] the Sušice camp, and other places was also cited, where, in accordance with the confession of guilt given before the ICTY, the accused Dragan Nikolić, "many Muslim women were raped and exposed to inhumane physical and verbal abuse" maltreatment, and several men were also tortured in the same camp".[244] Below are examples of beatings, rape of female detainees and torture committed in the camp in the Penitentiary Home in Foča,[245] as well as torture and sexual abuse in the area of Prijedor (Omarska camp,[246] Keraterm camp,[247] Trnopolje camp).[248] Regarding the Trnopolje camp, it was stated that in the *Tadić case*, the ICTY Trial Chamber concluded that all the beatings took place in the Trnopolje camp and that " due to the fact that this camp housed the largest number of women and girls, there were more listening to teas of rape than in any other case",[249] and that these conclusions regarding beatings and rape were also confirmed in other judgments of the ICTY.[250] Examples of torture and sexual abuse in the Manjaĉa and Luka camps were also cited.[251] In connection with the above, the

[242] ICTY, *Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Judgment of the Trial Chamber, 22 February 2001, paragraphs 574 and 592, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. of Serbia and Montenegro, February 26, 2007,* par. 306.
[243] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 307.
[244] ICTY, MT-94-2-T, *Nikolić,* Verdict, 18 December 2003, paragraphs 87-90, *in* ICJ, Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, 26 February 2007, para. 308.
[245] Report of the Commission of Experts, Volume IV, p. 128-132; United States State Department cable, April 19, 1993, no. 16, p. 262; *Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Judgment of the Trial Chamber, February 22, 2001, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 309-310.
[246] Citations from the Report of the UN Commission of Experts on Physical Abuse, Rape and Torture in the White House - Report of the UN Commission of Experts, Volume IV, Annex VIII, pages 207-222; ICTY, IT-94-1-T, *Tadić case,* Judgment of the Trial Chamber of May 7, 1997, para. 155-158, 163-167, 194-206; ICTY, IT-98-30/1-T, *Kvočka et al.*, Judgment of the Trial Chamber, para. 21-50 and 98-108; ICTY, IT-99-36-T, *Brđanin case,* Judgment of the Trial Chamber, para. 515-517; ICTY, IT-97-24-T, *Stakić case,* Judgment of the Trial Chamber, para. 229-336. [255] Witness statements from the Report of the UN Commission of Experts on Beatings and Rapes, supported by witness statements reported by the Permanent Mission of Austria to the United Nations and the Helsinki Watch organization; ICTY, IT-99-36-T, *Brđanin case,* Judgment of the Trial Chamber, September 1, 2004, para. 851 and 852; ICTY, IT-97-24-T, *Stakić case,* Judgment of the Trial Chamber, para. 237, 238-241; ICTY, IT-98-30/1-T, case of *Kvočka et al.*, Judgment of the Trial Chamber of November 2, 2001, para. 114, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 313. [256] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 314.
[247] ICTY, IT-94-1-T, *Tadić case,* Before the Court of May 7, 1997, para. 175.
[248] ICTY, IT-97-24-T, *Stakić case,* Judgment of the Trial Chamber of July 31, 2003, para. 242; ICTY, *Brđanin case,* IT-99-36-T, September 1, 2004, para. 513-514, 854-857.
[249] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 316.
[250] *Ibid.*, para. 317.
[251] *Ibid.,* par. 304.

Funded by the European Union

ICJ concluded that *the actus reus was met*, but not *the dolus specialis* for violations from Article II (b) of the Convention, except in the case of Srebrenica where both of these criteria were met:[252]

> “Having carefully examined the evidence presented to it and having taken note of those presented to the ICTY, the Court considers that, based on completely irrefutable evidence, it has been established that the members of the protected group were, during the conflict, and especially in detention camps, were systematic victims of mass ill - treatment, beatings, rape and torture, causing severe physical injuries and mental pain. In this way, the necessary condition concerning the material element as defined in Article II (b) of the Convention is fulfilled. The court, however, concludes based on the evidence before it, that it has been irrefutably established that these crimes, although they cannot be classified as war crimes and crimes against humanity, were committed with specific intent (dolus specialis) that a protected group is completely or partially destroyed, and what is needed to conclude that genocide has been committed”.[253]

With regard to the commission of crimes from Article II(c) in detention camps, the Court gave examples from the judicial practice of the ICTY related to the camps in Podrinje (Sušica camp,[254] Correctional Center in Foča)[255], Prijedor (Omarska,[256] Keraterm,[257] Trnopolje)[258], Banja Luka (Manjača camp)[259] and Bosanski Šamac,[260] and concluded:

> Based on the elements that were put to its inspection, the Court considers that they exist irrefutable and convincing evidence that the detainees in the camps were exposed to horrible conditions. However, the evidence that was presented did not allow the Court to determine that these the acts were accompanied by a specific intent (dolus *specialis)* to completely or partially destroy the protected group. In this regard, the Court notes that in none of the cases before the ICTY, which

[252] Ibid., para. 319.
[253] ICTY, IT-94-2-S, *Nikolić,* Judgment of 18 December 2003, paragraph 69.
[254] ICTY, IT-97-25-T, *Krnojelac,* Judgment of March 15, 2002, paragraph 440.
[255] ICTY, IT-98-30/1-T, *Kvočka et al.,* Judgment of the Trial Chamber of November 2, 2001, paragraphs 45 and 55.
[256] ICTY, IT-97-24-T, *Stakić,* Judgment of the Trial Chamber of 31 July 2003, paragraph 163.
[257] ICTY, IT-97-24-T, *Stakić,* Judgment of the Trial Chamber of 31 July 2003, paragraph 190.
[258] ICTY, IT-00-39-S and 40/1-S, *Plavšić,* Sentencing Judgment of February 27, 2003, paragraph 48.
[259] ICTY, IT-95-9-T, *Simić,* Judgment of October 17, 2003, paragraph 773.
[260] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 354.

Funded by
the European Union

are related to the aforementioned camps, did the ICTY establish that the accused acted with such a specific intention (*dolus specialis*).[261]

When it comes to deportations, the Court concluded that "even if it is left before the deportations and expulsions can be characterized as falling within the framework of Article II (c) of the Convention on Genocide”, it has not been irrefutably established that " such deportees and expulsions were followed with the intention of completely or partially destroying the protected group".[262] While considering the acts from Article II (c), the court also stated an interesting point of view regarding the destruction of historical, religious and cultural assets. Referring to the conclusion from the Krstic case *that attacks* on cultural and religious assets and symbols of the target group, which often occur simultaneously when there is physical or biological destruction, "can legitimately be considered as evidence of the intention to physically destroy the group",[263] the Court concluded that, however, "the destruction of historical, of religious and cultural heritage cannot be considered a genocidal act within the meaning of Article II of the Genocide Convention".[264]

Imposition of measures aimed at preventing births within the protected group

In relation to Article II (d) of the Convention on Genocide - the imposition of measures aimed at preventing births within a protected group, the Court stated that it was neither provided nor given evidence that would reveal the Claimant's claim that "the forced separation of men from Muslim women in Bosnia and Herzegovina, which is systematic was carried out after the invasion of various municipalities by Serbian forces (...) it most likely had as a necessary consequence the drop in the birth rate of that group, considering that for many months there was no physical contact“.[265] The court also stated that the Applicant stated that rape and sexual violence against women led to physical trauma that blocked the reproductive functions of the victims and in some cases caused infertility, but that "the only evidence that the Applicant the lawsuit cited was the indictment in the *Gagović case* before the ICTY, in which the prosecutor stated that a witness could no longer have children because of the sexual abuse she had suffered", and that "in the opinion of the Court, the indictment of the prosecutor does not constitute convincing evidence". In addition, the Court stated that

---

[261] *Ibid.*, para. 334.
[262] ICTY, IT-98-33 -T, *Krstić,* Judgment of the Trial Chamber of 2 August 2001, paragraph 580.
[263] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 344.
[264] *Ibid.,* par. 355.
[265] ICTY, IT-96-23-I, *Gagović et al.,* Original Indictment of 26 June 1996, paragraph 7.10, *in* ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, 26 February 2007,* para. 356.

Funded by the European Union

"the *Gagović* case did not reach the trial stage due to the death of the accused".[266] The Court's finding on sexual abuse of men is also interesting:

> The plaintiff is referred to sexual violence against men because later reproduction is impossible for them. To support this claim, the Plaintiff made the statement that in the case of Tadić, the Trial Chamber established that in the Omarska camp the guards forced a Bosnian Muslim to bite off the testicles of another Bosnian Muslim (Tadić, IT-94-1-T, Judgment of 7 May 1997, paragraph 198). The plaintiff also cited a report from the newspaper *Le Monde* on a study by the World Health Organization and the European Union on the sexual abuse of men during the conflict in Bosnia and Herzegovina, which states that sexual abuse of men is practically it will always be accompanied by a threat in the sense that the victim will no longer be able to produce Muslim children. *Le Monde* also refers to the statement of the president of the non-governmental organization called/Medical Center for Human Rights/ that about five thousand men of non-Serbian nationality were victims of sexual abuse. However, the Court notes that the *Le Monde* article is only a secondary source. In addition, the results of studies by the World Health Organization and the European Union were only preliminary and a statement about how the Medical Center for Human Rights arrived at the number of five thousand men, victims of sexual violence.[267]

Regarding the allegations of the Claimant, who, referring to the legal practice of the ICTR that "rape can be a measure aimed at preventing childbirth, in the event that the person who was raped refuses to give birth",[268] stated that rape and sexual abuse on men and women led to psychological trauma, which is o prevented the victims from entering into new relationships and starting a family, the Court concluded that "The plaintiff did not submit any evidence that this was also the case with women in Bosnia and Herzegovina".[269] The court also stated that it was not provided with any evidence that confirms the claimant's argument "that Bosnian Muslim women who have suffered sexual abuse are exposed to the risk of being rejected by their

[266] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 357.
[267] MKSR-96-4-T, *Akayesu case*, Trial Chamber Judgment of 2 September 1998, paragraph 508.
[268] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 358.
[269] *Ibid.*, para. 359.

Funded by the European Union

husbands or that they will not be able to find a marriage partner".[270] In connection with the above, the Court, referring to the opinion of the Defendant that the Plaintiff did not state "any facts, did not present any serious arguments and did not submit any evidence" for the allegation that the rape was carried out in order to prevented births within the group, as well as that "claim The claimant 's claim that there was a drop in the birth rate within the protected group was not supported by any evidence regarding the birth rate in Bosnia and Herzegovina both before and after the war", he concluded:[271]

> "Having carefully examined the arguments of the parties to the dispute, the Court finds that the evidence presented by the Plaintiff does not provide an opportunity to conclude that the Bosnian Serb forces committed acts that could be qualified as the imposition of measures in in order to prevent births in protected group within the meaning of Article II (d) of the Convention".[272]

Forced transfer of children from a protected group to another group

In relation to the violations from Article II (e) - the forced transfer of children from a protected group to another group - the Court stated the argument of the Claimant that rape was used "as a way to influence the demographic balance by Muslim women fertilized themselves with the sperm of Serbian men", that is, that rape was used for the purpose conception, and "that the children who were born from those forced pregnancies would not be considered part of the protected group".[273] In this regard, it was stated that the Plaintiff referred to numerous sources, including the indictment in the case of Gagović *and others,* in which the Prosecutor of the ICTY claims that two Bosnian Serb soldiers raped one of the women, witnesses, and that they the father said that she would give birth to Serbian children".[274] However, the Court concluded that "the indictment cannot constitute convincing evidence for the case before it" and that in the case of *Gagović* "the trial stage did not even come". The Court further stated that the Claimant also referred to the Expert's Report to the Commission, in which it is stated that the woman was detained and that she was raped daily by three or four soldiers "who told her that she would give birth to a little

[270] *Ibid.*, para. 360.
[271] *Ibid.*, para. 361.
[272] *Ibid.*, par. 362.
[273] ICTY, IT-96-23-I, *Gagović et al.,* Initial Indictment of June 26, 1996, paragraph 9.3.
[274] Report of the Commission of Experts, Volume I, page 59, paragraph 248.

Funded by the European Union

Chetnik",[275] as well as to the source presented by the Trial Chamber in the revision of the indictment of *Karadžić and Mladić*,[276] according to which "some camps were specially intended for rape with the aim of forcing the birth of Serbian children, and women were often kept in captivity until it was too late to terminate the pregnancy", and that the "goal many rapes were forced insemination". The Court concluded that this position of the Trial Chamber is based solely on the testimony of one *amicus curiae* and on the aforementioned event reported by the Commission of Experts. Examples from the *Kunarac* verdict were also cited, where the ICTY Trial Chamber found that the accused, after raping a female witness, told the victim that "now she will carry a Serbian child and that she will never know who the father is".[277] Referring to the position of the Defendant, who pointed out that Muslim women who were raped gave birth to children on Muslim territory and that, "however, those children were not raised by Serbs, but, on the contrary, by Muslims", and that "it cannot be claimed that children were moved from one group to another second",[278] the Court concluded:

> "The court, on the basis of the above-mentioned elements, established that the evidence presented to it by the plaintiff did not allow to establish the existence of any form of forced pregnancy policy, nor that there was any goal to move the children from protected group to the second group, in terms of the meaning of Article II(e) of the Convention".[288]

Attribution of responsibility to the Respondent

The question that the Court should have considered in connection with the attribution of responsibility was whether the acts of genocide were committed by bodies which according to the rules of international law can be considered as bodies of the state. The second question was, if the perpetrators were not bodies of the Defendant, whether they were under the control of the latter, that is, whether they acted under its instructions or control. Since previously *the actus reus,* together with *the mens rea* of the crime of genocide, the Court established only the crimes

---

[275] ICTY, IT-95-5-R61 and IT-95-18-R61, Karadžić and Mladić case, *Revision* of the Indictment in accordance with Article 61 of the Rules of Procedure and Submission of Evidence, July 11, 1996, paragraph 64.

[276] ICTY, IT-96-23-T and IT-96-23/1-T, case of *Kunarac et al.*, Judgment of February 22, 2001, para. 583.

[277] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 366.

[278] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 367.

Funded by the European Union

committed in the area of Srebrenica, the consideration of attribution of state responsibility referred only to the genocide committed in Srebrenica.

Attribution of responsibility to the Defendant based on the behavior of its authorities

In considering the issue of attributing this type of state responsibility, the Court referred to the basic postulate of the rule on state responsibility, according to which the behavior of any state organ should be considered an act of the state under international law and that such behavior, if it constitutes a violation some international countries triggers her responsibility. This rule, namely, which is also one of the rules of international customary law, is provided for in the Provisions of the Commission for International Law on State Responsibility (Article 4):

> The behavior of everybody of the state is considered part of the state under international law, whether that body performs legislative, executive, judicial or any other function, regardless of the position it has in the organization of the state and regardless of its nature o rgana c central authorities or territorial states. Authority includes any person or entity that has that status in accordance with the internal legislation of that country.

In order to apply this rule, the ICJ stated that it is necessary, first of all, to determine whether the acts of genocide in Srebrenica were committed by persons or entities that had the status of an organ of the Federal Republic of South Oslawi "in accordance with the internal legislation of that country which was then in force":

> It must be said that there is not a single element that allows an affirmative answer to this question. It has not been proven that the army of the FRY participated in the massacres, nor that the political leaders of the FRY had a part in the preparation, planning or in any way participated in the execution of the massacre. It is true that there is evidence of the direct or indirect participation of the official army of the FRY, in addition to the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years preceding the events in Srebrenica. Political bodies of the United Nations have repeatedly condemned such participation, demanding that the FRY terminate it (see, for example, UN Security Council Resolution No. 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993).

Funded by
the European Union

> However, it was not proven that there was any such participation in the massacres that took place in Srebrenica, since neither the Republika Srpska nor the VRS were *de jure* organs of the FRY others did not have the status of an organ of the state according to its internal legislation.[279]

General Mladić, of the VRS, remained under the dual military administration of the FRY and that their salaries were paid by Belgrade until 2002, and that accordingly, the officers "represented *the de jure* authority e (FRY) who are designated according to the hierarchy to perform their duties in the ranks of the VRS in Bosnia and Herzegovina", the Court stated that "no evidence was presented that either General Mladić or any other officer whose duties were concerned about 30 Personnel center were, according to the internal legislation of the Respondent Party, the officers of the Respondent Party 's army - *the de jure* body of the Respondent Party" and that "VRS officers, including General Mladić, in the performance of their functions, were called upon to perform tasks on behalf of the Bosnian Serb authorities, especially the Republika Srpska". It was also stated that "they exercised certain public powers of the Republika Srpska", as well as "the special situation of General Mladić or any other VRS officer who was present in Srebrenica, and who are possibly 'administratively' related to Belgrade, is not of such a nature as to lead the Court to change the conclusion to which he came up with in the previous paragraph".[280]

Furthermore, the question arose as to whether the Defendant can bear responsibility for the acts committed by members of the Serbian unit "Scorpions" related to crimes in and around Srebrenica. The claimant's argument about the imputability of the behavior of certain authorities was that "reality must prevail over appearance", and that "Republika Srpska and the VRS, as well as paramilitary militias, are known as 'Scorpions', ' Red Berets', Tigers' and 'White Eagles' must consider, regardless of their status, *de facto,* to the authorities of the FRY, especially at the time we are talking about, so that all their actions, especially the massacres in Srebrenica, must be considered attributable to the FRY, precisely in the sense that they were organs state according to its internal legislation".[281] The Court, stating that the first question raised by this argument "is whether it is possible to attribute responsibility to a state for the behavior of persons or groups of persons who, although they do not have the status of state authorities, in fact act under the strict control of that state, that they must be

[279] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 386.
[280] *Ibid.*, para. 388.
[281] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 390.

Funded by the European Union

treated as its authorities",[282] referred to its previous practice in the case of *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of American States*).[283] In this regard, the court stated that persons, groups of persons or other entities can be equated with state bodies even if such status does not derive from internal legislation, provided that they act in "complete dependence" on the state of which they are they, in the last case in, the instrument itself. Applying this criterion to the genocide in Srebrenica, the court stated:

> "In the relevant period, July 1995, neither the Republika Srpska nor the VRS could be considered mere instruments through which the FRY acted, without any real autonomy. It is certain that the political and military relations, as well as those in the field of logistics, between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav Army and the VRS, were strong and close in previous years (see paragraph 238 above in the text) and that these relations are they would undoubtedly still be strong. But they, at least in the relevant period, were not such that the political and military organizations of the Bosnian Serbs could be equated with the organizations of the FRY. It was even disclosed that at that time there were also differences in strategic positions between the Yugoslav authorities and the leaders of the Bosnian Serbs; in the last case it proves that the latter possessed a relative but real degree of otherness. Regardless of the extremely large support that the Defendant gave to the Republika Srpska, without which it could "carry out its key or most significant military and paramilitary activities", this does not indicate that there was complete dependence of Republika Srpska on the Defendant party".[284]

On the issue of whether the Defendant can bear responsibility for the acts committed by the "Scorpions" in and around Srebrenica, i.e. whether the "Scorpions" were a *de jure* organ of the Second Party, the Court stated the following:

---

[282] *Ibid.*, para. 391.
[283] In this dispute, the ICJ had to determine whether the " nature of the contras with the United States Government " represented a relationship of dependence or control, so that the *contras* could be considered an organ of the US Government, or an *organ* acting on its behalf. of the Government. Examining the facts " in the light of the information at his disposal ", the Court stated that " there is no clear evidence that SA D actually exercised control to such an extent that the treatment of *contras* in all areas can be justified. "as if they were acting in their name ", and then concluded that " the evidence available to the Court... is insufficient to prove the complete dependence / *counter* / on American aid ", so the Court " could not determine that internal forces *can equalize* for legal ", ICJ, Military *and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* Judgment of June 27, 1986, p. 62-64, paragraphs 109 and 110).
[284] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 394.

Funded by the European Union

> is a disagreement between the parties in the dispute as to when the 'Scorpions' entered the forces of the Defendant. The plaintiff claims that the annexation was made on the basis of the Decree from 1991 (which was not submitted as an Annex). The defendant's statement is that "those regulations (were) relevant exclusively to the war in Croatia in 1991 and that there is no evidence that they were in force in Bosnia and Herzegovina in 1992".The court notes that, considering that the sovereign state of Yugoslavia was disintegrating at the time, the status of "Scorpion" in the middle of 1995 is relevant for this dispute. In the two intercepted documents submitted by the plaintiff. 'Scorpions' are presented as 'MUP of Serbia' and as 'a unit of the Ministry of Internal Affairs of Serbia'. The defendant identified the senders of those letters, Ljubiša Borovĉanin and Sava Cvjetinović, as 'high-ranking officials of the police forces of the Republic of Srpska'. The court notes that none of those communications were addressed to Belgrade. Bearing in mind these elements, the Court is not able to conclude that the 'Scorpions' were *a de jure* organ of the Turkish side in mid- 1995. In addition, the Court stated that in any case, the work of an organ that the state puts at the disposal of another public body is not considered to be the work of the state, if that body acted on behalf of the public body to which it made available.[285]

The court further concluded that it was not presented with a single element that shows that the "Scorpions" actually acted in "complete dependence" on the Defendant.

It is also important to mention the position of the Court according to the jurisprudence of the ICTY, which the Complainant stated as relevant. Namely, one of the processes in which the individual responsibility of the head and first deputy of the State Security of Serbia for the crimes committed in Bosnia and Herzegovina was proven at the same time before the ICTY - the *Stanišić and Simatović case,* which also contained accusations of crimes committed against the victims of Srebrenica in July 1995. Considering this issue for the purpose of determining the responsibility of the state in the dispute before it, the ICJ stated, on the one hand, that the *Stanišić and Simatović case may be of importance for clarifying the status of "Škorpione", but* that "the Court cannot draw further conclusions with considering that your case is in the indictment phase", and he

[285] *Ibid.*, para. 389.

Funded by the European Union

reminded that "he can only express his opinion based on the information that was presented to him at the time when he made his decision, which derives from the written document and its annexes from this court case and the arguments presented by the party in the dispute at the oral hearing:[286]

> “The court has previously established that the acts of genocide in Srebrenica cannot be attributed to the defendant party in the sense that they were committed by it or by organs or persons or entities that are completely dependent on it, which is why, on this basis, and there is an international responsibility status of the female party”.[287]

Attribution of responsibility to the Defendant based on its instructions or control

In this part of the review, the ICJ referred to the rule of customary law contained in Article 8 of the International Law Commission on State Responsibility, which provides:

> The behavior of a person or group of persons will be considered a state crime under international law if that person or group of persons, in fact, acts on the instructions, or based on the direction or control of that state.

In the 1986 Judgment in the dispute concerning *Military and paramilitary activities in and against Nicaragua". (Nicaragua v. United States of America*), the ICJ rejected the argument that *the contras* should be identified with US authorities, with the explanation that they were not in a relationship of "complete dependence" on the USA. In that dispute, the ICJ further determined whether the USA as The Respondent "ordered or imposed the commission of acts contrary to human rights and humanitarian law" as claimed by Nicaragua, the Applicant State "effective control", that is, that the US had effective control over the military and paramilitary operations (which were conducted by *the contras*) during which these violations occurred[288] and if they do not have the same status according to the internal legislation of that country, and that in this context " it is not necessary to prove that persons who committed acts

> ... were in a relationship of 'complete dependence ' with the state representing the defendant", but that "it should be proven that they acted in accordance with the instructions of that state or under its ' effective control'". It was added that

---

[286] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 395.
[287] *Ibid.*, para. 395.
[288] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 399.

Funded by the European Union

> "it is necessary to establish that this ' effective control ' was carried out or that the state gave instructions for each operation in which the alleged violations took place, and in general in relation to all actions was undertaken by persons or groups of persons who committed those violations".[289]

In connection with the requirement of "effective control", Bosnia and Herzegovina presented the argument that "the nature of the crime of genocide is specific" and "that it can consist of a significant number of isolated acts that are separated in space", and that the assessment should be accordingly "effective controls" should refer to the entire operations carried out by the direct perpetrators of genocide. The Court, however, considered that "the specific characteristics of the genocide do not justify the Court to depart from the criteria elaborated in the Judgment in the dispute relating to *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America*)", concluding that the rules for attributing international illegal conduct to a state do not change with the nature of the illegal act, in the absence of a clearly expressed *lex specialis.*[290]

Noting that Bosnia and Herzegovina, as the Plaintiff, disputed the validity of the application of the criterion of "effective control" in the dispute regarding the violation of the Convention on Genocide, and referring to the judgment of the Appeals Chamber of the ICTY in the case of *Tadić,* where the criterion of "overall control" was accepted, the Court presented an extensive analysis of this position of the ICTY:

> In this case, the Council (Appellate Council in the Tadić case) did not follow the Court's jurisprudence in the case of Military and Paramilitary Activities : it considered that the appropriate criterion, which in their opinion is applicable to the qualification of the military conflict in Bosnia and Herzegovina like of the international conflict, as well as on the imputability of acts committed by Bosnian Serbs to the FRY according to the law on state responsibility, represents the criterion of 'total control' that the FRY had over the Bosnian Serbs; and that this criterion is satisfied in this dispute (...). In other words, the Appeals Chamber took the view that the acts committed by the Bosnian Serbs could have given rise to the international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, and that at the same time, there is no need to prove that every operation

[289] *Ibid.*, para. 400.
[290] *Ibid.*, para. 401.

Funded by the European Union

> during which the acts representing the violation of international law were committed, was carried out according to the instructions of the FRY or under its effective control.[291]

The ICJ expressed a very critical attitude towards this decision of the ICTY:

> The Court carefully considered the views of the Appeals Council, which supports the aforementioned conclusion, but considers that it cannot support the opinion of the Council. First, the Court states that the ICTY was neither invited in the *Tadić case*, nor was it invited at all, to decide on issues of state responsibility, because its jurisdiction is criminal and extends only to individuals. Therefore, in that Judgment, the Tribunal dealt with the issue that was necessary for the exercise of its jurisdiction. As it was said above, the Courtattaches the greatest importance to facts and the legal qualifications reached by the ICTY when deciding on the criminal liability of the accused before it, and the Court, in this dispute, fully takes into account the trial and the verdict on the appeal of the ICTY, which deal with the events that are the basis of this sp ora. The situation is not the same as regards the positions adopted by the ICTY on issues of general international law that do not fall within the specific scope of its jurisdiction and the resolution of which, moreover, is not always necessary for the resolution of crimes of the legal cases that will be conducted before him.[292]

In its criticism of the ICTY, the International Court of Justice, continuing its argumentation, went further:

> "This is the case with the doctrine presented in the Tadić judgment. To the extent that the criterion of 'overall control' was used to determine whether or not an armed conflict had an international character, which was the only question the Appeals Chamber was called upon to resolve, this criterion is applicable and he answers yesterday and; However, the Court does not consider it appropriate to take a position on this issue in this dispute, and it is not necessary to resolve it for the needs of this Judgment. On the other hand, the ICTY presented the criterion of 'overall

[291] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007*, para. 402.
[292] *Ibid.*, para. 403.

Funded by the European Union

> control', which is equally applicable according to the rules. In this context, the arguments in favor of that criterion are unconvincing".[293]

Stating the very interesting point of view that "no logical necessity requires the application of the same criterion for solving these two questions, which are very different in nature", the Court further developed its argumentation:

> "The degree and nature of participation of one state in an armed conflict on the territory of another state, which are necessary to characterize the conflict as international, may, without logical inconsistency, be distinguished from the degree and nature of participation necessary to s e started responsibility of the state for a specific act committed during the conflict. (...) Furthermore, it should be noted that the criterion of ' overall control' has a significant drawback, which consists in expanding the scope of state responsibility beyond the basic principle of international responsibility law: the state is responsible for for everything own behavior, that is, for the behavior of persons who, on any basis, act on its behalf. This is the case with acts carried out by its official bodies, as well as persons or entities that are not officially recognized as official bodies according to internal legislation, but which must nevertheless be equated with state bodies because they are in a relationship of complete dependence on the states. With the exception of these cases, the responsibility of the state can arise due to acts committed by persons or groups of persons - who are neither state bodies nor can be equated with those bodies - only if, under the premise that these acts represent internationally illegal act, they can be attributed to her according to the rule of international customary law, which is stated in the above - mentioned Article 8 (paragraph 398). Such is the case when the state body gave instructions or directions in accordance with which the perpetrators of the illegal act acted, or when it exercised effective control over the action during which the crime was committed. In this sense, the criterion of "overall control" is not appropriate because it separates, almost to the point of breaking, the connection that must exist between the conduct of state organs and its international responsibility".[294]

---

[293] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 404.
[294] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 405-406.

Funded by the European Union

Following the aforementioned argumentation, and among other things, the Defendant's position according to which "in the final verdicts of the ICTY related to the genocide in Srebrenica, the involvement of none of its managers was established",[295] the Court concluded:

> “Based on the above, the Court concludes that the acts of those who committed the genocide in Srebrenica cannot be attributed to the Defendant based on the rules of international law on state responsibility: therefore, international responsibility of the defendant party was created on this basis”.[296]

The Court then established Serbia's responsibility for not preventing the genocide "exclusively in Srebrenica, because these are the only acts for which the Court concluded in this Dispute that genocide was committed", with the explanation:

> “Serbia's obligation to prevent and the corresponding obligation to act arises from the moment when the state learns, or should in normal circumstances have learned, about the existence of a serious threat of committing genocide. From that moment on, if the state has means that could have a deterrent character for those who are suspected of preparing genocide, or for whom there is a well-founded suspicion of having a specific intention (*dolus specialis*), it is obliged use those funds, depending on the circumstances.[297] (...) The court first states that during the considered period, the FRY had an influence on the Bosnian Serbs who planned and carried out the genocide in Srebrenica, incomparable to the influence of any other state party to the Genocide Convention, thanks to the strength of political, military and financial ties existed between the FRY on the one hand and the Republika Srpska and VRS on the other, which, although somewhat weaker compared to the previous period, still remained very strong.[298] Second, the Court cannot fail to state that on the relevant date the FRY was bound by very specific obligations based on two orders determining the temporary measures that the Court passed in 1993. In particular, in its Order of April 8, 1993, the Court stated, among other things, that although it is not in a position at this early stage

[295] *Ibid.,* par. 408. See in detail par. 408-412.
[296] *Ibid.,* para. 415.
[297] *Ibid.,* para. 431. See more on this issue: para. 432-438.
[298] *Ibid.,* para. 434.

Funded by the European Union

of the proceedings to make 'definitive conclusions about the facts or the attribution of guilt', it considers the FRY to be obliged to:

> to ensure that none of the military, paramilitary or irregular military units that may be under its authority or have its support, as well as any organization or person that may be under its control, direction or influence, does not commit an act genocide, association for the purpose of committing genocide, directly and publicly abetting the commission of genocide or acts of complicity in genocide...'

Thirdly, the Court recalls that although it did not establish that the information available to the Belgrade authorities indicated with certainty that the genocide was imminent (which is why the complicity of the Jews was not confirmed above in text: paragraph 424), they were hardly aware of the real danger of genocide when the VRS forces decided to occupy the enclave of Srebrenica. Among the documents that contain information that clearly indicate that such awareness existed, we should mention the report cited above (see paragraphs 283 and 285 above in the text) of the Secretary General of the United Nations, which was prepared in accordance with Resolution of the General Assembly no. 53/35 on the 'fall of Srebrenica' (Document of the United Nations No. A/54/549) which mentions the visit to Belgrade on July 14, 1995 of the negotiator of the European Union, Mr. Bildt for a meeting with Mr. Milosevic m. Mr. Bildt essentially informed Mr. Milošević about his very serious concern and persistently asked him... to immediately give the UN High Commissioner for Refugees the possibility of providing assistance to the population of Srebrenica and the possibility of the ICRC starting the registration of those who are Bosnian Serbs were held as soldiers prisoners'".[299]

Disposition of the Judgment

In the dispositive part of the Judgment, the Court stated that "Serbia did not commit genocide, through its organs or persons whose actions entail its responsibility under international customary law, in violation of its obligations under the Convention on the Prevention and Punishment of Crimes of genocide". Furthermore, the court also

[299] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 431-438.

Funded by the European Union

concluded that Serbia “was not an accomplice in the genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide". In the continuation of the provision, it was stated that "Serbia violated its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide, since it did not extradite Ratko Mladić, accused of genocide and complicity in genocide, for trial before the ICTY, and in that way neither is it fully cooperated with that court".

Also, the Court found that "Serbia violated its obligation to comply with the temporary measures ordered by the Court on April 8 and September 13, 1993 in this dispute, since it did not take all the measures that were in her power to prevent ig genocide in Srebrenica in July 1995". In this regard, the Court ordered Serbia to "immediately take effective steps in order to ensure full compliance with the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide in order to punish the act of genocide as defined in Article II Convention, or any other offenses prohibited by Article III of the Convention, and to transfer persons accused of genocide or any of the other offenses to the International Criminal Tribunal for the former Yugoslavia, and to cooperate fully with that Tribunal".

As for the reparations for the violation of these obligations, it was stated that “the Court's conclusions formulated in those points represent adequate satisfaction" and that "the dispute is of such a nature that it would be appropriate to issue an order for the payment of compensation", nor for "providing assurances and guarantees about non-repetition".[300]

Request for revision of the Judgment

In accordance with the Rules of the International Court of Justice, each of the parties to the dispute has the right to review the judgment within an objective period of ten years after the issuance of the judgment. On February 23, 2017, Bosnia and Herzegovina, through its representative until then, submitted to the Court Registry an Application for the revision of the Judgment passed on February 26, 2007 for violation of the Convention on the Prevention and Punishment of the Crime of Genocide. Arguing that within the three-member presidency of Bosnia and Herzegovina there were disagreements regarding the submission of the revision, the

[300] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 471.

Funded by the European Union

Court "in light of the obvious uncertainty regarding the intention of Bosnia and Herzegovina to submit a request for revision" turned to the Presidency of Bosnia and Herzegovina asking for clarification, and after the response of the three members of the Presidency of Bosnia and Herzegovina, stated:

> "The court carefully examined described above different communications. The court considered that their content shows that no decision was made by the competent authorities, on behalf of Bosnia and Herzegovina as a state, to initiate a review of the verdict of February 26, 2007 in the proceedings for violation of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina against Serbia), and that, therefore, the matter was not properly resolved. Therefore, regarding the document entitled "Application for revision of the judgment of February 26, 2007 in the proceedings for violation of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia) " cannot be undertaken no action".[301]

***

Bosnia and Herzegovina vs. Serbia and Montenegro case is one of the most complex cases of the International Court of Justice. It stands out with the volume of documents, presentations and testimonies.[302] This dispute lasted a full fourteen years, and most of the time was spent in lengthy procedures and discussions regarding the jurisdiction of this court and the applicability of the Convention on Genocide to this case. Nevertheless, in the segment of jurisdiction, significant jurisprudence has been established that could enable a clearer application of the existing international legal theory and practice, which is not the case with the positions of this court in the merits of the verdict. Namely, through a detailed analysis of the proceedings and the rendered verdict, as well as the separate opinions of the

[301] ICJ, Press Release, no. 2017/12, 9 March 2017, *Document entitled "Application for revision of the Judgment of 26 February 2007 in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)" Statement by HE Judge Ronny Abraham, President of the International Court of Justice,* http://www.icj-cij.org/files/press-releases/0/000- 20170309-PRE-01-00-EN.pdf

[302] The written procedure, from the Request for initiation of proceedings, through various requests for interim measures, Lawsuits and Replies of Bosnia and Herzegovina, amounts to about 1,500 pages, not counting the various decisions of the Court made in the meantime. The Verdict itself is 201 pages, not counting separate opinions. The oral procedure was also very long: from numerous discussions on the issue of jurisdiction from 1993-1996. year, until the presentation of the arguments of the parties in the dispute during 2006.

Funded by the European Union

judges who participated in this dispute, the legal practice of the Court in this case remains in many segments undefined and even controversial.[303]

First of all, when it comes to the factual bases, the ICJ relied exclusively on the legal practice of the ICTY and only from cases that had been completed by the time the oral hearing began (March 2006), that is, not legally binding. The facts from the ICTY indictments, even in cases where the accused could not be brought before the ICTY due to death, or died during the trial, were neither considered in detail nor were other sources sought for their confirmation or rejection. The same is the case with first-instance verdicts. Although it had at its disposal extensive material from other relevant sources, which in accordance with its rules on procedure and evidence it could use and develop its legal practice on, the ICJ used exclusively factual elements from the practice of the ICTY. It should be noted, however, that these factual elements were presented before the ICTY solely for the purpose of determining the individual responsibility of individual defendants, so many facts that could not be attributed on an individual level remained outside the scope of these trials. As for the final judgments of the ICTY that the ICJ took into account as "the most convincing and reliable source of evidence ", as was the case of the Opinion and Judgment of the ICTY in the *Tadić case,*[304] *Kvočka and others,*[305] *Mountaineer*[306] and *Stakić,*[307] The ICJ stated that they proved the material element of genocide (*actus reus),* but not the specific intent (*dolus specialis*). As the specific intent is proven exclusively through the individual responsibility of the accused in each individual case, this attitude of the ICJ is surprising. Bearing in mind that the *actus reus element was* proven in these cases, the MCA could go further and determine whether this *actus reus* can be attributed to other perpetrators or accomplices, that is, individuals who are part of the structure of the organs of the FRY. For example, the Interim Judgment in the *Slobodan case Milošević,*[308] contained similar views regarding the established *actus reus* element of the crime of genocide, but the final judgment in relation to *dolus specialis* was not pronounced due to the death of the accused. Also, regarding the imputability to the Defendant of the acts committed by the "Scorpions" unit during the genocide in Srebrenica, the Court stated that "the *Stanišić and Simatović*

[303] Sabina Subašić Galijatović, *Crimes of sexual abuse in Bosnia and Herzegovina 1992-1995 in the light of the theory and practice of international law,* University of Sarajevo-Institute for the Research of Crimes against Humanity and International Law, Sarajevo, 2021.
[304] ICTY, IT-94-1-T, *Tadić case,*Judgment of the Trial Chamber of May 7, 1997, para. 155-158, 163-167, and 194-206.
[305] ICTY, IT-98-30/1-T, *Kvočka et al.*, Judgment of the Trial Chamber, para. 21-50 and 98-108, confirmed in the appeal procedure.
[306] ICTY, IT-99-36-T, *Brđanin case,* Judgment of the Trial Chamber, para. 515-517.
[307] ICTY, IT-97-24-T, *Stakić case,* Judgment of the Trial Chamber, para. 229-336.
[308] ICTY, IT-02-54-T, *Prosecutor against Slobodan Milošević,* before the Trial Chamber, Decision on motion for acquittal, June 16, 2004.

Funded by the European Union

case may be of importance for clarifying the status of the 'Scorpions'". At the same time, he reminded that "he can express his opinion only on the basis of the information that was presented to him at the time when he made his decision, which derives from the written documents and their annexes from this court case and the arguments of the party in dispute brought to oral argument".[309]

He referred to these positions of the Court to the conflicting opinions of the judges who participated in this dispute:

> Evidence requirements are not exactly the same when dealing with individual involvement and when dealing with state involvement. The strictest requirement in justification is when we are in criminal matters, where we are dealing with the fact that one specific individual action is being tried and when you need to prove the established intentions - beyond any reasonable doubt - the defendant is accused of committing an act of genocide; we know that the level of strictness of these requirements is a source of discussion and contestation, as shown by the different opinions that sometimes accompany some judgments (see, for example, the partially separate opinions of Judge Shahabuddeen in the cases *of Krstić* and *Jelisić,* Judges Wald and Pocar in the case of *Jelisić*) and numerous comments that caused this judgment in theory. It remains that, although such a request was not fulfilled and the personal participation of the victim was not accepted, the acquittal of this person from the indictment for this crime does not exclude him and automatically his existence; namely, the accused cannot commit terrible acts by carrying out orders without being fully informed or unaware that they fit into a policy aimed at genocide. There may, therefore, be disagreements in legal practice, especially between a chamber of the ICTY that accepts guilt for genocide and an Appeals Chamber that upholds that guilt, without it being decisive for the existence of politics of genocide. Namely, in this case, it is not a matter of proving that the accused personally committed the act of genocide or was an accomplice; rather, it is about identifying elements of evidence that could prove that the crimes were committed in such conditions that they are directly related to the genocidal policy that can be attributed one to the state and more specifically, that they were committed by or at the instigation of persons

[309] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 395.

Funded by
the European Union

directly connected to the state of the Defendant or who acted on her behalf or on her account or under her control in the execution of such a criminal plan.[310]

The ICJ, in addition to rejecting the facts from the cases that were not legally binding, stated that "the plaintiff did not submit a sufficient number of evidence", or in certain cases, that he did not submit "a single piece of evidence". This position of the Court indicates inconsistency, since, among other things, the Claimant has repeatedly[311] asked to submit additional documentation.[312] The ICJ, however, rejected these requests, with the explanation that "The plaintiff has extensive documentation and other evidence, especially those from the easily accessible files of the ICTY" and that it was "used to a large extent".[313] This attitude of the MSP is disputed on several grounds. Not only did this court reject the Petitioner's request, especially when it comes to the request that the Court ask the Defendant to deliver the documentation in its possession, but such a position is not even legally substantiated. The ICJ only noted: "Although the Court did not accept any of the Petitioner's requests to provide copies of unredacted documents, it did not fail to note the Petitioner's proposal that the Court is free to draw its own conclusions".[314] Namely, Article 49 of the Statute of the MSP provides that "any refusal" is to be formally noted, but not the claims of the Complainant. In addition to the findings that do not satisfy Article 49, no conclusions were drawn from the Defendant's refusal to provide the requested documentation. In accordance with the earlier legal practice of the ICJ,[315] such conclusions made it possible for the Court to consider *the onus probanda differently*

[310] *Ibid.*, Dissenting Opinion of Judge Mahiou, para. 54.
[311] In a letter dated December 28, 2005, the Deputy Representative of Bosnia and Herzegovina requested, on behalf of his Government, that the Court invite Serbia and Montenegro to, in accordance with Article 49 of the Statute of the Court and Article 62, paragraph 1, of the Rules of the Court, submit a certain number of documents. In a letter dated January 16, 2006, the representative of Serbia and Montenegro informed the Court of his Government's position regarding this request. In a letter dated January 19, 2006, the Registrar acting in accordance with the Court's instructions, asked Bosnia and Herzegovina to submit certain additional information related to the request it submitted pursuant to Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court In 2006, the deputy representative of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina made a decision to limit its request to the hidden parts of certain documents On January 31, 2006, the assistant representative of Serbia and Montenegro conveyed the views of his Government regarding that amended request. In letters dated February 2, 2006, the Registrar informed the parties to the dispute that the Court decided not to ask Serbia and Montenegro to submit the documentation in question at this stage of the proceedings. However, the Court retained the right, which is given to it by Article 49 of the Statute and Article 62, paragraph 1, of the Rules of the Court, to subsequently, if necessary, use its powers to ex officio request the submission of those documents from Serbia and Montenegro", ICJ, Judgment, para. 44.
[312] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 205.
[313] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 206.
[314] *Ibid.,* para. 206.
[315] "On the other hand, the fact of exclusive territorial control, which some state exercises within its borders, has an impact on the method of proof available to establish knowledge of the Due to such exclusive control, the other state, the victim of the violation of international law, is often not able to provide direct evidence of the facts that confirm it. responsibility. That state should be allowed to draw conclusions about facts and comparative evidence. Such indirect evidence is relaxed in all legal systems and their use is recognized international decisions. They must be considered as evidence of special weight when they are based on a series of interconnected facts, which logically lead to a unique conclusion". *Corfu Channel* (United Kingdom v. Albania), Merits, Judgment, International Court of Justice, Reports 1949, page 18.

Funded by the European Union

and allow free drawing of conclusions about facts and indirect evidence. Therefore, the ICJ ruled in relation to *the actus reus* of the crime of genocide on the basis of facts "from easily accessible sources of the ICTY", which it had at its disposal until the moment of the oral hearing (March 2006), and did not take into consideration the ideology that characterizes the crime of genocide., as well as the fact that at the time of consideration of the dispute, the responsibility of the high military or political chain of command (*Mladić*, *Karadžić*, *Miloševic*) was not determined. Relying exclusively on the factual basis from the up to then final judgments of the ICTY, the ICJ did not take into account other sources, nor did it accept the claimant's request for the delivery of additional documentation.

Regarding the imputability of acts in terms of state responsibility, in this segment the ICJ completely rejected the legal practice of the ICTY, which it previously stated contained "the most convincing and reliable sources of evidence", even stating that the reasoning of the ICTY in this case is "unconvincing".[316] Therefore, in the first part of its verdict, regarding the factual bases, the ICJ relied exclusively on the legal practice of the ICTY, while it rejected the same in the part of attributing responsibility and links between the Bosnian Serbs and the FRY, with thorough criticism. At the very least, this attitude represents a paradox - the ICJ adhered to the legal practice of the ICTY where it was incomplete, and where the legal practice of the ICTY was consistent, the ICJ refuted it.[317] Namely, the ICJ completely rejected the legal practice of the ICTY from the *Tadić case,*[318] where the criterion of "general control" of the state was required for the attribution of the act, and applied its legal practice from the *Nicaragua case, in which* a criterion of a higher degree than the global one was also required control, i.e. "effective control" of military or paramilitary operations during which violations of international law were committed. In this regard, it should be emphasized that the *Nicaragua case* was of a completely different character. This

---

[316] ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 403-404.

[317] Ascensio Herve, *La responsabilité selon la Cour internationale de justice dans l' affaire du génocide bosniaque,* Extrait de la Revue Générale de Droit International Public, avril-june 2007, numéro 2, éditions A. Pedone, Paris, 2007, p. 287.

[318] "The required degree of control over armed groups or private persons varies. If it is necessary to determine whether a private person or a group that is not militarily organized acted as a *de facto* organ of the state in the execution of a certain act, it is necessary to establish whether that state in question issued specific instructions to an individual or group for the execution of that specific act; alternatively, it should be determined whether the state ex *post facto* supported or approved the illegal act. to militias or paramilitary units may have a general character (and must include more than the mere provision of financial assistance, military equipment, or training.) This condition, however, does not go so far as to require the issuing of specific orders or the direction of each individual operation by the state law, it is by no means necessary that the controlling authorities also plan all the operations of the units that depend on them, choose targets or give specific instructions for the conduct of military operations and possible violations of international humanitarian law that are claimed to have occurred. It can be considered that there is control as required by international law when a state (that is, in the context of an armed conflict, a party to the conflict) plays a role in organizing, coordinating or planning the military actions of a military group, in addition to financing, training and equipping the group or provides operational support. Acts committed by a group or its members may be considered de facto acts of state authorities, regardless of whether the controlling state issued any specific instructions for the commission of each of those acts", ICTY, IT-94-1-A, Prosecutor v. Duško Tadić aka "Dule", before the Appeals Council, July 15, 1999, para. 137.

Funded by the European Union

position of the ICJ led is to the extent that the crime of genocide, which was accepted as an act established by the legal practice of the ICTY, was attributed to a political entity *sui generis*, and not to the states, that "the danger that threatened was known and was of such a nature that it could be assumed that there was an intention to commit genocide if nothing was done to prevent that danger",[319] under the Convention in the sense of not preventing and not punishing the crime of genocide. The issue of responsibility for complicity under Article III of the Genocide Convention has remained largely unexplained. As stated in the international legal doctrine in relation to the judgment of the International Court of Justice in this dispute: "This judgment is dominated by an imbalance, since the Court failed to determine responsibility in terms of facts - not criminal responsibility, the determination of which does not fall under the jurisdiction Court, but state responsibility".[320]

This approach in the treatment of the most serious crime of international law, which was established by the ICJ in the case of Bosnia and Herzegovina through its interpretation of the Convention and the Rules on State Responsibility, led to key questions of international legal doctrine: "It is clear that the Court has resolutely closed international responsibility within a very narrow framework state, out of step with reality. We can only hope that he did not inadvertently signal to the States *a modus operandi* for future crimes".[321]

[319] See also: ICJ, *Judgment of the International Court of Justice: Bosnia and Herzegovina v. Serbia and Montenegro, February 26, 2007,* para. 438.
[320] Ascensio Herve, *La responsabilité selon la Cour internationale de justice dans l' affaire du génocide bosniaque,* Extrait de la Revue Générale de Droit International Public, avril-juin 2007, numéro 2, éditions A.Pedone, Paris, 2007.
[321] Ascensio Herve, *La responsabilité selon la Cour internationale de justice dans l' affaire du génocide bosniaque,* Extrait de la Revue Générale de Droit International Public, avril-juin 2007, numéro 2, éditions A.Pedone, Paris, 2007, p. 302.

Funded by
the European Union

Krstić Radislav (Krstić, IT-98-33, "Srebrenica - Drina Corps")

Forensic evidence, mass graves

Extermination, genocidal intent

Individual responsibility, joint criminal enterprise

“During a little more than a week, thousands of lives were extinguished, irreparably damaged or simply erased from the pages of history. The Trial Chamber leaves it to historians and social psychologists to measure the true depth of that episode of the Balkan conflict and to examine the deep-rooted causes. The task that is set here is of a more modest nature: it is necessary to establish, on the basis of the evidence presented during the trial, what happened during that period of approximately nine days, and finally to determine whether the defendant in this case, that is, General Krstić, according to the provisions of international law, criminally responsible for his participation in those events. The Trial Chamber cannot allow itself to indulge in the expression of its feelings in relation to the events in Srebrenica, as well as its opinion on how individuals, and national and international groups that are not part of this case, contributed to the tragedy. This defendant, like all others, deserves to have his case considered on its own merits and can only be convicted if the evidence presented in the courtroom proves beyond a reasonable doubt that he is guilty of the acts that represent crimes covered by the Statute of the International Court of Justice. For this reason, the Trial Chamber will concentrate on presenting the facts about those nine days of hell in detail, while avoiding rhetorical expressions of its outrage at those events. It happened anyway. At the end of the day, no comments can bring the Srebrenica epic to life more than a bare enumeration of the events themselves, or more clearly expose the devastation caused by war and ethnic hatred, as well as the long road that there is still more to overcome in order to mitigate their bitter legacy”.[322] According to the indictment, after the outbreak of armed conflict in the Republic of Bosnia and Herzegovina in the spring of 1992, Bosnian Serb military and paramilitary forces occupied cities, towns and villages in the eastern part of the country and participated in a campaign of ethnic cleansing, which resulted in the mass flight of Bosnian Muslims. to the enclaves of Srebrenica, Goražde and Žepa. Acting in accordance with Chapter VII of the Charter of the United Nations, on April 16, 1993, the Security Council adopted resolution number 819, which requested all

[322] ICTY, IT-98-33-T, *Prosecutor v. Radislav Krstić,* before the Trial Chamber, Verdict, August 2, 2001, (hereinafter: *Krstić First Instance Verdict*) para. 2, http://www.icty.org/x/cases/krstic/tjug/bcs/krs- tj010802b.pdf

Funded by the European Union

parties to the conflict to treat Srebrenica and its surroundings as a "protected zone" that would not be exposed armed attacks or any other act of hostility. Nevertheless, on July 6, 1995, units of the Drina Corps of the Army of Republika Srpska (VRS) shelled Srebrenica and attacked UN observation posts with a Dutch crew located in the protected zone. The attacks continued until July 11, 1995, when VRS forces entered Srebrenica.

Bosnian Muslims, men, women and children, who found themselves in Srebrenica after the start of the attack decided on one of two options: several thousand women, children and a few mostly elderly men sought refuge in the vicinity of the UN base in Potočari, inside the Srebrenica protected zone, where they sought the protection of the Dutch battalion. From July 11 to 13, 1995, they stayed in Potoĉari and its surroundings and were terrorized by members of the VRS, after which they were taken to areas outside the enclave in buses and trucks controlled by the VRS.

Namely, on July 12, in the presence of Ratko Mladić and Radislav Krstić, the refugees were deported, men were separated from women and children and detained in Potoĉari and around Potoĉari. The second group, which included approximately 15,000 Bosnian Muslim men, and a few women and children with them, set off in a huge column through the forest towards Tuzla. Approximately one third of the group consisted of armed Bosnian Muslims, members of the army, the rest were unarmed members of the army and civilians. Bosnian Serb forces, members of various VRS brigades and special forces of the Ministry of Internal Affairs, supported by armored personnel carriers, tanks and artillery, took up positions along the road with the intention of intercepting the convoy. Thousands of Bosnian Muslims from the retreating column were captured or surrendered to the military forces commanded by Ratko Mladić and Radislav Krstić. These forces participated from July 11 to 18, 1995, in numerous cases of opportunistic killing of captured Bosnian Muslim men, as well as the systematic liquidation of numerous men detained and killed on the spot, and others who were taken to various killing grounds throughout the territory controlled by Drinski of the VRS corps. VRS forces commanded and directed by Ratko Mladić and Radislav Krstić drove out or killed most of the Bosnian Muslim population in the Srebrenica enclave. The result of these actions was that the VRS forces practically eliminated any presence of Bosnian Muslims in the area of the Srebrenica enclave, thus continuing the ethnic cleansing campaign that began in the spring of 1992.[323]

---

[323] ICTY, IT-98-33-PT, *Prosecutor of the International Court of Justice against Radislav Krstic,* Amended Indictment, October 27, 1999, para.1-11, http://www.icty.org/x/cases/krstic/ind /bcs/krs-ai991027b.htm

General Krstić, commander of the Drina Corps of the Republika Srpska Army, was charged first with genocide and, alternatively, with complicity in genocide, based on individual responsibility and the responsibility of a superior, in connection with the mass executions of Bosnian Muslim men in Srebrenica between July 11 and 1 November 1995. Krstić was further charged with the murders as independent crimes under Article 3 of the ICTY Statute (violation of the laws and customs of war) and under Article 5 of the Statute (crimes against humanity) committed in the Srebrenica enclave, and the murders as one element of the charges related to the persecutions and extermination of the population (crimes against humanity, Article 5 of the Statute). Also, the indictment included the deportation or forced transfer of women, children and the elderly from the Srebrenica enclave (crimes against humanity as a violation of Article 5 of the Statute).[324]

The established factual situation, the occupation of the enclave and its seizure, the plan to execute the male population of Srebrenica and the military operations to that end, as well as the role of General Krstić, were presented in detail in the first verdict for the crime of genocide before the ICTY.[325] As the Trial Chamber pointed out, in July 1995 General Krstić found himself at the very center of one of the most heinous war crimes committed in Europe since the end of World War II: "he may not have been the originator of the plan to execute Bosnian Muslim men, but that plan carried out in the area of responsibility of the Drina Corps".[326]

Forensic evidence, mass graves

One of the essential elements of the crime in the *Krstić trial* is the creation and relocation of mass graves in the Srebrenica region. Precise forensic evidence, for the first time in history done on such a wide scale, corroborated numerous aspects of the testimony of survivors from various execution sites. In the verdict against General Krstić, the places of execution, mass graves and their connections were detailed, as evidence presented by the ICTY Jury. Namely, starting in 1996, one year after the occupation of the enclave and the mass executions, the Prosecutor's Office exhumed 21 mass graves linked to the occupation of Srebrenica. Of the 21 exhumed graves, 14 were primary graves, in which the bodies were placed immediately after the persons were killed. Of those graves, eight were later dug up illegally and the bodies were

[324] *Ibid.*, par.15-33.
[325] See more about the role of the brigades of the Drina Corps, especially the Bratunac and Zvornik brigades, par. 429-460, and the role of General Krstić, par. 461-477, First Instance Verdict *Krstić.*
[326] *Ibid.*, par. 421.

Funded by the European Union

moved and buried elsewhere, often in secondary graves located in more remote areas. Seven of the exhumed graves were secondary graves.[327] The Prosecution hired experts for ballistic analysis, soil and material analysis, in order to perform comparative tests of the materials and remains found in the primary and secondary graves. As a result of these analyses, links between certain primary and secondary graves were discovered, and forensic evidence supported the prosecution's claim that after the capture of Srebrenica, thousands of Bosnian Muslim men were summarily executed and buried in mass graves. Although the forensic experts could not determine with certainty how many bodies were in the mass graves due to the degree of decomposition of the bodies and the fact that many were mutilated during the process of being moved by heavy machinery from the primary to the secondary graves, the experts gave a restrained assessment during their work, according to in which at least 2028 separate bodies were exhumed from mass graves.[328]

The claims of the defense regarding the forensic findings were based on the argument that "a number of graves were created from the corpses of persons who died in armed clashes between the warring parties, and that in some graves, where cases of safe execution were registered, there were also corpses persons killed in battle...”.[329] According to the findings of the forensic examinations, the Trial Chamber came to the conclusion that most of the persons whose bodies were exhumed did not die in combat, but were killed during mass executions. The panel also stated the fact that "what is most significant is that the forensic evidence presented by the prosecution also shows that during a period of several weeks in September and early October 1995, Bosnian Serb forces dug up many of the primary mass graves and bodies buried again in even more remote locations. Forensic tests have linked certain primary and secondary graves". In this regard, the Council pointed out that the evidence of moving bodies and their reburial points to concerted attempts to hide the bodies of men from those primary graves, as well as that "such extreme measures would not have been necessary if most of the bodies in those primary graves belonged to victims killed in battle". The panel therefore stated that "forensic evidence presented by the prosecution corroborates the testimony of survivors that after the capture of Srebrenica in July 1995, thousands of Bosnian Muslim men from Srebrenica were killed during carefully planned and methodical mass executions".[330]

[327] First Instance Verdict *Krstić,* para. 71.
[328] *Ibid.,* par. 72-73.
[329] *Ibid.,* par. 76.
[330] *Ibid.,* para. 75-79.

Funded by
the European Union

Legal findings

In its legal findings, the Council examined whether the factual situation established by the Council supports beyond a reasonable doubt the findings that the crimes for which the accused was charged were committed, especially bearing in mind that by their nature these crimes usually include many people with different degrees of participation, as well as a series of events over a period of time. The Council therefore considered it reasonable to establish, first of all, whether the existence of legal prerequisites for the commission of those criminal acts was proven on the basis of factual argumentation, and then to determine the degree of guilt that can possibly be attributed to the accused. After finding that the prerequisites for the crimes under the Statute were met (Article 3, violation of the laws and customs of war; Article 5, crimes against humanity, including persecution), the Trial Chamber examined the factual elements related to murder, extermination, severe physical or mental harm, deportation or forced transfer, persecution and, ultimately, genocide.[331]

Murders

Starting from the definition of murder as "all forms of intentional deprivation of life, with or without premeditation", the Trial Chamber considered the murders committed between July 12 and 19, where larger or smaller groups of men were summarily executed in several places in the area of responsibility of the Drina Corps. The Council also considered the murders committed on July 12, 13 and 14 in Potoĉari and the opportunistic executions of men detained in Bratunac between July 12 and 14, 1995, and concluded that murders were committed within the meaning of Articles 3 and 5 (murder and persecution).[332]

Extermination

According to the indictment, the murders were the basis for the charge of extermination as a crime against humanity, and the Council considered this act. Starting from the statement that in a very large number of international and national instruments, extermination is recognized as a crime against humanity, and that despite this, this crime rarely appears in national courts, the Council sought a definition in international law.

---

[331] *Ibid.,* para. 478-483.
[332] *Ibid.,* para. 484-488.

Funded by the European Union

Stating that the ICTY had not yet defined this act, The Council established that the term "extermination" appeared in a number of post-war decisions made by the Nuremberg Military Tribunal and the Supreme Court of Poland, but no specific definition of the term "extermination" was provided, apart from the necessary elements of the crime outlined by the ICTY in several cases: the accused or their subordinates participated in the killing of certain named or described individuals; the act or omission was unlawful and intentional; the unlawful act or omission must constitute part of a widespread or systematic attack; the attack must be directed against a civilian population.[333] The Trial Chamber stated that the criminal acts of murder and extermination have a similar element, since their goal is the death of the victims, and that both acts have the same *mens rea*, which consists of the intention to deprive the victim of life or intent to cause grievous bodily harm to the victim, which the offender must have reasonably foreseen would be highly likely to cause death. The Trial Chamber further identified what else the crime of extermination includes and whether the conditions for that criminal offense were met in this case. Starting from the usual meaning of this term, as in the French dictionary *Nouveau Petit Robert*, the word *exterminer*/to exterminate/comes from the Latin word *exterminare* /to drive out, which developed from *ex,* whose meaning is outside and *terminus,* which means border, and *Oxford English Dictionary,* where the first meaning of the word *exterminate* is the act of expelling or banishing a person or a group of persons outside the borders of a state, territory or community, the Council concluded that the use of the term "extermination" took over time the connotation of destruction began to mean the destruction of a large number of people.[334] The Council further referred to the definition of the International Law Commission which insists on the element of mass destruction:

> (Extermination is) a crime which by its very nature is directed against a group of individuals. Additionally, the act used to carry out the crime of extermination includes an element of mass destruction, which is not a requirement for murder. In this sense, extermination is closely related to the crime of genocide.[335]

---

[333] The judgment in the case *The Prosecutor v. Jean-Paul Akayesu,* case no. ICTR-96-4-T, 2 September 1998, para. 591-592; The judgment in the case *The Prosecutor v. Kambanda,* case no. ICTR-97-23, 4 September 1998; The judgment in the case *The Prosecutor v. Kayishema/Ruzindana,* case no. ICTR-95-1- T, 21 May 1999, para. 141-147; The judgment in the case *The Prosecutor v. Rutaganda,* case no. ICTR-96- 3-T, 6 December 1999, para. 82-84; The judgment in the case *The Prosecutor v. Musema,* case no. ICTR- 96-13-T, 27 January 2000.

[334] First Instance Verdict *Krstić,* para. 496.

[335] Draft Code of the International Law Commission, *Report of the International Law Commission on the work of its 48th session,* May 6-26. July 1996, Official Documents of the United Nations General Assembly 51st session, Supplement no. 10 (A/51/10), Article 18, p. 118.

Funded by the European Union

Furthermore, considering the limited number of precedents related to this criminal act, the Council referred to Article 7(2)(b) of the Statute of the Permanent International Criminal Court, which defines the term "extermination" in more detail and specifically states the following:

> Extermination involves the deliberate imposition of living conditions that, among other things, deny access to food and medicine, in order to lead to the destruction of part of a population.

The Chamber therefore concluded that the crime of extermination can be applied to acts committed with the intent to kill a large number of victims, either directly, such as by killing people with firearms, or less directly, by creating conditions that will lead to the death of the victims. The Council then examined the identification of the victims in terms of crimes against humanity from Article 5 of the ICTY statute "directed against any civilian population", and concluded that the victims do not have to have common national, ethnic, racial or religious characteristics, as well as that for the crime of extermination it is not necessary that the victims are treated in a discriminatory manner for political, social or religious reasons.[336] The Council further considered the crime of extermination and its distinction in relation to the crime of genocide:

> According to the commentary on the Draft Code of the International Law Commission, extermination differs from the crime of genocide based on the fact that the target population does not necessarily have common national, ethnic, racial or religious characteristics, and that it also refers to situations in which "some members of one group was killed, while others were spared". For these reasons, the crime of extermination exists when the act is directed against an entire group of individuals, even if no discriminatory intent or intent to destroy the group as such on national, ethnic, racial or religious grounds is established. The same applies to a situation where the target population does not have any common national, ethnic, racial or religious characteristics.[337]

The Trial Chamber also stated that the term "extermination" itself strongly refers to the commission of a crime on a mass scale, which on the other hand presupposes a considerable degree of preparation and organization, but that "extermination" can theoretically be applied to the commission of a crime that is not "widespread", but

---

[336] First Instance Verdict *Krstić*, para. 498-499.
[337] *Ibid.*, para. 500.

Funded by the European Union

which nevertheless amounts to the destruction of an entire population, distinguishable on the basis of some characteristic (or characteristics) not covered by the Genocide Convention, where that population consists of a relatively small number of people - in other words, while extermination in general speaking involves a large number of victims, this crime can also exist in cases where the number of victims is limited.[338] In its finding, the Trial Chamber concluded that, although there is evidence that among those killed in Potoĉari and later there was a smaller number of women, children and the elderly,[339] practically all persons killed after the fall of Srebrenica were Bosnian Muslim men of military age: "the verification procedure in Potoĉari, the gathering of those men at the places of detention, their transportation to the places of execution, the opportunistic killings of people from the column along the Bratunac- Milići road after they were caught, all this shows beyond any reasonable doubt that all able-bodied Bosnian Muslim men who were captured or otherwise fell into the hands of Serbian forces were systematically executed. The result was that most of the Bosnian Muslim men of military age who escaped from Srebrenica in July 1995 were killed, and that the crime of extermination was committed in Srebrenica".[340]

Abuse

Proceeding from the statement that the indictment primarily refers to the killing of a large number of Bosnian Muslim men, the Council stated that two types of abuse were alleged: inflicting severe physical or mental injury, as a criminal offense of genocide, and cruel and inhumane treatment, including severe beatings, as an element of the persecution of Bosnian Muslims.

The grievous bodily harm or mental injury alleged by the prosecutor as part of the genocide charge referred to the suffering suffered by those who survived the executions. In this connection, the definitions of serious physical or mental injury from the judgment in the *Akayesu case are listed*, which includes "acts of torture, whether physical or mental, inhumane or degrading treatment, persecution",[341] and in the *Eichmann case,* according to which "enslavement, starvation, deportation and persecution, (as well as) detention (of individuals) in ghettos, transit and

[338] *Ibid.,* para. 501.
[339] "One witness testified that one baby was slaughtered. Expert reports on exhumations show that a small number of victims were younger than fifteen or older than sixty-five. Although in the legal sense these victims cannot be qualified as "military-fit men", it is obvious that the Bosnian Serb forces treated them as if they were military-fit"., First Instance Verdict *Krstić,* par, 504, fn 1229.
[340] *Ibid.,* para. 504.
[341] *Akayesu* Judgment, para. 504, cited in the prosecution's pre-trial brief, 25 February 2000, para. 105, p. 39.

Funded by the European Union

concentration camps in conditions calculated to degrade them, to deny them their human rights beings, to trample them, and to expose them to inhuman suffering and torture"[342] can represent severe physical or mental injury.[343] In accordance with the above, the Trial Chamber concluded that severe physical or mental injury as *actus reus* in the sense of Article 4 is an intentional act or omission that causes severe physical or mental suffering, as well as that the severity of the suffering must be assessed on a case-by-case basis and based on specific circumstances. In accordance with the judgment in the *Akayesu case,* it was stated that a serious injury does not have to be the cause of a permanent and incurable injury, but it must include an injury that is more serious than temporary distress, discomfort or humiliation, that is, it must be an injury whose consequence is long-lasting and severe impairment of a person's ability to lead a normal and constructive life. Accepting the jurisprudence presented above, the Council stated that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts that can cause serious physical or mental injury, as well as that "the wounds and trauma suffered by the few individuals who succeeded Surviving mass executions indeed constitutes serious physical and mental injury in the sense of Article 4 of the Statute.[344]

Regarding the act of cruel and inhumane treatment, the Council considered the suffering experienced by both the Bosnian Muslims who fled to Potoĉari and the Bosnian Muslims who were captured from the column. The council cited examples of severe beatings and other forms of cruel treatment suffered by Bosnian Muslim men after being separated from their families in Potočari, and the difficult conditions prevailing in and around the UN base in Potočari: "there was not enough food and water, which the VRS provided in very limited quantities, thousands of people were crammed into a small space. It is even more significant that reliable witnesses spoke of rapes and murders, and some people committed suicide out of terror". The whole situation in Potočari was described as a campaign of terror: "the ultimate form of suffering was represented by the cases of some women whose young sons were snatched away as soon as they entered the buses, whom no one ever saw again".[345] Based on the presented examples, the Council concluded that the VRS and other Serbian forces subjected a large number of Bosnian Muslims to cruel and inhumane treatment, which is also based on allegations of inhumane treatment in the case of

[342] *The Israeli Government Prosecutor General v. Adolph Eichmann,* Jerusalem District Court, 12 December 1961, *in* International Law Reports, vol. 36, 1968, p. 340, cited in Prosecution Pre-Trial Brief, 25 February 2000, para. 105, p. 39.
[343] First Instance Verdict *Krstić,* para. 508.
[344] *Ibid.*, para. 513-514.
[345] *Ibid.*, para. 517.

Funded by the European Union

the forced transfer of Bosnian Muslim women, children and the elderly from the Srebrenica enclave.

Deportation and forced relocation

The council stated that on July 12 and 13, 1995, about 25,000 Bosnian Muslim civilians were forced to leave the Srebrenica enclave by bus and cross over to the territory under the control of Bosnia and Herzegovina, which was the basis for accusations of persecution and deportation, alternatively as inhuman acts as crimes against humanity.[346] In connection with these accusations, the Council examined the reference provisions of the Geneva Conventions in terms of permitted evacuation for reasons of security or imperative military reasons, and found that the conditions of these provisions were not met in the case of the population of Srebrenica: "active hostilities in the city of Srebrenica itself and south of the enclave in fact, they had already stopped at the moment when the people were taken away from Potoĉari by bus. The safety of the civilian population cannot therefore be cited as a reason to justify relocation".[347] As for imperative military reasons, the Council stated that there was no military threat after the capture of Srebrenica: "the atmosphere of terror in which the evacuation was carried out proves, on the contrary, that the relocation was carried out in accordance with a well-organized policy, the aim of which was to expel the Bosnian-Muslim population from the enclave. The goal was the evacuation itself, and that evacuation was not justified either by the protection of civilians or by imperative military necessity".[348] The council further examined the forced nature of the transfer, and concluded that "despite the attempts of the VRS to present it as a voluntary departure, the Bosnian Muslims from Srebrenica did not really choose to leave, but reflexively reacted to the certainty that their survival depended on their escape".[349]

Persecution

With the definition of the act of persecution from the *Kupreškić case* as "a gross and flagrant denial on a discriminatory basis of a fundamental right established by international customary or conventional law, which reaches the same degree of severity as other acts prohibited by Article 5", the Council referred to the earlier legal

[346] *Ibid.*, para. 519.
[347] *Ibid.*, para. 524-525.
[348] *Ibid.*, para. 527.
[349] *Ibid.*, para. 530.

Funded by the European Union

practice, which acts can be covered by this norm: "discriminatory criminal acts charged as an act of persecution must be assessed not in isolation but in their context, and so that their cumulative effect will be looked at. Although individual acts may not be inhumane, their overall consequences must be such a violation of humanity that they can be called inhumane".[350] The accusations of persecution against General Krstić were based on the facts of the murders of thousands of Bosnian Muslim civilians, including men, women, children and the elderly; cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings; terrorizing Bosnian Muslim civilians; destruction of personal property of Bosnian Muslims; and the deportation or forced relocation of Bosnian Muslims from the Srebrenica enclave.[351] Accordingly, the Trial Chamber concluded that the widespread and systematic attack against the Bosnian Muslim population of Srebrenica from July 11 onwards, the humanitarian crisis in Potoĉari, the burning of homes in Srebrenica and Potoĉari, the terrorizing of Bosnian Muslim civilians, the killing of thousands of Bosnian Muslim civilians in Potoĉari or in carefully planned executions on a mass scale, and the forced transfer of women, children and elderly persons from the territory under the control of the Bosnian Serbs constitute acts of persecution committed in the period from July 11, 1995 and onwards in the Srebrenica enclave.[352]

Genocide

General Krstić was charged with genocide and, alternatively, complicity in genocide, in connection with the mass executions of Bosnian Muslim men in Srebrenica between July 11 and November 1, 1995.[353] The prosecution argued that the evidence showed intent to destroy part of the group as such, which is consistent with the definition of genocide. In contrast, the defense argued that the intention to kill all able-bodied Bosnian Muslim men who lived in Srebrenica could not be interpreted as an intention to destroy, in whole or in part, the group as such within the meaning of Article 4 of the Statute.[354] Starting from the statement that Article 4 of the Statute of the ICTY (genocide) must be interpreted taking into account the state of customary international law at the time when the events in Srebrenica took place, the Trial Chamber took into account several sources: the work on codification and the preparatory works of the Convention on Prevention and Punishment of the crime

[350] *Ibid.*, para. 535.
[351] *Ibid.*, para. 533.
[352] *Ibid.*, para. 537-538.
[353] Counts 1 and 2 of the Indictment.
[354] First Instance Verdict *Krstić,* para. 548.

Funded by the European Union

of genocide, then the Convention itself interpreted in accordance with the general rules of interpretation of international treaties according to the Vienna Convention on the Law of International Treaties, and the international judicial practice of the ICTR. The work of other international bodies, such as the reports of the Subcommission for the Prevention of Discrimination and the Protection of Minorities of the UN Human Rights Commission, and the works created during the preparation of the Rome Statute with the purpose of establishing an international criminal court as a means of determining *the opinio juris* of states were also used in the consideration.[355]

Based on the established *actus reus* in relation to the murders and the infliction of severe physical and mental injuries, the Council stated that the Bosnian Muslim men, residents of the enclave, were killed, either in mass executions or individually, and that the small number of persons who survived the mass executions were executions inflicted severe physical or mental injury. Regarding the element *of mens rea,* the Trial Chamber expressed its belief that the murders and the infliction of serious bodily or mental injury were committed with the intention of killing all able-bodied Bosnian Muslim men in Srebrenica, regardless of whether they were civilians or soldiers.[356] In its consideration, the Council started from the elements of special intent (dolus *specialis)*, according to which the act or acts must be directed against a national, ethnic, racial or religious group, and the act or acts must aim to destroy all or part of the members of that group. After consideration, the Council concluded that the protected group in terms of Article 4 of the Statute must in this case be defined as Bosnian Muslims, and the Srebrenica Bosnian Muslims or Eastern Bosnian Muslims part of the protected group under Article 4.[357] The Council further considered the war aims of the Bosnian Serbs and the importance of Srebrenica for and goals:

> The war goal of the Bosnian Serbs was clearly stated, especially in the decision of Momĉilo Krajišnik, the then president of the Assembly of the Serbian People in Bosnia and Herzegovina, dated May 12, 1992. The decision states that one of the strategic goals of the Serbian people in Bosnia and Herzegovina is the reunification of the entire Serbian people in a single state, especially by erasing the Drina border that separates Serbia and eastern Bosnia, where the majority of the population is

[355] *Ibid.*, para. 541.
[356] See a broader description of established facts, First Instance Verdict *Krstić,* para. 543-547.
[357] *Ibid.*, para. 550-560.

Funded by the European Union

> Serbian. The aim of the campaign in Bosnia was defined by the accused himself in an interview from November 1995, explaining that the Podrinje region should remain "Serbian forever, with the eastern part of the Republika Srpska and the Drina River [being] an important point of convergence of the Serbian people on both sides of the Drina With that goal in mind, the cleansing of Bosnian Muslims from Srebrenica brought special benefits. Located in the middle Podrinje region, whose strategic importance for the creation of the Bosnian Serb state (...) Srebrenica and its surroundings represented a pocket with a majority Muslim population within a predominantly Serbian region along the border with Serbia.[358]

Intention to destroy the group in whole or in part

The Prosecution stated that acts were committed with the required intent when "(the accused) consciously wanted (his) acts to result in the destruction, in whole or in part, of the group as such; or if he knew that his actions were destroying the group as such in whole or in part; or if he knew that the consequence of his actions would probably be the destruction of the group as such in whole or in part", that is, that, in this case, General Krstić and others "consciously wanted their actions to lead to the destruction of a part of the Bosnian Muslim people as (...) groups". The defense, for its part, expressed the view that the perpetrator of genocide must "have a specific intention to destroy (...) the group" and concludes that "dolus specialis represents a higher degree of premeditation".[359] The Council considered that Article 4 of the Statute for genocidal acts does not require that there be premeditation for a long time in advance and that it is possible to imagine a situation where the destruction of a group, even though there was no intention to do so at the beginning of an operation, may become the goal at a later stage of the execution of the operation. In its consideration, the panel referred to the position of the appeals panel in the *Jelisić case* that the existence of a plan is not a legally relevant element of the crime of genocide, but that it can help in the evidentiary sense when determining the intent of the perpetrator of the criminal act.[360] The evidence presented in the *Krstić case,* according to the position of the Council, showed that the killing was planned, taking into account the number and character of the engaged forces, the standardized coded language used by the units in communications related to the killings, the scale

[358] *Ibid.*, para. 562-564.
[359] *Ibid.*, para. 569-570.
[360] Second-instance judgment in the *Jelisić case,* para. 48.

Funded by the European Union

of the executions, the uniformity of the killing method used. The council further stated that it cannot determine the exact date of the decision to kill all men of military age, and therefore cannot conclude that the murders committed in Potoĉari on July 12 and 13, 1995 were part of a plan to kill all men of military age, but that it is firmly believed that the mass executions and other murders committed from July 13 onwards were part of that plan.[361]

Regarding the question of the partial destruction of the group, the question raised by the Council was whether this group of victims, since in this case the killed were primarily Bosnian Muslim men of military age, represents a sufficient part of the Bosnian Muslim group in order to intend to they qualified the destruction as "the intention to completely or partially destroy the group" according to Article 4 of the Statute. Among other things, the prosecution referred to the work of the Commission for International Law and the judgment in the *Jelisić case,* in which the term "in whole or in part" was interpreted as a "substantial" part in a quantitative or qualitative sense, and to the judgment in the *Akayesu case*, according to which the accused was declared guilty of genocide due to acts committed within only one community, as well as the decision in the *Nikolić case,* in which the characterization of genocide was accepted for acts committed only in one region of Bosnia and Herzegovina, in that case in the Vlasenica region. The defense, for its part, was of the position that the term "partially" refers to the scale of the crimes actually committed, as opposed to the intention that would have to extend to the destruction of the group as such, i.e. in its entirety "which would mean that any destruction, even if only partially, must be carried out with the intention of destroying the entire group as such". In this matter, the Council took the position that, according to the Convention, the expression "in whole or in part" refers to the intention, and not to the actually carried out destruction, and concluded that any act committed with the intention to destroy a part of the group as such constitutes an act of genocide in the sense Conventions.[362]

> The Trial Chamber is therefore of the opinion that the intention to destroy a group, even a partial one, means an aspiration to destroy some separate part of the group, and not just any set of members of that group. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must consider the part of the group they wish to destroy as a separate entity that must be

[361] First Instance Verdict *Krstić,* para. 572-573.
[362] *Ibid.,* par. 582-584.

Funded by the European Union

> eliminated as such. A military campaign resulting in the killing of a certain number of members of a protected group in various places throughout a larger geographical area does not have to be qualified as genocide, despite the high total number of victims, because it is not necessarily an expression of the perpetrators' intention to target the very existence of the group as such. On the contrary, the killing of all members of a part of a group located within a smaller geographical area, even if it results in a smaller number of victims, will qualify as genocide when it is carried out with the intention of destroying a part of the group as such located in that smaller geographical area. Indeed, the target of physical destruction can only be a geographically bounded part of a larger group because the perpetrators of genocide consider the intended destruction sufficient to destroy the group as a separate entity in the geographical area that mediates it. In this sense, it is important to keep in mind the overall context in which the physical destruction was carried out.[363]

The Prosecution and the Defense presented conflicting views regarding the partial destruction of the group as such according to the meaning of the Convention. The Prosecution reasoned that "causing the death of at least 7,475 people, mostly male Bosnian Muslims in Srebrenica, the destruction of that part of the group, which before the fall had a total of between approximately 38,000 and 42,000 members, represents a significant part of the group not only because it was directed at a quantitatively large the number of victims, but also because the victims make up a significant segment of the group". The prosecution further stated that the VRS forces were fully aware that by killing all able-bodied men, they would penetrate deep into the very core of the group's social and cultural base, and that the mass executions of able-bodied men should be seen in the context of what happened to the rest. of the Srebrenica group: "the objective of the offensive on the protected zone was the ethnic cleansing of Bosnian Muslims, and it gradually escalated into the killing of Bosnian Muslim men and the evacuation of women, children and old people". From the point of view of the Prosecutor's Office, the final result was not accidental, "as can be seen from the long-term plan of the Republika Srpska to eliminate Bosnian Muslims from that area", citing as an example Directive no. 7 of March 7, 1995, in which Radovan Karadzic ordered the Drina Corps to create "conditions of total insecurity, intolerability and no prospects for the further survival and life of the villagers in Srebrenica and Žepa". According to the Prosecutor's Office, "by killing the

[363] *Ibid.*, par. 590.

Funded by
the European Union

group's leadership and defenders and deporting the others, the VRS and General Krstić ensured the conditions for the Bosnian-Muslim community of Srebrenica and its surroundings not to return to Srebrenica or to rebuild in that region, or indeed anywhere else”. The prosecution further drew attention to the consequences that the events of July 11-16 had for the Srebrenica community of Bosnian Muslims: "What is left of the Srebrenica community, in many cases, lives only in a biological sense and nothing more”. It is a community that has fallen into despair, a community that lives in memories, a community without leadership, a community that is a shadow of what it once was”. The prosecution concluded that "the crimes of the accused did not only result in the death of thousands of men and young men, but also the destruction of the Bosnian-Muslim community of Srebrenica".[364]

The defense, for its part, stated that, "although it is understandable such a strong desire to condemn the actions of the Bosnian Serb army in Srebrenica in the harshest possible terms, those acts do not fall under the legal definition of genocide because it has not been proven that they were committed with the intention to destroy the group as an entity”. The defense justified this position with the following statements: "firstly, the killing of even 7,500 members of the group, Bosnian Muslims, of whom there are approximately 1.4 million in total, is not evidence of the intention to destroy a "substantial" part of the group, in the eyes of the defense, 7,500 dead is not a significant number in relation to to 40,000 Bosnian Muslims from Srebrenica". The defense further stated that the VRS forces did not kill the women, children and old people who gathered in Potoĉari "in contrast to all other examples of genocide in modern history which were directed at men, women and children without distinction". According to the defense, if the VRS had really intended to destroy the Bosnian-Muslim community of Srebrenica, its forces would have killed all the women and children who were helpless and already in their hands, rather than spend so much time and manpower searching for and liquidating the men from the column. The defense argued that the facts, on the contrary, showed that the VRS forces only intended to kill all potential combatants in order to eliminate any future military threat, citing as an example that the wounded men were spared. The defense concluded that "there is no evidence on the basis of which the Trial Chamber could conclude beyond any reasonable doubt that the murders were committed with the intention of completely or partially destroying the Bosnian Muslims as an ethnic group".[365]

[364] *Ibid.,* par. 592.
[365] *Ibid.,* par. 593.

Funded by the European Union

In its concluding deliberations, the Trial Chamber stated that "the VRS tried to kill all able-bodied Bosnian Muslim men regardless of whether they were civilians or soldiers", that the wounded men "were spared only because of the presence of UNPROFOR", and that the part of the column that managed to break into the territory controlled by the Government "owes its survival to the fact that the VRS did not have sufficient military resources to capture them":

> The Bosnian-Serb forces could not fail to know, at the moment when it was decided to kill all the men, that this selective destruction of the group would have lasting consequences for the entire group. (...) The Bosnian Serb forces knew, at the moment when they decided to kill all men of military age, that these killings, in conjunction with the forced relocation of women, children and the elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica". Finally, a strong indication of the intent to destroy the group as such is the concealment of corpses from mass graves by digging them up, mutilating the bodies in the process, and reburying them in other mass graves located in even more remote areas. (...) The Council concludes that the intention to kill all male Bosnian Muslims of military age in Srebrenica represents the intention to partially destroy Bosnian Muslims as a group within the meaning of Article 4, which must therefore be qualified as genocide.[366]

Individual responsibility, JCE

After the Trial Chamber concluded that the prosecution proved beyond a reasonable doubt that genocide, crimes against humanity, and violations of the laws and customs of war were committed against Bosnian Muslims in Srebrenica in July 1995,[367] the criminal responsibility of General Krstić for those crimes was considered, in in accordance with the provisions of Article 7 of the ICTY Statute. The Trial Chamber concluded beyond a reasonable doubt that from the evening of July 13 onwards, General Krstić participated in a joint criminal enterprise to kill able-bodied Bosnian Muslim men from Srebrenica:

> General Krstić may not have come up with the plan to kill, nor participated in the initial decision to extend the goal of the criminal

[366] *Ibid.*, par. 594-596.
[367] *Ibid.*, par. 599.

Funded by the European Union

> enterprise from forced relocation to the destruction of a group of Bosnian Muslim men of military age from Srebrenica, but there is no doubt that, from the moment he learned of the widespread and systematic murders and apparently participated in their commission, shared the genocidal intent to kill these men. This cannot be denied if one takes into account his informed participation in the executions in the form of using the resources of the Drina Corps.[368]

The Trial Chamber also concluded that the able-bodied Bosnian Muslim men from Srebrenica constituted a significant part of the group of Bosnian Muslims and that the killing of these men inevitably led to the destruction of the entire Bosnian Muslim community in Srebrenica, especially considering that General Krstić played a key role role in the forced transfer of women, children and elderly Muslims from the territory under Serbian control, and he was undeniably aware of the fatal consequences that killing men would have on the ability of the Bosnian Muslim community in Srebrenica to survive as such. In the end, the Council concluded that General Krstić participated in the genocidal acts of killing members of the group referred to in Article 4(2)(a) of the Statute with the intention of destroying a part of the group, as well as causing serious physical and mental injury to members of the group referred to in Article 4(2)(b) of the Statute, as foreseeable consequences of a joint criminal enterprise.[369] The panel further concluded that General Krstić participated in a joint criminal enterprise to kill Bosnian Muslim men of military age with the knowledge that these killings would lead to the destruction of the entire Bosnian Muslim community in Srebrenica and that therefore his intention to kill those men constituted genocidal intent to the group is partially destroyed. The Council reasoned that General Krstić did not come up with a plan to kill those men, nor did he personally kill them, but that he played a key role as the coordinator of the implementation of the killing campaign: "specifically, at the stage in which his participation was clearly necessary, General Krstić exercising his power as the commander of the Drina Corps, he organized that people under his command commit murders. Therefore, he was one of the key participants in the genocidal killings after the fall of Srebrenica. In short, taking into account both his *mens rea* and his *actus reus*, General Krstić must be considered one of the main perpetrators of these crimes".[370]

---

[368] *Ibid.,* par. 633.
[369] *Ibid.,* par. 634-635.
[370] *Ibid.,* par. 644.

Funded by the European Union

Regarding his participation in other crimes resulting from the deprivation of life, the Trial Chamber found that, based on his participation in the joint criminal enterprise of killing Bosnian Muslims of military age from Srebrenica, General Krstić was also guilty of murders as a violation of the laws and customs of war, as well as murders as crimes against humanity and, given the goal of the joint criminal enterprise to kill all able-bodied Bosnian Muslim men from Srebrenica, for extermination. The council also concluded that General Krstić was guilty of the murders as acts of persecution, and that his intention to discriminate against the Bosnian Muslim population of Srebrenica was manifested in his participation in the killing of all Bosnian Muslim men and the transfer of allwomen, children and elderly persons outside the territory of Drina. of the corps.[371] Accordingly, the Council concluded that the evidence meets the test from judicial practice, according to which General Krstić bears command responsibility under Article 7(3) for the participation of the Drina Corps personnel in the killing campaign.[372]

Conclusions on the criminal responsibility of General Krstić

The Trial Chamber concluded that General Krstić was criminally responsible for participating in two different sets of criminal acts that took place after the VRS attack on Srebrenica in July 1995. Firstly, with regard to the humanitarian crisis and the crime of terror in Potoĉari and the forced transfer of women, children and elderly people from Potoĉari to the territory held by Bosnian Muslims, from July 11 to 13, the Council concluded that General Krstić liability under Article 7(1) for inhumane acts (forcible transfer) and persecution (murder, cruel and inhuman treatment, terrorism, destruction of personal property and forcible transfer). Secondly, with regard to the murders of Muslim men of military age from Srebrenica and the infliction of serious physical and mental injuries on the men who survived the massacres, the Council concluded that General Krsti ć bears responsibility under Article 7(1) and Article 4(3)(a) for genocide, and that he is also responsible under Article 7(1) for murder as extermination, murder and persecution as crimes against humanity and murder as a violation of the laws and customs of war.[373]

In considering the applicable law regarding the sentence, the Trial Chamber stated that the exceptional gravity of the crimes committed by General Krstić was

[371] *Ibid.*, par. 646.
[372] *Ibid.*, par. 647.
[373] *Ibid.*, para. 653.

Funded by the European Union

established based on their scope, organization and speed of execution, over a period of ten days:

> In just one week, three generations of Muslim men from Srebrenica disappeared. To this day, most of the surviving women and children have not been able to return to their homes. Many of them suffer from what is known as the "Srebrenica syndrome", which is the inability to continue their lives due to the lack of definitive information about the fate of lost sons, husbands or fathers.[374]

The Trial Chamber further stated that it also had in mind that General Krstić's behaviour during the trial was not entirely accommodating: "General Krstić testified under oath before the Trial Chamber. But while this could be seen as a sign of cooperation with the International Tribunal, the evidence clearly established that he based his defense on several critical issues on falsehoods, the most obvious of which was that he denied that he or anyone else from of the Drina Corps was involved in the forced removal of women, children and elderly Bosnian Muslims from Potoĉari, and testified regarding the date he was appointed commander of the Drina Corps and the time when he found out about the mass executions. In the cross-examination, General Krstić showed stubbornness by constantly refusing to directly and honestly answer the legitimate questions of the prosecution and even the judge. His demeanor during the proceedings as a whole showed an absence of remorse for the role he played in the Srebrenica area in July 1995".[375] After the deliberations, the Trial Chamber sentenced General Krstić to a single prison term of forty-six years.[376]

Second-instance judgment

In the appeal procedure, the defense filed several grounds of appeal that related to the conviction of Radislav Krstić for genocide against Bosnian Muslims, due to a wrong legal interpretation of the definition of genocide and its wrong application to the circumstances of the case. The defense argued that the definition of a part of a national group was unacceptably narrow and that the Trial Chamber erred when it extended the term "destroy" from the prohibition of genocide to include the geographic displacement of a community.[377] The Defense further argued that the Trial Chamber, even if the conclusion on the existence of genocide was correct, erred

[374] *Ibid.,* par. 720.
[375] *Ibid.,* par. 722.
[376] *Ibid.,* par. 726.
[377] ICTY, IT-98-33-A, *Prosecutor v. Radislav Krstić,* before the Appeals Chamber, Verdict, April 19, 2004, para. 5, http://www.icty.org/x/cases/krstic/acjug/bcs/krs-aj040419b.pdf

Funded by the European Union

when it concluded that there was sufficient evidence that Radislav Krstić was a participant in a joint criminal enterprise to commit genocide.[378] The next argument presented by the defense was that the Trial Chamber erred in rejecting its argument that the executions were ordered and supervised through a parallel chain of command formed by the VRS security forces, over which Radislav Krstić had no control. The defense claimed that this chain of command went from General Mladić, through his security commander, Colonel Beara from the Main Staff of the VRS, to Colonel Popović from the Drina Corps and, finally, to the security officer of the Zvornik Brigade, Dragan Nikolić. Acting through this parallel chain of command, according to the Defense, the Main Staff of the VRS could and did in fact manage the resources of the Drina Corps without consulting the Drina Corps Command.[379] The Defense also contested the Trial Chamber's findings regarding Krstić's criminal responsibility for the crimes committed between July 12 and 13, 1995 in Potoĉari, claiming that Radislav Krstić should not be considered guilty of the crime because by July 13 in 1995, the commander of the Drina Corps was General Živanović.[380]

The Appeals Chamber, after considering these issues, determined that the Trial Chamber correctly determined a significant part of the protected group in this case, and rejected the Defense Appeal regarding this issue.[381] The Appeals Chamber also concluded that some members of the VRS Main Staff intended to destroy the Bosnian Muslims from Srebrenica, and that the Trial Chamber did not deviate from the legal requirements for the crime of genocide and rejected the Defense Appeal on that issue.[382] The Appeals Chamber went on to determine whether the Trial Chamber erred in finding that Radislav Krstić shared the genocidal intent of the joint criminal enterprise to commit genocide against the Bosnian Muslims of Srebrenica.[383] In relation to this issue, the Appeals Chamber concluded that Krstić was aware of the intention of some members of the Main Staff of the VRS to commit genocide and that, knowing this, he did not prevent the personnel and resources of the Drina Corps from being used to facilitate the commission of those murders and that, accordingly, he is not guilty of genocide as the main perpetrator. The Appeals Chamber ultimately concluded that Krstić's criminal responsibility is therefore more

[378] *Ibid.,* par. 39.
[379] *Ibid.,* par. 48.
[380] *Ibid.,* par. 145.
[381] *Ibid.,* par. 23.
[382] *Ibid.,* par. 38.
[383] *Ibid.,* par. 79.

Funded by
the European Union

appropriate to describe as the responsibility of an aider and abettor in the genocide, rather than as the responsibility of the perpetrator.[384]

The Appeals Chamber further concluded that consideration of Radislav Krstić's participation in the crime of genocide is also relevant for his criminal responsibility for the murders of Bosnian Muslim civilians based on Article 3 (violation of the laws and customs of war), and for extermination and persecution under Article 5 (crimes against humanity), stemming from the execution of Bosnian Muslims from Srebrenica between July 13 and 19, 1995. The Appeals Chamber concluded that the evidence showed that Krstić was not ordered any of those murders or directly participated in them, but that he knew that those murders were being carried out and that he allowed the General Staff to use the personnel and resources under his command to help in their execution, and that therefore in this part the responsibility Radislav Krstić's responsibility as an aider and abettor in murders, extermination and persecution, not the responsibility of the main co-perpetrator.[385] Regarding the challenge of the defense when it comes to the responsibility of Radislav Krstić as part of the joint criminal enterprise to forcibly relocate Bosnian Muslim civilians from Potočari, and the criminal responsibility for the crimes of murder, beating and abuse committed between July 12 and 13, 1995, the Appeals Chamber rejected the argument that Krstić was not responsible since he was not the commander of the Drina Corps at that moment. The appeals panel concluded that the responsibility of Radislav Krstić for the crimes committed in Potoĉari stems from his personal participation in the joint criminal enterprise to forcibly relocate civilians and that the crimes were a natural and foreseeable consequence of that joint criminal enterprise, and that the conviction of Krstić the verdict for those criminal acts is not related to his position in the headquarters of the Drina Corps at the time of their commission.[386]

In terms of sentencing, the Appeals Chamber found that Radislav Krstić was responsible for very serious violations of international humanitarian law, and that the general opinion is that the crime of genocide is a particularly serious and reprehensible violation: "given the circumstances in in this case, as well as the nature of the serious crimes that Radislav Krstić aided and abetted or committed himself, the Appeals Chamber, taking into account the principle of proportionality, considers that the sentence imposed by the Trial Chamber should be reduced to 35 years”.[387]

[384] *Ibid.,* par. 134-137.
[385] *Ibid.,* par. 144.
[386] *Ibid.,* par. 151.
[387] *Ibid.,* par. 275.

Funded by
the European Union

"His life story is the story of a professional soldier who could not oppose the mindless desire of his superiors to rid Srebrenica of Muslims forever, and who, in the end, participated in the illegal execution of this heinous intention".[388]

[388] First Instance Verdict *Krstić*, para. 724.

Funded by the European Union

Stanišić & Simatović (Stanišić and Simatović, IT-03-69)

Responsibility for the actions of special and paramilitary units

Joint criminal enterprise

Aiding and abetting

Criterion of concrete direction of actions

If we cannot conclude that the defendants aided and abetted these crimes, I fear we have reached a dark moment for international law, a moment when, as the Honorable Justice Robert H. Jackson put it in 1949, "only the common people fear the law and when it only applies to minor crimes".[389]

Factual basis

Jovica Stanišić was a high-ranking official of the Ministry of Internal Affairs of the Republic of Serbia. Until the end of 1991, he was in the position of deputy head of the State Security Service (DB), and *de facto* he was the first person in the DB even before his official appointment at 1991. until October 27, 1998. Franko Simatović, known as Frenki, worked in the DB in various jobs until 2001, first in counterintelligence jobs, and then in the Directorate for Intelligence Affairs of the DB (the so-called Second Directorate), where he was the commander of the special operations unit of the DB. During the entire period covered by the Indictment, Franko Simatović acted under the authority of Jovica Stanišić.[390]

> In or around April 1991, Jovica Stanišić and Franko Simatović helped open a training center in Golubić near Knin, in the Serbian Autonomous Oblast (SAO) Krajina, Republic of Croatia. In that training center, the accused organized, supplied, financed and supported the training of "Serbian forces" [401]by members of the State Security of the Republic of Serbia and managed it. Later, additional training centers were opened in parts of

[389] Judge Michèle Picard, ICTY, IT-03-69-T, Prosecutor v. Jovica Stanišić and Franko Simatović, before Trial Chamber I, Judgment, May 30, 2013, Volume II-II, par. 2406, 30 May 2013, according to Robert H. Jackson, Nuremberg in Retrospect: Legal Answers to International Lawlessness, from an address to the Canadian Bar Association, Banff, Alberta, September 1, 1949.
[390] ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, Third Amended Indictment, July 9, 2008, para. 1-2, http://www.icty.org/x/cases/stanisic_simatovic/ind/bcs/080709.pdf

Funded by the European Union

Croatia and Bosnia and Herzegovina, which were under Serbian control. Those training centers were financed by the DB of Serbia.[391]

Volunteers and recruits were trained in those centers. Those special units were secretly formed by or with the help of the DB of Serbia no later than April 1991 and during the period described in the Indictment. They were formed for the purpose of undertaking special military actions in Croatia and Bosnia and Herzegovina. Those units (special units of the DB of the Republic of Serbia) included groups or members of groups known by the following names: Unit for Special Purposes of the Ministry of Internal Affairs of Serbia, JATD (Unit for Anti-Terrorist Actions) and JSO (Unit for Special Operations) - (both also known as "Red Berets"), "Scorpions", Serbian Volunteer Guard (SDG), also known as "Arkanovci" and the elite SDG unit known as Arkanovi "Tigers". Those units often acted in cooperation with other "Serbian forces" which are defined later in the text.[392]

The defendants directed financing, training, logistical support and other types of significant assistance or support to special units of the DB of the Republic of Serbia and other Serbian forces that participated in the commission of crimes in Croatia and Bosnia and Herzegovina during the period covered by the Indictment. For a long period of time they continuously sent forces and provided support to them and did not instruct them to refrain from committing illegal acts and did not stop replenishing the forces in the field that were committing illegal acts. [404]From April 1991 until the end of 1991 at the latest, Serbian forces, especially special units of the DB of the Republic of Serbia, which acted in cooperation with the Yugoslav People's Army (JNA), Territorial Defense (TO) and paramilitary forces, committed crimes in towns and villages in SAO Krajina and SAO Slavonia, Baranja and western Srem (SBZS), attacked them and took control over them. From March 1992, and

[391] "For the purposes of this Indictment and specifically in connection with the joint criminal enterprise (hereinafter: JCE) in which the defendants participated, the term "Serbian forces" means the following: a) members of the Yugoslav People's Army (JNA), which later became the Yugoslav Army (VJ); b) the newly formed Serbian TO SAO Krajina and SAO SBZS, which later became the army SAO Krajina (Serbian Vojska Krajina, SVK); c) the newly formed TO in BiH, which later became the VRS; d) TO of the Republic of Serbia; e) special units of the DB of the Republic of Serbia; f) the newly formed police and special police forces of SAO Krajina, which were later included in the MUP of the Republika Srpska Krajina (RSK), usually referred to as "Martić's police", "Martićevci", "SAO Krajina Police" or "SAO Krajina Militia" (Martić's Police); g) the newly formed police and special police forces of the SAO SBZS, including the National Security Council (SNB), (MUP forces of the SAO SBZS), which were later included in the MUP of the RSK; h) newly formed police and special police forces in territories under Serbian control in BiH, which later became police and special police forces of the MUP of the Republic of Srpska; il) members of Serbian paramilitary and volunteer formations from Serbia, Montenegro, Bosnia and Herzegovina and Croatia, including "Chetniks" or "Seseljevics", Indictment, para. 6.

[392] Indictment, para. 4.

Funded by the European Union

> continuously until 1995, Serbian forces, and especially special units of the DB of the Republic of Serbia, committed crimes in towns and villages in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Sanski Most and Zvornik, attacked them and took control of them, and committed crimes in Trnovo.[393]

Jovica Stanišić and Franko Simatović were accused on the basis of individual responsibility for criminal acts committed within the framework of a joint criminal enterprise that included high- ranking civil and military officials of the Republic of Serbia,[394] which arose no later than April 1991 and which, according to the indictment, lasted at least until December 31. in 1995. The goal of that joint criminal enterprise was the forcible and permanent removal of the majority of non-Serbs, primarily Croats, Bosnian Muslims and Bosnian Croats, from large areas in Croatia and Bosnia and Herzegovina, by committing crimes of persecution, murder, deportation and inhumane acts (forced relocations).[395] According to the Indictment, Jovica Stanišić and Franko Simatović participated in a joint criminal enterprise in such a way that they provided communication channels between the key participants in the JCE in Belgrade, in specific areas and at the local level, and between them; organized and managed the formation of special units of the DB of the Republic of Serbia and other Serbian forces that participated in committing crimes in Croatia and Bosnia and Herzegovina; organized and managed financing, training, logistical support and other types of significant assistance or support to special units of the DB of the Republic of Serbia and other Serbian forces that participated in committing crimes in Croatia and BiH, and over a long period of time continuously sent forces and provided support to them, and they did not instruct them to refrain from doing it.[396]

In addition, according to the indictment, Stanišić and Simatović participated in the very conception of those crimes, and were in a position of authority that they used to give instructions to others to commit criminal acts and had the intention that the crimes would be committed or were aware of the high probability that they would be committed during the execution of a given plan or order. Additionally, according

[393] Indictment, para. 5.

[394] Indictment, para. 8-9.

[395] Numerous individuals participated in that JCE. Each participant, by doing or not doing, contributed to the achievement of the goal of that undertaking. Among the individuals who participated in that JCE, and thus significantly contributed to the achievement of the goal of that undertaking, were the accused Jovica Stanišić and Franko Simatović; Slobodan Milosevic; Veljko Kadijević; Blagoje Adžić; Ratko Mladic; Radmilo Bogdanović; Radovan Stojičić aka Badža; Mihalj Kertes; Milan Martic; Goran Hadzic; Milan Babic; Radovan Karadžić; Momčilo Krajišnik; Biljana Plavšić; Mico Stanišić; Željko Ražnatović aka Arkan; Vojislav Seselj; and other members of the Serbian forces. Alternatively, the persons mentioned in this paragraph participated in the JCE and implemented its goals using members or groups from the Serbian forces. (par. 12 of the Indictment).

[396] Indictment, par.10-13.

Funded by the European Union

to the indictment, the accused provided practical help, encouragement and moral support to persons who committed the crimes of persecution, deportation, forced transfer and murder, which significantly influenced the commission of the crime, they did so with the necessary awareness. The acts alleged in this Indictment to have contributed to the JCE also constitute acts of planning, ordering and/or aiding and abetting.[397]

Stanišić and Simatović case represents one of the longest trials before the ICTY and the Mechanism for International Criminal Courts (IMCC), which after the closure of the ICTY took over the remaining cases of this court.[398] The initial indictment was filed on May 1, 2003, and the proceedings against the defendants began after their arrest and guilty plea in March 2003. Trial Chamber I of the ICTY acquitted the accused on all counts of the Indictment in its first-instance verdict of May 30, 2013. This panel concluded that units of the State Security Service of Serbia committed crimes on the territory of Croatia[399] and Bosnia and Herzegovina,[400] but considered that Stanisic and Simatovi were not criminally responsible for those crimes. they commit crimes. Namely, after the analysis of the evidence, the majority of the members of the Council stated that they could not determine that the accused possessed the intention to realize the joint criminal goal of the joint criminal enterprise. The panel also concluded that it was not proven beyond a reasonable doubt that Stanisic or Simatovic planned or ordered those crimes. In connection with the allegations of aiding and abetting, the majority of the members of the Panel found that on the occasions when the two accused provided support to the special units, that support was not specifically aimed at the commission of those crimes. The judgment of the Appeals Chamber was pronounced on December 15, 2015. Based on the errors identified in the judgment of the Trial Chamber, the Appeals Chamber concluded that the circumstances of this case meet the conditions for a retrial in accordance with the Rules of Procedure and

---

[397] Indictment, para. 16.

[398] The mechanism was established by UN Security Council Resolution no. 1966 (2010) and continues the material, territorial, temporal and personal jurisdiction of the ICTY and ICTR. The Trial Chamber is obliged to interpret the Statute and Rulebook of the Mechanism, as issues related to the Statute and Rulebook of the ICTY, i.e. ICTR, in a manner consistent with the practice of the ICTY and ICTR, MICT-15-96, *Prosecutor v. Jovica Stanišić and Franko Simatović,* before the Trial Chamber, Verdict, 30 June 2021, par.1, fn 1, https://ucr.irmct.org/LegalRef/CMSDocStore/Public/BCS/Judgement/NotIndexable/MICT-15-9

[399] IT-03-69-T, *Prosecutor v. Jovica Stanišić and Franko Simatović,* Judgment, Volume I of II, May 30, 2013, par. 60-61, 64, 78, 85, 102-104, 110-112, 125, 130-136, 145-147, 312-317, 319, 339, 348-349, 363, 368, 392, 398-400, 404-406, 453-454, 468, 478-479, 527, 538, 553-554, 560, 573, 578, 1003, 1005-1009, 1011-1015, 1019-1024, 1026-1030, 1049-1054, https://www.icty.org/x/cases/stanisic_simatovic/tjug/bcs/130530_1.pdf

[400] *Ibid.,* par. 579-580, 584, 587, 596-598, 649, 684-686, 697- 703, 718-722, 744-747, 773-774, 776-781, 804-805, 825-827, 829, 839, 861, 863, 877, 883, 889, 917-923, 931, 942, 947, 1056-1061, 1062-1067, 1074-1079, 1081-1086, 1087-1092, 1093-1099, 1100-1105, 1106-1111, 1130-1138, 1166-1171, 1172-1173, 1174-1175, 1176-1181, 1183-1188, 1189-1194, 1195-1200, 1201-1206, 1207-1212, 1225-1230, 1231-1236, 1248, 1253.

Funded by the European Union

Evidence of the ICTY. Consequently, the Appeals Chamber ordered that Stanisic and Simatovic be tried again on all counts of the indictment.

The retrial was conducted before the Mechanism for International Criminal Courts. The accused appeared before the Mechanism on December 18, 2015. Both accused pleaded not guilty. The verdict of the MMKS Trial Chamber was pronounced on June 30, 2021. The Trial Chamber concluded that Jovica Stanišić and Franko Simatović were responsible for aiding and abetting the crime of murder as a violation laws and customs of war and crimes against humanity, and crimes of deportation, forced transfer and persecution as a crime against humanity, committed by Serbian forces after the capture of Bosanski Šamec in April 1992. Both were sentenced to 12 years in prison. On September 6, 2021, Jovica Stanišić, Franko Simatović, as well as the prosecution submitted notices of appeal. Judgment of the Appeals Council of the Mechanism it was pronounced on May 31, 2023. The appeals panel rejected the appeals of Stanisic and Simatovi, annulled the acquittals for the joint criminal enterprise and increased their sentences to 15 years in prison.[401]

Joint criminal enterprise

In its extensive analysis of joint criminal enterprise as a form of liability, the Trial Chamber in the *Stanišić and Simatović* case determined three forms of liability under the JCE:

- in the first form of JCE, all co-accused, acting in accordance with a common plan, possess the same criminal intent; for example, the formulation of a plan among co-perpetrators to commit murder, and when, in carrying out that joint plan (even if each of the co-perpetrators performs a different role within the plan), they all intend to commit the murders.

- the second form of JCE, which is described as a subtype of the first form, is applicable in a situation where criminal offenses are alleged to have been committed by members of military or administrative units, such as those operating in concentration camps and similar "systems".

[401] UN, ICTY, Case Information, IT-03-69, *Stanišić and Simatović*, https://www.icty.org/x/cases/stanisic_simatovic/cis/bcs/cis_stanisic_simatovic_bcs.pdf
[414] ICTY, IT-03-69-T, *Prosecutor v. Jovica Stanišić and Franko Simatović*, May 30, 2013, before Trial Chamber I, Verdict, Volume II-II, par. 1254-1257, https://www.icty.org/x/cases/stanisic_simatovic/tjug/bcs/130530_2.pdf

Funded by the European Union

- the third form of JCE is characterized by a common criminal intention to act in such a way that one perpetrator or several co-perpetrators commit an act which, although outside the scope of the common intention, is a natural and foreseeable consequence of the implementation of that intention.[402]

The Council further singled out the common features of the first and third forms of JCE, which require the participation of several persons in the achievement of a common criminal goal, which do not have to be organized into a military, political or administrative structure, but must be concretely identified, for example, by name or the category or group to which they belong. Next, the common goal must represent or include the commission of a criminal offense provided for in the Statute of the ICTY, and furthermore, the accused person must participate in the implementation of a common goal, which is reflected in the commission as well as in obtaining or providing assistance in the commission of a criminal offense that is part of the common goal, i.e. the crime it must be a natural and foreseeable consequence of a common criminal purpose.[403]

In the first-instance verdict, the Trial Chamber evaluated the participation of the accused in the JCE, the formation and management of special units of the State Security Service of Serbia (Unit,[404] Serbian Volunteer Guard - SDG[405] and Scorpions[406]), police and territorial defense units of SAO Krajina (Croatia)[407], other Serbian units (police and TO SBZS,[408] unit of TO Zvornik[409]), as well as providing communication channels between key participants in JCE in Belgrade, in specific areas and at the local level, and between them.[410] Proceeding from the question of whether the accused organized the formation of special units of the DB of Serbia and managed them, the Trial Chamber established the criterion of the concrete direction of the actions:

> According to the understanding of the Trial Chamber, the wording used in the Indictment "organized and directed the formation" refers to the establishment or the process of establishment of those units. The Trial

[402] *Ibid.*, para. 1258
[403] Special units of the DB of Serbia, known as the Special Purpose Unit of the MUP of Serbia, JATD or Red Berets, ICTY, IT-03-69-T, *Prosecutor v. Jovica Stanišić and Franko Simatović,* May 30, 2013, before Trial Chamber I, Judgment, Volume II-II, par.1288-1756;
[404] *Ibid.*, para. 1757-1915.
[405] *Ibid.*, para. 1916-2106.
[406] *Ibid.*, para. 2107-2217.
[407] *Ibid.*, para. 2218-2262.
[408] *Ibid.*, para. 2263-2289.
[409] *Ibid.*, para. 2290-2304.
[410] *Ibid.*, para. 1266.

Funded by the European Union

> Chamber will also consider whether the accused directed the participation of those units in specific actions in Croatia and Bosnia and Herzegovina. Given that the Prosecution uses the terms "management" and "command" in its Final Trial Brief and that the actions in question (stated in the Prosecution's Final Brief) were of a military nature, the wording from the Indictment "led by [their] participation", according to the understanding of the Trial Chamber, refers to ordering or commanding units in military operations.

In this regard, the Trial Chamber noted that "many of the terms used in the Indictment to describe the acts of the accused can be said to be vague or overlapping". [411] The Council further specified that it will also consider whether the accused organized the participation of the above-mentioned units in specific actions and whether they supplied, financed and supported those units for these actions:

> In this regard, the wording from the Indictment "organized [...] their participation", according to the understanding of the Trial Chamber, refers primarily to the engagement of those units in specific military operations (including all relevant preparations for that engagement), in which those units may have been included in the command structure of other military forces. In addition, the Trial Chamber will assess whether the accused organized and managed financing, training, logistical support and other types of substantial assistance or support, even outside the scope of specific actions.[412]

Planning, ordering and aiding and abetting

Furthermore, based on earlier legal practice, the Trial Chamber gave the basic elements and features of responsibility for planning, ordering, aiding and abetting, as a form of individual criminal responsibility under Article 7(1) of the Statute of the ICTY. The Council further stated that this type of responsibility reflects the principle of attributing criminal responsibility not only to the direct perpetrator, but also to the person who planned, encouraged, ordered and/or aided and abetted criminal acts, by doing or not doing, when there is an obligation to act and stated the conditions for attribution of this type of responsibility: the crime is committed, the

[411] *Ibid.*, para. 1266, fn 2231.
[412] *Ibid.*, para. 1267

Funded by the European Union

accused person must make a significant contribution to the commission of the crime.

Liability for planning may arise from a criminal offense subsequently committed by the principal offender. The person planning must have the intention to commit the crime or the intention to carry out the plan, with the awareness of a significant probability that the plan will lead to the commission of a criminal act. Responsibility for ordering may arise from ordering the main perpetrator to commit a criminal offense or to act in a manner that will result in the commission of a criminal offense. The person giving the order - at the time of issuing the order - must be in a position of formal or informal authority over the person committing the crime. The giver of the order must have the intention that the offense be committed or must be aware of the considerable probability that the execution of the order will result in the commission of a criminal offense. Liability for aiding and abetting may arise from aiding in the commission of a criminal offense, that is, encouraging or providing moral support, if this support has a significant impact on the commission of a criminal offense. For aiding and abetting by inaction, it is necessary to prove that the accused person had the possibility to fulfill his duty to act. Aiding and abetting may precede the commission of the main criminal offense, may be simultaneous with the offense or may follow after it.[413]

In its reasoning, the Trial Chamber, based on earlier judicial practice, relied on the criterion of concrete orientation:

> When making an assessment on whether the acts of the aider and abettor had a significant impact on the commission of the criminal offense, the trial panel must establish that they were specifically aimed at assisting in the commission of that criminal offense, that is, encouraging or providing moral support.[414] The characteristic of concrete direction can be considered explicitly or implicitly, within the framework of the significant impact analysis.[415] However, if the person is far from the criminal acts for which he is accused of aiding and abetting, the analysis of the specific orientation must be explicit.[416] The factors that define distance in this sense include temporal and spatial distance.[417] The Appeals Chamber further concluded that the mere provision of general assistance, which could be used for both

[413] *Ibid.*, para. 1260-1264.
[414] Second-instance verdict in the *Tadić case,* para. 229; Second-instance judgment in the *Perišić case,* para. 36, footnote 97.
[415] Second-instance judgment in the *Blagojević and Jokić case,* para. 189; Second-instance judgment in the *Perišić case,* para. 36, footnote 97.
[416] Second-instance judgment in the *Perišić case,* para. 39.
[417] Second-instance judgment in the *Perišić case,* para. 40.

Funded by
the European Union

legal and illegal actions, would in most cases not be sufficient to prove that such assistance was specifically directed towards the criminal acts of the main perpetrators.[418] Proving specific intent in such circumstances requires evidence establishing a direct link between the assistance provided by the accused and the relevant criminal acts of the principal perpetrators.[419] Specificity may also relate to matters closely related to issues of *mens rea* and evidence concerning a person's state of mind may serve as circumstantial evidence that the assistance provided by that person was specifically directed toward the crimes charged.[420] The aider and abettor must be aware that his acts or omissions assist the main perpetrator in the commission of the crime.[421] The aider and abettor must also be aware of the criminal actions of the main perpetrator, but not their legal characterization, as well as the criminal state of consciousness of the main perpetrator.[422] This includes the special intention of the main perpetrator if such an intention is required for the act in question.[423] However, it is not necessary for the aider and abettor to know which exact act was intended to be committed or which act was actually committed; it is enough for him to know that there is a probability that one of several criminal acts will be committed, if one of those acts is actually committed.[424]

Mens rea

The findings of the Trial Chamber regarding the intention of the accused Stanišić and Simatović were presented in relation to the evidence discussed on concrete examples and the analysis of the conclusions drawn on the basis of the actions of the accused. Thus, based on examples of "spoken words", concretely intercepted telephone conversations between JCE participants in which they stated their plans,

[418] Second-instance judgment in the *Perišić case*, para. 44.
[419] Second-instance judgment in the *Perišić case*, para. 44.
[420] Second-instance judgment in the *Perišić case*, para. 48.
[421] Second-instance verdict in the *Vasiljević case*, para. 102; Second-instance judgment in the *Blaškić case*, para. 45-46; Second-instance judgment in the *Simić et al. case*, para. 86; Second-instance judgment in the *Brđanin case*, para. 484, 488; Second-instance judgment in the *Blagojević and Jokić case*, para. 127; Second-instance judgment in the case of *Nahimana et al.*, para. 482; Second-instance verdict in the *Orić case*, para. 43; Second-instance judgment in the *Mrkšić and Šljivančanin case*, para. 49, 146, 159; Second- instance judgment in the case of *Haradinaj and others*, para. 57-58; Second-instance judgment in the *Kalimanzira case*, para. 86.
[422] Second-instance judgment in the *Aleksovski case*, para. 162; Second-instance judgment in the *Simić et al. case*, para. 86; Second-instance judgment in the *Brđanin case*, para. 484, 487-488; Second-instance judgment in the case of *Nahimana et al.*, para. 482; Second-instance verdict in the *Orić case*, para. 43; Second-instance judgment in the *Mrkšić and Šljivančanin case*, para. 49, 146, 159; Second-instance judgment in the case of *Haradinaj and others*, para. 57-58.
[423] Second-instance judgment in the *Krnojelac case*, para. 52; Second-instance judgment in the *Krstić case, para. 140; Second-instance judgment in the Simić et al. case, para. 86; Second-instance judgment in the Blagojević and Jokić case, para. 127; Second-instance judgment in the Kalimanzira case, para. 86.*
[424] Second-instance judgment in the *Blaškić case*, para. 50; Second-instance judgment in the *Simić et al. case*, para. 86; Second-instance judgment in the case of *Nahimana et al.*, para. 482; Second-instance judgment in the *Mrkšić and Šljivančanin case*, para. 49, 159; Second-instance judgment in the case of *Haradinaj and others*, para. 57-58.

Funded by the European Union

the Council concluded that "the fact that Stanišić mentions the murders and his words "we will exterminate [them] to the end" are too much unspecified so that they could be interpreted as confirmation of the allegation that Stanišić had the intention to achieve the alleged common criminal goal". Other evidence concerning the telephone conversations with Karadžić in January 1992 and the meetings in Belgrade in 1993 were also assessed as insufficient "to draw the conclusion that Stanišić had the intention to achieve the alleged common criminal goal by committing the crime".[425]

On further examples such as participation in meetings in Belgrade that took place between high-ranking persons of the civil and military chain of Serbia and the delegation from the so-called Republic of Bosnian Serbs (Milošević, Perišić, Karadžić, Mladić and others), where Karadžić outlined the strategic goals of the Bosnian Serbs, including "state demarcation from the other two national communities", and where Stanišić offered battle groups for those operations, the Council concluded that although the meeting was "admittedly held in the DB building", that "Stanišić neither convened nor presided over it", and that "due to Stanišić's, apparently, limited participation in it does not follow from the meeting that he had the intention to achieve the alleged joint criminal goal".[426] The Council further presented other examples, such as Stanišić's personal involvement in the operation in Vukovar in 1991, and reached a similar conclusion that "from the fact that Stanišić attended the meeting in question, it cannot be concluded that he shared a common criminal goal".[427]

In the absence of direct evidence that would indicate that Stani šić possessed the intention to achieve the alleged common criminal goal of the forced and permanent removal of the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina, as stated by the Trial Chamber, the question of whether the conclusion of with such intent can be deduced from "his other actions" during the period covered by the Indictment:

> For example, the prosecution claims that the inference of the defendants' intent can be inferred in part from evidence that they knew that people under their jurisdiction were committing criminal acts and that they continued to allow them to commit them. The conclusion

[425] ICTY, IT-03-69-T, *Prosecutor v. Jovica Stanišić and Franko Simatović,* May 30, 2013, before Trial Chamber I, Verdict, Volume II-II, par. 2307-2312, 2316.
[426] *Ibid.*, para. 2310-2312.
[427] *Ibid.*, para. 2315.

Funded by
the European Union

> about the intention of the accused can, as the prosecution claims, also be derived from the evidence that they knew that other participants in the JCE contributed to the commission of the crime and that they continued to closely cooperate with them.

The Trial Chamber further considered Stanišić's acts related to the Serbian forces and whether the Serbian forces committed criminal acts that were part of the objective of the joint criminal enterprise, with the requirement that "that conclusion must be the only reasonable conclusion that can be drawn from the evidence". In this regard, the Council considered Stanišić's individual actions related to the Unit, the SAO Krajina police, the SDG and the Scorpions:

> Regarding the Unit, the Trial Chamber recalls that the accused organized its formation and managed it, that they organized its participation in a series of operations in Croatia and Bosnia and Herzegovina, as well as that during the period covered by the Indictment, they organized the provision of finances, logistical support and other types of substantial assistance or support, and directed by him. From September 1991 at the latest, the accused commanded the Unit and controlled its engagement and training, through leading members of the Unit, (...) who worked on the order of the accused and who were directly subordinate to them.

The Trial Chamber further recalled its conclusion that members of the Unit committed the crimes of murder, deportation, forced transfer and persecution in the municipality of Bosanski Šamac and deportation, forced transfer and persecution in the municipality of Doboj in early 1992 during two operations, as well as that the accused organized the Unit's participation in operations in Bosanski Šamac and Doboj in 1992. With the statement that "the evidence contains no other details about how the accused engaged the Unit in Doboj, for example, about the selection of members of the Unit for certain actions, about meetings or instructions related to them", the Council concluded:

> The Trial Chamber did not come to the conclusion that the accused personally directed the Unit during the operations in Bosanski Šamac and Doboj. There is no evidence that any of the accused directed the Unit to commit crimes in Bosanski Šamac or in Doboj. Moreover, there is no evidence that Stanišić issued any orders, instructions or information to the Unit regarding either of these two operations. Nor does it appear from the evidence that the defendants influenced in any other way how

Funded by the European Union

> the operations were to be carried out. During the operation in Bosanski Samac, the unit was subordinate to the JNA.

The Trial Chamber further concluded that Stanišić could realistically foresee that the members of the Unit would commit criminal acts in the municipality of Doboj in 1992 and that it considered it likely that Stanišić knowingly engaged them in those actions, including the actions in Skelani in 1993, during which the members The units cooperated with other forces and were subordinated to other persons who may have intended to achieve the alleged common criminal goal, but that "he does not consider that from Stanišić's actions in connection with the activities of the Unit, the only reasonable conclusion can be drawn that he had the intention to achieve the alleged joint criminal goal of the forced and permanent removal of the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina":

> “The majority of the members of the Council, with the dissenting opinion of Judge Picard, consider that there is a reasonable possibility that Stanišić's intention regarding the actions of the Unit was limited to the establishment and maintenance of Serbian control over large areas of Croatia and Bosnia and Herzegovina. As most members of the Chamber interpret the evidence, it was realistically possible to predict that the Serbs would commit criminal acts during the establishment and maintenance of control, but this evidence is not sufficient to support the accusations of the first form of responsibility for the JCE. In view of this, the majority of the members of the Council, with the dissenting opinion of Judge Picard, do not consider that the evidence of Stanišić's actions in connection with the actions of the Unit, by themselves or in the context of the overall evidence regarding this accused, is sufficient to establish beyond a reasonable doubt established that Stanišić possessed the intention to achieve an alleged common criminal goal by committing criminal acts”.[428]

Furthermore, in order to determine the intention of the accused, the Council considered the conclusions that can be drawn from the actions of the accused in connection with the training of Serbian forces from 1991 to 1995, and cited a number of examples of the formation and management of training centers in several places in the territory of the occupied parts of Croatia and Bosnia and Herzegovina, as well

[428] *Ibid.*, para. 2327.

Funded by the European Union

as on the territory of Serbia.[429] It was stated that training in weapons and setting up ambushes, tactical exercises, fitness training and shooting, as well as dealing with prisoners of war and civilians in armed conflict took place in those centers, and that in certain centers, in addition to general combat training, training for the use of human shields. In this regard, the Council concluded that, based on the evidence presented, "it cannot be established to what extent the accused decided on the specific content of the training", as well as that there were cases when members of the aforementioned Serbian forces committed serious crimes against non-Serb nationalities in Croatia and Bosnia and Herzegovina, and concluded:

> “However, taking into account the general nature of the training, the majority of the members of the Council, with the dissenting opinion of Judge Picard, do not consider that from Stanišić’s actions in connection with the training of members of the Serbian forces by the members of the Unit, the only reasonable conclusion can be drawn that Stanišić possessed the intention to achieve the alleged joint criminal goal of the forced and permanent removal of the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina in connection with the training of Serbian forces by the Unit was limited to helping those forces to establish and maintain Serbian control over large areas of Croatia and Bosnia and Herzegovina. In view of this, the majority of the members of the Council, with the dissenting opinion of Judge Picard, do not consider that the evidence of Stanišić's actions related to the training of Serbian forces, by themselves or in the context of the overall evidence regarding this accused, is sufficient to establish beyond a reasonable doubt established that Stanišić possessed the intention to achieve an alleged common criminal goal by committing criminal acts”.[430]

The Council also reached similar conclusions for a number of other crimes committed by forces that the defendants trained and financed and whose intention to commit crimes they "must have known given their close cooperation":

> The Trial Chamber was convinced that the accused could realistically foresee that the SDG would commit murders in the municipality of

[429] "In addition to training for the SAO Krajina police from 1991 to 1995, the accused also organized training for members of other Serbian forces. Those forces included members of the Unit/JATD, MUP SBZS, police units, VRS, TO Skelani, SVK, JNA and paramilitary units known as Karagini ljudi and Miće. The training took place in centers in Ležimir, Brĉko, in the center in Pajzoš, in Doboj, in Tara, in Skelani, Bratunac, Sova, Bilje, Žirište, at the Surĉin airport, in the security center in Banjica and in the Lipovicka forest"., *Ibid.*, couple 2328. [443] *Ibid.*, para. 2329.
[430] *Ibid.*, para. 2330

Funded by the European Union

> Sanski Most during the period in which they financed it. However, although the evidence can establish that the accused financed SDG at the time when SDG committed the murders, it cannot be established that the accused financed SDG in order for SDG to commit the murders.[431]

The concrete direction of the actions that the Trial Chamber required as a criterion is perhaps the most visible in the example of considering the crimes committed by the Scorpion units in the vicinity of Sarajevo:

> The Trial Chamber recalls the conclusion that in July 1995 in Godinjski Bari, the Scorpions committed the crime of murdering six men and boys of Muslim nationality, as part of an operation in Treskavica and Trnovo. The Trial Chamber also stated that during that operation, the Scorpions received ammunition from the training center at Pajzoš on at least one occasion, during July 1995. Based on this, the Trial Chamber concluded that the accused supplied the Scorpions with ammunition on at least one occasion during their participation in the operation in Treskavica and Trnovo. The evidence does not show whether the ammunition was delivered before or after the murders, as well as whether the ammunition delivered by the accused to the Scorpions was related to those specific murders, and not to the broader operation in Treskavica and Trnovo that was ongoing.

In its conclusion regarding these crimes, the Council reiterated that "the evidence that the accused supplied ammunition to the Scorpions is not sufficient to establish that Stanišić had any other intention than to support those forces in establishing and maintaining Serbian control over Treskavica, i.e. over Trnovo", and that it cannot establish beyond a reasonable doubt that Stanišić" intended to achieve the alleged common criminal goal by committing criminal acts".[432] Similar conclusions were reached by the Trial Chamber regarding the responsibility of Simatović.[433]

Regarding the responsibility for planning, ordering, aiding and abetting, although the Council for a number of crimes concluded that the accused organized and financed the units that committed the crimes, in its consideration of whether the actions of the accused were "specifically" aimed at assisting in the commission of crimes of murder, deportation, forced transfer and persecution, the Trial Chamber

[431] *Ibid.*, para. 2332-2333.
[432] *Ibid.*, para. 2334.
[433] *Ibid.*, para. 2351-2354.

Funded by the European Union

concluded that "it cannot draw the conclusion that the accused, by providing assistance to the Unit, aided and abetted the commission of the crime".[434]

Criticism of applied standards

Noting that the Verdict refers to a large number of events and actors and covers a large territory and a long period of time, and that it discusses almost the entire war in the territory of the former Yugoslavia, Judge Picard explained her views in detail:

> "When drawing conclusions, my colleagues considered the evidence individually, but in order to be able to assess what the situation really was, the picture, I am deeply convinced, must be viewed as a whole. I also believe that it is necessary to see these events within the wider military and political context of that period. (...) I think it should be reminded that these two defendants are not soldiers but members of the Serbian intelligence service whose duty was to protect the security of the Serbian (and not the federal) state, and not to participate in military or paramilitary operations outside the borders of the Republic of Serbia as a unit of the federal of the state. It should be said that they always, even in the first days, when the conflicts just started to break out, acted in secret, "considering the international context", and that at the end of the war, the archive of the department headed by Jovica Stanišić was almost completely destroyed".[435]

Noting that in the absence of direct evidence, the intent to achieve the JCE's common goal can be deduced from the circumstantial evidence presented, Judge Picard analyzed in detail the events in the relevant areas and the intent of the accused, and accordingly concluded:

> "The defendants in this case knowingly financed and armed criminals, and even trained them to use illegal means of warfare (human shields) so that they could commit crimes that the defendants knew (most Council members say: should have known) that these people would end
>
> and commit. If we cannot conclude that the defendants aided and abetted these crimes, I fear we have reached a dark moment for international law, a moment when, as the Honorable Justice Robert H.

[434] *Ibid.*, para. 2359-2361.
[435] *Ibid.*, para. 2367, 2368.

Funded by the European Union

> Jackson put it in 1949, "only the common people fear the law and when it only applies to minor crimes". Even if, on the basis of the evidence, it can be established "only" that the accused were indifferent to the fact that these heinous crimes were committed in order to achieve their ultimate "military" goal, I think that the majority of the Chamber erred in acquitting them of all charges".[436]

The complexity of this case, especially in relation to the standard of proof and the criterion of the concrete direction of the actions, were discussed in the procedure that followed. The Appeals Chamber of the ICTY, based on the written submissions of the parties to the proceedings and the arguments presented at the appeal hearing, annulled the decisions of the Trial Chamber and ordered that the accused be tried again on all counts of the indictment, concluding that the Trial Chamber made an error in the application of law when it did not make the necessary conclusions in connection with the existence and scope of a common criminal goal shared by a plurality of persons, and that the Trial Chamber erred in requiring that the acts of the aider and abettor be specifically aimed at aiding and abetting committing criminal acts:

> "Given the nature and extent of the legal errors identified by the Appeals Chamber in this case (...) if the Appeals Chamber were to conduct its own review of the Trial Chamber's relevant findings of fact, applying the correct legal standards, it would first have to consider the error in relation to liability under the JCE - and to draw conclusions about the existence and scope of a common criminal goal shared by a plurality of persons, and then to evaluate Stanišić's and Simatović's contribution and intention for responsibility based on JCE. Depending on the outcome of such an analysis, the Appeals Chamber may then have to consider the error of aiding and abetting liability. (...) The Appeals Chamber believes that this analysis would not be appropriate because it would have to analyze the entire file of the first-instance proceedings, without the possibility of directly hearing the witnesses in order to determine whether it was convinced of the conditions for liability based on the JCE and, depending on the results of such analysis, with respect to the requirements for aiding and abetting liability. (...) if the new trial panel examines Stanišić and Simatović's responsibility for aiding and abetting

[436] *Ibid.*, para. 2370 -2406.

Funded by the European Union

the crime, the Appeals Chamber (...) directs it to (...) apply the correct legal standard for liability on the basis of aiding and abetting, as set out above in the text, which does not require that the acts of the aider and abettor are specifically aimed at aiding the commission of criminal acts. (...) it was determined that specific orientation, based on customary international law that the International Court must apply, was never one of the elements of responsibility for aiding and abetting".[437]

Findings in the renewed procedure

The mechanism for international criminal courts, which continued to work on the remaining cases after the closure of the ICTY, conducted renewed proceedings in this case. This panel, in addition to applying standard principles of evidence, taking into account the standard of fair trial, the gravity of the crimes and the interests of the victims, allowed the Prosecutor's Office to present new evidence in certain cases, for example when the evidence presented during the original trial later became unavailable due to circumstances beyond the control of the prosecution or were not available during the initial proceedings, that is, they could not be discovered despite the application of due diligence, and their acceptance is in the interest of justice.[438]

The first-instance panel of this court, in its findings in relation to the responsibility of the accused under the JCE and the responsibility for aiding and abetting, applied, among other things, the standard of "viewing the evidence together", and after examining the contributions of the accused within the JCE, and noting the existence of a parallel chain of command, the weakness and insufficiency of evidence and the problems of circumstantial evidence, concluded that the accused are not responsible based on their participation in JCE.[439] The Council then examined alternative forms of aiding and abetting liability and concluded that it was proven that Stanišić and Simatović were responsible for aiding and abetting the crimes of persecution, murder, deportation and forced relocation committed by Serbian forces in the area of Bosanski Šamac.[440]

In the renewed appeals procedure, the Appeals Chamber rejected the defense's appeal in its entirety and partially accepted the prosecution's appeal. The Appeal

---

[437] ICTY, IT-03-69-A, *Prosecutor v. Jovica Stanišić and Franko Simatović,* before the Appeals Chamber, Verdict, December 9, 2015, para. 125-128, http://www.icty.org/x/cases/stanisic_simatovic/acjug/bcs/151209.pdf
[438] MICT-15-96, *Prosecutor v. Jovica Stanišić and Franko Simatović,* before the Trial Chamber, Judgment, June 30, 2021, https://ucr.irmct.org/LegalRef/CMSDocStore/Public/BCS/Judgement/NotIndexable/MICT-15- 96/JUD286R0000661561.pdf
[439] *Ibid.,* See examples, para. 397, 443-444, 445, 453, 465, 596, 597.
[440] *Ibid.,* para. 599, 604-608

Funded by the European Union

Panel found the responsibility of Stanišić and Simatović based on their participation in a joint criminal enterprise (first category) for the commission of criminal acts from points 1 to 5 of the Indictment, which refer to crimes committed in 1992 in the area of Bijeljina, Zvornik, Bosanski Šamac, Doboja, Sanski Most (Bosnia and Herzegovina) and SAO SBZS (Croatia), as well as crimes committed in the area of Trnovo and Sanski Most in 1995.[441] The Appeals Chamber annulled the conclusion of the Trial Chamber's conviction regarding responsibility for aiding and abetting the crimes committed in Bosanski Šamac, for which the defendants were charged under Counts 1 to 5 of the Indictment, as an alternative type of responsibility:[442]

> The Appeals Chamber found that Stanišić and Simatović were the main perpetrators in the execution of the crimes of murder, deportation, inhumane acts (forcible transfer) and persecution in connection with the takeover of power in Bosanski Šamac and after that, as well as the murder and persecution committed by the Serbian Volunteer guard in Sanski Most in September 1995. Those criminal acts can therefore be attributed to Stanišić and Simatović. The Appeals Chamber further states that the following criminal acts can be attributed to Stanišić and Simatović through other participants in the joint criminal enterprise: (i) deportation, inhuman acts (forced transfer) and persecution, which were carried out by the Serbian Volunteer Guard in connection with the takeover of power in Bijeljina, as and Serbian forces and members of paramilitary formations who acted in coordination with it; (ii) murder, deportation, inhuman acts (forced relocation) and persecution, which were carried out by the Serbian Volunteer Guard and the JNA, as well as the forces that acted in coordination with them, in connection with the takeover of power in Zvornik; (iii) inhumane acts (forced relocation) and persecution, which were committed by the JNA, the forces under the command of Radojica Božović, as well as the forces under the command of Milovan Stanković, during the takeover of power in Doboj; (iv) deportation, inhumane acts (forced relocation) and persecution, which were carried out in April and May 1992 in Sanski Most by the 6th Light Partisan Brigade of the JNA, VRS and/or forces subordinate to them or acting in coordination with them ; (v) the murder and persecution carried

[441] *Ibid.*, para. 511-512, 513-516, 520-537, 538, 546, 549, 551, 553, 555, 560, 563.
[442] MICT-15-96-A, *Prosecutor v. Jovica Stanišić and Franko Simatović,* before the Appeals Chamber, Judgment, May 31, 2023, par.664, https://ucr.irmct.org/LegalRef/CMSDocStore/Public/BCS/Judgement/ NotIndexable/MICT-15-96-A/JUD296R0000662769.pdf

Funded by the European Union

out by the Scorpions in Trnovo in July 1995; and (vi) the murder and persecution carried out by the Serbian Volunteer Guard in cooperation with the Serbian National Security, in connection with the murder of Marija Senasa in Daljska Planina, in SAO SBZS, in June 1992.[443]

[443] *Ibid.*, para. 567.

Funded by the European Union

Professor ADNAN FOČO, PhD

This analysis is based on verdicts downloaded from the "website" of the ICTY and on the provisions of the Statute of the ICTY, which was used before this court. The analysis was not based on other analyses and readings of scientific works, these facts were extracted from the explanation of each verdict individually, and certain legal interpretations were presented based on this. It should be noted that these are extremely complex procedures and cases and that this text does not represent a framework analysis.

In the text, it is indicated which case the text refers to, and in the text, it is marked "accused" and refers to the accused named in the title. The analysis includes which events the persons were accused of and which crime they were charged with, as well as what was determined in the proceedings and what they were convicted of. This analysis does not include a special elaboration of the applicable law and what was established in order to draw a conclusion about the responsibility of each individual accused. It should bear in mind that there are certain conditions for the act to be considered to fall under the application of the Statute of the ICTY, and the analysis in this way could be done subsequently, exclusively from that aspect.

MOMČILO KRAJIŠNIK

Momčilo Krajišnik was accused of both command and individual responsibility (Article 7 (1) and Article 7 (3) of the Statute of the ICTY) - convicted of individual responsibility - sentenced to 27 years in prison at first instance, after an appeal, he was sentenced to 20 years at second instance by judgment; The prosecutor's office appealed for a life sentence.

Command responsibility

Momčilo Krajišnik was a high official of the SDS and one of the most important collaborators of Radovan Karadžić. He was a member of the main board of the SDS, president of the Assembly of the Serbian People in BiH (Bosnian Serb Assembly), a member of the Presidency of the Republic of Serbia and a member of the Supreme Command of the Armed Forces of the Republic of Serbia. The verdict stated that the sessions of the presidency were not held if Momčilo Krajišnik or Radovan Karadžić

Funded by
the European Union

could not attend them, and in the case of Karadžić's absence, Momčilo Krajišnik replaced him, which speaks enough for the importance of this accused. He was accused of having participated in the crimes **of genocide, involvment in genocide, extermination, murder and intentional deprivation of life** in order to take control of parts of BiH, namely: *Banja Luka, Bijeljina, Bileća, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Bratunac, Brčko, Čajniče, Čelinac, Doboj, Donji Vakuf, Foča, Gacko, Hadžići, Ilidža, Ilijaš, Ključ, Kalinovik, Kotor Varoš, Nevesinje, Novi Grad, Novo Sarajevo, Pale, Prijedor, Prnjavor, Rogatica, Rudo, Sanski Most, Šipovo, Sokolac, Teslić, Trnovo, Višegrad, Vlasenica, Vogošća, Zvornik.*

Momčilo Krajišnik, as one of the leading officials of the Serbian leadership (Bosnian Serb forces, which includes both military and paramilitary structures, as well as police authorities), created conditions for the impossible life of the entire non-Serb population in the areas of these cities and created conditions for their forced departure from these city areas. He is accused of participating in this goal with Radovan Karadžić, as well as other members of the presidency.

He was accused for the earliest period (from July 1, 1991 to December 31, 1992) of planning, inciting, ordering, committing or otherwise helping and supporting the planning, preparation or execution of the destruction by himself or in cooperation with Radovan Karadžić and others, in whole or in part, of Bosnian Muslim and Bosnian Croat national, ethnic, racial or religious groups in several municipalities in the area Bosnia and Herzegovina (Bijeljina, Bratunac Bosanski Šamac, Brčko, Doboj, Foča, Ilijaš, Ključ, Kotor Varoš, New Town Prijedor, Rogatica, Sanski Most, Višegrad, Vlasenica, Zavidovići and Zvornik) - so his plan and intention, independently and jointly, was aimed at the destruction of all non-Serb elements in the territory of the entire BiH and was not limited to some parts of BiH, judging by the indictment, namely by killing Bosnian Muslims and Croats in camps and detention facilities, inflicting severe physical or mental injuries in these facilities and detaining them in such conditions as to forcibly lead to the physical destruction of those national, racial, religious groups that do not belong to the Serbian element.

He was accused of the murders committed by the Bosnian Serb forces in the mentioned areas, the establishment of camps and detention facilities, the persecution of Bosnian Muslims and Croats, the execution of attacks, forced marches, being taken to the Manjača, Omarska, Keraterm camps, the Vuk Karadžić school in Bratunac, Batković in Bijeljini, Prison institution in Foča and others. Military and police personnel managed and worked in these camps and detention facilities,

Funded by
the European Union

which at the highest level were managed and controlled by, among others, Momčilo Krajišnik with Radovan Karadžić as the leadership of the Bosnian Serbs. He was also accused of murders that occurred en masse in the camps and detention facilities, causing severe mental and physical suffering to the prisoners, as well as in inhumane conditions in the camps (without water, food, medical aid, hygiene, air) - according to the indictment, these were conditions calculated to lead to the physical destruction of the population - probably the prosecution in this direction charged the commission of genocide, but the panel concluded that he was not guilty of genocide because it was not proven that his goal was aimed at the permanent or partial destruction of a nation, but the goal was aimed at eliminating the non-Serb people. Momčilo Krajišnik was accused of knowing about the actions of his subordinates or having reason to know it, but that he did not take any measures and actions to prevent it or punish their perpetrators. However, the verdict will state that this was not proven because it was not proven that the crimes abovementioned were committed under his jurisdiction, as well as that he did not have effective control over the authorities of the Bosnian Serbs, which would have entailed conducting an investigation and punishing the perpetrators. The bottom line is that he was informed about everything and knew everything, but that it served to achieve his goal.

Momčilo Krajišnik was actually accused of being the mastermind, together with Radovan Karadžić and the rest of the leadership whose goal was the destruction of the non-Serb population, participating in the formation of Serbian authorities, parallel bodies, the creator of the formation of "Greater Serbia", which was only possible through ethnic cleansing by forming such a policy and the formation of bodies at all levels of the state that will implement such an idea and policy.

He was accused of genocide, complicity in genocide, crime against humanity (extermination, murder), violation of the laws and customs of war (murder) and serious violations of the Geneva Conventions (intentional deprivation of life).

Momčilo Krajišnik was accused of persecuting and killing thousands of Muslims and Croats, of attacks, forced relocation and deportation of non-Serbs, inhuman treatment and torture through daily torture, mistreatment and humiliation and degradation of human dignity through denial of basic human rights - persecution on political, racial and religious grounds and as a crime against humanity.

When it comes to **individual responsibility,** Momčilo Krajišnik was accused as a

Funded by
the European Union

member of the Serbian leadership alone or in cooperation with Radovan Karadžić, he formally and de facto had authority and control over all bodies that participated in criminal acts - he was a member of the National Security Council, whose president was Radovan Karadžić and which body decided on all issues as the main authority in the “Serbian republic”. Momčilo Krajišnik was a member of the Main Committee of the SDS, whose president was Karadzic, and this committee adopted the party's policy and ensured that it was implemented - it was ordered that crisis headquarters of the SDS be formed in the municipalities where Serbs lived. **Momčilo Krajišnik is the main creator of SDS policy at all levels, which aimed at a widespread and systematic attack directed against Bosnian Muslims and Croats and other civilian populations in Bosnia and Herzegovina.**

The indictment covers the early period of war conflicts and it is stated that at that time there was an international armed conflict in BiH and a partial occupation of BiH.

The indictment was brought in 2000, and the first-instance verdict was handed down in 2006, the second-instance verdict was handed down in 2009, during the trial he was in custody, which was included in his sentence. The first-instance verdict, at the beginning, elaborates the historical and geographical position and situation in the territory of BiH as an introduction and basis for what Momčilo Krajišnik was accused of and sentenced for. I will not comment on this at this time, but base it on what the court accepted as relevant in terms of the accused's criminal responsibility - the essence is that the accused participated in all activities and promoting the idea of the formation of Greater Serbia, and that the secession of Bosnia and Herzegovina should not be allowed from Yugoslavia because in that case the Serbian people in Bosnia and Herzegovina would be in the minority, he worked to promote and form lower bodies in all areas where Serbs lived with the aim of maintaining that idea - the accused participated in the proclamation of the Republic of the Serbian People of Bosnia and Herzegovina January 9, 1992 - defining the ethnic territory of the Bosnian Serbs and establishing state authorities on that territory.

The participation and capacity of the accused is supported by material evidence - minutes from the sessions of the presidency of the Bosnian Serbs and witness statements, and in general his participation through telephone conversations, public appearances - the accused contested that he was a member of the extended presidency, however, due to his factual presence at the sessions, the court did not accept this because observed the accused's position in this part from the point of

Funded by
the European Union

view of substance, not form. The court found that the presidency was exclusively made up of SDS members, while SDS members were mostly also in the Assembly. This means that when the Bosnian Serb institutions started to work, whoever had control over the SDS also had control over the politics of the future state of the Bosnian Serbs. The function and roles of the accused (president of the Assembly, member of the Presidency) and Karadžić (president of the Republic of Bosnian Serbs and president of the SDS) were such that the Krajišnik and Karadžić controlled absolutely all the bodies that served to implement the policies of the SDS.

At the session of the Bosnian Serb assembly held on May 12, 1992, the accused advocated the creation of the VRS, explaining that the conquest of territory was the ultimate goal. At the same session, a decision was made that officially formed the VRS (Supreme Military Commander Radovan Karadžić, and Ratko Mladić directly subordinated as Commander of the Main Staff of the VRS) - The accused admitted in the proceedings (to undisputed questions) that Mladić, in his capacity as commander, was directly subordinate to the Presidency.

However, in the proceedings, the accused downplayed the importance of the presidency to which he belonged, but the court concluded from the official records of the sessions of the Presidency of the Serbian Republic of Bosnia and Herzegovina in that period, as well as from telephone conversations between the members of the presidency, that from May to November 1992, General Mladić consulted regularly with the Bosnian Serb leadership and that the Presidency often discussed military issues and made decisions about them, as well as that it had the authority to initiate an investigation into allegations of criminal acts committed in connection with combat actions, to order a ceasefire and end military operations if political or diplomatic circumstances dictate. The Presidency had the authority to secure the release of prisoners of war.

The chain of command was established by the council through witnesses and the official records of the sessions, because the main staff informed the members of the presidency about the military situation in the entire republic of Bosnian Serbs and even that politicians gave orders to military leaders. The MUP (Ministry of Internal Affairs) was also formed in order to implement a political idea, and members of the MUP participated in the crimes described in the indictment.

Crisis staffs (organs at the municipal level that acted as executive bodies) were formed as an extended arm of the presidency of the Republic of Bosnian Serbs who

Funded by
the European Union

reported to the authorities at the level of the republic and, among other things, to the accused - this was concluded by the court because there were written reports as evidence, records, shorthand records in which the accused is directly mentioned. The accused was (at the meeting of the presidency on July 6, 1992.) appointed as the contact person with the war commissioners.

The fact that accused performed his function can be seen from the evidence - the certificate on the appointment of the war commissioners, as well as the fact that he held meetings with the war commissioners where the court established that he was one of the key links in the implementation of activities between the war presidencies and the presidency of the Assembly of the Republic of Srpska.

In the verdict, the panel stated that it is clear that the crimes were not only committed by Serbs, but that it valued certain events presented at the main trial only from the aspect of the defendant's responsibility and that it valued some of these events as events that motivated the Serbs to commit crimes.

The first-instance verdict elaborates on the state and situation in each municipality individually, starting with Bijeljina, which was the first to be occupied by the Bosnian Serbs (this will later be taken as the first moment of the JCE, but it was problematized by the second-instance verdict), then for each municipality specifically. At the end the council concludes how many people were killed, how many camps and detention facilities there were, as well as the conditions under which people left those municipalities, as well as the conditions in the detention facilities - evidence that mainly the statements of witnesses are supported.

What is significant is that this verdict established the same way of behaviour and actions of Bosnian Serbs - a general pattern of behaviour.

On the legal side, the court concluded that the conditions for the criminal offense of crimes against humanity according to Article 5 of the Statute of the ICTY were met and that during the period covered by the indictment there was an armed conflict on the territory of BiH.

The panel concluded that the attack directed against Bosnian Muslim and Bosnian Croat civilians who lived in the municipalities covered by the Indictment lasted from March 18, 1992 until the end of the period covered by the Indictment (December 30, 1992). At the beginning of April 1992, Serbian forces attacked Muslims and Croats who lived in cities, villages and smaller settlements, which were mostly undefended

Funded by
the European Union

and in which there were mostly no military objectives, in order to take control of the given municipality.

Creating conditions for the forced departure of the population through threats, arrests, murders, destruction of houses and religious buildings, and that the perpetrators had the intention of such a wide, systematic and widespread attack and that they knew that their actions were part of that attack and that the attack was aimed at changes in the population structure in the municipalities that are the subject of the indictment.

The accused was charged with extermination and murder as a crime against humanity, followed by deportation and forced transfer, and persecution as a crime against humanity.

The verdict established that in the period and in the territory covered by the indictment, around 3,000 Muslims and Croats were killed, which was established beyond a reasonable doubt, based on the evidence, but the panel noted that the possibility that there were many more victims, as well as extermination, was not ruled out.

What the panel established beyond a reasonable doubt concluded that the death of all victims was the result of the actions of the perpetrators who had the intention to take the lives of people who had no active participation in the hostilities, and that it was part of a systematic and widespread attack, as well as that impossible living conditions were created in all municipalities, which led to the population having to move.

When it comes to the criminal offense of persecution, it should be borne in mind that it must be about discrimination, the introduction and maintenance of measures that limit human rights, and in the indictment the accused was charged with five rights that were denied on a discriminatory basis, so the panel, bearing in mind the right to the accused must be clearly aware of the accusations against him, only what the accused was accused of was appreciated. The verdict established that the acts described in the indictment (i) *denial of freedom of movement; (ii) denial of employment through removal from management positions in local state institutions and the police and general dismissal from work; (iii) interference with privacy through arbitrary searches of apartments; (iv) denial of the right to legal proceedings; and (v) denial of equal access to public services*) are considered crimes

Funded by the European Union

against humanity when viewed in correlation with other acts because they were carried out at the same time as the other acts.

The council found that when it comes to denying freedom of movement, the Serbian authorities and Serbian forces restricted the freedom of movement of Muslims and Croats, set up checkpoints, ordered mandatory reporting, violated the right to privacy by searching houses under the pretext of looking for weapons, and then fired from the work of Muslims and Croats, then that children in Prijedor were prevented from attending school, denied equal access to services, electricity and water were cut off, which de facto represented discrimination and directed either against Croats or Muslims, as well as murders that were targeted because the population belonged to a certain nationality, and that the conditions in all detention facilities were inhumane and humiliating (beatings, abuse, bad conditions, no food, water, places to sleep) and the panel came to the conclusion that the perpetrators intended to cause serious injury, as well as severe physical and mental pain and suffering to the victims, who were civilians.

Regarding illegal imprisonment, it was established that there were 350 such facilities, with the fact that there were also facilities for which the council could not determine that they were detention centers or that they were such at the time covered by the indictment, and that the detainees were taken to forced labor, e.g. digging trenches, and they did not have the opportunity to declare that it was possible to talk about some kind of forced labor and that such behavior of the perpetrators was part of a systematic and widespread attack

Further, the looting and confiscation of property that Muslims and Croats handed over to the municipality was dealt with, for which they received written consent to leave the municipality, while on the other hand there was widespread looting of houses and business buildings owned by Muslims and Croats - so all for the purpose removal of the non-Serb population.

What is significant is that the panel found that the confiscation and looting of property was directly related to forced transfer and illegal detention, which constitutes persecution as a crime against humanity.

Destruction of cultural and religious buildings where the council determined that mostly mosques and Catholic churches and other religious monuments were destroyed, while Orthodox churches were spared, with the fact that there are some mosques for which the council could not establish a connection with the events in

Funded by
the European Union

the indictment.

The murders are classified as crimes against humanity according to Article 5 of the Statute of the ICTY.

With regard to the criminal offense of genocide, the accused was charged with three actions that are considered genocide - he was charged with genocide and complicity in genocide, the indictment stated that the accused had the intention of partial destruction:

(i) *The killing of members of a group of Bosnian Muslims and a group of Bosnian Croats, which should be understood as the killing of members of those groups*

(ii) *Causing serious physical or mental harm to members of these groups through cruel or inhuman treatment, including torture, physical or psychological abuse, sexual violence and beatings*

(iii) *Imposing living conditions on members of these groups that are calculated to lead to their physical destruction. It is alleged that these conditions were: cruel or inhuman treatment, which included torture, physical or psychological abuse and sexual violence; inhumane living conditions, specifically, failure to provide adequate accommodation, shelter, food, water, medical care and hygienic-sanitary conditions; and forced labor.*

The panel did not conclude that any of these acts were committed with the intent to partially destroy the ethnic groups of Bosnian Muslims or Bosnian Croats as such.

In connection with cases of extermination, the Council considered whether the conclusion about the genocidal intent of the perpetrator could be derived directly from the large number of people killed. In this regard, the Council also considered the number of victims in relation to the number of Muslims and Croats who were in the village or detention center where these victims were killed, and the choice of victims. According to the Council's conclusion, in no case were the killings alone sufficient to reach a conclusion on whether the perpetrator had genocidal intent. - it was not established that he committed genocide because it was not proven that he intended to destroy a nation, but all actions were characterized as a crime against humanity.

Funded by
the European Union

Joint Criminal Enterprise (JCE)

The Council states that the JCE, of which the accused was a member, consisted of persons who were located throughout the territory of the Republic of Bosnian Serbs - the JCE was proven to have committed crimes against humanity aimed at the goal of the Bosnian Serbs for territorial separation and removal of the non-Serb population. The appellate panel accepted the defense's argument in the appeal that the first-instance verdict had to state exactly who makes up the ordinary participants of the JCE (local politicians, military and police commanders, paramilitary leaders and others were stated in the first-instance verdict) - that it had to be identified - but it should be noted that in the verdict there is an identification that is valid for the Appeals Council because it was stated who makes up the members of the JCE by name.

The Appeals Chamber confirmed the position of the Trial Chamber that this is the first form of the JCE, but accepted the appeal that the criminal offense of persecution on a discriminatory basis, murders and extermination do not fall under the JCE because these acts were not covered by the first criminal objective. The Trial Chamber subsumed these acts under the JCE at the moment when the accused and the rest of the Bosnian Serb leadership were informed of these crimes and that then these acts became part of the JCE, which the appeals panel did not accept.

The verdict established that the accused held a central position in that JCE. He not only participated in the realization of the common goal, but was one of the initiators of its realization. The accused knew about the mass detention and expulsion of civilians and had the intention to do so, he had the authority to intervene, and the vagueness of his answers on the witness stand confirmed to the Council that he was not interested in the difficult situation of the detained and expelled persons, nor did he care about it.

The accused's general contribution to the JCE consisted in his assistance in establishing and maintaining the continuity of the SDS and state structures that played a significant role in the commission of the crime. He also used his political skill both locally and internationally to enable the realization of the JCE's common goal through the crimes that the realization of that goal entailed. – this is the true form of JCE.

The accused testified at the main trial as a witness - the panel did not give credence to his testimony because it was contrary to witness statements and material evidence - he tried to downplay some events, was not specific in his answers, avoided

Funded by
the European Union

and gave partial answers, tried to distance himself from some of his statements - what is significant is that he tried to downplay all the facts, but that his appeal against the first-instance verdict was mostly aimed at the fact that the lawyer did not adequately represent him, which appealing council did not accept.

The informations that the accused received during the period covered by the indictment are an important element for determining his responsibility. That was based on the fact that a person was informed and continued his participation, a conclusion can be drawn about his intention. The panel was presented with a large body of evidence that directly proves the intention of the accused, as well as the fact that he knew about many facts. For example, the intention and level of knowledge of the accused is directly proven by the witnesses who presented evidence that they informed the accused about the crimes committed against Muslims and Croats. This evidence sometimes included the reactions of the accused to such information. The minutes of the meetings attended by the accused or presided over (including the sessions of the Assembly and the Presidency) contain a lot of evidence of this kind. Recordings of telephone conversations conducted by the accused also have immediate evidentiary value. Some other evidence is to a lesser extent direct, such as the evidence of continuous interaction between the accused and persons who were informed - members of parliament, military elders, local SDS leaders, etc. These evidences, together with information about the positions held by the accused, his powers and interests, can unequivocally show what kind of information the accused received and that he did nothing but supported further actions.

The panel came to the conclusions that the accused was aware of information - if not always in detail, then at least in grosso modo perspective - about such issues that were reported to the Bosnian Serb leadership, if not to him personally, such as the detention of civilians, deportation or forced transfer, cruel or inhumane treatment, killing and extermination and destruction of personal property and cultural objects of Muslims and Croats by Bosnian Serb forces. Such conclusions were confirmed by the Council's finding that the accused did not passively receive information, but rather diligently sought to obtain information, and detailed information about the ongoing events. He maintained daily contact with people who were closely briefed and was a central point of consultation for those who governed areas under Bosnian Serb control and that he and Karadzic shared information with each other.

He appeared on television and in the media, where he publicly expressed his attitude

Funded by the European Union

and vision, which represents the embodiment and disclosure of his goal.

"Instructions on the organization and operation of organs of the Serbian people in Bosnia and Herzegovina in extraordinary circumstances" a document adopted by the Bosnian Serb leadership, which later served to implement the policy advocated by the accused.

Based on all the evidence considered by the Council, it is clear that the accused intended to separate from Bosnia and Herzegovina not only the existing territories under Serbian domination; if it were not so, there would be no call for the creation of a new factual situation on the ground. The "ethnic separation" on the ground mentioned by the accused meant the expulsion of the surplus members of other nations from the territories claimed by the Serbs, where they were in the minority, thus creating new territories with a Serbian majority.

The council concluded that the accused disparaged Muslims at all sessions, resisted the idea of secession from Bosnia and Herzegovina, declared that it is impossible to live with Muslims and other things that were interpreted in the verdict on this topic - everything shows a strong hatred towards Muslims.

It follows from the evidence that the accused received reports about the situation on the ground - about the occupation, the attack and the situation in certain municipalities, and this is enough to establish his responsibility.

The accused should not have wondered where the strength of the Bosnian Serbs came from; not only did he know that they were armed and that they had activated their own police forces, not only did he have to know about the help provided by the paramilitary units, but he knew that the JNA forces were also providing them with help.

The panel states that the accused knew about the cooperation provided by the JNA in the seizure of power by the Bosnian Serbs. He was not telling the truth when he told the Council that it was "possible" that he knew that in April 1992 the municipalities with a majority Muslim population were "liberated", but that he did not know which forces participated in it on the side of the Bosnian Serbs. If the accused did not know this, he would have asked.

Funded by
the European Union

No one in the Bosnian Serb leadership was in a position to be better informed about the events in the disputed areas than the President of the Assembly. The Council did not accept the thesis of the accused that he had no contact with the MPs nor that they informed him of what happened and that they were in cooperation with the JNA.

The panel did not accept the accused's thesis that he learned about the crimes like any other person, because the evidence shows the opposite, e.g. that he supported the crime against the inhabitants of Sarajevo and that he wanted to change the national composition of the population of Sarajevo by force, that he participated in the formation of the Serbian municipality of Rajlovac, then that he attended a meeting with Alija Izetbegović at the end of March 1992 at which he supported separation on a national basis in order to prevent further conflicts.

The panel did not find any evidence that the accused ever tried to defend Muslims in the Parliament, nor that he ever tried to prevent any parliamentarian from doing anything directed against Muslims.

He played an active role in the bombing and siege of Sarajevo

He had direct information about the events in Zvornik from Dragan Đokanović as war commissioner for the municipality of Zvornik - Đokanović told him that war crimes were probably committed there - he did nothing.

Bijeljina CSB informed Karadžić about the events in Bijeljina, which means that Momčilo Krajišnik was also aware of it

Reports were submitted on the events on the ground, so there is no doubt that the Bosnian Serb leadership, including the accused, was regularly informed about the whole series of various crimes against Bosnian Muslims and Bosnian Croats, and that they accepted these crimes. These crimes included the killing of civilians, sometimes in large numbers, and the looting and destruction of civilian property

The accused not only knew about the operations of the Bosnian Serb armed forces in 1992, but also actively supervised them as a member of the management. The Bosnian Serb Assembly was the forum where military strategy was formulated and coordinated.

Publicly praised paramilitary formations - e.g. arcanists (named by war criminal

Funded by the European Union

Željko Ražnatović Arkan).

Momčilo Krajišnik and Radovan Karadžić may have install themselves at the recognizable hubs of a modern state structure (President of the Assembly, President of the Republic), but in reality, they ran the Republika Srpska as their personal fiefdom. They intervened and exerted immediate influence on all levels of Bosnian Serb activity, including military operations. They had direct contacts with deputies from municipalities giving them instructions and advice. In fact, the policies, plans and actions of the Bosnian Serbs on the ground coincided with the ideas advocated by the accused himself and he served and deliberately supported them throughout 1992.

When the Supreme Command of the Bosnian Serb Armed Forces was officially established in November 1992, the accused became one of its members.

At that time, the accused was one of the most important figures in the military structure of the Bosnian Serbs, and perhaps he even thought so himself, and in his testimony he could not convince the panel that he did not have such an important role and that he was not only considering issues of bureaucracy and logistics.

The accused accepted the "possibility" that they sent him military reports from time to time. However, it was more than a possibility. During his many trips to Bosnian Serb territories, the accused was able to personally see the extent of the destruction of Muslim and Croat settlements caused by Bosnian Serb forces, and especially the destruction of one conspicuous feature, that is, a former feature of the landscape, namely the mosques.

Deputies and presidents of municipalities also met with the accused in his office and talked with him about, as he said, "various issues".

It was established that municipal managers often sought consultations with the accused, as the president of the Bosnian Serb assembly. Đerić, who was prime minister in 1992, said in his testimony that he often saw representatives of municipalities, especially those of Sarajevo, visiting the accused. Biljana Plavšić testified that the accused's office was always full of deputies and municipal representatives. "I knew every MP as myself," said the accused.

Reports on the forced displacement of Muslims were submitted through the VRS chain of command to the Main Staff, and thus to General Mladić, who informed the

Funded by
the European Union

members of the Presidency about the growth and stabilization of the Bosnian Serb republic. The evidence includes many reports of this type and, although the Panel does not conclude that the accused himself received the relevant reports, it finds that information of this type, as soon as it reached Pale, was passed on to the accused, as well as to Karadžić.

Regarding the detention, the accused claimed that he did not know anything about it until August 1992, but the material evidence shows that this is not true, and the situation in these facilities was not portrayed truthfully, but represented an attempt to conceal the facts by the commissions that were appointed by of the presidency to conduct tours, and one of the witnesses stated that at one of the sessions of the presidency there was no discussion about punishment and the closing of illegal detention facilities.

Everything was discussed at the sessions of the presidency.

The accused, as a member of the presidency, had to be informed about the conditions in the detention facilities, there is an ICRC report that was submitted to the presidency, about which he and the accused had to be informed, as a member of the presidency, he was aware of the combat reports in which the massacres were described, and it follows from the evidence that these reports were not acted upon - no investigations were carried out nor were the perpetrators punished, even the commanders of the brigade whose members committed the crimes still remained in office. It has not been proven that he had effective control - he had power and influence over the authorities, but he did not personally have effective control - would that be the responsibility of the presidency or not?

He knew that the inhabitants of Bosnian Serbs were arming themselves through SDS, but he did not help in this, nor did he encourage it, nor did he participate in the procurement and distribution of weapons, so this allegation was not proven.

Furthermore, it was not proven that he participated in the activities of paramilitary formations, nor was it proven that he was obliged to investigate and punish the perpetrators of crimes because it was not proven that he personally had this authority.

It has been proven that he denied accurate information to the public and international bodies.

Funded by
the European Union

Momčilo Krajišnik is **NOT GUILTY** of genocide; complicity in genocide; killing as a violation of the laws and customs of war.

Momčilo Krajišnik **IS GUILTY** according to Article 7(1) of the Statute:

- persecution as a crime against humanity;
- extermination as a crime against humanity;
- murder as a crime against humanity;
- deportation as a crime against humanity;
- inhuman acts (forcible transfer) as a crime against humanity.
- Guilty of individual responsibility and JCE

Sentenced to 27 years in prison, with the fact that he wanted to achieve the goal by killing and extermination as one of the most serious crimes, as well as the forced relocation and persecution of the population, as well as the brutality of the treatment and the consequences for the victims that cannot be corrected by any punishment, was considered as an aggravating circumstance. economic and social consequences, the geographical spread of the crime and the duration of the crime, he abused his position and function and abused the trust of the civilian population, which increased the gravity of the crime and the responsibility per member 7(1) of the Statute as well as the level of education of the accused and his position as a politically strong personality whose obligation was to protect the population and to be expected to prevent or punish crimes, not to support them.

Among the mitigating circumstances, the court took into account the fact that he was 61 years old at the time of the trial, had good behavior in custody and that for him a sentence of 27 years actually represents a life sentence, his previous lack of conviction, personal and family circumstances, as well as the fact that the accused helped to some non-Serbs to be released from captivity, but that there is still responsibility for the JCE, as well as the fact that there was a conflict and that it was not only Bosnian Serbs who committed crimes that made the council succeed to understand why Momčilo Krajišnik committed the crimes, the personality of the accused had no influence on sentencing in terms of his attitude at the time of the crime because it was explained that he acted in a discriminatory manner and that

Funded by the European Union

some of the witnesses said that he was very cynical.

When determining the sentence, the council took into account the practice that was established for war crimes in the former Yugoslavia, guided by the provisions of the Criminal Code of the SFRY in such a way that this law stipulated that the longest prison sentence is 15 years, but that for the most serious crimes it can be imposed the death penalty or, instead of a prison sentence, a prison sentence of 20 years, which is why the panel, taking into account the practice of the ICTY, imposed a prison sentence of 27 years.

The appeals panel convicted him for these points

- 1st point 3, persecution (deportation): Bratunac, Zvornik, Sanski Most, Banja Luka, Bijeljina and Prnjavor;

- 2nd point 3, persecution (forced transfer): Bijeljina, Bratunac, Zvornik, Bosanska Krupa, Sanski Most, Trnovo and Sokolac;

- 3rd point7, deportation: Bratunac, Zvornik, Sanski Most, Banja Luka, Bijeljina and Prnjavor;

- 4th point 8, inhuman acts (forced relocation): Bijeljina, Bratunac, Zvornik, Bosanska Krupa, Sanski Most, Trnovo and Sokolac

While for the other counts, the first-instance verdict was annulled because the appellate panel found that criminal responsibility was wrongly attributed for certain acts (these are acts for which he was convicted in the first instance, but for which he was not in the second-instance verdict).

Neither the Appellate Chamber, nor the Trial Chamber, stated in their verdicts that they have no doubt that serious crimes were committed against Bosnian Muslims and Bosnian Croats in large areas of Bosnia and Herzegovina in the period from April 1992 to December 1992. However, the evidence that the crimes took place is not sufficient to support a conviction against Momčilo Krajišnik because some acts were not proven beyond a reasonable doubt. This appellate panel concluded that the trial panel had to establish, that is, the prosecution had to prove that the JCE participants had a common goal that represented or included the criminal acts for which he was convicted in the first instance.

Funded by
the European Union

Social aspect and general prevention

When it comes to the civil aspect, this would mean that the injured parties and victims as well as their families can settle for the damage caused as a result of the acts described in the verdict against Momčilo Krajišnik. However, the judgment did not specify how and in what way the injured parties can exercise their rights. First, it is questionable what kind of rights they could and should realize in the first place due to the heinous crimes committed by Bosnian Serbs guided by the goal and idea of Momčilo Krajišnik.

The verdict does not direct the injured party to pursue a property claim. The question is against whom and in what way this litigation would be directed. If today's laws were applied, the lawsuit could only be directed against the convicted person, in this case Momčilo Krajišnik, and it would be practically impossible, even pointless, to conduct such proceedings against one man.

The injured, the victims and their families could in no way, with any money, be able to compensate for the lost lives, as well as the mental and physical suffering, which is serious and difficult, especially for those who stayed in camps and detention facilities, so any sanction or any compensation could satisfy the victims in terms of non-material damage, as well as the emotional and sentimental moment due to the fact that people were forced to leave their homes, jobs, and could not return there later, or worse, that they lost their property had to give ownership to the municipalities that belonged to the Bosnian Serbs.

When it comes to looted, ransacked and burned houses, in that sense there would be both material and non-material damage, with the fact that conducting any civil proceedings was also impossible. The same applies to business premises, restaurants and other business activities carried out by Muslims and Croats in the areas covered by the indictment.

The victims have never in no way been able to be satisfied or achieve any satisfaction, nor has any regulation or legal framework been adopted to date that would in some way enable the protection of the rights and interests of the injured.

Additionally, all witnesses who survived those events would be re-traumatized by testifying and being reminded of those events.

As for the acts and crimes described in the indictment against Momčilo Krajišnik, it

Funded by
the European Union

should be emphasized that these are huge consequences hundreds of years later that will be suffered by the population from the area covered by the verdict, and which is certainly reflected in the situation in the whole of Bosnia and Herzegovina, to this day.

With the pronouncement of judgments, there was a certain social condemnation of everything that happened by the international community, but within the borders of Bosnia and Herzegovina, the condemnation mostly came from one or two sides, i.e. on the part of those who suffered, while a part of society in Bosnia and Herzegovina does not even recognize the legally established facts to this day. Moreover, they continue to try to belittle and distort it to the extent that some details appear in school textbooks, which requires intervention by society and institutions. These are still mostly the actions of people who belong to the Serbian nationality. The message - a policy rewarded by the formation of the RS whose political leaders, followers of Momčilo Krajišnik's policy, deny the genocide, do not accept the facts and justify it in some way. It should be noted that such a policy in the area that was once under the control of the authorities of the Republic of Serbia, in which Momčilo Krajišnik participated, was destroyed.

The consequences are also reflected in the destruction of the economy, education, and culture of the Muslim and Croatian people. In particular, it should be borne in mind that the crimes took place in a wide geographical area, including in the capital of Bosnia and Herzegovina, in Sarajevo as the center of Bosnia and Herzegovina.

Consciousness was additionally affected by the demolition and destruction of religious buildings and national monuments with the aim of removing the identity of Muslims and Croats as their symbols. The verdict even states in one part that Serbian religious buildings everywhere were spared in the attacks that are the subject of the indictment.

The consequences are reflected in the health and physical and mental health of the entire population, poverty, difficult struggles for life, people whose working life was interrupted or people who were supposed to start work during the war, it was interrupted and to this day they may never have been employed or work temporarily and occasionally. A large number of people from these areas moved away and continued to live in European countries and never returned to BiH.

What is worrying is the fact that the direct perpetrators of the crime, as well as

Funded by
the European Union

officials at various levels, although they are known, have never been prosecuted and live and move perhaps among people who are members of the families of the victims and the injured, or what is worse, are employed by the state and public institutions. Some of the criminals are members of public, social and active political life. Article IX of the Constitution of Bosnia and Herzegovina clearly stipulates that no person who has been prosecuted before the ICTY can be a candidate or hold any unappointed, elective or other public office on the territory of Bosnia and Herzegovina, however the situation in society is such that certain persons have not been prosecuted before any court, which leaves them with the possibility of active engagement in all spheres of life.

What is even more worrying is the slow and inefficient way of conducting investigations and proceedings in the courts of Bosnia and Herzegovina, the audits and statuses of these proceedings are repeatedly carried out, which are never positive, and the deadlines are always extended and new strategies adopted for the resolution of war crimes cases. The fact that twenty years have passed and there are still a lot of unsolved cases and investigations is devastating.

Most of those who could be suspected or accused, as well as witnesses, are already elderly people, and due to inefficient management of proceedings, confidence in any positive outcome is lost, to the extent that people do not even want to testify. Finally, I could add the fact that today there is an entity Republika Srpska which should and generally functions as an entity created after the signing of the Dayton Agreement, however the fact is that the current public officials continue to subtly implement the policy that was outlined long ago by the ideology of Momčilo Krajišnik. Given that Karadžić Radovan is closely related to Momčilo Krajišnik in this part, the two judgments share the same civil and social aspect. What is specific about Radovan Karadžić is that the verdict refers specifically to Sarajevo and Srebrenica.

In the verdict against Radovan Karadžić, the consequences for society are more prominent because the verdict refers more to concrete events and more consequences. It should be added the fact that the Serbian forces under the control of Ratko Mladić as the commander of the VRS, who was guided by the ideas of Radovan Karadžić and Momčilo Krajišnik, the population of several municipalities, especially Sarajevo and Srebrenica, suffered great and severe consequences due to exposure to constant and deliberate shelling and sniper shooting in which destroyed a large number of civil, cultural and educational facilities. A large number of civilians and children were killed. As far as the public knows, to date no one has been

Funded by
the European Union

prosecuted in the case of the murdered children of Sarajevo, and the perpetrators are known.

For Srebrenica, every word is superfluous, the pain and suffering of this population is indescribable considering the fate they experienced. Forced expulsion, persecution, exposure to conditions to the point of unbearable that some people had to commit suicide to mass killing which ultimately ended in a conviction for genocide.

The consequences are also reflected in the fact that there was a displacement of the population, that the inhabitants of certain cities and municipalities never returned to where they left during the war.

The importance of Sarajevo is indisputable. Its significance is described in the verdict against Radovan Karadžić, it is clear that the Bosnian Serbs wanted to divide Sarajevo into Muslim and Serbian, and this follows from their documents. Later, they implemented these goals in the field by committing crimes. Sarajevo was under siege and blockade all the time, with a shortage of food, drink, water, gas, and electricity, where the only way out of the city was via the airport runway and the escape tunnel, which is enough to indicate the destruction of the city and the years needed for recovery. Almost four years of cutting off the capital of a country means the complete destruction of its progress, economy and economy.

The city of Sarajevo was significant not only because of what it represented and the fact that without it the Bosnian Muslim side would not be able to have a functional independent state, but also because it had special importance, e.g. for Radovan Karadžić, who lived in it until the beginning of the war and considered it his city, which surely caused him a greater need to consider it a city belonging to the Serbian people.

The social consequences are reflected in the fact that those who were displaced left their homes and property, without any guarantee regarding the possibility of returning in the future, which caused severe mental suffering or injury to the victims. In addition, some of the persons displaced from Srebrenica had previously been relocated from their homes in other municipalities; their displacement from Srebrenica increased their sufferings and as is known to the public, this kind of ideology is still felt in Srebrenica and it is undeniable that the displaced population did not return there.

The goal and actions in Srebrenica show the intention to destroy a nation, this can

Funded by
the European Union

be seen especially in the action that boys and men from 16 to 65 years of age were killed, and this does not mean only those who are fit for the military, but to influence the descendants of that nation in the area Srebrenica.

People from the area of Srebrenica were displaced all over Bosnia and Herzegovina, and today most of these people live in the vicinity of Sarajevo, while a certain number of residents have gone to live abroad.

Funded by
the European Union

RADOVAN KARADŽIĆ

The case against Radovan Karadžić refers to the events that took place in the period from October 1991 to November 1995 in various locations in Bosnia and Herzegovina, including in Sarajevo, Srebrenica and 20 municipalities in the Autonomous Region of Krajina (ARK), in the area of Sarajevo and in eastern Bosnia and Herzegovina - far longer period and a larger geographical area compared to Momčilo Krajišnik, whose accusations are related to the accused, considering the goal and the function he performed. These are the following municipalities: Bijeljina, Bratunac, Brčko, Foča, Rogatica, Sokolac, Višegrad, Vlasenica and Zvornik in eastern BiH; in the municipalities of Banja Luka, Bosanski Novi, Ključ, Prijedor and Sanski Most in the Autonomous Region of Krajina (ARK); and in the municipalities of Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale and Vogošća in the Sarajevo area.

The accused was one of the founders of SDS and its president from July 12, 1990 to July 19, 1996. The accused was the chairman of the Council for National Security of SrRBiH, which was founded on March 27, 1992. and sat until approximately May 1992. On May 12, 1992, the accused was elected president of the three-member Presidency of SrRBiH. At the beginning of June 1992, the Presidency was expanded to five members and the accused remained in office as the President of that Presidency. From December 17, 1992, he was the sole president of the RS and the supreme commander of the armed forces of the RS.

Karadžić was charged under Article 7(1) of the Statute – individual responsibility for participating in four related JCEs and the fact that he participated in a "comprehensive" JCE to permanently remove the population of Muslim and Croat nationality from the territory of BiH claimed by the Bosnian Serbs by committing crimes as stated in the indictment, to initiate and carry out a campaign of sniping and shelling directed against the civilian population of Sarajevo, whose primary goal was to spread terror among the civilian population, the accused participated in the JCE to eliminate the Bosnian Muslims in Srebrenica killing Srebrenica men and boys, as well as forcibly taking women, children and some elderly men from Srebrenica, to take 200 UN peacekeepers hostage in order to force NATO to refrain from airstrikes on Bosnian Serb military targets - so JCE in the sense of permanent removal of the Muslim and Croat population, JCE related to Sarajevo, JCE in Srebrenica and prevention of air attacks on Bosnian Serb military targets.

According to individual responsibility, it is not charged that he personally physically

Funded by
the European Union

committed the acts, but that he shared the intention within the JCE and contributed to each act. Radovan Karadžić was a central figure in the events in Bosnia and Herzegovina in the period from 1991 to 1995.

The defendant is charged with planning, inciting, ordering, and/or aiding and abetting the crimes listed in the Indictment and as a superior under Article 7(3) of the Statute - command responsibility for genocide, persecution and extermination and murder, deportation, inhuman acts as a crime against humanity, murder, acts of violence with the primary aim of spreading terror among the civilian population, illegal attacks on civilians, taking hostages as a violation of the laws and customs of war - specifically stated for which municipalities both for Sarajevo and Srebrenica.

According to his command responsibility, he was charged with the fact that he was superior to the civil and military authorities and that he exercised effective control over all state bodies that participated in crimes and that was the actual situation on the ground.

Extremely complex and voluminous proceedings were conducted against this accused, tens of thousands of pages, the judgment itself has over 2,500 pages, a large amount of evidence was conducted, a large number of experts, the first-instance judgment was drawn up in 4 volumes It is specific that in this proceeding a certain number of witnesses were heard who were sentenced before the ICTY and to whom the accused was superior - the accused is the "crown" of all events in the territory of Bosnia and Herzegovina during the war period, and that is how he and the judgment against him are presented to the public., the entire public in these areas, and especially the victims, were extremely interested in the outcome of this proceeding, especially since it concerned the Srebrin area, and bearing in mind what was put to the accused as the ultimate goal that he wanted to achieve by committing the crime.

The first-instance verdict at the beginning elaborates the standard of proof and evaluation and acceptance of evidence by the trial panel, and then elaborates the historical aspect and "background" of the case, namely the disintegration of the SFRY, events in the territory of Bosnia and Herzegovina since 1990, the declaration of Bosnia and Herzegovina as an independent state, events in January and in February 1992, when a people's referendum was supposed to be held regarding the opinion on independence, the decision of which was announced by the Bosnian SBI, who were in the ruling structures, as illegal and, in parallel, at the end On February 28, 1992, they adopted the Constitution of the Republic of Bosnia and Herzegovina.

Funded by
the European Union

International and inter-party tensions were then created, in which SDS officials and Bosnian Serb leaders began to proclaim certain ideas that we have already stated in the analysis of the verdict of Momčilo Krajišnik. On May 16, 1992, the accused was presented at the assembly the strategic goals of the Bosnian Serbs, the essence of which was reflected in the separation of the Serbs from the other two national communities, the erasure of the Drina river as a border, the division of Sarajevo into Serb and Muslim and the exit of Repuplic of Bosnia and Herzegovina (RBiH) to the sea.

Further, the first-instance judgment elaborated on the establishment and policy of the SDS, the implementation of that policy and its structure and hierarchy, then the establishment of the Assembly of the Serbian People (the president was Krajišnik), which on August 12, 1992. made a decision to change SrRBiH to RS. In 2008, the accused was appointed as the President of the RS and his duties were to represent the Republic, propose to the National Assembly candidates for the Prime Minister and candidates for the President and judges of the Constitutional Court, promulgate laws by decree, issue pardons, award awards and recognitions established by law and perform other affairs in accordance with the Constitution, he also had extraordinary powers to, during a state of war or imminent danger of war, on his own initiative or at the proposal of the Government, pass acts on issues within the competence of the Assembly, and submit them for confirmation To the Assembly as soon as it is able to meet.

The accused, as the President of the Republic, was the commander-in-chief, or supreme commander, of the VRS, and on May 21, 1992, the accused, in his capacity as the President of the Presidency, issued an order for general mobilization and, as the President, had the authority to issue an order for the use of the police for time of war. 15.06.1992. in 2010, the accused established a command and control system in the VRS. The VRS consisted of the Main Staff and operational groups, including ground army corps, which included brigades, regiments and units, and the Main Staff was directly subordinated to the accused as president, and on November 30, 1992, the accused, in his capacity as president of the Presidency, founded the Supreme Command in order to coordinate and improve the efficiency of the VRS command system, and the accused was Supreme Commander until July 1996, in which function he had the widest authorizations (issuance of instructions, organization and all other matters of strategic importance).

His subordinate was the commander of the Main Staff (the highest operational body)

Funded by
the European Union

and that was Ratko Mladić. The main staff had corps. As the Supreme Commander, the accused was superior to everyone and received reports from everyone (the verdict elaborated the system of functioning and reporting of the VRS) through the Corps to the Main Staff to the accused as the Supreme Commander. Thus, the accused was informed about everything in detail through a hierarchical reporting system, each corps from its area of responsibility sent a report to the main staff, and the main staff to the accused as the commander. There are numerous such reports in the evidence, from which it can be indisputably concluded that the accused came up with the entire plan, was at the head of all bodies and functions, gave instructions, guidelines, plans and received reports about it in return - the authorities of the RS were founded in this way and functioned. It is specific for the accused that as the president of the RS he was the supreme commander of the VRS. He received all military and intelligence reports on a daily basis (not only in writing, but also through meetings and telephone conversations, which was taken as evidence). Military courts and prosecutor's offices were also established, which the accused put under his control, as the president of the RS, he appointed all prosecutors and judges of military courts and dismissed them. Priority was given to solving the cases for those who avoided military service, which indicates what kind of goal and plan the accused had. The accused established such a system that he established all government bodies, appointed all officials, dismissed them and controlled them.

The accused issued an order that everyone must comply with the rules of international humanitarian law, the Third and Fourth Geneva Conventions, and a law on the subject was also adopted (the Law on Compulsory Submission of Information on Committed Crimes Against Humanity and International Law). In the verdict, it was established that regardless of the fact that he issued such orders, he did not do anything to ensure that they were implemented. The accused, as a representative of the Bosnian Serbs, participated in international negotiations to end the conflict in Bosnia and Herzegovina in mid-1992, but the verdict shows that his intentions in this regard were not sincere and realistic, and that he advocated the division of Sarajevo into Serbian and Muslim parts, as that numerous problems arose in the negotiations regarding the Srebrenica area, and none of the agreements and plans that took place in 1992 and 1993 bore fruit because the Bosnian Serbs led by Radovan Karadžić insisted on the sovereignty of the RS.

Karadžić constantly presented members of the Serbian nationality as victims, as if they could not live together with other members, and insisted on separation. No

Funded by
the European Union

peace plan was sufficient and effective for a complete ceasefire - the first- instance verdict describes every negotiation during the entire war period, which I do not consider important to analyze at this moment, because I am analyzing the verdict from the aspect of the accused. At this point, it is enough to say that he participated in the negotiations, and if necessary, his role can be analyzed.

The first-instance verdict analyzes the municipalities individually in which the council makes conclusions about the situation in each municipality and describes the actions of the Serbian forces regarding the commission of the crime. The first-instance panel determined that all the suffering and consequences were the result of the actions of the Serbian forces and that the Serbian forces acted with that intention. The first-instance verdict found that in all cases, civilians were involved, and that it was a widespread and systematic attack directed against the civilian population of Muslim and Croatian nationality.

Regarding the acts and actions of the Serbian forces, we can refer to the analysis of the judgment of Momčilo Krajišnik, because both of them shared the same intention and the same goal when it comes to the resettlement of the population. The council found that in the municipalities that are the subject of the indictment, the Bosnian Serb forces spread such an atmosphere of fear that caused the violence, killing, cruel and inhuman treatment, illegal detention, rape and other acts of sexual violence, discriminatory measures and reckless destruction of villages and houses. and cultural monuments in which it was impossible to live, that it was suggested in the worst possible way to Muslims and Croats to leave those areas (either forcibly or voluntarily) and that these acts constitute inhumane acts under Article 5 (i) of the Statute as crimes against humanity. The same applies to acts of murder.

When it comes to abuse in detention facilities and camps, it is about such acts that humiliate human dignity to the lowest possible extent, so that the act of beating would be the mildest form of inhumane treatment. In addition, the council found the criminal acts of rape, as well as discriminatory behavior directed against certain members of the people, then illegal detention, as well as taking people to forced labor and using people as human shields, looting the property of Bosnian Muslims and Bosnian Croats, and destroying cultural and religious buildings and monuments, then the imposition and maintenance of restrictive and discriminatory measures through the fact that all key positions in the local government were taken over by Bosnian Serbs. In some municipalities, Bosnian Muslims were prevented or dissuaded from coming to work, while others were exposed to threats, harassment

Funded by
the European Union

and insults, after which they stopped coming to work, suspension of salary payments to Bosnian Muslim workers, while Bosnian Serb workers, still received a salary, telephone connections were limited, the right to shop in stores was limited.

When reaching these conclusions, the Council took into account the locations, time period and identity of the victims of those acts, which correspond to the extent of the widespread and systematic attack, as well as the scale and systematic character of the attack on the Muslim and Croat civilian population of Bosnia and Herzegovina.

When it comes to the criminal offense of Genocide, the accused claimed that neither he nor the other members of the Bosnian Serbs had genocidal intent. In the verdict, the Council concluded that the statements made by the accused and the inciting speeches were not of a genocidal nature in the sense of the destruction of a nation, but had the character of a warning in the case of independence and drawing attention to the fact that coexistence is impossible, and that in their entirety, based on of the entire file do not indicate that the accused and other named members of the JCE had genocidal intent to destroy a nation. The verdict stated that during 1991 and 1992, the accused had the intention to preserve the Serbian identity and not to marginalize the Serbs, and that the accused played a key role in promoting the ideology and politics of the SDS in this regard. In addition, the verdict concluded that the accused's speech did not reflect the situation on the ground - more precisely, that he misrepresented the facts. The panel found that the accused emphasized the suffering of Serbs in past wars and that he justified his ideology and vision with that. The accused was very direct with his statements at the time when the situation surrounding the independence of Bosnia and Herzegovina was taking place, where he publicly threatened the disappearance of Muslims and that they would disappear if there was a war (Karadžić's famous statement). The accused participated in conversations and attempts to influence and convince Izetbegović that Bosnia and Herzegovina was not going to declare independence, that he did so with Milošević, and that both publicly and in internal conversations he stressed the protection of Serbs and their secession, which the verdict characterized as threats.

The Panel also states that the accused supported the creation of entities in BiH based on ethnicity and that he also advocated for the identification of Serb areas from which Bosnian Muslims would be excluded, that the attitude of the accused was that the Bosnian Serbs would not allow the secession of BiH from Yugoslavia and that they would, if Bosnia and Herzegovina insists on independence, the Bosnian Serbs will also do so, and that he characterized Muslims as a religious sect that received

Funded by
the European Union

the status of the People through a referendum. However, the panel found that the accused presented Serbs as victims in public, was against the conflict, but that the evidence shows otherwise in his private conversations. In fact, Karadžić insisted and tried to implement the plan to break away territorially from the Serbs. The analysis is identical to that of Momčilo Krajišnik, that living together is impossible. The accused supported and praised the military successes of the VRS under Mladić's command, and that as early as September 1991 he had identified the territories to which the Bosnian Serbs would lay claim. In the framework of achieving control over that territory, the accused worked on the creation of parallel institutions, authorities, and military and police structures that could achieve or maintain control over those areas.

The accused's rhetoric and conversations with representatives of the international community also clearly show that he advocated the separation of nations and that he believed that coexistence with Bosnian Muslims and Bosnian Croats was impossible.

The panel further notes that the strategic goals of the accused and the Bosnian Serb leadership were also communicated to the VRS and that they constituted a key element in the military strategy of the VRS, which was the creation of the RS. These speeches and statements show that the accused and the leadership of the Bosnian Serbs supported and advocated the conquest of territories that were achieved by military means by Serbian forces.

The accused and the Bosnian Serb leadership were aware that the goal of ethnic separation would lead to violence, considering the extent to which the population in BiH was mixed, and yet they continued to achieve that goal.

The strategic goals that the assembly of Bosnian Serbs agreed upon, and that the accused had an explanation for each of these goals, they were a key element of the military strategy:

- separation from the other two national communities and separation of states;
- establishing a corridor between Semberija and Krajina;
- establishing a corridor in the Drina river valley, that is, eliminating the Drina as a border between Serbian states;

Funded by the European Union

- establishing a border on the Una and Neretva rivers;
- the division of the city of Sarajevo into Serbian and Muslim parts; and
- exit of SrRBiH to the sea

Karadžić played a central role in formulating, promoting and distributing the Strategic Goals, emphasizing the first goal and the importance of separation from the other two national communities. These were not only the goals of the accused and other members of the Serbian leadership, but an instruction to all lower authorities to act in this way. These strategic goals were the central element when it comes to the goals of the Bosnian Serbs all the time during the conflict in BiH and the accused continued to emphasize their importance during 1995. Karadzic also brought a document on the organization and action of the Serbian people with variant A and variant B (A municipalities where the majority are Serbs, and B where Serbs are a minority) in which certain measures and procedures were prescribed (the instructions also provided that the commander of the Crisis Staff should be, in the municipalities of Variant A, the president of the assembly municipalities or the president of the executive committee of the municipality, and in the municipalities of Variant B the president of the SDS municipal committee, to convene and declare an assembly of the Serbian people in the first instance, which would consist of councilors from the ranks of the Serbian people in the municipal assembly and presidents of local SDS committees, make preparations for the formation of municipal state bodies, such as the executive board, administrative bodies, the court for minor offenses and the SJB, as well as the preparation of personnel proposals for the performance of work in these bodies, to carry out an assessment of the number of members of active and reserve composition of the police, TO units and civil protection units, to "replenish" these units and to take the necessary actions for their activation in accordance with the development of the situation, the filling of war units.) - the implementation of this instruction led to the declaration of Serbian municipalities on the territory of BiH, all under the idea of Karadžić, who followed the implementation of the instruction and received reports, even personally intervened or sent commissioners in case of non-functioning. So, Karadžić is the central figure thanks to which all government bodies are formed and their functioning is maintained. He monitored the execution of the instructions and ordered which action to be carried out. This instruction was the basis for the formation of parallel organs, variant A implied the formation of Serbian organs, and variant B implied the recognition of other ethnic groups, but only if they followed

Funded by
the European Union

the goals of the Bosnian Serbs.

The accused was an undisputed authority in SDS politics. Karadžić and Krajišnik cooperated closely in everything. The central figure of all events, the formation of the RS and all its organs, he implemented all the decisions made at the presidency and were respected at all lower levels and followed all the acts and decisions conceived by Karadžić. This was the formation of territorial (formation of autonomous regions) and administrative and political and any other space in which the policy and goals of the SDS would be implemented, the main actor of which was Karadžić, in cooperation with other high officials of the Bosnian Serbs.

Karadžić was active in all periods of the war, he appointed or elected the presidents of the war presidencies, he advocated the idea that the Serbs should take over the territories to which they claim, he asked for the division of municipalities into Serbian and Muslim ones, he participated in the decision on the declaration of an imminent threat of war by SNB, the way in which the Instruction with variant A and B was distributed shows a high level of organization, planning and coordination in order to ensure that all key managers of Bosnian Serbs in the municipalities receive this instruction, all with the goal creation of a separate state that would belong to the Bosnian Serbs.

In the proceedings, this accused also tried to downplay the significance of some facts such as the chain of command, that is, that there was a phenomenon of false reporting, which the verdict did not accept.

Given that Karadžić was the supreme commander of the VRS, the commander of the Main Staff, Mladić, was subordinate to him, but the accused disputed that thesis, pointing out that he had no cooperation with Mladić, there was evidence that he and Mladić differed in their views, but it was still established that the two of them had a superior-subordinate relationship in the spring of 1995. The verdict established that I Mladić shared a common plan with the others - Mladić contributed through his role as commander of the Main Staff and through the direct engagement of VRS units in operations during which forced expulsion of non-Serbs and other crimes were carried out in the municipalities. In addition, the Council concluded that, despite the fact that in some periods there were tensions and disagreements between the accused and Mladić regarding some aspects, the accused retained his role as Mladić's superior and had de jure control over him, and that this control exercised over him de facto during the entire conflict; accordingly, no temporary

Funded by
the European Union

disagreements between the accused and Mladić call into question their agreement or the contribution Mladić made to the joint plan at any time from his appointment on May 12, 1992 until at least November 30, 1995 Karadzic had all the authority over military matters and the VRS both at the strategic and operational levels, and he also had de jure authority over the MUP of the Bosnian Serbs from April 15, 1992 at the latest, which he effectively exercised as the president of the Presidency and, later, as president of the RS and supreme commander of the VRS, he participated in the formation of territorial defenses and exercised de facto control over them. He had a different attitude towards the paramilitary formations, he tried to drive them away and dissolve them, with the proviso that he would keep them if they submitted to the VRS.

The judgment elaborates on Karadžić's contacts and cooperation with individuals by name, of which Slobodan Milošević, who was then president of the Republic of Serbia, is worth mentioning.

From April 1992, Karadžić knew and was informed in a timely manner about the displacement of non-Serb civilians and he knew about the acts of Serbian forces against those people, he knew about the abuse of non-Serb civilians, about the conditions in the detention facilities, but that he minimized all this to the representatives of the international community falsely represented the facts. It was also established that there was a systematic failure to punish the perpetrators and conduct investigations, and the accused justified this by the lack of funds, the impossibility of collecting evidence, which the panel did not accept because it follows from the evidence that nothing was ever done about most of the incidents, and the accused was informed about it, he even promoted or rewarded some of those he knew to have committed criminal acts.

With regard to the joint plan, the verdict established, as already stated in the analysis, that from 1990 until mid-1991 the political goal of the Bosnian Serb leadership was to preserve the integrity of Yugoslavia and prevent the independence of Bosnia and Herzegovina, but that this later changed to plans for the creation of a Bosnian Serb state which goal was developed by the accused with other members of the management and that through military means.

The panel concludes that Krajišnik, Koljević and Biljana Plavšić, together with the accused, shared the intention to implement a joint plan for the permanent removal of Bosnian Muslims and Bosnian Croats from the territory claimed by the Bosnian

Funded by
the European Union

Serbs, and that, through their position in the leadership of the Bosnian Serbs and with their involvement in the entire area of the Municipalities, contributed to the execution of that joint plan in the period from October 1991 to at least November 30, 1995.

Joint Criminal Entrerprise (JCE)

Radovan Karadžić was the first man when it came to the elaboration and promotion of the SDS (Srpska Demokratska Stranka/ Serbian Democratic Party) ideology, which included preventing the separation of Serbs, determining historical Serbian territories, and creating a united Serbian nation. These principles formed a key element of the SDS policy and the goals of the Bosnian Serb leadership were based on them. The judgment established that these goals were not criminal in the beginning, they created the conditions for the realization of criminal intent. The accused had a key role, i.e. he laid the foundation for the realization of that intention, which was the homogenization of the Serbian population and the creation of an entity on a national basis, in which the accused not only formulated that policy but was determined not to let anything stop the Bosnian Serbs in achieving their goals. The accused was instrumental in formulating policies and actively promoting the creation of parallel state, military, police and political structures that were used to seize or maintain control over Bosnian Serb-claimed territory designed to support the existence of a separate state. of Bosnian Serbs and enable the achievement of the goal of the comprehensive JCE. During all that time, the accused held all the most important functions of the state, military and political structures and used his influence to advance the goal of eliminating Muslims I he directly determined the territories that he considered the Serbs to be entitled to, and in this sense he used all possible means and all authorities with the goal of a comprehensive JCE.

The accused used rhetoric to create hatred and fear among Muslims and Croats, he spread such propaganda through all levels of government and controlled their effectiveness. He went to such an extent that he presented the Serbian people as victims and that they are endangered and therefore need to be protected. This later created a base for crimes. He conducted and ordered all military actions, controlled them and received reports on them through the chain of command, and during the entire period he had information about crimes and "ethnic cleansing".

Funded by
the European Union

The panel considers that the accused's failure to exercise his authority to adequately prevent or punish crimes committed against non-Serbs sent a signal to Serbian forces and Bosnian Serb political and state authorities that crimes against non-Serbs were tolerated throughout the period of the comprehensive JCE. In view of this, his failure to take appropriate steps to prevent and punish criminal activities directed against non-Serbs in the Municipalities had the effect of inciting and enabling criminal offenses under the first category of the JCE, but the judgment found that the Council was convinced beyond any reasonable doubts that the accused could foresee that the Serbian forces that were used to achieve the goal of the joint plan, during its implementation, could, with the intention of discriminating, commit persecution through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, then creating and maintaining inhumane living conditions in detention facilities as cruel or inhuman treatment, killing, forced labor on the front line, using non-Serbs as human shields, confiscation or looting of property, and wanton destruction of private property, including cultural monuments and religious buildings. In addition, the Council finds that the accused could foresee that the Serbian forces, which were used to achieve the goal of the joint plan, could commit murder during its execution. Finally, the fact that the accused knew that the joint plan was being carried out over a large geographical area and that numerous protagonists from civilian and military units participated in its implementation, and that he was directly informed of the mass killing at the beginning of April 1992, shows that he knew that there was a possibility that the Serbian forces that were used to achieve the goal of the joint plan might commit large-scale killing. Accordingly, the Panel finds that the possibility that Serb forces might commit extermination was sufficiently significant that the accused could have foreseen it. These criminal acts will be referred to as "criminal acts under the third category of the JCE".

The accused bears individual criminal responsibility based on Article 7(1) of the Statute within the JCE for

- persecution, crime against humanity (point 3);
- extermination, crime against humanity (point 4);
- murder, crime against humanity (point 5);
- murder, violation of laws and customs of war (item 6);
- deportation, crime against humanity (point 7); and

Funded by the European Union

- inhuman acts (forced transfer), crime against humanity (point 8).

The first-instance judgment contains a part that refers to Sarajevo, in which part the sniping was elaborated, which was intentional, which led to the random casualties of civilians and the destruction of buildings, as well as the shelling of Sarajevo with the aim of spreading terror among the civilian population, then the judgment analyzed each part in detail Sarajevo, every street and incident that is the subject of the indictment, up to the Markala market, which was determined not to have been a military target, that the direction of the shell was from the territory commanded by the Serb Republic of Krajina (SRK) (in the proceedings it was questioned where it came from the grenade arrived, and it was established by the evidence that it was from the area commanded by the SRK - by expert testimony and determination of the direction of the grenade, the list that he possessed, which equipment, etc. and that the victims were exclusively civilians.

The verdict also elaborated on the firing of modified aerial bombs, which was under the strict supervision of the VRS Main Staff, and that there was deliberate, disproportionate and indiscriminate shelling of civilian objects and civilians in the city, which means that if all this was under the supervision of the VRS Main Staff, that all Radovan Karadžić also knew about it, of which there is no doubt.

The verdict concluded that the SRK essentially surrounded Sarajevo and kept it under siege, and that the city, as such, was under a blockade, and that the population could not leave the city safely even because of the events in the towns around Sarajevo.

The aim and intention of Karadzic can best be seen through the elaboration of the situation and the siege of Sarajevo, from which you can actually see the idea set in the Strategic Objectives, which is to firmly hold the city under blockade and gradually tighten the ring; carry out, among other things, offensive operations and liberate the remaining parts of "Serbian territory", which will improve tactical positions and normal communication within the RS; isolate parts of the city and surrounding settlements and ensure the most favorable position for the division of Sarajevo.

None of the thesis of the accused in this part was accepted.

In relation to Sarajevo, Karadžić was accused of violating the laws or customs of war under Article 3 of the Statute, specifically for murder, terrorizing and unlawful

Funded by the European Union

attacks on civilians, as well as in one count of the Indictment for crimes against humanity under Article 5 of the Statute, specifically for murder.

With regard to Sarajevo, the verdict found that the attack on the civilian population in Sarajevo was both widespread and systematic, and that in each of the incidents in Sarajevo, the perpetrators acted with the intention of killing the victims or at the very least inflicting serious physical injuries, although it was reasonable to assume that such actions could lead to death and that these murders constitute an integral part of crimes against humanity.

In regard to some shelling and killings where it could not be established beyond a reasonable doubt that they were targeted from SRK positions, the council did not make a condemning decision.

JCE related to Sarajevo (started at the end of May 1992 and lasted until October 1995) The verdict found that the pattern and duration of sniping and shelling in the city are the two most convincing factors that support the prosecution's claim that there was a joint criminal plan to launch a campaign of sniping and shelling aimed at spreading terror among the civilian population in Sarajevo. This lasted for over three years, and because of this, the defendant's thesis that it was a coincidence or that some actions of the soldiers "got out of control" and that there was indiscriminate shelling and attacks on the city as part of a joint plan cannot be accepted. The accused, as part of the Bosnian Serb leadership, was informed of all this, he was informed that civilians were dying and that they were exposed to such types of terror, but that they agreed to it to the extent that it became normal and usual. There were well-fortified sniper nests, fire was opened on civilians and civilian objects, and most importantly, it was established that this was not possible without the command of the SRK and the Main Staff of the VRS, which are directly subordinate to the accused, and that the shelling was part of the plan. The accused wondered about everything when it comes to Sarajevo.

The relationship between Radovan Karadžić and Ratko Mladić, whom Karadžić brought and appointed as the commander of the Main Staff of the VRS, is significant. He freely formulated his strategy for Sarajevo in front of the accused and other members of the Bosnian Serb political leadership and stated very clearly that, in his opinion, the siege and the shelling of Sarajevo from numerous heavy weapons to force the Bosnian Muslims to agree to the demands of the Bosnian Serbs. Despite clearly explaining what would happen to Sarajevo, the accused and other members

Funded by
the European Union

of the Bosnian Serb leadership voted for Mladić's appointment and there is no doubt that the accused supported Mladić in his efforts to intensify shelling and sniping in the city throughout the conflict in Sarajevo and during the entire period to which the indictment refers.

The accused led the forces in Sarajevo and had influence over them. The accused used his authority over the VRS and in that way managed the actions in and over Sarajevo and received reports that the chain of reporting functioned adequately.

In view of this, the accused oversaw events in Sarajevo, both politically and militarily, and had the power to stop and prevent the opening of fire on civilians, as well as the opening of indiscriminate and disproportionate fire on the city by the SRK.

The knowledge of the accused about the events in Sarajevo cannot be overcome in any way because the media was buzzing about it and the accused was informed in that way, just as he was aware of the decisions of the international community.

The accused's contribution to the JCE in Sarajevo

Relying on the above-mentioned evidence and conclusions about the acts and omissions of the accused relating to (i) his continued support for Mladic, who played a key role in the implementation of the JCE related to Sarajevo; (ii) his direct role in military matters in and around Sarajevo, both in the sphere of planning and on the operational level; (iii) his knowledge of the attacks on civilians in Sarajevo and the SRK's indiscriminate or disproportionate fire, as well as his persistent denial and avoidance of any SRK responsibility; (iv) his failure to prevent shelling and sniping of civilians and to punish those responsible, despite his leadership position in the VRS and SRK; (v) his support and promotion of SRK commanders and units, although he knew that they were participating in a campaign of sniping at civilians and shelling civilians; and (vi) his adjustment of that campaign depending on the political goals he wanted to achieve, the Chamber was convinced beyond anynreasonable doubt that the accused shared the common goal of JCE related to Sarajevo and that he intended to spread terror among the civilian population of Sarajevo through the campaign sniping and shelling. Furthermore, relying on the same evidence, the Council states that the accused provided a significant contribution to the JCE related to Sarajevo and that without him none of this would have happened.

Funded by
the European Union

JCE in relation to Srebrenica

As for Srebrenica, Karadžić is accused of having, in agreement with other members of the JCE, the intention to forcibly relocate the residents of the Srebrenica enclave, namely Muslims, from March 1995 to November 1995, by killing men and boys, and forcibly relocating women, the elderly, and children.. It was started on July 11, 1995. and the accused was charged with, among others, the criminal offense of genocide for the area of Srebrenica.

In November 1992, the accused issued a directive in which it was expressly stated that the population of Cerska, Žepa, Goražde and Srebrenica should be forced to leave that area.

Srebrenica was cut off from the rest of Bosnia and Herzegovina, serious and heavy fighting took place in the entire area, the area of Cerska, Konjević polje, in Srebrenica it was a terrible situation, without any help, with many victims, armed attacks were daily. In the area of SRebrenica, the Drina Corps within the VRS, commanded by Mladić, operated.

16.04.1993. Srebrenica was declared a protected zone by the Security Council, which will not be exposed to any attacks or other hostilities.

The first-instance verdict elaborates on the situation and events in Srebrenica before the VRS attack on Srebrenica, which will not be analyzed at this moment because the analysis starts from the position of the accused.

11.07.1995. In 2008, the attack on Srebrenica took place and on that day Mladić's famous speech was made in front of the cameras where he says that Serbian Srebrenica is being given to the Serbian people and the Drina Corps is ordered to continue towards Potočari. The evidence shows that there was an intention to kill all the men.

The judgment goes on to describe the civil and humanitarian atmosphere and situation in Srebrenica, the separation of men from women and children who were taken to the territory under the rule of Bosnian Muslims, the taking of the men to the "white house", the conditions in that white house, then the meetings held between the representatives of the Bosnian Serbs, Mladić and the Bosnian authorities, the role of the Dutch battalion. The verdict further elaborates on the situation in Bratunac,

Funded by
the European Union

Konjević polje, the surrounding locations and describes the role of Ratko Mladić, the murders in different locations, the situation in Cerska, which the panel determined happened as described in the indictment, then the situation in Kravice, in Glogova, the killing in the Vuk Karadžić elementary school, events in Zvornik, Bratunac, detentions, deaths, found graves, and in the verdict it was concluded that the Main Headquarters of the VRS between September and October In 1995, he organized the reburial of the bodies of persons who were killed in July 1995 in the areas of responsibility of the Bratunac and Zvornik brigades. These bodies were exhumed from the original graves and reburied in distant secondary graves. The reburial operation was carried out by members of the security organs of the Main Headquarters, the Drina Corps, the Bratunac Brigade and the Zvornik Brigade, with the help of the Bosnian Serb civil authorities and other units of the VRS and MUP.

The panel further concludes that the reburial operation was initiated because the international community discovered the existence of mass graves in Srebrenica after Madeleine Albright addressed the Security Council in August 1995, and that it was carried out to cover up evidence of the mass executions that took place in July 1995 in Srebrenica.

The accused disputed the time of the victims' suffering, the number of victims, and evidence was presented on these circumstances, the cause and manner of death were disputed.

Murders in Srebrenica and extermination

The panel concluded that in the weeks following the fall of Srebrenica on July 11, 1995, Bosnian Serb forces killed at least 5,115 male Bosnian Muslims until the beginning of August 1995, and that this meets the requirement of mass killing required to establish extermination. the deaths of the victims in each of the incidents described in the verdict were the result of the actions of Bosnian Serb forces. The panel concluded that the perpetrators of each of these incidents acted with the intention of killing the victims or at least intentionally inflicting serious physical injuries on them, which they reasonably should have known could lead to death. The victims were deliberately shot and were civilians. **The Council concluded that it was a criminal act of murder as a crime against humanity.**

Forced resettlement from Srebrenica

Funded by the European Union

In the proceedings, the accused accepted that a large number of Bosnian Muslims from Srebrenica were transferred from Potočari to the territory controlled by Bosnian Muslims, but claimed that this event did not constitute the criminal offense of forced transfer.

The judgment stated that the circumstances stemmed from the limitation of humanitarian aid on the basis of Directive no. 7 issued by Mladić, the attack on Srebrenica, as well as the atmosphere in Potočari, which was all a consequence of the actions of the Bosnian Serb forces, created an atmosphere of coercion in which Bosnian Muslims had no real alternative but to leave the enclave in order to stay alive, which is why The council concluded that the removal of women and children, as well as some older men, Bosnian Muslims, from the Srebrenica enclave was forced, and that the humanitarian disaster in Potočari contributed to it. The Council concluded that the forced nature of the removal of Bosnian Muslims from Potočari was not justified under international law.

Accusations and established facts for the genocide in Srebrenica

The prosecution charged the accused with two categories of crimes based on Article 4(2) of the Statute: the killing of more than 7,000 Bosnian Muslim men and boys from Srebrenica by execution and inflicting serious physical or mental injuries on thousands of Bosnian Muslims from Srebrenica, male and female, including, among other things, the separation of men and boys from their families and the forced removal of women, children and some older men from the enclave. The panel concluded that after the fall of Srebrenica, Bosnian Serb forces killed at least 5,115 men, Bosnian Muslims. The Chamber is therefore satisfied within the meaning of Article 4(2)(a) of the Statute that members of the protected group were killed and that the only reasonable conclusion that can be drawn from such evidence is that the members of the Bosnian Serb forces who directed this operation intended to destroy Bosnian Muslims from Srebrenica as such by killing, separating and forced resettlement.

The accused gave the order to occupy Srebrenica, after which the Bosnian Serb forces, under the command of Mladić and Krstić, resorted to heavy shelling in order to push the Bosnian Muslims northwards, first towards the Bravo company base, and then northwards towards the UN base in Potočari. Bosnian Serb forces operating under Mladić's command treated Bosnian Muslims who were waiting to leave

Funded by
the European Union

Potočari in a cruel and inhumane manner.

The Council also noted that in September and October 1995, the Main Staff organized a reburial operation carried out by members of the security organs of the Main Staff, the Drina Corps, the Bratunac Brigade and the Zvornik Brigade, with the help of the Bosnian Serb civil authorities and other units of the VRS and the MUP - which indicates that the killing was carried out according to a common plan.

The verdict established that the killing was carried out according to a systematic and highly organized plan. When drawing this conclusion, the Council took into account that the Bosnian Serb forces began to obtain detailed intelligence information about the presence of men, Bosnian Muslims, among the population in Potočari on the night of July 11 and that, at about the same time, they also began to receive reports of the existence and the movement of the column of men and boys, Bosnian Muslims, who were trying to break through to Tuzla. The accused justified that the killing of Muslims in Srebrenica was caused by an incident in Kravica, which the council did not accept, but considered that the implementation of the large- scale killing plan began then.

It was established that the killing was carried out according to a systematic and highly organized plan. In reaching this conclusion, the Council took into account that the Bosnian Serb forces began to obtain detailed intelligence about the presence of Bosnian Muslim men among the population in Potočari on the night of July 11 and that, at about the same time, as described below in text, also began to receive reports about the existence and movement of a column of men and boys, Bosnian Muslims, who were trying to break through to Tuzla.

The Council also concludes that the complex operation in which men and boys, Bosnian Muslims from Srebrenica, were killed would not have been possible without the authorization and orders of VRS commander Mladić. Considering Mladić's role and function at the time, his presence on the ground after the fall of Srebrenica and his actions in the days after the seizure of power and while the killing operation was in progress, the Council is convinced that Mladić was an essential part of that operation. It should always be borne in mind that Mladić is directly subordinate to Karadžić.

The verdict concluded that the actions in Srebrenica (which were extremely cruel) constituted genocide since the pattern of killing and the clear intention to kill all

Funded by
the European Union

able-bodied men, Bosnian Muslims from Srebrenica with the intention to destroy the Bosnian Muslims from Srebrenica.

In the proceedings, the accused disputed the genocidal intent and plan, that is, that he did not agree to the joint criminal enterprise to commit genocide in Srebrenica.

The starting point for the intention and plan of the accused is the passing of Directive No. 7, which contained an order to the Drina Corps to "create conditions of total insecurity, intolerability and no prospects for the further survival and life of the locals in Srebrenica and Žepa" and that this directive was implemented by later limited delivery of humanitarian aid and the access of UNPROFOR supply convoys to Srebrenica. Six days after that, the accused made a decision on the formation of the State Committee for cooperation with the UN, which was in charge of approving the passage of convoys with humanitarian aid, while the VRS was in charge of approving the passage of UNPROFOR supply convoys and retained the right not to approve the decisions of the State Committee, as well as to control the movement of convoys first of all, the accused was informed, who controlled everything, and even disputed and delayed the passage of the convoy, which is what his intention was. Due to this retention, there were catastrophic conditions where people died of hunger because he had control over goods and manpower. After the entry of the Serbian forces into Srebrenica, the accused issued all the orders, as well as receiving all the reports on the situation in Srebrenica and the progress of the Serbian forces, and that he had direct contacts with Mladić. 14.07.1992. made a decision on the appointment of the wartime presidency of Srebrenica in that municipality and declared a state of war.

The accused followed foreign media coverage of Srebrenica.

The accused also adds that the military action to capture Srebrenica was not a crime and that the VRS, when he gave it the authority to enter Srebrenica, had a legitimate right to take military action against the Muslim forces in Srebrenica. However, the Council has already concluded that, at least at the time when Directive no. 7, the accused and Mladić had already drawn up a long-term plan with the aim of eventually forcibly removing the Bosnian Muslims from Srebrenica. This was in line with their long-term goal of permanently removing Bosnian Muslims and Bosnian Croats from territories claimed by Bosnian Serbs. The fact that the accused formed Bosnian Serb structures in Srebrenica shows that there was an intention to make the removal of the inhabitants, Bosnian Muslims, planned by the political and state authorities of the Bosnian Serbs at that time, permanent. Therefore, although the

Funded by
the European Union

capture of the city was not, in itself, a punishable operation, the Council considers that the capture of Srebrenica, as well as the capture of the Municipality, was planned with the intention of permanently removing the inhabitants, Bosnian Muslims, who lived there.

The accused's contribution to the JCE in Srebrenica is significant. The accused shared the intention to commit the crimes of murder, inhuman acts (forcible transfer), extermination, persecution and genocide, the Council concludes that, based on his participation in the JCE related to Srebrenica, the accused is responsible for these crimes, but that it can be established that the accused agreed to the killing as an aspect of the plan to eliminate Bosnian Muslims from Srebrenica only from July 13 at 8:10 p.m., cannot hold the accused responsible based on his participation in the JCE related to Srebrenica for killing and relevant acts of persecution committed before that time.

Therefore, he is not responsible for JCE according to individual responsibility before July 13, 1995., but the verdict also considered his responsibility as a superior according to Article 7(3) of the Statute because he did not punish the perpetrators, and earlier in the analysis his position as a superior and his role in the creation of political, public and state bodies, the police and the army under his authority.

The panel concluded that the accused was informed that the plan was extended to the killing of Srebrenica boys and Muslims when he received information that Bosnian Serb forces had killed hundreds of Bosnian Muslims after the fall of the Srebrenica enclave, which was alarming for him to take measures, but not that he did not but approved these actions and joined the elimination plan, **which is why it was determined that he is responsible under Article 7(3) of the Statute for command responsibility** for participation in genocide.

The Accused did not punish his subordinates for crimes that occurred before he agreed to the killing as an aspect of the Srebrenica-related JCE. Therefore, the accused also bears individual criminal responsibility under Article 7(3) of the Statute for genocide (point 2); persecution, crime against humanity (point 3); extermination, crime against humanity (point 4); murder, crime against humanity (point 5); and murder, violation of the laws and customs of war (point 6). However, since the Chamber has already concluded that the accused is responsible for genocide based on his participation in the JCE related to Srebrenica, as stated above, the Chamber will not pass a conviction under Article 7(3) of the Statute in relation to point 2.

Funded by the European Union

He was declared responsible for holding UN personnel hostage with the aim of forcing NATO to stop airstrikes on Bosnian Serb military targets, and that, together with other members of that JCE, he shared the common goal and intent to commit **the crime of taking hostage, for which he was declared guilty according to Article 7(1) of the Statute - individual responsibility.**

The Council determined that the individual criminal responsibility of the accused was proven in accordance with Articles 7(1) and/or 7(3) 20571 of the Statute for the following counts of the Indictment:

- **count 1**: genocide (Article 4(3)(a));
- **count 2**: persecution, crime against humanity (Article 5(h)); count 3: extermination, crime against humanity (Article 5(b)); count 4: murder, crime against humanity (Article 5(a));
- **count 5**: murder, violation of laws and customs of war (Article 3); count 6: deportation, crime against humanity (Article 5(d));
- **count 7**: inhuman acts (forcible transfer), crime against humanity (Article 5(i));
- **count 8**: acts of violence with the primary aim of spreading terror among the civilian population, violation of the laws and customs of war (Article 3);
- **count 9**: unlawful attacks on civilians, violation of laws and customs of war (Article 3); and count 10: taking hostages, violation of laws and customs of war (Article 3).

Sentenced to a prison term of 40 years, which was changed to life imprisonment by the verdict of the appeals panel. Radovan Karadžić was convicted of genocide in Srebrenica (for the other municipalities it was not determined that the crime of genocide had been committed).

This is an analysis of the first-instance verdict and the second-instance verdict should be compared with regard to the decision on genocide.

The first-instance panel assessed the seriousness of the committed criminal acts as aggravating circumstances in this case. The accused made a significant contribution to a joint criminal enterprise whose goal was the permanent removal of Bosnian Muslims and Bosnian Croats from the territory claimed by the Bosnian Serbs.

Funded by the European Union

Also, among the aggravating circumstances, we can mention the status of the victims of the crimes committed by the accused, their age and number, and the consequences of the crimes committed on them. If we are only talking about Srebrenica, the implementation of the JCE's joint plan related to Srebrenica resulted in the killing of at least 5,115 men, Bosnian Muslims, and the forced transfer of 30,000 women, children and elderly men, Bosnian Muslims, from Srebrenica to territory held by Bosnian Muslims. As for the women, children and elderly men who were subjected to the forced relocation operation, they were not only chased away, but the Council highlighted the severe mental trauma caused by their sudden separation in Potočari from their male family members, who were taken from there to wait his uncertain fate.

Abuse of power, as one of the aggravating circumstances in this case, refers to the fact that the accused, more than any other person in the RS, was able to stop the violent actions of his subordinates, but that he did not stop them, but rather on the contrary, he carried out strategic supervision and issued specific directives to support these actions, reward perpetrators, lie to representatives of the international community and cover up crimes.

The panel paid special attention to the unique position of the accused in the highest position of government in the RS and his de jure authority over the VRS, MUP and other political bodies, which he actually exercised. The key role that the accused played in the commission of the crimes under each part of this case was a reflection of his position and the way in which he used that position to achieve his goals.

For the purpose of sentencing, the only mitigating circumstances the court considered was that the accused had indeed resigned from all public and party positions on July 19, 1996, and that since then he had refrained from appearing in public. What is relevant is the fact that his decision had a positive impact on the establishment of peace and stability in BiH and the region after the signing of the Dayton Agreement. The accused's decision in July 1996 to resign from his public and party functions was a mitigating factor in sentencing.

To the appropriate extent, when determining the appropriate sentence to be imposed, the Council took into account the accused's expressions of regret in several situations to the witness who testified at that moment, and the fact that the accused had not previously been criminally punished was taken into account as a mitigating circumstance.

Funded by
the European Union

MILAN LUKIĆ

The case related to the convicted Milan Lukić and his cousin Sredoje Lukić is related to incidents related to the period from 1992 to 1994 in the territory of Eastern Bosnia, more precisely in the municipality of Višegrad.

Milan Lukić was born on September 6, 1967 in Foča, and grew up near Višegrad, in eastern Bosnia. In 1992, he lived for some time in Šeganj, in the municipality of Višegrad. At the beginning of April 1992, he left the Visegrad police, but approximately in May 1992 he started working again as a policeman in Visegrad and was listed on the list of police officers who had a "wartime schedule" in the period from August 4, 1992 to 20 January 1993.

Its goal is to deprive a large number of people of their lives or to subject a large number of people to such living conditions, the outcome of which will be their death.

Milan Lukić was sentenced to life imprisonment by the first-instance verdict, while Sredoje Lukić was sentenced to 30 years in prison. Milan Lukić was sentenced to life imprisonment by the second-instance verdict, while Sredoje Lukić's sentence was reduced to 27 years.

ICTY found Milan Lukić guilty under Article 7(1) of the Statute - individual responsibility for murder and cruel treatment as violations of the law or customs of war punishable under Article 3 of the Statute. Milan Lukić was also found guilty, based on the act, of persecution, murder, extermination and other inhumane acts, as crimes against humanity punishable under Article 5 of the Statute of the ICTY. Sredoje Lukić was found guilty under Article 7(1) of the Statute for the same, but for aiding and abetting.

In 1992, there were various paramilitary and irregular units in Višegrad, among which were "Sešeljevci", "Arkanovci", "Garavi sokak" and "Beli orlovi". According to witness statements, in 1992 Milan Lukić organized a local paramilitary group that was sometimes referred to as "Beli Orlovi" and "Osvetnici", whose member was Sredoje Lukić. It is said that this group had connections with the Višegrad police and Serbian military units. After the withdrawal of the JNA from the territory of Višegrad, the "Beli Orlovi" began to commit crimes, such as murders, robberies, robberies, burning villages, rape and forced abduction of people, including girls.

The Prosecution charged Milan Lukić with nine counts of the Indictment for

Funded by
the European Union

violations of the laws or customs of war, punishable under Article 3 of the Statute of the International Tribunal and sanctioned by Article 3 which is common to all four Geneva Conventions of August 12, 1949, murder (counts 3, 7, 10, 15 and 19) and cruel treatment (points 5, 12, 17 and 21).

The prosecution further charges Milan Lukić with 12 counts for the following crimes against humanity, punishable under Article 5 of the Statute: persecution (count 1), extermination (counts 8 and 13), murder (counts 2, 6, 9, 14 and 18) and inhuman acts (items 4, 11, 16 and 20).

Milan Lukić was sentenced to life imprisonment by the first-instance verdict on July 20, 2009, and the Trial Chamber found him guilty of persecution, murder, extermination, and other inhuman acts, i.e. crimes against humanity, murder and cruel treatment as violation of the laws and customs of war.

Milan Lukić was found guilty of:

1. The event on the Drina that took place on June 7, 1992, when Milan Lukić and other soldiers kidnapped seven Bosnian Muslims and took them to a house in Bikavac. Milan Lukić robbed the kidnapped Bosnian Muslims and threatened to kill them. They then took the seven men to the banks of the Drina, where Lukić then ordered them to line up, and Milan Lukić, together with two soldiers, opened fire on these men and killed all but two of the men.
    i. He was found guilty of committing **murder, as a violation of the laws or customs of war and as a crime against humanity** for killing five men, and in relation to the two survivors he was found guilty of **committing cruel treatment, as a violation of the laws or customs of war and other inhuman acts, as a crime against humanity.**

2. The event at the "Varda" factory, which took place on June 10, 1992, or on a date approximately the same, on which occasion Milan Lukić took seven Bosnian Muslims, civilians, out of the "Varda" factory and forced them to go to the banks of the Drina, where he shot them and killed. On the basis of these conclusions, Milan Lukić was found guilty of committing murder, as a violation of the laws or customs of war and as a crime against humanity, and persecution as a crime against humanity.

Funded by the European Union

3. Deprivation of the life of Hajra Korić, which happened one day between June 28, 1992 and July 5, 1993, when Hajra Korić was waiting with a group of women and children to join the convoy to Macedonia, when Milan Lukić separated Hajra Korić from the said group and shot twice, resulting in death. The Trial Chamber found Milan Lukić guilty of murder, as a violation of the laws or customs of war, and as a crime against humanity.

4. The event in Pionirska street in Višegrad, on which occasion Milan Lukić, Sredoje Lukić and a group of armed men were present in Memić's house in Pionirska street in Višegrad, where a group of people from Koritnik were detained, on which occasion they were robbed and then taken to Omeragić's house where they locked them and set the aforementioned house on fire. Those who tried to escape were shot and on that occasion at least 59 people died. In connection with the incident in Pionirska Street, the Trial Chamber found that Milan Lukić committed the criminal acts **of murder and cruel treatment, as violations of the laws or customs of war, as well as extermination, persecution and other inhumane acts, as crimes against humanity.**
   - The Appeals Chamber partially accepted Milan Lukić's appeal and replaced the Trial Chamber's conclusion that 59 victims lost their lives in this event in Pionirska Street with the conclusion that 53 victims lost their lives.

5. The event in Bikavac that took place on June 27, 1992, when Milan Lukić, together with a group of armed men, drove a group of approximately 60 Muslim civilians into Aljić's house in Bikavac, Višegrad district, shot at that house, threw hand grenades inside and after that it caught fire. At least 60 people died, and Zehra Turjačanin was the only survivor. This woman was a witness at the trial and based on her testimony, Milan Lukić was convicted of **murder and cruel treatment, as a violation of the laws and customs of war, and of extermination, other inhuman acts and persecutions, as crimes against humanity.**
   - *As the only survivor, Zehra Turjačanin was left with permanent consequences for her health. At the moment when she was running away from the house that was on fire, fake hand grenades dug into her left leg, and the flames*

burned her skin. Severe burns on the arms and hands resulted in permanent damage and consequences. According to the statement of one of the witnesses, Zehra Turjačanin was "in a terrible condition" and that the upper part of her body was burned, which had undeniable consequences for this victim. Unfortunately, as stated above in the analysis of the civil and social aspect, there is no adequate compensation for Zehra Turjačanin nor was she able to obtain it through any mechanism.

6. Camp in Uzamnica- The trial panel concluded that Milan Lukić repeatedly beat Muslim detainees, including Islam Kustura, Adem Berberović, Nurko Dervišević and witness VG025, in the camp in Uzamnica in the period from June 1992 to the beginning of 1993. In reaching these conclusions, the Trial Chamber rejected the partial alibi of Milan Lukić and relied on the testimony of Kustura, Berberović, Dervišević and witness VG025. The Trial Chamber convicted Milan Lukić of committing criminal acts **of cruel treatment, as a violation of the laws and customs of war, as well as persecution and other inhumane acts, as a crime against humanity.**
    i. The same attitude as in the previous point, and it is related to allegations from the social and civil aspects. Severe trauma and consequences for victims.

Sredoje Lukić was convicted of committing criminal acts of cruel treatment, as a violation of the laws and customs of war, and other inhumane acts, as a crime against humanity, and for aiding and abetting persecution, as a crime against humanity.

The Trial Chamber, with the dissenting opinion of Judge Van der Wyngaert, found Milan Lukić guilty of two counts of extermination, in connection with the death of 59 people in the incident in Pionirska Street and the death of 60 or more people in the incident in Bikavac, which was also accepted by the Appeals Chamber.

Milan Lukić and Sredoje Lukić presented alibis regarding part of the charges brought against them. Both accused claimed that they were not in the relevant places, neither in Pionirska Street nor in Bikavac, at the time when, according to the allegations, the criminal acts for which they were charged were committed. Milan

Funded by
the European Union

Lukić presented an alibi in connection with the incident on the banks of the Drina river, the incident at the "Varda" factory and part of the period to which the allegations relate to the events in the detention camp in Uzamnica.

A significant number of witnesses in this case testified with the application of protective measures, which is quite understandable, and a large number of evidence was of a confidential nature.

Joint Criminal Enterprise (JCE)

Less than a month before the start of the trial and more than two years after the filing of the second amended indictment, on June 12, 2008, the Prosecution filed a request to amend the Second Amended Indictment, which included proposals for better alignment with current judicial practice regarding the JCE, as well as for the inclusion of new accusations of rape, enslavement and torture, however this proposal of the prosecution was not adopted because it would violate the right to defense, i.e. the accused would not be adequately informed for what the prosecution accused him of.

Therefore, it is a procedure with individual responsibility, the direct perpetrator of criminal acts and witnesses who survived and could testify to these acts.

In this case, the defendants put forward as a defense thesis that they were not at certain locations and presented an alibi, so the Prosecution presented evidence that confirms their responsibility and refutes the alibi.

The first-instance verdict dealt with the city of Višegrad, it is stated that the Uzić Corps operated there, and that the situation in Višegrad also prevailed as described in the analysis for Radovan Karadžić, and in this verdict, the implementation of the policy and goals of the Bosnian Serbs can be seen. The Muslim population in Višegrad was killed, abused and mistreated in all kinds of ways, the presence of paramilitary formations is also recorded. The best indicator is the population census from 1991 to 1997, which shows that before the war there were twice as many Muslims as Serbs living in Visegrad, while after the war this situation changed and Serbs made up more than half of the population after the war, and that from Višegrad missing men of military age aged 14 to 45. At the beginning of the war, there was a division of the police on a national basis.

Funded by the European Union

In the process, it was established whether the Beli orlovi were active in the area of Višegrad, when, in what way and under whose command they were. Witnesses claimed that Milan Lukić and Sredoje Lukić belong to the "Beli orlovi", but some evidence also showed that Milan Lukić does not belong to the "Beli orlovi". The verdict concluded that no convincing evidence was presented that Milan Lukić and Sredoje Lukić were members of the "Beli orlovi" or the "Osvetnici", as well as the connection between the "Beli orlovi" or the "Osvetnici" with any of the crimes for which Milan Lukić and Sredoje are charged.

The verdict elaborates on each event from the indictment individually, and the disappearance of people is proven, apart from witness statements, Amor Mašović's statement, lists of missing persons, data on exhumation and finding the missing and murdered. Regarding the actions of the accused Milan Lukić, the witnesses recognized or identified him, that is, they were asked if they saw him and where and how he was dressed for each of the events. Accused Milan Lukić disputed his participation in the events for which he was accused.

For the incident on the banks of the Drina, the accused claimed that he was in Belgrade at the time. He presented evidence on the alibi circumstance.

The prosecution claimed that Milan Lukić influenced the witnesses, that he bribed them to testify in his favor.

The panel had to pay special attention in this case considering the differences in witness statements, but in the end it determined that five civilians of Muslim nationality, listed by name, were killed on the banks of the Drina. More precisely, the trial panel found that the prosecution proved beyond a reasonable doubt the events that led to the killing on the banks of the Drina on June 7, 1992, including that Milan Lukić shot the seven men he had picked up and detained earlier that day, and the alibi was rejected as a cynical and callous orchestrated fabrication.

Regarding the incident at the "Varda" factory, the trial panel established that seven men were taken and shot by Milan Lukić, and in this part the alibi was not accepted.

In this proceeding, it was very uninteresting to conduct evidence for the reason that it was necessary to establish the action and presence of the accused Milan Lukić at the location for which he is charged and to establish that each of the victims was a consequence of his action, while it is possible that the sequence of the entire events must be described which would have preceded some of his acts, and there was a lot

Funded by
the European Union

of disagreement in the testimonies of the witnesses. In doing so, it was important to determine whether it was really Milan Lukić based on the description of his clothes, behavior, his arrival, his departure, his words, whether anyone was accompanying him, in which vehicle he came, when he arrived and when went away.

Most of the witnesses recognized Milan Lukić in the courtroom. Due to certain events, e.g. arson had to be presented as evidence and expert testimony. In this procedure, an expert demographer was heard due to the disappearance of a large number of people in the area of VIšegrad.

The Trial Chamber therefore concludes that the prosecution proved beyond a reasonable doubt the presence of Milan Lukić on June 14, 1992 at the location of Jusuf Memić's house, during the transfer of the group from Koritnik to Adem Omeragić's house and during the burning of that house. The Trial Chamber also concludes that Milan Lukić participated in the robbery of a group from Koritnik in the house of Jusuf Memić, that he took several women from that group, including Jasmina Vila, Ifeta Kurspahić and Mujesira Kurspahić, who later returned crying and stated that they had been raped. Specifically, the Trial Chamber also concludes that Milan Lukić not only participated in moving that group from Jusuf Memić's house to Adem Omeragić's house, but also that he closed the door of that house, that he later opened it and placed an explosive device in the room of Adem Omeragić's house, which caused a fire in that room, as well as that he shot at people who were trying to escape from the house. Milan Lukić was a member of the reserve police force.

The event in Bikavac - witness Zehra Turjačanin, who was the only survivor and testified at the main trial.

The council concluded for this event that the prosecution proved beyond a reasonable doubt that Milan Lukić was present during the incident in Bikavac, that he shot at the house, that he threw hand grenades into the house and then set the house on fire, but for Sredoje Lukić, the council did not convinced beyond a reasonable doubt that he was also present there.

The council found beyond dispute that Milan Lukić shot Hajra Korić, and with regard to the ill- treatment of prisoners in the Uzamnica camp, it was established that persons who were civilians were abused by the camp guards and those who visited the camp from time to time, as well as by Milan Lukić, as well as by Sredoje Lukić.

Milan Lukić was a member of a unit that was part of Serbian forces and participated

Funded by the European Union

in battles with Muslim forces, as well as the fact that Milan Lukić and Sredoje Lukić were members of the reserve police force. Milan Lukić and Sredoje Lukić were constantly seen in Višegrad, armed and in camouflage uniforms. In addition, Milan Lukić had a wide range of weapons of various types. The Trial Chamber was convinced that the armed conflict created a situation that favored the commission of the criminal offenses with which the accused are charged and that Milan Lukić and Sredoje Lukić were fully aware of the fact that there was an armed conflict in the vicinity of Višegrad. The criminal acts for which Milan Lukić and Sredoje Lukić are charged were undeniably part of the attack. All victims were civilians. They belonged to one nation.

The Trial Chamber concluded that Milan Lukić was responsible for the deaths of at least 132 people. Milan Lukić committed these crimes against vulnerable victims whom he rendered helpless. The victims of the arson in Pionirska Street and the arson in Bikavac were children, women and the elderly. Among the victims of the arson attack in Pionirska Street were a seventy-five-year-old woman, six children between the ages of two and four, and a two-day- old newborn. Some of Milan Lukić's victims were his neighbors, people he used to go to school with and women who had known him since childhood.

In the incidents on the banks of the Drina and in the "Varda" factory, Milan Lukić chose the victims at random from among the Muslim civilians. Immediately before the killing on the banks of the Drina, Milan Lukić ordered the two armed men he had brought with him to set their weapons to single and not burst fire. He also carried out the cold-blooded murder of Hajra Korić in a nonchalant and careless manner - he laughed after shooting her twice. The brutal beatings of detainees in the Uzamnica camp that Milan Lukić carried out as an "occasional visitor" also reflect his enjoyment of inflicting pain on Muslim victims.

The surviving victims of those crimes live today with permanent physical damage and the mental pain that accompanies those who witnessed and survived the brutality and violence perpetrated against them by Milan Lukić. The Trial Chamber especially recalls Zehra Turjačanin, a sad and tragic but heroic character, who is the only surviving victim of the arson attack in Bikavac. The surviving victims of both arson attacks were forced to save themselves, leaving family members or neighbors behind. The few surviving victims still bear scars and physical pain from the burning, bullets and shrapnel. Detainees from Uzamnica live with scars, impaired health and severe physical injuries as a result of the beatings they suffered in captivity. Family

Funded by the European Union

members watched their loved ones being taken away, and after the incident on the banks of the Drina and the incident at the "Varda" factory, they had to live in fear and uncertainty that Milan Lukić led them to with his random choice of victims among Muslims.

Mitigating circumstances

The defense of Milan Lukić states that the personal circumstances of Milan Lukić, which George Hough mentioned in his report on expert testimony and testimony, must be considered as a factor in mitigating his sentence.

George Hough, a clinical psychologist, stated that Milan Lukić did not show any of the usual signs of "possibility of deviant development or severe psychopathology" as a child, such as fights, delinquency, criminality and drug and alcohol use. He also concluded that Milan Lukić is "a follower, not a leader" and that there are no indications that Milan Lukić was ever in the position of a leader. He also stated that Milan Lukić "introduced himself wherever he went because he considered himself a professional police officer".

In this case, there was no evidence that Milan Lukić acted on the orders of his superiors. However, the Trial Chamber took Dr. Hough's analysis into account when determining the sentence.

In his crimes, Milan Lukić deliberately proceeded phase by phase. Neither the fear nor the suffering of his victims could convince him to give up. He was not deterred even by the possibility of being recognized while carrying out his heinous deeds. The victims of the incident on the banks of the Drina, the incident in Pionirska Street and the incident in Bikavac, before they were to be killed, were detained. Milan Lukić decided to kill them instead of freeing them.

Funded by
the European Union

ZDRAVKO TOLIMIR

Zdravko Tolimir was accused of individual responsibility (Article 7(3) of the Statute of the ICTY) - convicted of individual responsibility - first instance sentenced to life imprisonment, after the appeal of the convicted Tolimir - the first instance verdict was confirmed in the part of the sentence decision, and he was sentenced to life imprisonment for crimes in the area of Srebrenica and Žepa in the period 1992 to 1995

Individual responsibility

Tolimir is charged in the Indictment with eight counts, according to Articles 3, 4 and 5 of the Statute of the International Tribunal (hereinafter: the Statute): genocide (count 1), conspiracy to commit genocide (count 2), extermination (count 3), murder (points 4 and 5), persecutions (point 6), inhumane acts through forced transfer (point 7) and deportation (point 8) under Article 7(1) Statute on the basis of his participation in two separate joint criminal enterprises: a joint criminal enterprise (hereinafter: JCE) with the aim of killing thousands of men and boys of military age, Bosnian Muslims, captured in Srebrenica, in the period from July 11, 1995 to 1 November 1995 (hereinafter referred to as: JCE murders) and JCE with the aim of forcibly removing the population, Bosnian Muslims, from the enclaves of Srebrenica and Žepa, in the period from approximately March 8, 1995 until the end of August 1995 (hereinafter referred to as the JCE of forced removal).

As the head of the Sector for Intelligence and Security Affairs, the accused was in charge of controlling and managing the entire sector. Thanks to this position, the accused controlled the appointment of intelligence and security officers. As assistant commander, the accused was directly subordinate to the commander of the Main Staff of the VRS, Mladić. Chief of Staff Milovanović said that the accused was Mladić's "eyes and ears". The accused had the task of preventing the release of top-secret information, so that it would not fall into the hands of the enemy or anyone else who "doesn't need [...] to know", and the task of "concealing the intentions of the Army of Republika Srpska". In addition, the accused was informed about every task that Mladić would directly give to one of the intelligence and security officers who were subordinate to the accused.

Tolimir participated in the effort to forcefully remove Bosnian Muslims from the Srebrenica and Žepa enclaves and in the effort to kill military-fit men, Bosnian Muslims, from the Srebrenica enclave - thus as an extension of Krajišnik's and

Funded by the European Union

Karadžić's ideas. Ratko Mladić and Zdravko Tolimir embodied the idea of Bosnian Serbs. On the field, they implemented their goals.

The accused was responsible for carrying out and supervising all tasks related to Mladić's and Milovanović's orders on security and intelligence issues. As Mladic's assistant, he was "an expert in carrying out the commander's order and task in the best way". As a general of the VRS, the accused could exercise general military command, but he could also be assigned to a position at the front, either in a commanding or controlling role. In addition, in Mladić's absence, the accused was able to assume command authority and issue orders in Mladić's name. The accused was also in charge of negotiating with the ARBiH, the UN and the international community and participating in negotiations in front of the VRS. In this sense, throughout the war, the accused played an important role in approving the movement of convoys and in issues related to the exchange of prisoners of war.

Mladić had the greatest trust in the accused. Mladić often consulted with the accused in order to hear his opinion before making a decision. The accused often accompanied Mladić to negotiations or meetings, where Mladić often described him as his "right hand".

Zdravko Tolimir is accused of being an assistant commander as a member of two joint criminal enterprises. First, the JCE murders of Bosnian Muslim men of military age from the Srebrenica enclave, approximately between July 11 and November 1, 1995. Second, the JCE of the forced removal and deportation of the Bosnian Muslim population from the enclaves of Srebrenica and Žepa, which, as stated, began with the issuance of Directive 7 in March 1995, signed by the President of the Republika Srpska (RS) Radovan Karadžić, who in its the compilation was assisted by various sectors in the VRS Main Staff, including the sector for intelligence and security affairs, which was headed by Tolimir.

Tolimir was further charged with criminal responsibility **under the extended form of JCE, known as JCE III,** which charges related to the situationally determined murders of small groups of men of military age from Srebrenica (as a foreseeable consequence of both JCEs), the predictable targeted killing of three leaders of Bosnian Muslims from Žepa (as a foreseeable consequence of the JCE of forced removal) and other acts of persecution (as a foreseeable consequence of both JCEs).

The accused was not only charged with committing those crimes through alleged participation in two JCEs, but **also under Article 7(1) of the Statute** for planning,

Funded by
the European Union

inciting, ordering and other forms of aiding and abetting in the planning, preparation and execution of criminal offenses for which was charged.

Thus, the Verdict states that from the end of March 1995, the accused participated in several long-term activities that were preparations for the occupation of the enclaves of Srebenica and Žepa, which finally took place in July 1995. For example, as an assistant to the commander of the Sector for Intelligence and Security Affairs, the accused participated in the formulation of Directive Op. no. 7, in the part that referred to intelligence data. In addition, the Council has already established that the accused actively participated in approving or prohibiting the movement of UNPROFOR convoys to replenish supplies, both before and during the increasingly strict restrictions imposed after March 1995.

On May 27, 1995, since NATO had been attacking VRS targets from the air for several days, and the VRS had then taken members of the UN as hostages, the accused approved the sending of a document to the intelligence and security departments of several subordinate corps suggesting that they propose to their commanders "that the captured members of the UN forces be deployed in the area of a possible attack by NATO aviation". It was handwritten by Radovan Karadžić. Therefore, it is obvious that the accused knowingly participated in actions directed against members of UNPROFOR. The panel concluded that members of the 10th sabotage squad, which was professionally subordinated to the Directorate for Intelligence Affairs, and which, again, was supervised by the accused, entered the Srebrenica enclave on the night of June 23-24, 1995, with the aim of carrying out diversions in the area of Vidikovac. On June 25, 1995, the accused issued a daily intelligence briefing in which he said that the 28th Division "wants to provoke condemnation from the international community" by "spreading disinformation" that the VRS had sabotaged civilian facilities.

The accused communicated with Brigadier General Cornelis Nicolai, Chief of Staff of UNPROFOR, about the conditions and worsening conditions in Srebrenica. So even though the accused promised Nicolai that the UNPROFOR positions would not be attacked, and even though the VRS Main Staff issued an order not to attack UNPROFOR, Bosnian Serb forces surrounded two UNPROFOR positions. Furthermore, the Accused never once admitted that the VRS was penetrating the enclave, but repeatedly insisted that the conflict was between the VRS and the Army of Bosnia and Herzegovina (ARBiH) (which, as he claimed, was using heavy weapons that it had not surrendered and armored personnel carriers belonging to to

Funded by
the European Union

UNPROFOR), and not between VRS and UNPROFOR or VRS and the civilian population. Based on the information he received from a Bosnian Muslim who was captured while moving in a convoy, the accused concluded "that the civilian population headed towards the UNPROFOR base in Potočari in an organized manner [...], while the armed formations of military capability started to break through illegally to Tuzla".

The Indictment states that the JCE of forced removal began in March 1995, with the issuance of Directive op. no. 7, but most of the members of the Council conclude that the RS started implementing such a policy as early as 1992, with the aim of eliminating Bosnian Muslims in the eastern enclaves. In this regard, the Council particularly recalls its conclusion on the adoption and implementation of six strategic goals from May 1992, and the Directive op. no. 4, issued in November of the same year. It follows from the evidence that all members of the Bratunac Brigade received instructions at the beginning of 1994 to "undertake everything that would ensure an unbearable life with the goal that the Muslims would eventually leave the enclave due to such a situation".

The accused claimed that the VRS did not aim to create unbearable living conditions for the civilian population and referred to the statement of the witness Franken, who, among other things, spoke about the fact that Bosnian Serbs and Bosnian Muslims traded on the black market. The accused claimed that this would not have happened if there had been an intention to make life completely unbearable for the population of the enclave. However, the majority of the Council members maintained the ruling that Franken was talking about the "first few months" of 1995, since he arrived in January 1995, and in addition, Franken said that the civil authorities of the warring parties proposed to establish trade on black market, and that it was an attempt to normalize relations between Bosnian Serbs and Bosnian Muslims. The fact that Serbs and Muslims traded on the black market in the first few months of 1995 does not mean that the VRS did not have a plan to make life unbearable for the inhabitants of the enclaves. The defendant further claims that Directive op. no. 7 was not implemented at all, but that it was replaced by Directive op. no. 7/1, which was issued on March 31, 1995 and which does not mention the creation of intolerable living conditions. In addition to imposing restrictions and attacks on UN positions, during May and June 1995, the VRS constantly intensified shelling and sniping in the Srebrenica enclave. At the end of May 1995, in retaliation for NATO airstrikes on the territory controlled by the VRS, the VRS shelled enclaves and took members of the

Funded by
the European Union

UN hostage, and that this fire was partly aimed at civilians and civilian objects. These activities simultaneously led to terrorizing the civilian population, which was their intended consequence.

At the beginning of July, the situation worsened when the VRS, in accordance with the orders for the "Krivaja 95" operation, began to directly and more openly attack the Srebrenica enclave and Potočari. The defendant claims that the goal of the "Krivaja 95" operation was not to make life unbearable for the population of Srebrenica, but to attack the forces of the ARBiH that were in the enclaves, which the verdict did not accept because in the combat order issued on July 2, 1995, it is explicitly referred to the Directive op. no. 7. This is a directive that was dealt with in the analysis of the Karadžić verdict, which talks about the strategic goals of the Bosnian Serbs.

This accused also falsely represented the facts at the time of the incident, which indicates the identical modus operandi of all the accused. After the fall of the Srebrenica enclave and the end of the operation in which women, children and the elderly were forcibly moved from Potočari, the VRS turned all its attention to Žepa. The accused claims that, as with the "Krivaja 95" operation, the civilian population was not the target of the attack on Žepa. The council established that the goal that the VRS had for both enclaves was clearly stated by the accused, who said the following at that meeting: "Srebrenica has fallen, now it's Žepa's turn. We can do this in two ways. I suggest that you all leave from Žepa, you evacuate, get on the buses and leave". As the only alternative to "evacuation", the accused stated the use of military force against the enclave. The accused claimed that the aim of these "negotiations" was to allow men of military age to surrender their weapons and leave, not to expel the population, which the verdict concluded that it is not true because the representatives of the Muslim soldiers were not allowed to consult with their superiors.

The accused was present when, on May 12, 1992, at the 16th session of the National Assembly, the six strategic goals of the RS were discussed and the separation of Serbs and Muslims on a national basis was called for. He was a member of the Main Staff in November 1992, when Mladić issued Operational Directive no. 4, in which he ordered that the enemy be inflicted "as large losses as possible" in order to force him to "leave the areas of Birač, Žepa and Goražde with the Muslim population"; that area included all three eastern enclaves. The majority of Council members have already established that the issuance of Directive op. no. 7 marked the beginning of the

Funded by the European Union

elaboration and implementation of the JCE for the forced removal of the Muslim population from Srebrenica and Žepa by Bosnian Serb forces. The sector headed by the accused contributed to the drafting of Directive no. 7.

The position of the Council members on the JCE of forced removal, starting from the end of May until July 1995, was that the VRS intensified military activities directed against the Srebrenica enclave, including shelling and sniping against civilian targets.

Most of the members of the Council further state that the accused actively contributed to the goal of limiting the ability of UNPROFOR to carry out its mandate. In the days immediately preceding the start of the attack on the Srebrenica enclave — as can be seen from a series of communications between the accused and Nicolai and Janvier — he kept UNPROFOR under control by denying the intentions of the VRS, delaying responding to communications in which UNPROFOR expressed concern about the military activities of the VRS, and drew attention to the ARBiH.

After the enclave was captured on 11 July, the accused continued his active role, disseminating relevant intelligence and security information to ensure that the VRS maintained control of the enclave. On the night of July 11 at the latest, the accused was informed that thousands of Muslim civilians had begun to gather in Potočari, and on July 12 at the latest, he was informed that approximately 25,000–30,000 Muslim civilians had sought refuge in the UN base, as well as the fact that men are separated. His subordinate Radoslav Janković, who was an officer in the Directorate for Intelligence Affairs of the Main Staff, was at both meetings at the "Fontana" hotel, held at night on July 11 and in the morning on July 12; most members of the Council do not doubt at all that the accused was informed about the conversations that were held at those meetings. It is worth noting that just a few days later, the accused ordered Janković to supervise the evacuation — carried out by the ICRC — of wounded Bosnian Muslims from the hospital in Bratunac. Radoslav Janković executed that order. The powers and participation of the accused in the evacuation process cannot be viewed in isolation. Although he may not have been physically present in Potočari on July 12 and 13, most members of the Council state that he was informed about the events on the ground through Radoslav Janković, as well as thanks to the participation of subordinate officers from the security and intelligence authorities at the level of brigades and corps. Therefore, this accused was in the chain of command and reporting.

Funded by
the European Union

When it comes to the role played by the accused in the events in Žepa, the Council concluded that he was clearly more of a leader. On July 13, a meeting was held in Bokšanica, where the accused told the attendees at the very beginning "Srebrenica has fallen, now it's Žepa's turn", adding that the only alternative to the "evacuation" of Žepa is the use of military force against that enclave. In a report he issued the same evening, the accused suggested, among others, to Mladić himself that "part of the free forces from the battlefield in Srebrenica engage in an attack on Žepa from the direction of Radava [...] with the aim of capturing Žepa within 21 hour, in order to avoid condemnation and reaction of the international public". Most of the members of the Council were already convinced, on the basis of a series of documents issued by the accused on July 14, that he actively contributed to the effective occupation of that enclave by the VRS by, among other things, similar to the contribution he made in Srebrenica, ensuring that UNPROFOR did not be able to intervene, so that the operation can proceed smoothly. In addition, the Council found that his proposal to capture Žepa within 21 hours in order to avoid condemnation and reaction from the international community shows that he knew very well that nothing about the capture of Žepa was legitimate. In addition, on the basis of his direct participation in those events - and especially on the basis of the proposal he gave to Mladić in the night hours of July 13, to "occupy Žepa, as well as his proposal from July 14 to start "combat operations" - that bombing of Žepa continued, the VRS shelled the surrounding villages, as well as the center of Žepa, which no doubt instilled fear in the population, which then, as the accused had already reported, had already begun to gather around checkpoints and UNPROFOR bases asking for protection. After the start of the attack on the Žepa enclave and before its fall sometime on July 24, 1995, the accused actively participated in further "negotiations", and he was perfectly aware of the fact that the members of the Žepa War Presidency were authorized to resolve any issues concerning the ARBiH. On July 20, the VRS exerted psychological pressure on the Muslim population to return to the enclave in order, by the opinion of most members of the Council, his last proposal regarding the destruction of the "fugitive Muslim population".

That must be considered precisely in the context of the goal of accelerating the "surrender of Muslims"; persistent attempts by the VRS to force the ARBiH to hand over their weapons since the beginning of the "negotiations" that were conducted earlier in July have not been successful.

In the evening hours of July 24, Mladić assigned the accused to lead the operation to

Funded by
the European Union

remove the Muslim population from Žepa, which was supposed to begin the next morning. The accused immediately began to carry out several activities in order to prepare for the start of the operation. Apart from Mladić, he was the highest VRS leader who was present during the forced removal of the population of Žepa and apparently directed that operation. He added to the intimidating atmosphere during the process by pointing a gun in the air in an attempt to intimidate Muslim civilians. He personally escorted the last convoy that left Žepa in the evening of July 25. On July 27, he was present in Luka near Tišća and actively participated in the removal of 12 slightly wounded men, whom he allowed to board a bus in Žepa earlier that day; these men were taken off the bus and taken to Rasadnik prison near Rogatica. His later dealings with these prisoners and the conversations he had with members of UNPROFOR regarding their fate show that he directly participated in the forced removal operation, as well as to what extent he exercised control over that operation.

The majority of the members of the Council, with the dissenting opinion of Judge Nyamba, were convinced beyond a reasonable doubt that the accused was a participant in the JCE murder starting from July 13 and that by his actions and inactions he made a significant contribution to the common goal.

The accused was the head of the sector for intelligence and security affairs, and as the head of this sector, the accused managed, coordinated and supervised the work of two administrations, as well as subordinate security and intelligence authorities, including the military police, whose activities he was informed about.

The verdict elaborates on the events that preceded the attack on Srebrenica and Žepa from 1991 to 1994. Those events were also elaborated in the verdict against Radovan Karadžić.

From the legal side, each judgment determines the conditions for the application of the ICTY Statute, whether the four conditions from the Tadić case are met, and each of the judgments states that the conditions are met, including the judgment against Zdravko Tolimir.

- Bosnian Serb forces killed at least 4,970 Bosnian Muslims after the fall of Srebrenica and three Bosnian Muslims after the fall of Žepa - responsibility of this accused for **the murder**
- based on the evidence, it was concluded that there was a single planned and organized operation to kill men and boys, Bosnian Muslims, on a

large scale, the crime of **extermination**

- The Council was convinced beyond a reasonable doubt that the members of the protected group, Bosnian Muslim civilians, were killed
- The verdict established that there was genocidal intent to destroy a part of the population, Muslim, as such - the killing of men, Bosnian Muslims, an act of genocide and that it was committed with the required special intent to exterminate Bosnian Muslims from eastern BiH, in which he was involved Zdravko Tolimir, as well as other officers from the management of the VRS.
- taking approximately 25,000–30,000 Bosnian Muslims from Potočari on July 12 and 13, 1995, and almost 4,400 Bosnian Muslims from Žepa on July 25–27, 1995. in July 1995 they committed the criminal offense **of forcible transfer.** The victims of this forced transfer were civilians, almost exclusively women, children and the elderly, and these actions were an important part of the attack directed against the predominantly civilian population in terms of crimes against humanity punishable under Article 5 of the ICTY.
- residents, Bosnian Muslims gathered in Potočari from July 11 to 13, and Bosnian Muslim men, who were separated from their families, who were captured or surrendered while walking in the convoy, who were detained and who were later executed, were subjected to cruel and inhuman treatment so severe that, in accordance with Article 5, it could be characterized as **an act of persecution** as a crime against humanity.

The essence of this verdict is that the accused participated in a joint plan to forcibly remove and kill Muslims of military age from the area of Srebrenica and Žepa, that conditions were created for the forced disappearance of the Muslim population from this area, and that women, children and the elderly separated for this purpose from their male family members. This caused severe mental suffering for all victims. The implementation of this idea began in Srebrina on July 11 or 12, 1999. The policy of separation was the policy of Zdravko Tolimir.

Liability under the third category of the JCE: it was concluded that the accused, from March 1995 to August 1995 at the latest, made an active contribution to the VRS's goal of "creating conditions of total insecurity, intolerability and hopelessness for the further survival and life of the villagers in Srebrenica and Žepi", set in Directive op. no. 7, which resulted in the removal of approximately 30,000–35,000 Bosnian

Funded by
the European Union

Muslims from the enclaves of Srebrenica and Žepa during a period of only two weeks, and that **according to Article 7(1) of the Statute, as a participant of the JCE, he bears criminal responsibility for the forced removal of the Bosnian Muslim population, from eastern BiH.**

It was established that he contributed to the common goal of the JCE of murder and that starting from July 13, 1995, he was a participant of the JCE of murder and that by his actions and inactions he made a significant contribution to the common goal.

Taking into account that the accused possessed genocidal intent, the majority of the members of the Council were convinced beyond a reasonable doubt that the accused could have reasonably foreseen that targeted killings with genocidal intent would be committed as a result of a concerted undertaking, i.e. a JCE of forced removal, and that by his participation willingly took that risk in that JCE. Therefore, the majority of the members of the Council state **that the accused is criminally responsible for the criminal act of genocide under the third category of responsibility for the JCE, and this is through doing because he planned, encouraged, ordered and otherwise helped and supported the planning, preparation and execution of the criminal act of genocide.**

Punishment

The panel concluded that the accused bears criminal responsibility for committing the crimes of genocide, conspiracy to commit genocide, extermination, murder, persecution and forced transfer through his participation in the JCE of forcible transfer and the JCE of murder. In particular, the deliberate and calculated physical destruction of the population of eastern BiH, the Bosnian Muslims, was appreciated by the Council as representing one of the heaviest crimes known to mankind - the crime of genocide. The Council also appreciated the extreme scale and scope of the committed crimes, which could only be achieved by an organized, connected military structure, which acted in unison. In a very short period of time, the separation plan was successfully implemented on a national basis. Most members of the Council believe that this pattern of large-scale brutality applied by the VRS increases the gravity of these crimes. In this sense, it referred to the testimonies of the horrific mass executions given by the survivors who managed to get out of the pile of dead bodies, as well as the testimonies of people who were detained in indescribably inhumane conditions, abused and tortured, knowing that all they could do was

Funded by the European Union

expect from life that they simply wait for death. The Council particularly highlighted the testimony of a boy aged 5/6 who survived the execution in Orahovac. The council also appreciated the fact that the majority of Bosnian Muslim women continue to face psychological trauma, stress and anxiety, and this syndrome is also known as the "Srebrenica syndrome". When determining the sentence, the council took into account the irreparable consequences for the victims.

Aggravating and mitigating circumstance: In relation to the position, functions and actions of the accused, the majority of the Council members especially have in mind the high rank of the accused and the central position he held as assistant commander and head of the Intelligence and Security Sector in the Main Staff of the VRS. In addition, from the beginning of the plan for the removal of Bosnian Muslims from eastern BiH, the accused, in the opinion of the majority of the Council members, actively participated in the realization of the goals of the VRS outlined in the Directive op. no. 7, according to which it was necessary to "create conditions of total insecurity, intolerability and no prospects for the further survival and life of the villagers in Srebrenica and Žepa", which resulted in the forced removal of approximately 30,000–35,000 Bosnian Muslims from the enclaves of Srebrenica and Žepa in a short period. The majority of the members of the Council specifically stated that the accused contributed to the JCE murders by using his position as the head of the Sector for Intelligence and Security Affairs to cover up the crimes of his colleagues, participants of that JCE. In this regard, the Council appreciated the instruction given by the accused to his subordinates to take measures to hide from view the men and boys, Bosnian Muslims, who were detained on the soccer field in Nova Kasaba. The majority of the Panel members also found that the accused knew that he had a duty to protect the captured men from harm, but that he deliberately failed to perform this duty in order to contribute to the JCE murder. Therefore, the Panel found that the accused abused his position by concealing the crimes and failing to protect the captured Bosnian Muslims in accordance with the rules that were binding on the Bosnian Serb forces. In addition, the accused contributed to the forced removal operation in both enclaves, which also represents an abuse of his position. Therefore, most members of the Council take this into account as an aggravating factor. The Chamber also appreciated the fact that the accused stated that he was not guilty and should be acquitted on all counts of the Indictment, as well as that he did not present any mitigating factors.

When it comes to mitigating circumstances, the Council appreciated that the good

Funded by
the European Union

behavior of the accused during detention in the PJUN and during the trial procedure, in contrast to his disruptive behavior observed during the pre- trial procedure, improved the Council's ability to conduct the trial in a fair and expeditious manner, but emphasized that although such behavior is considered in principle a mitigating factor, it should be common, expected of all the accused and, observing it together with the accused's earlier behavior during the pre-trial proceedings, The Council gave little weight to that factor. The Council further took into account the advanced age of the accused; however, considering the accused's age in relation to the gravity of the criminal offenses for which he was found guilty, the Chamber gave very little weight to that factor. In the end, the poor state of health of the accused was one of the main reasons for the Council's concern during the pre- trial phase. However, taking into account the previous and current state of health of the accused, the Chamber determined that this was not an exceptional case that should be considered a mitigating factor, therefore the Chamber did not give it any weight.

By the Disposition of the Verdict, the Council, by majority vote, with the dissenting opinion of Judge Nyamba, stated that the accused Zdravko Tolimir was **GUILTY under Article 7(1) of the Statute, based on** the following counts: count 1: genocide under Article 4(3)(a) of the Statute; point 2: association to commit genocide under Article 4(3)(b) of the Statute; count 3: extermination, crime against humanity under Article 5(b) of the Statute; point 5: murder, violation of laws and customs of war according to Article 3 of the Statute; count 6: persecution, crime against humanity under Article 5(h) of the Statute; count 7: inhuman acts (forcible transfer), crime against humanity under Article 5(i) of the Statute.

Pursuant to the cumulative sentencing principles, the majority of the Chamber does not impose a conviction on the following count: Count 4: murder, a crime against humanity under Article 5(a) of the Statute.

The Council finds that Zdravko Tolimir **is NOT GUILTY** and therefore acquits him of the following count: count 8: deportation, crime against humanity under Article 5(d) of the Statute.

The appeal against the first-instance verdict was filed by Tolimir Zdravko, and the appellate panel

1. partially adopted the grounds of appeal, and annulled the conviction handed down to Tolimir for: extermination as a crime against humanity, to the extent that it refers to the murder of three leaders from Žepa,

Funded by the European Union

which is specifically stated in paragraph 23.1 of the Indictment; on the basis of Article 4(2)(b) of the Statute for genocide committed by inflicting serious mental injury on the Muslim population of Eastern BiH to the extent that the judgment was based on the forced transfer of Bosnian Muslims from Žepa; on the basis of Article 4(2)(c) of the Statute for genocide through the imposition of living conditions calculated to lead to the destruction of the Muslim population of eastern-BiH;

2. adopted the grounds of appeal and overturned the conviction of Tolimir for genocide (count 1) insofar as it relates to the murder of three leaders from Žepa, for genocide (count 1), extermination as a crime against humanity (count 3) and murder as a violation of the law and customs of war (item 5) to the extent that these verdicts refer to the killing of six Bosnian Muslims near Trnovo;

3. dismissed Tolimir's remaining grounds of appeal; and **confirmed Tolimir's sentence of life imprisonment**, with the provision that the minimum sentence should be 30 years in prison.

Funded by
the European Union

ANTE GOTOVINA

The defendants Ante Gotovina, Ivan Čermak and Mladen Markač are jointly accused in the indictment of crimes against humanity and violations of the law or customs of war allegedly committed in the period from at least July 1995 to approximately September 30, 1995 against the Serbian population in the southern Krajina in Croatia.

According to the indictment, the accused are responsible for planning, inciting, ordering or supporting and aiding the criminal acts **of persecution,** as a crime against humanity, **deportation,** as a crime against humanity, looting of public and private property, as a violation of the laws or customs of war, **wanton destruction,** as a violation of the laws and customs of war, **murder,** as a crime against humanity, **murder,** as a violation of the laws and customs of war, **inhuman acts,** as a crime against humanity, **cruel treatment** as a violation of the laws and customs of war, **inhuman acts - forced transfer,** as a crime against humanity. The prosecutor also states that the defendants are criminally responsible because they knowingly failed to prevent or punish punishable acts or omissions of their subordinates. The indictment charges each defendant with individual criminal responsibility under Article 7(1) of the Statute for allegedly planning, inciting and/or ordering each of the crimes charged in the Indictment and/or aiding and abetting their planning, preparation and/or execution.

Each defendant is also charged with individual criminal responsibility under Article 7(3) of the Statute for knowingly failing to prevent or punish crimes and/or omissions committed by their subordinates, over which each of them allegedly had effective control. The events in this case took place in the context of years of tension between Serbs and Croats in Krajina. Although the Trial Chamber had this in mind in the context of this case, it was not about crimes committed before the period covered by the Indictment, nor was it the decision of the Croats to resort to Operation Storm at trial. **This case is about whether Serbian civilians in Krajina were the targets of crimes and the responsibility of the accused for these crimes.**

Anta Gotovina, Ivan Čermak and Mladen Markač were tried on the basis of allegations that they participated in a joint criminal enterprise. The goal of that mentioned criminal enterprise was the permanent removal of the Serbian population from the territory of Krajina.

Funded by the European Union

Operation Storm

According to the indictment, at least until July and the beginning of August 1995, Croatian leaders, officials and forces conceived, planned, established and implemented the army for Operation "Storm". Operation Storm had a goal and purpose that was reflected in the recapture of the territory in Krajina, which at that time was inhabited mainly by Serbs. The major part of the military operation fully began on August 4, 1995. After the Croatian government announced that the operation was successfully carried out, the accompanying actions allegedly continued until November 15, 1995.

The Prosecution states that before, during and after the large military operation Operation Storm, there was an idea to expel Serbs from the territory of Krajina. The prosecution further states that the Croatian government, army, police, security and intelligence services persecuted Krajina Serbs with deportations and forced relocations, destruction of Serb houses and businesses, looting of Serbian property, murders, shelling of civilians and cruel treatment, illegal attacks on civilians and civilian objects, imposition of restrictive and discriminatory measures, discriminatory expropriation of property, illegal detentions and disappearances. This is mentioned in the context of all the events that were the subject of the trial.

The role and function of Ante Gotovina

The Prosecution alleges that from at least August 4, 1995 to November 15, 1995, Ante Gotovina was the commander of the Split Joint Area and the operational commander of Operation Storm in the southern part of Krajina. He further states that he participated in the planning and preparation of the operational participation of Croatian forces in Operation Storm and the continuation of operations and actions related to Operation Storm.

The Prosecution also alleges that he had effective control over all elements of units and members of the HV that formed or were attached to the Split Military District and other forces that were subordinate to his command and that operated and were present in the southern part of the Krajina area during Operation Storm. As the commander of the Split choir area, he was responsible for maintaining order, discipline and supervising the behavior of his subordinates.

The Trial Chamber sentenced Ante Gotovina to 24 years in prison, but the Appeals Chamber later acquitted him.

Funded by
the European Union

The role and function of Ivan Čermak

In relation to Ivan Čermak, the Prosecution states that from August 5, 1995 to approximately November 15, 1995, he was the commander of the Knin Assembly Area, which included the municipalities of Civljane, Ervenik, Kijevo, Kistanje, Knin, Nadvoda and Orlić. He further states that in addition to military operations, he also acted as a representative of the Croatian Government in dealing with members of the international community and the media when we talk about Operation Storm in areas that extended beyond his command boundaries.

According to the Prosecutor's Office, Ivan Čermak had effective control over the members of the units or elements of the HV that consist of or are attached to the Knin District, as well as control over the civilian police. As the garrison commander, he was responsible for maintaining order among the personnel in the garrison, organizing duty in the garrison and establishing cooperation and coordination between the garrison and the police forces of the area for the purposes of maintaining law and order.

The Trial Chamber acquitted Ivan Čermak of the criminal acts charged against him in the indictment.

The role and function of Mladen Markač

When we talk about Mladen Markač, the Prosecution states that from February 18, 1994, he was an assistant to the Minister of Internal Affairs, and as such he was also the commander of the Special Police of the MUP of Croatia. It is stated that he had overall authority and responsibility for the work and functioning of the Special Police. According to the Prosecutor's Office, Mladen Markač had effective control over all members of the Special Police involved in Operation Storm and the continuation of related operations and actions in southern Krajina, and he also had effective control over all members of the HV rocket and artillery units attached to his forces or subordinated to his command during Operation Storm and the continuation of related operations and actions.

The Trial Chamber sentenced Mladen Markač to 18 years in prison, but the Appeals Chamber acquitted him of the criminal offenses charged against him in the indictment.

Funded by
the European Union

JCE (Joint Criminal Enterprise)

Anta Gotovina, Ivan Čermak and Mladen Markač were tried on the basis of allegations that they participated in a joint criminal enterprise. The goal of that mentioned criminal enterprise was the permanent removal of the Serbian population from the territory of Krajina. According to the prosecutor's claims, the enterprise represented, or included, the commission of criminal acts of persecution, deportation and forced transfer, robbery and destruction.

He states that the aforementioned criminal acts were a natural and foreseeable consequence of the implementation of this enterprise. In addition, murders, inhuman acts and cruel treatment were also a natural and foreseeable consequence of the implementation of the joint criminal enterprise.

The indictment charges each of the defendants as participants in a joint criminal enterprise, based on **Article 7(1) of the Statute**, for all the acts for which they are accused.

The prosecutor claims that among the participants of the joint criminal enterprise, in addition to the three defendants, were Croatian President Franjo Tuđman, Defense Minister Gojko Šušak, as well as the Chiefs of the Main Staff of the Croatian Army, first Janko Bobetko and then Zvonimir Červenko. These participants in the joint criminal enterprise, it is alleged, used others or cooperated with them to facilitate or carry out the criminal acts. Other participants included government officials and members of the Croatian Army, military police, Special Police and civilian police. According to the prosecutor, the defendants participated in a joint criminal enterprise and acted in different ways in order to realize it.

The prosecutor charges all three defendants as participants in a joint criminal enterprise.

The Council concluded that Franjo Tuđman, the main political and military leader in Croatia before, during and after the period of the indictment, was a key member of a joint criminal enterprise that intended to populate the Krajina with Croats, so he ensured that his ideas were turned into official policy and action through of his influential position as president and supreme commander of the armed forces. A similar idea existed among Momčilo Krajišnik, Radovan Karadžić and other members of the Serbian leadership in Bosnia and Herzegovina.

Funded by
the European Union

Crimes committed in municipalities in Krajina (July-September 1995) Murders and looting of property as crimes against humanity

The indictment charges the accused with murder as a crime against humanity and violation of the laws and customs of war, from at least July 1995 until around September 30, 1995 in the municipalities of Donji Lapac, Drniš, Ervenik, Gračac, Kistanje, Knin and Orlić. The indictment also charges the accused with murder as a basic crime against humanity, persecution at the same time of the year in the municipalities of Benkovac, Civljane, Lišana Ostrovička, Lisičić, Nadvoda, Obrovac and Oklaj.

The Trial Chamber dealt only with those incidents for which there were sufficient evidence to consider in detail whether a crime had occurred and, if so, whether the main perpetrator could be identified.

The verdict elaborated on each municipality and the events in the municipalities - the murders of each victim individually, and in that direction it referred to the evidence presented for each of the events, as well as for the looting of public and private Serbian property as an act of persecution - a crime against humanity - committed in the same period in the mentioned municipalities and the municipalities of Civljane and Lisičić. In this part, a series of evidence was presented that indicate looting and destruction of property, but the council had to and could only determine whether a crime had been committed and, if so, then determine the affiliation of the main perpetrator, so that a conclusion could be drawn about the responsibility of the accused. For a more detailed analysis, it would be necessary to observe each individual event, because certain acts were committed that cannot be linked to the indictment and the accused in, for example, the burning of houses, fires, and the like, as well as in the case of robberies where certain perpetrators were present, it was determined who they were with, when, how they were dressed, when they left, etc., in order to be able to evaluate the evidence in relation to each other and draw a conclusion beyond reasonable doubt that these actions are connected to the accused.

Taking into account circumstances such as the nationality of the victims, and the time and place where the acts were committed, the Trial Chamber found that the murders were part of a widespread and systematic attack on the civilian population.

Funded by the European Union

Inhuman acts and cruel treatment

The indictment charges the accused with inhuman acts as a crime against humanity and cruel treatment as a violation of the laws and customs of war in the period from July 1995 to approximately September 30, 1995, in the municipalities of Benkovac, Donji Lapac, Drniš, Gračac, Kistanje, Knin and Orlić. and for inhuman acts as the basic crime of crimes against humanity and persecution, in the same period of time, in the municipalities of Civljane, Ervenik, Lišane Ostrovičke, Lisičić, Nadvoda, Obrovac and Oklaj.

Inhuman acts are reflected in abuse, detention, difficult and bad conditions, exposure to numerous maltreatments, fights, threats that detainees will be killed or slaughtered. In this part, too, it was important to determine who the perpetrators were, how the crime was committed, where the detainees were, who visited them, who threatened them, how they were trained, etc. in order to reach a conclusion about the relationship with the accused and their responsibility.

In regard to these acts, the court was not presented with relevant evidence for individual municipalities, as the judgment states. In relation to what the court regarded as relevant, the judgment described the names of the injured parties and victims, as well as all the evidence that was conducted on those circumstances.

The panel found that certain events were proven beyond a reasonable doubt.

Illegal attacks on civilians and civilian objects

The indictment charges the defendants with unlawful attacks on civilians and civilian objects as basic acts of crimes against humanity of persecution from July 1995 to approximately September 30, 1995 in the municipalities named in the indictment. The evidence received by the Trial Chamber focused on a number of towns, with most of the evidence relating to Knin during the early days of Operation Storm and relating to the artillery shells that fell on or near Kistanje and Kaštel Žegarski on 4 and 5 August 1995. those places, in the municipality of Nadvoda, and on Polač and hamlets in the valley of Plavno, in the municipality of Knin. The trial panel concluded that this part was not about targeting civilians and civilian objects, but that the forces that fired artillery missiles at those cities or areas near them were deliberately targeting military targets.

The Trial Chamber received evidence regarding artillery projectiles that were fired at

Funded by the European Union

or near Kistanja, Kaštel Žegarski in the municipality of Nadvoda and Polače and hamlets in the Plavno valley, both in the municipality of Knin between August 4 and 5, 1995.

However, the evidence received by the Trial Chamber was insufficient for the Trial Chamber to determine the number of missiles fired at these cities. The evidence does not sufficiently establish whether there was a presence of the Serbian Army of the Krajina in these cities.

The artillery reports received as evidence by the Trial Chamber do not contain further details of what the HV fired at in or near these towns. Under these circumstances, the Trial Chamber cannot determine which forces fired the artillery projectiles that hit the mentioned cities, which is why the Chamber determined that it was an attack on military targets, and not that the intention was to destroy civilian objects or kill civilians.

Deportation and forced relocation

The indictment charges the defendants with deportation and inhumane acts (forced transfer) as a crime against humanity and as the basic acts of a crime against humanity, persecution, from July 1995 to approximately September 30, 1995 in all municipalities covered by the indictment.

According to the indictment, members of the Krajina Serb population were forcibly relocated and deported from the southern part of the Krajina region to SFRY, Bosnia and Herzegovina and other parts of Croatia by threatening and committing acts of violence and intimidation (including looting and destruction of property). The indictment states that an "orchestrated campaign to expel Serbs from the territory of Krajina" began before Operation Storm, mainly through the use of propaganda, misinformation and psychological warfare. During the operation, Croatian forces shelled civilian areas, entered civilian Serb settlements at night and threatened those civilians who had not yet fled with shooting and other intimidation. Furthermore, according to the Indictment, systematic looting and destruction of property owned or inhabited by Serbs was organized and this was an integral part of the campaign to expel the remaining Serbs from the area and/or to prevent or discourage those who escaped from returning. In addition, individuals who tried to escape at that time were caught, loaded into vehicles and transported to detention facilities and 'collection centers', in order to better ensure that they do not return to their

Funded by
the European Union

settlements.

As far as this part of the verdict and this criminal offense is concerned, it is evident that the panel states that the Krajina Serbs left these areas.

However, further analysis of the verdict shows that reception and collection centers were established for civilians in accordance with the Geneva Conventions.

The trial panel notes that members of the Croatian Armed Forces and the Special Police carried out an illegal attack on civilians and civilian objects in the cities of Knin, Benkovac, Obrovac and Gračac, which constitutes persecution as a crime against humanity.

The trial panel concludes that the forced displacement of persons from Benkovac, Gračac, Knin and Obrovac, carried out by the HV and the Special Police on August 4 and 5, 1995, constituted deportation as part of a widespread and systematic attack on the civilian population. The Trial Chamber does not consider persons who lived in Krajina and were among the people who left the cities on August 4 and 5, 1995, who were not of Serbian nationality, to be victims of the deportation charged in the Indictment.

Regarding **reckless destruction**, the perpetrators, according to the opinion of the first instance panel, had the intention to commit destruction or that at the very least they committed the acts with reckless disregard for the probability that their consequence would be destruction. The council also determined that certain events were **intentional robberies**.

RESPONSIBILITY OF ANTE GOTOVINA

According to the interpretation of the Hearing Panel, Gotovina in his order treats the cities themselves as targets of artillery fire.

Illegal attacks were an important element in the implementation of the JCE. The Council then considered Gotovina's failure to seriously focus on the prevention of criminal offenses about which he received reports and to monitor the situation on the ground in this regard, and the Council assessed this failure in the light of his order for an illegal attack on civilians and civilian objects. The council concludes that Gotovina's omissions affected the general atmosphere regarding criminality in ZP Split. In addition, the Trial Chamber concludes that Gotovina's order for the unlawful

Funded by the European Union

attack on civilians and civilian objects was in itself a significant contribution to the JCE. And finally, considering the nature of his behavior and, especially, considering the unlawful attack, the Trial Chamber concludes that Gotovina knew that there was a widespread and systematic attack on the civilian population and that his actions were part of that attack.

In the part concerning Gotovina's responsibility, the judgment seems to contradict itself, the panel establishes conclusions, but the evidence it interprets does not support such conclusions.

The panel found that Gotovina gave the order to attack civilians and that his contribution to the JCE was that he knew that acts such as destruction, robbery, murder, inhumane acts, cruel treatment and illegal detentions (in themselves or as acts on the basis of persecution) a possible consequence of the execution of the JCE. Despite this, Gotovina contributed to the JCE, coming to terms with the possibility that the punishment for the crimes would be committed.

Mitigating circumstances

Gotovina's defense did not make any arguments regarding mitigating circumstances, even after the Trial Chamber instructed them to present sentencing arguments in their closing arguments, if they so wished, and that it was the duty of the defense to present the facts at the trial stage. which establish mitigating circumstances in the trial phase, and which they want to be taken into account.

The Trial Chamber notes the statement of one witness that he was positively impressed by Gotovina after meeting him on several occasions, that Gotovina was professional in his demeanor and that his soldiers respected him greatly. Even considering the likelihood that this is indeed the case, this evidence is not sufficient for the Trial Chamber to assess whether the accused has good character that could be taken into account as a mitigating circumstance. The trial panel notes that nothing drew its attention to the fact that Ante Gotovina behaved well, both in the courtroom and in custody. He considers this fact as mitigating the sentence, but only to a limited extent. On the other hand, Marko Markač's defense presented arguments that could possibly be considered mitigating circumstances by the decision of the Trial Chamber. What Markač's defense stated, among other things, was the fact that the accused Mladen Markač voluntarily surrendered to the Tribunal and that on

Funded by the European Union

March 11, 2004 he was transferred to the headquarters of the Tribunal. Markač's defense also stated that Mladen Markač is not in a good state of health and that his health has been deteriorating for years, to which Mladen Markač's medical record is attached as proof of the above. The trial panel considers these factors as mitigating circumstances in order to mitigate his sentence. The defense emphasized Markač's good governance and behavior as mitigating circumstances, but the Trial Chamber notes that nothing drew its attention to the fact that he behaved well, both in the courtroom and in custody. In short, the Trial Chamber does not consider Mladen Markač's behavior in the courtroom and in custody to be a mitigating circumstance. Markač's defense pointed to the statements given by several witnesses, including the provision of assistance to victims, as evidence of Mladen Markač's good character. Considering the above, the Trial Chamber considers this evidence insufficient for the Trial Chamber to assess whether Mladen Markač has a good character, which it could consider mitigating circumstances.

Aggravating circumstances

With regard to aggravating circumstances, the Trial Chamber considers that in this case it is appropriate to consider the gravity of the criminal acts committed by the accused together with other aggravating circumstances.

In assessing the severity of the crime, the total impact of the crime on the victims and their families can be taken into account, but only factors that have been proven beyond a reasonable doubt will be taken into account as aggravating circumstances.

In the specific case, speaking of the seriousness of the criminal acts as an aggravating circumstance, the Trial Chamber considers that since Ante Gotovina and Mladen Markač were declared responsible for participating in a joint criminal enterprise, it also follows that they were declared responsible for a large number of crimes that occurred in a wide geographical area and in a period of approximately two months. The Trial Chamber reminds us of the large number of dead people for whom criminal responsibility could be established under this indictment. He notes that some settlements were almost completely destroyed by their acts of reckless destruction, as was the case with Kistanje, where what was home to many was destroyed and practically made it impossible for them to return. Thousands of people have been driven from their homes, condemning most of them to live the uncertain lives of

Funded by
the European Union

refugees who must rebuild their lives abroad and dispossessing them of their possessions through wanton destruction and looting.

The Trial Chamber considered the vulnerability of the murder victims as an aggravating circumstance in this case against the accused. Namely, the victims consisted of those too weak to avoid the advance of the HV, which includes the elderly and the disabled. For this reason, the Trial Chamber considers that these circumstances should be taken into account when sentencing the accused.

In relation to Gotovina, his high position in that time period was taken into account. In such high positions, which were mentioned earlier, Ante Gotovina thus received a great responsibility to ensure that the troops under his command respect international humanitarian law. However, instead of fulfilling these duties, Ante Gotovina abused his position by contributing to JCE in several ways. Accordingly, the Trial Chamber considers this abuse of his position to be an aggravating circumstance.

The same is stated for Markač. Considering his high position as the assistant minister of the interior who managed the Special Police and as the commander of the operation of the Collective Special Police Forces which he commanded during the operation Storm and during the cleaning and the search operation that followed, Mladen Markač did not fulfill the responsibility related to his position to supports the standards of international humanitarian law. He is believed to have abused his position by contributing to the JCE in a number of ways. Accordingly, the Trial Chamber considers this abuse of his position to be an aggravating circumstance.

Judgment of the Trial Chamber

The Trial Chamber declares Anta Gotovina **GUILTY** of the following charges in the indictment:

- Point 1: Persecution, as a crime against humanity;
- Point 2: Deportation, as a crime against humanity;
- Point 3: Looting of public and private property, as a violation of the laws or customs of war;
- Point 4: Reckless destruction, as a violation of the laws and customs of war;
- Point 5: Murder, as a crime against humanity;

Funded by
the European Union

- Point 6: Murder, as a violation of the laws and customs of war;
- Point 7: Inhuman acts, as a crime against humanity;
- Point 8: Cruel treatment as a violation of the laws and customs of war;

The Trial Chamber acquits Anta Gotovina on count 3 of the indictment (inhuman acts (forcible transfer) as a crime against humanity.

The Trial Chamber hereby sentences **Ante Gotovina to a single sentence of 24 years in prison.**

The Trial Chamber finds that **Ivan Čermak is not GUILTY on all counts of the Indictment.**

The Trial Chamber declares Mladen Markač GUILTY of the following charges in the indictment:

- Point 1: Persecution, as a crime against humanity;
- Point 2: Deportation, as a crime against humanity;
- Point 3: Looting of public and private property, as a violation of the laws and customs of war;
- Point 4: Reckless destruction, as a violation of the laws and customs of war;
- Point 5: Murder, as a crime against humanity;
- Point 6: Murder, as a violation of the laws and customs of war;
- Point 7: Inhuman acts, as a crime against humanity;
- Point 8: Cruel treatment, as a violation of the laws and customs of war;

The Trial Chamber acquits Mladen Markač on count 3 of the indictment (inhuman acts (forcible transfer) as a crime against humanity.

The Council hereby sentences Mladen Markač to a single sentence of 18 years in prison.

Funded by
the European Union

Appeal on the Judgement

Ante Gotovina and Mladen Markač filed appeals against the first-instance verdict of the Trial Chamber, which sentenced Ante Gotovina to 24 years in prison and Mladen Markač to 18 years, in which it was stated that the Trial Chamber erred when it concluded that there was a JCE and they also argued that the Trial Chamber erred in finding that the artillery attacks on the four cities were unlawful, and they argue that these errors invalidate their convictions.

Gotovina, inter alia, in the part that refers to the fact that the Trial Chamber erred in concluding that unlawful artillery attacks were carried out, claims that, "if the finding of unlawful attacks that led to mass deportation is not sustained," the Trial Chamber's conclusion that there was JCE should be annulled. Markač joins Gotovina's arguments.

Both argued that without the conclusion that illegal artillery attacks were carried out, the conclusions of the Hearing Panel regarding the JCE cannot be sustained. Gotovina claims that the Trial Chamber specifically concluded that the goal of the JCE was to deport Serbian civilians by means of **illegal** artillery attacks and that overturning the Trial Chamber's conclusions regarding the illegal attacks **would negate** the *actus reus* of the JCE.

The Appeals Chamber overturned the finding that the artillery attacks on the four towns were unlawful. The Appeals Chamber concluded that the Trial Chamber's conclusion that the departure of civilians from towns and villages subjected to legitimate artillery attacks cannot be characterized as deportation, nor could it be concluded that the persons who participated in the legitimate artillery attacks had the intention of forcibly displacing civilians. The reasoning of the Hearing Panel makes it impossible to draw the conclusion that the departures from the four cities, which occurred in parallel with the legitimate artillery attacks, constituted deportation. After considering the evidence, the Appeals **Chamber came to the conclusion that the civilian departures that followed alongside the legitimate artillery attacks could not be qualified as deportation.**

The Appeals Chamber was therefore not convinced that the artillery attacks for which the appellants were responsible were sufficient to prove beyond a reasonable doubt their guilt for deportation on the basis of any alternative form of responsibility set forth in the Indictment.

Regarding the responsibility of the accused Ante Gotovina, the Trial Chamber

Funded by the European Union

concluded that Gotovina failed to make serious efforts to investigate these crimes and prevent future ones.

The Appellate Panel considers that the description presented by the Trial Panel of the additional measures that Gotovina should have taken is insufficiently elaborated and imprecise, and that it does not specifically establish how such measures would affect the deficiencies in the steps that should have been taken in relation to with criminal acts. The trial panel expressly took into account the evidence that Gotovina took numerous measures to prevent and minimize criminal acts and riots among HV soldiers under his control. The appeals panel also took into account the fact that the testimony of the expert at the trial shows that Gotovina took all necessary and reasonable measures to maintain order among his subordinates. In this context, the Appeals Chamber considers that the evidence in the file does not prove beyond a reasonable doubt that there was any big enough omission in Gotovina's case to constitute a basis for criminal liability in the sense of aiding and abetting or the responsibility of a superior.

When we talk about Markač, the Trial Chamber concluded that Markač failed to order the conduct of investigations in connection with the alleged criminal acts committed by members of the Special Police.

However, the Appeals Chamber notes that the Trial Chamber did not expressly establish that Markač significantly contributed to the relevant criminal acts committed by the Special Police or that he had effective control over these forces.

When we take into account all of the above, the Appeals Council made its decision, which is that it will not convict Markač on the basis of alternative forms of responsibility.

Bearing in mind this analysis of the verdict, it can be compared with the verdicts against members of the Bosnian authorities, in which a fundamental difference can be seen - in the verdicts against the Bosnian Serbs, it was undisputedly established that the goals and targets were exclusively civilians, while in Gotovina's case the goal was the elimination of legitimate military targets, which is allowed and cannot entail criminal liability.

Funded by
the European Union

JADRANKO PRLIĆ and others

The events that led to this case took place in eight municipalities and five camps on the territory of Bosnia and Herzegovina between 1992 and 1994.

In this case, the prosecution charges Jadranko Prlić, Bruno Stojić, Slobodan Praljko, Milivoj Petković, Valentin Ćorić and Berislav Pušić with individual criminal responsibility based on Articles 7(1) and 7(3) of the Statute for their role in the events from 1992 to 1994. in the municipalities of Prozor, Gornji Vakuf, Jablanica (Sovići and Doljani), Mostar, Ljubuški, Stolac, Čapljina and Vareš, as well as in the detention camps Heliodrom, Vojno and Ljubuški, and in the district military prisons in Dretelje and Gabela.

The prosecution charged Jadranko Prlić, Bruno Stojić, Slobodan Praljko, Milivoj Petković, Valentin Ćorić and Berislav Pušić with:

1. grave violations of the Geneva Convention of August 12, 1949 in accordance with Article 2 of the Statute, intentional killing (count 3), inhuman treatment (sexual assault) (count 5), illegal deportation of civilians (count 7), illegal transfer of civilians (point 9), illegal detention of civilians (point 11), inhumane treatment (conditions of detention) (point 13), inhumane treatment (point 16), large-scale destruction of property, which was not justified by military necessity and was carried out illegally and recklessly (point 19), and confiscation of property, which was not justified by military necessity and which was carried out illegally and recklessly (point 22);

2. violations of the laws or customs of war in accordance with Article 3 of the Statute, i.e. cruel treatment (point 14), cruel treatment (point 17), illegal work (point 18), wanton destruction of cities, settlements or villages, or unwarranted devastation by military necessity (point 20), destruction or intentional damage to institutions devoted to religion or education (point 21), robbery of public or private property (point 23), unlawful attack on civilians (Mostar) (point 24), unlawful terrorizing of civilians (Mostar) (point 25) and cruel treatment (siege of Mostar) (point 26); and

3. crimes against humanity according to Article 5 of the Statute, i.e. persecution on political, racial and religious grounds (point 1), murder (point 2), rape (point 4), deportation (point 6), inhumane acts (forced transfer). (item

Funded by the European Union

8), imprisonment (item 10) inhuman acts (conditions of detention) (item 12) and inhumane acts (item 15).

The indictment states that Prlić, Stojić, Praljak, Petković, Ćorić and Pušić are responsible for the following criminal acts under both articles:

- Article 7(1)-execution, including participation in a joint criminal enterprise ("JEC"), planning, inciting, ordering or aiding and abetting and;
- Article 7(3)-failure to prevent or punish crimes committed by their subordinates.

The Trial Chamber sentenced Prlić to 25 years in prison, Stojić, Praljko and Petković to 20 years in prison each, Ćorić to 16 years in prison, and Pušić to 10 years in prison, which were confirmed before Appeal panel.

Field of action

The Trial Chamber concluded that the crimes took place throughout Bosnia and Herzegovina - the Municipality of Prozor, Gornji Vakuf, Jablanica (Sovići and Doljani), Mostar, Ljubuški, Stolac, Čapljina and Vareš as well as five detention centers, i.e. the camp Heliodrom in the Municipality of Mostar, buildings grouped in the Vojno sector in the municipality of Mostar ("Pritvorski centar Vojno"), the Military Remand Prison in the city of Ljubuško ("Prison in Ljubuško"), the collective district prison Dretelj in the Municipality of Čapljina ("Dretelj Prison") and the Assembly of the Gabela District Prison in the Municipality of Čapljina at the relevant time to which the indictment refers.

Functions of the accused

According to the Indictment, Jadranko Prlić and Bruno Stojić held high political positions in the HZ HB and then in the HR HB at the time in question, and Slobodan Praljak and Milivoj Petković held high military positions in the HZ HB and then in the HR HB at the time in question.

Jadranko Prlić - On May 15, 1992, Mate Boban appointed Jadranko Prlić as the head of the Finance Department of The Croatian Defence Council (CDC/HVO), and then on August 14, 1992, as the president of the HVO, who at that time was the

Funded by the European Union

supreme executive, administrative and military body HZ HB. In August 1993, he became the prime minister of HR HB, and his duties, as the prosecution claims, remained mostly the same as when he was in the position of president of HVO. The Prosecution claims that during most of 1992 and 1993, along with Mate Boban, Jadranko Prlić was the most powerful official in the political structure and organs of the government of Herceg-Bosna/HVO, and at the end of 1993 he practically overshadowed Mate Boban as well. Bruno Stojić was the head of the Department (later the Ministry) of Defense of the HVO from July 3, 1992 to November 1993. On December 16, 1993, he was appointed the head of the Office of the Croatian Republic of Herceg-Bosna for the production and trade of weapons and military equipment HR HB. The Prosecution states that, as the person at the head of the Department (later the Ministry) of Defense of the HVO, Bruno Stojić was the highest political and managerial functionary of that body, responsible for the armed forces of Herceg- Bosna/HVO.

From approximately March 1992 to July 1993, Slobodan Praljak, as the prosecution claims, performed the functions of a high-ranking officer of the Croatian Army, assistant minister of defense and senior representative of the Ministry of Defense of the Republic of Croatia to the government and armed forces of HercegBosna/HVO, and de facto commanded the armed forces of the HVO during that period. After that, from approximately July 24, 1993 to November 9, 1993, he was the highest military commander of the armed forces of Herceg- Bosna/HVO as "Commander of the Main Staff".

On or about April 14, 1992, Milivoj Petković was assigned to head the Relocated Command Post of the Croatian Army in Grude, Bosnia and Herzegovina, which was or became the Main Headquarters of the HVO armed forces. Accordingly, from April 1992 until approximately July 24, 1993, Milivoj Petković held the position of military commander of the armed forces of Herceg-Bosna/HVO as the chief of the HVO Main Staff. From approximately July 24, 1993 to April 1994, he was the deputy commander-in-chief of the armed forces of the HVO.14 The Prosecution claims that, with regard to his functions and positions, Milivoj Petković de jure and/or de facto directed and commanded the armed forces forces of Herceg-Bosna/HVO. Valentin Ćorić, in the various positions and functions he held during the period covered by the Indictment, played a central role in the formation, management and work of the Military Police of the HVO, especially in the position of Head of the Military Police Directorate within the Department, and later the Ministry of Defense,

Funded by
the European Union

of the HVO from April 1992 until at least November 1993. The Prosecution claims that he de jure and/or de facto directed and commanded the Military Police of the HVO, which played an important role in the management of prisons and detention facilities of Herceg-Bosna/HVO. In November 1993, he was appointed Minister of Internal Affairs of the Croatian Republic of Herceg-Bosna.

Berislav Pušić had a major role in the HVO when it came to the exchange of prisoners and the management of HVO detention centers and prisons from 1992-1993. Years. On April 22, 1993, Valentin Ćorić assigned him to represent the Military Police of the HVO during the exchange of Bosnian Muslims held captive by the HVO. On July 5, 1993, Jadranko Prlić appointed him head of the Exchange Service, and on August 6, 1993, Bruno Stojić appointed him president of the commission entrusted with the management of detention centers and prisons in Herceg- Bosnia/HVO- in. In addition, on May 11, 1993, Bruno Stojić appointed him HVO liaison officer with UNPROFOR.

Joint Criminal Enterprise (JCE)

What was charged against the accused in the indictment when we speak in the JCE is that in the period from November 18, 1991 until approximately April 1994, and after that, several persons, among whom were the accused, initiated and participated in the JCE political and military subjugation of Bosnian Muslims and other non-Croats who lived in those parts of the territory of the Republic of Bosnia and Herzegovina that were claimed to belong to HZ HB, to the future HR HB. The members of the JCE had as their goal the permanent removal of Muslims and other non-Croats of BiH, the ethnic cleansing of the area of Croatian Republic of Herzeg-Bosnia [HZ(R)HB] and the annexation of Croatian communities as part of "Greater Croatia", and this by the use of force, intimidation or threat of force, persecution, imprisonment and detention, forced transfer and deportation, confiscation and destruction of property and other means that constitute or include the commission of a crime.

The Prosecution claims that each of the accused, acting individually or through their high positions and authority, and in agreement with other participants in the joint criminal enterprise, participated in the joint criminal enterprise in a managerial capacity in one or more ways, i.e. establishing, organizing, managing, financing, enabling and supporting government structures and political and military structures and processes in HZ(R) HB and HVO; by establishing, organizing, managing and

Funded by
the European Union

financing the system of prisons and detention centers of the HVO that were used to imprison Bosnian Muslims and by establishing, organizing, managing and financing the system for the deportation or forced transfer of Bosnian Muslims to other countries or parts of Bosnia and Herzegovina.

The verdict established that already in mid-January 1993, there was a JCE with a common criminal goal, which was the domination of the Croats of the Croatian Republic of Herceg- Bosna through the ethnic cleansing of the Muslim population. It was further concluded that the JCE was established in order to create a Croatian entity in Bosnia and Herzegovina that will partially reconstruct the borders of the Croatian banovina, facilitating the reunification of the Croatian people. We conclude that Prlić, Stojić, Praljak, Petković, Ćorić and Pusić were members of that JCE.

Specifically, it was established that: Prlić, Petković and Ćorić contributed to the JCE since January 1993. until April 1994, Stojić and Praljak contributed to the JCE from January 1993 to November 1993; Pušić participated in the JCE from April 1993 to April 1994.

The ultimate goal

The verdict established that the ultimate goal of the HZ(R) HB leaders was to establish a Croatian entity that would restore, at least partially, the borders of Banovina from 1939 and facilitate the reunification of the Croatian people. It was further established that the JCE was established to achieve the ultimate purpose of the JCE. The joint criminal plan was the "dominance of HR HB Croats through the ethnic cleansing of the Muslim population" ("Joint Criminal Plan" or "KZP„).

The members of the JCE were found to have set in motion the entire system of deporting the Muslim population from the Croatian Republic of Herceg-Bosna.

This system consisted of a wide range of crimes: displacement and detention of civilians, murders and destruction of property during attacks, abuse and destruction of property during eviction operations, abuse and very harsh conditions of detention in HVO detention centers, use of detainees for manual labor on the conflict lines or as a human shield, and the displacement of detainees and their families to other territories after they were released from captivity. Thousands of people were the victims of these acts of violence, which in an organized manner made up the military

Funded by
the European Union

and political forces of the HVO.

The defenses of Prlić, Stojić, Praljko and Pušić contested the established finding that Franjo Tuđman and other leaders shared the same ultimate goal, which was the creation of a Croatian entity that would restore the previous borders and enable the reunification of the Croatian people.

What the defenses complained about when we talk about the JCE is the common criminal goal, which is stated to have been the "domestication of Croats in the Croatian Republic of Herceg- Bosnia through the ethnic cleansing of the Muslim population", and the defenses filed extensive appeals on this. However, the Appeals Chamber considers that none of the appellants on the defense side has shown that the Trial Chamber made a mistake when considering the above-mentioned issues.

One of the appeals of Prlić's defense when we talk about the JCE is that he pointed out that the Trial Chamber was wrong when it concluded that he was the main member of the JCE and that he contributed significantly to it from January 1993 to April 1994, among other things. by his participation in blocking humanitarian aid, as well as mass arrest of Muslims, participation in planning attacks on Gornji Vakuf Municipality, emigration and eviction of the population and concealment of crimes. Prlić claims that a mistake was made regarding his authority in both civilian and military affairs, the way in which he significantly contributed to the JCE, his intention and ability to foresee crimes not covered by the JCE and his willingness to accept that risk.

Attack on Prozor

The verdict established that the HVO attacked the town of Prozor on October 23, 1992.

There is evidence related to allegations of theft, as well as damage and burning of property and houses owned by Muslims after establishing control over Prozor. The evidence confirms that the HVO forces targeted the residential property of Muslims, while no evidence allows the conclusion that there was any burning of Croatian houses or property.

In October 1992, after establishing control over the town of Prozor, HVO soldiers arrested a large number of Muslims, members of the TO/ARBiH.

Funded by
the European Union

The HVO attacked a dozen villages in Prozor Municipality from June to mid-August 1993, during which property and mosques were damaged and six Muslims were killed.

Based on the testimony of Witness BS, it is concluded that in May or June 1993, members of the HVO set fire to the property of Muslims from Skrobućani and the mosque in Skrobućani.

Regarding the village of Lug, it was established that the damage was committed by members of the HVO, based on the evidence that includes the SIS report, which shows that these buildings were burned by HVO soldiers and "domestic rioters", as well as based on the testimony of Witness BT.

The verdict stated that during the attack on the village of Tošćanica on April 19, 1993, members of the HVO Military Police shot and killed Rama Vila, about 90 years old, and Ahmet Husrep, about 70 years old, committing murder.

It was also established that HVO soldiers, including members of the "Kinder platoon", killed an elderly and sick man in the village of Prajine, and that they beat and then shot and killed an 80-year-old disabled man, as well as another the man they previously captured. Based on the circumstances of the death of the Muslims from Prajin, it was established that HVO soldiers, including members of the "Kinder platoon", by shooting at the victims, had the intention of causing their death and that they committed the criminal offense of murder against each of these persons, from Article 5 of the Statute.

The verdict established that in the summer of 1993, members of the "Rama" brigade of the HVO illegally imprisoned civilians in the Secondary School in Prozor and thereby committed the criminal offense of imprisonment, from Article 5 of the Statute, as well as that the HVO had the intention of imprisoning them in the building "UNIS -a" of a minor who was 16 years old at the time, on the basis of which it was established that the HVO had the intention of detaining a 16-year-old young civilian. Also, we have an example of an act of imprisonment in the High School Center in Prozor, when the HVO detained Muslim men who were civilians. Based on the evidence, the Council concludes that on August 28, 1993, members of the HVO forcibly displaced women, children and elderly Muslims, detained in the villages of Lapsunj, Duge and the settlement of Podgrađe, and thereby committed the crime of inhumane acts, from Article 5 of the Statute.

Funded by
the European Union

The death of six Muslims in the area of Prajin and Tolovac

On July 19, 1993, on Mount Tolovac, HVO soldiers captured a group of Muslims, including men, women and children, who hid in a barn, and killed Bajra Munikoza, Šaha Munikoza and Šaban Hodžić. The soldiers first broke into the barn, and then, under the threat of death, ordered everyone present to go outside, then they singled out one of them from the group, hit him with a butt and shot him, then they took away Šaha Munikoza, who was never seen alive again, and her bloody body was found by the side of the road, and they fired two rounds with which they killed Šaban Hodžić, a physically handicapped Muslim. These actions show us that members of the HVO had the intention of causing their death. The council concluded that each of the mentioned persons committed murder, from Article 5 of the Statute.

Arrest, detention and displacement of Muslims, men, women, children and the elderly, from the spring to the end of 1993

From the spring of 1993 until the end of 1993, Herceg-Bosna/HVO forces arrested Bosnian Muslim men and took them to various detention centers in Prozor Municipality, where the Muslim detainees were physically abused, some of them were taken and no one ever saw him again and some detainees were transferred by the HVO to other detention centers in Ljubuški, Heliodrom, Dretelje and Gabela. Bosnian Muslims were used for forced labor, that while they were performing forced labor, they were beaten, humiliated and forced to perform sexual acts, and that some detainees died or were wounded while they were in forced labor.

On or around July 31, 1993, Herceg Bosna/HVO forces took about fifty detained Muslims to the conflict line and HVO soldiers then opened fire on the detainees, forcing them to go towards ARBiH positions, killing at least twenty detainees. It is mentioned that in July and August 1993, women, children and elderly persons were gathered and detained in two villages in the municipality of Prozor, and in the part of the city of Prozor called Podgrađe, that these persons were detained in "miserable" conditions, that were mistreated, humiliated, that their property was looted and that women were often raped. It is also stated that at the end of August 1993, thousands of detained civilians were brought near the front line, where they were forced to walk towards the territory held by the ARBiH and that HVO members then opened fire on them, injuring several of them. Herceg-Bosna/HVO forces continued to persecute and abuse Muslim civilians who remained in Prozor Municipality. The first detention center for Muslims is the High School in Prozor. The establishment of the detention

Funded by
the European Union

center in the High School began on July 7, 1993, following a series of orders issued by Marinko Zelenika, commander of the "Rama" Brigade of the HVO.

During the summer of 1993, between 400 and 500 people, originally from the city of Prozor and the surrounding villages, were detained in several classrooms of the High School in Prozor. Most of the detainees were Muslim men, members of the Territorial Defense Force of the Republic of Bosnia and Herzegovina/Army of the Republic of Bosnia and Herzegovina (TO/ARBiH). In June 1993, Željko Šiljeg gave instructions on what to do with captured Muslims, which referred to the deportation of Muslims, and that only some who would perform technical and physical work would be "retained".

It follows from the evidence that in July and August 1993, detainees in the High School were abused during detention. Detainees were physically abused by persons, members of the Military Police or HVO, who came from outside the High School, and among them were members of the "Kinder-voda". On the basis of the evidence that exists related to the aforementioned accusations, it is concluded that in July and August 1993, military policemen and HVO soldiers, among whom were members of the "Child platoon", abused Muslims, detainees in the High School, and that some of them taken outside the center and never seen again.

It was stated in two HVO reports dated August 13 and 14, 1993, one of which originates directly from the Department of Defense and the other from the SIS of the "Rama" Brigade, and which were received by the SIS administration in Mostar as part of the Department defense, that "members of the VP and the Rama brigade harass the population, take material goods, take away girls and rape and force them into prostitution" in Podgrađe, Lapsunje and Duga, while those villages were under responsibility of the "Rama" Brigade.

Municipality of Gornji Vakuf

This part refers to the crimes committed by HZ HB forces from October 24, 1992 to around January 22, 1993 in the municipality of Gornji Vakuf, specifically in Gornji Vakuf, Duša, Hrasnica, Trnovača, Ždrimci and Uzričje.

HZ HB/HVO forces arrested several Muslim civilians in these villages, separated the men from the women, children and the elderly, took the men to detention centers

Funded by the European Union

and imprisoned the women, children and the elderly in houses in the village. During the detention in these villages and in the village of Trnovača, civilians lived in "inhumane" conditions and were subjected to violence and abuse.

During a meeting on January 16, 1993 between representatives of the HVO and the ARBiH, Miro Andrić conveyed to the representatives of the ARBiH the general order on submission issued by Milivoj Petković on January 15, 1993, and requested that all ARBiH forces be placed under the control of the forces HVO.

Here, it is important to highlight the role of Slobodan Prljko, who came from Zagreb to join the command of the HVO forces in Gornji Vakuf on the evening of January 15, 1993, as well as the determination with which he imposed an "ultimatum" on January 16, 1993, through his commanders. warning the representatives of the ARBiH in Gornji Vakuf that "they will be run over if they do not accept the decisions of the HZ HB".

The HVO forces, with the help of heavy artillery, attacked the residential parts of Gornji Vakuf where Bosnian Muslims lived and that in that attack several civilians, Bosnian Muslims, were killed, as well as that a significant part of their property was destroyed or damaged. Evidence shows that the HVO used tanks, artillery, rockets and mobile anti-aircraft guns in the attack on the town of Gornji Vakuf. After the HVO attack on January 18, 1993, the town of Gornji Vakuf was burning and the Muslim part of Gornji Vakuf was badly destroyed in some places and that the town was badly damaged. Considering that the city suffered great damage both due to the conflict between the ARBiH and the HVO, as well as due to shelling by the VRS, the Council concludes that the HVO is, at least partially, responsible for the damage and destruction in the city of Gornji Vakuf.

Considering the evidence and witness statements, it was concluded that, after the HVO attacked the village of Duša and brought it under their control, the HVO soldiers set fire to the houses in the village, where it was established that there was destruction of property and wanton destruction of towns and settlements in Gornji Vakuf municipality.

According to the evidence included in the file, the HVO burned at least 22 houses in the village of Uzričje, where there was also destruction of property and wanton destruction of towns and settlements.

During the attack on the village of Duša, the HVO fired several shells from Mačkovec at the village of Duša, and one shell hit the house of Enver Sljiva, killing seven people

Funded by the European Union

in Enver Sljiva's basement. The victims were women and children and a 65-year-old man who was wounded on that occasion but died as a result of the injuries he sustained as a result of the attack. It was established on the basis of all the evidence that the village of Duša was the Muslim village that was the most destroyed as a result of the attack by the HVO and that on that occasion a significant part of the property owned by the Muslims in the village was damaged.

When we talk about the displacement of women, children, elderly and infirm people from the village of Duša, based on the evidence, it is possible to conclude that the women, children and elderly people were arrested after they fled to the house of Enver Sljiva in Duša. Although in this situation we cannot determine the exact number of women, children and elderly people who were in Enver Sljiva's house in Duša, nor exactly how many people were arrested after that, it can certainly be concluded that there were dozens of them.

The verdict established that the HVO held the Muslim residents of Uzričje prisoner in the village starting on January 19, 1993, for approximately one and a half days. It was established that the HVO beat and mistreated the prisoners. The evidence confirms that, around January 18, 1993, HVO soldiers beat some of the men detained in two houses in the village, including Ahmet Kurbegović, and that they forced one of them to take off his clothes during interrogation. During February 1993, HVO soldiers also forced the villagers to leave their houses and stand in the cold for a long time, after which they threatened them and shot them above their heads.

Regarding the issue of the displacement of residents from the village of Uzričje, after the attack on the village of Uzričje, a number of Muslims fled from that place, specifically in the direction of the territory under the control of the ARBiH, out of fear of upcoming events or as a result of pressure exerted on them by HVO soldiers.

Regarding the allegations of the transfer of Muslim men from Duša and Hrasnica to the furniture factory in Trnovača, the number of detainees ranged from 40 to 60 persons aged between 18 and 65. According to Senad Zahirović, one of the detainees, the Muslim men suffered from cold because there was no heating in the rooms where they were detained. Several witnesses detained in the Factory stated that, while they were imprisoned, they were victims and/or eyewitnesses to beatings and other forms of abuse by HVO soldiers. The evidence shows that members of the HVO forced the detainees to take off their clothes, that they beat them with wooden sticks, metal rods or with their feet and fists, that they forced them to sing Ustasha

Funded by the European Union

songs and to beat other detainees.

Based on the evidence included in the file regarding the criminal events that took place in the Furniture Factory in Trnovača, we can conclude that the HVO detained 40 to 60 Muslim men in the Furniture Factory in Trnovača, that some Muslim men were beaten and/or suffered abuse from by HVO soldiers while they were imprisoned and that, after fifteen days, these men were exchanged or transferred.

Municipality of Jablanica

This part refers to crimes committed in the municipality of Jablanica, specifically the villages of Sovići and Doljani by the HVO. It is stated that HZ HB/HVO forces attacked the villages of Sovići and Doljani on April 17, 1993, after which, first, they picked up and detained Muslim men of military age in the School in Sovići on April 17 and 18, 1993, and in Ribnjak near Doljan in the period from April 18 to 23, 1993 and, secondly, gathered from April 18 In 1993, they held men, women, children and the elderly in captivity in the School in Soviči and in houses in the village of Junuzovići until approximately May 5.

In order to strengthen the defense lines of the HVO in the area of Konjic and Jablanica, Milivoj Petković, Chief of the HVO General Staff, ordered that the combat readiness of the units be raised to the highest level. Milivoj Petković says in his order that he will personally determine the time of departure and the area to which the combat units will be sent, and that further orders will be issued by telephone. On the same day, the HVO started shelling the town of Jablanica.

84 to 90 members of the ARBiH were captured in Sovići and Doljani.

Beginning on April 19, 1993, HVO soldiers gathered around 400 women, children, and elderly people from Sovič and Doljan in houses in Junuzovići, Jablanica Municipality, where they held them captive until May 4 or 5, 1993, and some of mistreated them. After the visit of a joint delegation of the HVO and the BiH Army, which included Milivoj Petković and Berislav Pušić, as well as several members of international organizations, on May 5, 1993, the HVO transferred the detainees from the school in Sovići and houses in Junuzovići to Gornji Vakuf.

Regarding the arrest of women, children and elderly people, based on the evidence, it was determined that in the days after the attack, women, children and elderly

Funded by
the European Union

people, residents of Doljana, were arrested, and a series of evidence indicates that these acts were committed by members of the HVO, the HV and members of the MUP of the HVO HZ HB from Jablanica.

It is said that the HVO detained approximately 70 to 90 military-fit men, Bosnian Muslims, in the school in Sovici. The HVO gathered men, women, children and elderly people, Muslims, who were expelled from their homes in the area of Sovici and Doljani. It is stated that the conditions of detention were difficult and inhumane, and that members of the HVO beat, abused and mistreated the detainees, including women.

In the period of April 20 or 21, 1993, HVO soldiers caused the death of four Muslims detained in the school in Soviče, and thereby committed the criminal offense of murder against each of these persons, under Article 5 of the Statute.

In the School in Sovići, members of the HVO kept men, women, children and the elderly, especially Muslims, in captivity, and the conditions of detention were extremely difficult. HVO soldiers, among whom were KB soldiers, beat and abused some detainees, including women, during their detention, and some detainees were forced to perform certain works, including "engineering" works.

The verdict established that there was demolition and burning of houses and religious buildings in the villages of Soviči and Doljani. There is a lot of evidence that indicates that HVO soldiers - among whom were also KB soldiers - burned and/or demolished Muslim houses in the villages of Soviči and Doljani in the period from April 18 to 24, 1993. In the days after the HVO attack on the villages of Sovići and Doljani, HVO soldiers burned or destroyed at least two Muslim religious buildings.

The Council also concluded that on May 5, 1993, HVO soldiers, including "Tutina's" men, forcibly displaced Muslim civilians from Sovič and Doljani, detained in the School in Soviči and in the hamlet of Junuzovići, in Gornji Vakuf, and thereby committed the crime of inhumane treatment. acts, from Article 5 of the Statute.

Municipality of Mostar

This part refers to crimes committed on the territory of Mostar Municipality.

It is stated that Herceg-Bosna/HVO authorities attacked Bosnian Muslims in Mostar

Funded by
the European Union

in 1992 and until April 1994, during which an attack was carried out on the Vranica building complex in western Mostar, where a large number of people lived, that arrested Muslim men of military age, and detained them in several places in Mostar, as well as taking other residents of western Mostar to the Veleža stadium, and then to the Heliodrom, while some were taken to the prison in Ljubuško. It is also reported that Herceg-Bosna/HVO forces destroyed two mosques, Baba Bešir's and Hadži-Alibeg Lafin's mosques, both in West Mostar.

During the brutal beating, the soldiers of the HVO killed ten members of the ARBiH who were held captive by the HVO at the Faculty of Mechanical Engineering, and that they thereby committed murder, according to Article 5 of the Statute, which was established by the verdict. The council also determined that two of the five Muslim men died as a result of being beaten by HVO soldiers, and thus committed murder.

The verdict also established that, in the period from mid-May 1993 to February 1994, the HVO forced Muslims from West Mostar to leave their homes and to go primarily to East Mostar, and in some cases to third countries, thereby committing the criminal offense of deportation., from Article 5 of the Statute.

HercegBosna/HVO forces systematically expelled and forcibly relocated several thousand Muslim civilians from western Mostar and subjected them to physical abuse, sexual violence and other forms of abuse, opened fire on them, looted or confiscated their property. The statements given by several witnesses describe the destruction in the city of Mostar as a result of the shelling by the Serbian armed forces, and before the outbreak of the conflict between the Croats and the Bosnian Muslims. Several bridges were thus destroyed, with the exception of the Old Bridge, which was, however, damaged.

The HVO has set up checkpoints around the city of Mostar since May 1992, and the population's freedom of movement is also limited by introducing a curfew and establishing a system of permits for moving around the city and for leaving the city of Mostar - permits which, among others, published by Bruno Stojić.

In May 1993, intensive military operations were conducted and numerous crimes were committed alongside the military operations, especially in the temporary detention centers of the HVO in Mostar.

With regard to the demolition of a religious building in Mostar, specifically a mosque,

Funded by
the European Union

it was concluded that the HVO was responsible for the demolition of Baba Bešir's mosque in Mostar around May 10, 1993 based on the evidence that was presented.

It was established that during this operation Muslims were driven out by the HVO, and between 1,200 and 2,000 Muslim residents had to leave western Mostar. Consequently, in the second half of May 1993, HVO soldiers systematically expelled a large number of Muslims from their homes in western Mostar, forced them to cross the front line to eastern Mostar, or took them to the Heliodrome.

During the expulsion of Muslims from their homes in May 1993, the HVO threatened, intimidated and hit Muslims from western Mostar with their feet, fists and butts. They also confiscated all valuable items that the Muslims from West Mostar had with them.

The verdict established that the members of the Military Police were informed about the events of June 1993, which implied the commission of certain crimes, and that they forwarded the information in this regard to the Directorate of the Military Police. Likewise, on June 16, 1993, representatives of the international community warned Valentin Ćorić, Berislav Pušić, Bruno Stojić and Jadranko Prlić about these facts. All four gave the same answer, that is, that the actions of criminals over which the HVO has no control are concerned. Bruno Stojić and Milivoj Petković were also informed about the rape of Muslim women during the evictions on June 14, 1993, but nothing was done about it.

During June 1993, the expulsion of Muslims from West Mostar continued, and that Muslims suffered abuse, threats and beatings. It was established that Valentin Ćorić, Berislav Pušić, Bruno Stojić and Jadranko Prlić were informed of such a factual situation between June 14 and 16, 1993. Three members of the Military Police, in charge of the security of Jadranko Prlić, kidnapped two girls from the street in western Mostar without any special reason and then raped them. The analyzed evidence confirms that the act of rape was committed against these two girls.

More evidence shows that the HVO followed a political line aimed at banning or limiting the access of humanitarian convoys and international organizations to eastern Mostar. Berislav Pušić, as the head of the Service for the exchange of prisoners and other persons, was in charge of issuing special permits for the humanitarian evacuation of people from East Mostar, although this issue was not exclusively within his jurisdiction. Namely, the decision to grant access to

Funded by
the European Union

international organizations could have been made at a higher political level than Berislav Pušić, that is, the decision could have been made directly by Jadranko Prlić, or Bruno Stojić, Milivoj Petković. Therefore, international and humanitarian organizations encountered obstacles when their convoys tried to enter or leave East Mostar, since HVO military policemen detained and searched convoys at HVO checkpoints. The HVO and, specifically, Mate Boban stated on July 9, 1993 that international organizations, including UNPROFOR, UN military observers and PMEZ, would not be granted access to Mostar for at least a month.

Demolition of the Old Bridge in Mostar

The verdict established that on November 9, 1993, Herceg-Bosna/HVO forces destroyed the Stari Most, a building of international importance, which bridged the Neretva River, connecting East and West Mostar. The old bridge had great cultural, historical and symbolic significance. It was almost 500 years old and was the work of the architect Hajrudin.

The HVO Armed Forces are responsible for the destruction of the Old Bridge in Mostar and claim that at the time of the event, Slobodan Praljak was the commander of the Main Staff.

It follows from the evidence that on November 8, 1993, Milivoj Petković issued an order to go into offensive operations, including on Mostar, and that this order was implemented. In addition, it was shown that, on the same day and within the same attack, one tank of the armed forces of the HVO opened fire on the Stari Most during the entire day of November 8, 1993, and that on the evening of November 8, 1993, the Stari Most could already be considered destroyed..

The verdict established that an HVO tank stationed on the Stotina hill opened fire on the Stari most on November 8, 1993 throughout the day, as part of the offensive actions that, on the orders of Milivoj Petković, Miljenko Lasić put into action that day. He also concludes that it was in the military interest of the HVO Armed Forces to destroy the bridge, since its destruction practically completely prevented the further supply of ARBiH units.

Heliport

Regarding the Heliodrom detention center, it is stated that the HVO detention center at Heliodrom was established in September 1992 on the orders of Bruno Stojić and Valentin Ćorić. HZ HB/HVO forces are said to have arrested and detained hundreds of Muslims at the Heliodrom, with an estimated maximum of 6,000 detained at one time. In the detention center there were men, women and children, Muslims, who were abused, mistreated and humiliated. The verdict established, considering all the presented and considered evidence, that Valentin Ćorić ordered the establishment of the detention center at the Heliodrom, but the evidence does not allow him to come to a conclusion about the exact role that Bruno Stojić played in it. Very difficult conditions prevailed in the Heliodrom detention center, as in other detention centers, related to the lack of medical care, poor hygienic conditions, poor availability of drinking water, and the lack of beds and blankets. Also, a big problem arose with the lack of food, which resulted in the fact that many detainees lost a significant number of kilograms during their stay at the Heliodrom. Valentin Ćorić was sent a copy of the report of the director of the Heliodrom, addressed to the head of the Defense Department, Bruna Stojić, in which he describes the difficulties and conditions in the said detention center, primarily in connection with the supply of food for detainees. Accordingly, we conclude that Valentin Ćorić knew about the problems with the food of the detainees at the Heliodrom, as well as about other difficulties.

Several witnesses testified about the detentions in solitary confinement, describing the conditions in solitary confinement. Considering that the conditions were very bad, that the prisoners in solitary confinement had no food or water, some were forced to eat their own excrement and drink their own urine. It is important to emphasize here that Bruno Stojić was informed about such conditions by letter, and we conclude that Bruno Stojić knew about such bad conditions.

The verdict established the behavior towards the detainees of the Heliodrom detention center, that the detainees were regularly and severely beaten, and that they were forced to work on the front line, during which many were killed or wounded.

Jadranko Prlić, Milivoj Petković and Marijan Biškić were warned by a letter from the ICRC office in Medjugorje that many detainees were taken to the front line in Mostar, where they were forced to wear HVO uniforms and wooden rifles, while fierce fighting was going on there in August and September 1993.

Funded by
the European Union

It was established that the prisoners were forced to stand in front of the HVO soldiers or among them along the front line in Mostar in order to protect them from possible attacks by the ARBiH, that is, that the prisoners were placed as human shields. Since the condition for the detainee to be released from the Heliodrom detention center is that they move with their family to third countries or that they provide guarantees that they will really leave BiH and hand over their property to Herceg-Bosnia, the Council concludes that the HVO had the intention of deporting them outside the territory of Bosnia and Herzegovina.

There were several other detention centers, and these were the Vojnom detention center where murders also took place. Jadranko Prlić and Milivoje Petković, among others, were informed by letter about the murders of five Muslims who were detained at Heliodrom and then transferred to Vojno.

Municipality of Ljubuški

This part of the analysis will focus mainly on crimes related to the detention of Muslims in Ljubuški Prison and Vitina-Otok Camp.

In the Municipality of Ljubuški, in July and August 1993, the HVO listed military-capable men, disarmed them and restricted their movement, and then carried out mass arrests during which hundreds of men were imprisoned in the prison in Ljubuški and at Heliodrom. A number of empty apartments in the Ljubuški Municipality, where Muslims once lived, were occupied by Croats from central Bosnia.

Along with the mass arrests, the HVO established and ran a whole network of detention centers for Muslims. In June 1992, the military police of the HVO established a detention center in the area of the former police station in Ljubuški.

It has already been mentioned what the conditions were like in the detention centers. Among other things, a large part of the problem was the lack of food and water, medical aid, the hygienic conditions were very bad, and the problem was the overcrowding of all detention centers. Detainees in the prison in Ljubuški hardly had enough room to sit on the floor. In all detention centers, detainees were humiliated, mistreated and abused. Based on the evidence, the detention conditions to which the HVO subjected the Muslims detained in the Ljubuški Prison constitute inhuman

Funded by
the European Union

acts, a crime against humanity, from Article 5 of the Statute.

Since the condition for the release of Muslim men from the detention centers was that they and their families leave the municipality, it was concluded that in this way the Muslims from the Ljubuški municipality were forced to leave their homes. In no case was this an evacuation for security reasons or an evacuation justified by imperative military reasons. In addition, since the Muslims had to provide guarantees that they would really leave BiH, it is concluded that the HVO had the intention of deporting them outside the territory of BiH.

Based on the evidence, it was established that in August 1993, the HVO deported the Muslim population from the municipality of Ljubuški outside the territory of BiH and thus committed the criminal offense of deportation, from Article 5 of the Statute.

We have another example of deportation in Ljubuški when it comes to Muslims detained in the Ljubuški Prison. The verdict established that on August 13, 1993, Valentin Ćorić released two Muslim civilians because they had a letter guaranteeing their departure to Germany, which shows the intention of the HVO to deport them from Bosnia and Herzegovina.

The same situation happened in the Vitina-Otok Camp, where it was determined that an act of deportation had been committed because some detainees were released, but on the condition that they go to third countries. This committed the criminal offense of deportation and the criminal offense of inhumane acts (forcible transfer), from Article 5 of the Statute.

Since the Muslims had to choose between remaining in captivity or leaving their homes with their families, the verdict found that the HVO had the intention of forcing them to leave the municipalities, causing them serious mental harm.

In view of this, it was concluded that in August 1993, the HVO carried out the forced displacement of the Muslim population from the Ljubuški Municipality and thereby committed the crime of inhumane acts, from Article 5 of the Statute.

When it comes to Muslims detained in Ljubuški Prison, it was established that the HVO detained Muslim men and women, as well as members of the ARBiH and HVO, as well as children, teachers or politicians who were not members of any armed forces. So, it was about civilians. Therefore, it was established that, based on the evidence, the HVO unlawfully imprisoned civilians in the Ljubuški Prison from April

Funded by
the European Union

1993 to March 1994 and thereby committed the criminal offense of imprisonment, as referred to in Article 5 of the Statute.

We have another example of the criminal act of imprisonment committed in Vitina-Otok Camp, where Muslim men between the ages of 20 and 60 were detained, among whom some were members of the ARBiH, and some were not members of any armed forces. Therefore, the HVO kept civilians imprisoned, thus committing the crime of imprisonment.

Detainees in the detention center in Ljubuški were regularly insulted, punched and beaten, both in the prison and in the places where they performed forced labor, by HVO soldiers. The extremely violent behavior of members of the HVO armed forces towards the detainees led to the fact that the detainees were inflicted with severe physical and mental injuries and serious physical and mental injuries, which represents a serious violation of their human dignity, which leads to the conclusion that the criminal offense committed was cruel treatment, criminal offense from Article 3 of the Statute by the HVO.

Municipality of Stolac

Regarding the events in the municipality of Stolac, the Council has established that numerous witnesses have clearly identified members of the Military Police who were involved in several criminal events in the municipality of Stolac.

The criminal acts refer to the arrest and imprisonment of men of military age, Muslims, the arrest of women, children and the elderly, the displacement of the population, and the theft and damage of property in the municipality of Stolac in July and August 1993, as well as the imprisonment of women, children and the elderly in the municipality of Stolac.

When we talk about the murders committed by members of the HVO in the area of Stolac Municipality, members of the Military Police and armed forces of the HVO participated in the beatings and physical abuse of three Muslims while they were detained in the Koštana Hospital and thereby caused their death. HVO soldiers from Stolac also beat Salko Kaplan and caused his death in August 1993.

Funded by
the European Union

Municipality of Čapljina

The crimes committed in the territory of the Čapljina municipality are reflected in the persecution of the Muslim population from the municipality, the arrest of a significant number of men, Bosnian Muslims, in the Čapljina municipality, including prominent members of the community, and their detention in various detention centers of the HVO, the systematic expulsion of women, children and elderly people, Muslims, from the municipality of Čapljina and drove them to the areas under the control of the ARBiH or through Croatia to other countries, and that during these operations the forces Herceg-Bosne/HVO looted Muslim property, imprisoned Muslim civilians, sometimes in inhumane and cruel conditions, killed several people, destroyed houses owned by Muslims and destroyed mosques.

In April 1993, members of the HVO took Muslim men from the municipality of Čapljina, including men who were not members of any armed forces, to the barracks in Grabovina and the prison in Dretelje. Included in the file is an order dated June 30, 1993, which Milivoj Petković, commander of the HVO Main Staff, sent to the OZ Doostostuna Herzegovina, according to which it was necessary to: 1) disarm and "isolate" all Muslims in the HVO and 2) to "isolate" all military-capable Muslim men who lived in the area of responsibility of the OZ Southeastern Herzegovina.

In July 1993, 12 Muslim men, residents of the village of Bivolje Brdo, were arrested by HVO soldiers and men belonging to the Military Police. After that, 12 bodies of men who were previously arrested by HVO soldiers were found.

The Council accepted numerous evidence from various sources - documents from international organizations and testimonies of representatives of the international community, as well as residents of the municipality, which show that the HVO launched a campaign of eviction and displacement of women, children and the elderly, exclusively Muslims from the municipality of Čapljina, from July to September 1993.

It was concluded that members of the HVO — set fire to houses owned by Muslims in the village of Bivolje Brdo around July 13, 1993.

Based on the evidence, it was concluded that women, children and the elderly were forcibly displaced from the villages of Domanovići, Bivolje Brdo, Počitelj and Višići, and from the town of Čapljina, as well as that they were detained in various places and that they were then gradually forcibly taken to the territories under the control

Funded by
the European Union

of the ARBiH.

Regarding the detention of children, women and the elderly, the aforementioned was carried out in Silos. The verdict established that on the evening of August 23, 1993, members of the HVO Military Police and members of the MUP took personal belongings from women, children and elderly people brought to Silos from Čapljina.

Prison in Dretelj

Various crimes were also committed in the prison in Dretelje, including murder, arbitrary deprivation of life, deportation, illegal deportation of civilians, imprisonment, illegal detention of civilians, inhuman acts, inhuman treatment, cruel treatment, illegal attack on civilians, illegal terrorizing of civilians.

Detainees suffered during detention in hangars or tunnels due to lack of space and air, lack of hygienic conditions, insufficient amounts of food and water, and lack of medical care.

Such conditions led to the death of one person who died of dehydration during the extreme heat due to a lack of water, which the Council itself noted.

According to Witness C, five detainees died in Dretelje Prison. In addition, the report sent to Valentin Ćorić talks about five deaths registered up to that day. In the letter, it was stated that three detainees were killed when they stormed the outer door, and that the other two died of natural causes, most likely from a heart attack.

The verdict established that since September 1993, Muslims detained in Dretelje Prison were released on the condition that they had a letter of guarantee and a transit visa enabling them to leave the territory of BiH, which, according to the Council's conclusion, indicates that they had the intention of deporting them.

Prison in Gabela

Crimes related to murder, intentional deprivation of life, deportation, illegal deportation of civilians, inhumane acts, illegal transfer of civilians, imprisonment, illegal detention of civilians, inhuman treatment, cruel treatment, illegal attack on civilians, illegal terrorism were committed in Gabela prison. civilian.

Funded by
the European Union

The verdict established that the prison in Gabela was founded by Jadranko Prlić on the basis of two decisions signed by him as president of the HVO.

It follows from the evidence that the Military Police Administration, in the person of its chief, Valentin Ćorić, was responsible for issuing orders for the transfer of detainees from Gabela Prison to other detention centers. Also, Berislav Pušić, head of the Exchange Service, had the authority to order the transfer of detainees from Gabela Prison to Ljubuško Prison for their departure to third countries. Regarding the conditions in the prison in Gabela, it was established that during the detention the detainees suffered especially due to the lack of space and poor hygienic conditions, that they also suffered due to the lack of food and water, as well as due to insufficient medical care and that, finally, the conditions of detention for detainees from Gabela Prison were particularly difficult in mid-July 1993.

As for the mistreatment of the prisoners in Gabela, based on the statements given by several witnesses, we can conclude that the prisoners were beaten by the guards in the prison in Gabela, as well as that they sometimes had to beat each other.

It was confirmed that murders also took place in Gabela prison, i.e. that an ARBiH soldier was shot dead by the HVO during his detention in Gabela prison, and that another ARBiH soldier was shot dead by Boško Previšić during his detention in Gabela prison. by which the murder was committed.

Since the Muslim men from Gabela Prison were released on the condition that they leave BiH for third countries, the Council concludes that the HVO forced them to leave their homes in this way, with the intention of deporting them. Based on the evidence, it was concluded that in December 1993, the HVO deported Muslim men detained in Gabela Prison outside the territory of BiH, without the possibility of their return, and thereby committed the criminal offense of deportation, from Article 5 of the Statute.

Municipality of Vareš

In the municipality of Vareš, crimes were committed, including murder, intentional deprivation of life, rape, inhumane treatment, imprisonment, illegal detention of civilians, cruel treatment, large-scale destruction of property not justified by military necessity, reckless destruction of cities, confiscation of property not justified by

Funded by
the European Union

military necessity, looting of public and private property, illegal attack on civilians, illegal terrorizing of civilians, persecution on political, religious and racial grounds.

In October 1993, HVO soldiers arrested six Muslim men and took them to the Military Police prison in Vares. During their detention, members of the Military Police platoon assigned to the "Bobovac" Brigade and soldiers of the "Maturice" special unit beat the six people, sometimes until they passed out. Most of them were detained in the high school and then in the elementary school in Vares, where the conditions of detention were very difficult and where they were beaten by members of the HVO. Between October 23 and November 4, 1993, men of Muslim nationality were also detained in Vareš-Majdan. HVO soldiers used violence against them and humiliated them. For example, one detainee was forced to cut off his own beard and eat it.

In the municipality of Vareš, the HVO encouraged and even pressured the Croatian population to leave the territory of the municipality and go to Herceg-Bosnia. HVO also committed numerous crimes against Muslims in that municipality. Around November 3, HVO forces retreated from the town of Vareš towards Kiseljak.

The verdict established that the HVO forces in Vareš municipality received an order from Slobodan Praljak, which they interpreted as permission for violent behavior, stating that they "have no mercy for anyone", which somehow gave them the motivation to continue committing crimes. Members of the HVO arrested Muslim men in the town of Vareš. In addition, the Council states that Ivica Rajić informed Milivoj Petković about these arrests, as well as that during the arrest, HVO soldiers, some of whom were members of the special unit "Maturice", insulted, threatened and beat the arrested Muslim men, and that they stole property and money from the Muslim residents of Vareš.

In addition, on October 23, 1993, in the morning hours, the armed forces of the HVO launched an attack on the village of Stupni Do, inhabited by a Muslim population. They also killed 36 people during the attack, including three children aged 13, 8, and 3, thus committing murder. The village was completely destroyed, and the residents' property was confiscated.

During the attack on the village of Stupni Do, rape also occurred by members of the HVO, some of whom were also members of the special unit "Maturice". The council concluded that they forced two Muslim women from Vareš to have sex, thereby committing rape, and that HVO soldiers committed thefts in houses and shops

Funded by
the European Union

owned by Muslims. The verdict established that members of the special units "Maturica" and/or "Apostoli" arrested and then killed four residents of Stupni Dol in front of Zejnil Mahmutović's house in Stupni Dol, and two members of the ARBiH were among the killed.

It has been proven that Praljak, Petković and Stojić received reports on the situation in Vareš.

General prevention and social consequences

As in connection with other cases of legally concluded proceedings before the ICTY, compensation for victims, that is, injured persons, was absent in an effective sense. Both before the authorities of the Republic of Croatia and in Bosnia and Herzegovina, the injured parties were not compensated, including members of the immediate family. What can be determined as a particularly unacceptable circumstance is the fact that even in the areas covered by the activities of convicted war criminals there are no returnees, i.e. the returnee population, which is largely in the status of victims/damaged and is currently suffering the consequences of committed war crimes.

When it comes to general prevention, but also the reflection of legally binding decisions on the state of society, it follows that the level of resocialization of previously engaged parties is insufficient. Thus, the occurrence of so-called two schools under one roof is frequent, where children are separated for decades, in such a way that even the teaching program is organized in such a way that students, as young generations, do not meet at all or have a certain interaction that would ensure future understanding and good neighborly relations. among nations. Historical facts are discussed, and they are adjusted according to the population in which certain interests are promoted, while completely ignoring those decisive facts that have been determined in final court rulings. All the circumstances concerning the committed war crimes are often relativized, so it is a common occurrence that war criminals are presented in the media or in school programs as heroes within their own national corps. Therefore, it can be concluded that in the case of Prlić and others, the Hague judgments did not result in particularly positive consequences for the social community, nor did they effectively contribute to general prevention *pro futuro*.

Funded by
the European Union

"Rape in war - case study of Bosnia and Herzegovina"

MERSUDIN PRUŽAN

Prosecutor of the Prosecutor's Office

of Bosnia and Herzegovina

Introduction

The war in Bosnia and Herzegovina began in the spring of 1992 and lasted until the late autumn of 1995. It is estimated that several thousand victims (mostly women, but to a lesser extent also men) were raped during this time. On February 13, 1995 year, while the war in BiH was still going on, the prosecutor of the International Criminal Tribunal for the former Yugoslavia filed an indictment against Duško Tadić for several charges, among which was one charge related to the rape of a woman. Duško Tadić was the first suspect from the territory of the former Yugoslavia to be charged with rape before the ICTY, and the later indictment against Ante Furundžija was the first indictment before the ICTY that was entirely related to rape.

Since then, dozens of rape perpetrators have been charged before the ICTY, as well as before the courts in Bosnia and Herzegovina, and the analysis of five verdicts passed by the ICTY and the courts in Bosnia and Herzegovina gives certain indications about three particularly important issues related to the criminal prosecution of rapes committed in Bosnia and Herzegovina during the war, namely: the question of the possible legal qualification of rape, the question of proving rape in the almost complete absence of material evidence, and the question of applying mitigating and aggravating circumstances when sentencing rape perpetrators.

The question arises as to which facts should be proven in relation to the rape committed during the war and whether it is possible to bring the rape committed under different legal qualifications. The practice of the International Criminal Tribunal for the former Yugoslavia ("**ICTY**")[444] and the courts in Bosnia and Herzegovina have given instructions in this regard. The ICTY convicted some of the

[444] The International Criminal Tribunal for the former Yugoslavia is a United Nations court that dealt with crimes committed during the conflict in the Balkans during the nineties of the 20th century. It was established by UN Security Council Resolution no. 827 of May 25, 1993.

Funded by the European Union

NO-OBLIVION

rape perpetrators, while the majority of the remaining convicts were convicted by the courts in Bosnia and Herzegovina. When passing judgments, the ICTY acted in accordance with the Statute of the ICTY ("**Statute**")[445] and the Rulebook on Procedure and Evidence of the ICTY ("**Rulebook**"),[446] while the courts in BiH acted in accordance with theprescribes the treatment of prisoners of war, the treatment of the wounded, and prohibits the use of poison, the killing of enemy fighters who have surrendered, the pillaging of a city or town, and the attack or bombardment of undefended cities or settlements. Article 46 stipulates: Family honor and rights, personal life and private property, as well as religious beliefs and the performance of religious ceremonies must be respected.

In the first chapter of this paper, the characteristics of rape are considered, that is, what the prosecutor must prove in order to prove the existence of rape. After that, the different legal qualifications of rape are considered, which are sometimes qualified as a war crime, sometimes as a crime against humanity, sometimes as a violation of the laws and customs of war, and sometimes within these categories as torture, enslavement or sexual slavery.

In the second chapter, the standards of proving rape before the ICTY and before the courts in BiH are considered, and what evidence is used to prove this type of criminal offense, and how the legal framework can make it easier or more difficult to prove these offenses, especially bearing in mind that there is almost no material evidence. which could prove wartime rape committed years or decades before the opening of the investigation.

In the third chapter of this paper, the mitigating and aggravating circumstances that are appreciated by the ICTY and by the courts in Bosnia and Herzegovina when imposing prison sentences on perpetrators are considered, in order to point out the difficulties in determining the punishment, as well as the similarities and differences in the judgments between different jurisdictions.

In this paper, five adjudicated cases related to rape were analyzed, two of which were

[445] The United Nations Security Council adopted the Statute on May 25, 1993. year by resolution S/RES/827 (1993). Article 1 of the Statute gives the ICTY the authority to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. Articles 2 to 5 of the Statute give the ICTY jurisdiction over serious violations of the Geneva Conventions of August 12, 1949 (Article 2); violations of the law of war and customs (Article 3); genocide (Article 4); and crimes against humanity (Article 5). The Statute of the ICTY is available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf, last visited on 10.11.2024.
[446] Which ICTY judges, on the basis of Article 15 of the Statute, adopted on February 11, 1994, with subsequent amendments and additions - a total of 50, IT/32/Rev. 50. The Rulebook is available at: https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_bcs.pdf, last visited on November 10, 2024.

Funded by
the European Union

adjudicated before the ICTY, two before the Court of Bosnia and Herzegovina, and one before the entity court within Bosnia and Herzegovina, in order to demonstrate the application of all three key questions for this analysis for each of these cases.

Rape in war

What are the characteristics of rape committed in war?

The characteristics of the criminal act of rape were not specifically prescribed in the relevant international and BiH regulations that prohibited rape. Thus, in the Criminal Code of the SFRY, which was also applied to Bosnia and Herzegovina, no definition of rape was given, nor were the characteristics of rape specified, although the Criminal Code of the Socialist Republic of Bosnia and Herzegovina did prescribe the characteristics of rape, but it did not apply to rapes as war crimes. crime already on the so-called peacetime rapes.[447] For the above reasons, it was left to judicial practice to determine which characteristics of the act are considered rape.

In 2003, a new CC of BiH was adopted, which in Article 173 prescribes a war crime against the civilian population: (1) Who, in violation of the rules of international law during war, armed conflict or occupation, orders or commits any of the following acts:... e) forcing another person to have sexual intercourse or a sexual act equated to it (rape),... shall be punished by a prison sentence of at least ten years or a long-term prison sentence".

In the *Furundžija case*,[448] the ICTY trial panel concluded that in order for an act to be considered rape, the following characteristics must be met:

> *"(1) sexual penetration, no matter how minor*
>
> > *a) the victim's vagina or anus with the offender's penis or any other object used by the offender; or*
> >
> > *b) the victim's mouth with the offender's penis;*
>
> *(2) with the use of coercion or force or under the threat of force against the victim or a third party".*

[447] The Criminal Code of the Socialist Republic of Bosnia and Herzegovina ("Official Gazette of the Socialist Republic of Bosnia and Herzegovina" No. 16 of June 10, 1977) prescribed rape as follows in Article 88: "(*1) Whoever forces a female person with whom does not live in a married union by the use of force or the threat of directly attacking the life or body of that person or a person close to him, shall be punished by imprisonment from one to ten years* ".

[448] The first-instance judgment in the *Furundžija case* no. IT-95-17/1-T dated 10.12.1998, available at: http://www.icty.org/x/cases/furundzija/tjug/bcs/fur-tj981210b.pdf, last visited 08.11. 2024, paragraph 185.

Funded by the European Union

In the *Kunarac case*,[449] the Trial Chamber of the ICTY agreed with these characteristics, with an additional clarification that it gave regarding the understanding of the characteristics of " *use of coercion or force or threat of use of force against the victim or a third party*", namely: *"... when such sexual penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the free will of the victim, assessed based on the context of the existing circumstances*".[450]

Also, in the Kunarac case, the trial panel considered the application of Rule 96 of the Ordinance, which refers to consent,[451] which in the relevant part prescribes:

> *„........ (ii) consent cannot be used as a defense if the victim*
>
> *(a) was exposed to violence, coercion, deprivation of liberty or psychological pressure, or was threatened with the same, or had reason to fear the same, or*
>
> *(b) reasonably believed that, if she did not comply, someone else might be exposed to it, or might be threatened or intimidated;"*

And concluded that he did not consider the reference to consent as a "defense" in Rule 96 to be used in the sense of implying a shifting of the burden of proof to the accused, but that he understood it to be considered to negate any apparent consent. The court states that the understanding of the meaning of actual consent is that if the victim is "subjected to violence, pressure, imprisonment or psychological oppression, that is, when she is threatened with it or has reason to fear it" or if "it is reasonably believed that if [the victim] does not submit, someone else could be exposed to it, that is, they could be threatened or intimidated by it", every apparent consent that the victim could express was not freely given.

In the *Todović case*,[452] the first-instance panel of the Court of Bosnia and Herzegovina concluded that rape, according to the Criminal Code of Bosnia and Herzegovina, implies the cumulative existence of two elements:

> *"and. Forcing another person by the use of force or the threat of a direct attack on his life or body (. . .),*
>
> *a. To sexual intercourse or a sexual act equated with it.*
>
> *b. For rape to be a crime against humanity, it is additionally required that*

[449] The first-instance judgment in the case *Kunarac and others* no. IT-96-23-T and IT-96-23/1-T dated February 22, 2001, available at: https://www.icty.org/x/cases/kunarac/tjug/bcs/kun-010222b.pdf, last visited on November 11, 2024., paragraphs 436-460.
[450] Ibid, paragraph 460.
[451] Ibid, paragraphs 461-464.
[452] The first-instance verdict in the Todović case no. S1 1 K 021644 18 Kri from 04.12.2018, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/49305, last visited 19.11.2024.

Funded by the European Union

the perpetrator knew that his actions were part of a widespread and systematic attack on the civilian population.

In the case of *Đ.P.,* the Cantonal Court in Sarajevo, as a first-instance court, rendered a verdict,[453] and when considering the characteristics of rape, stated that the crime of rape is a crime against the freedom of decision-making in the sexual sphere and consists in forcing the sexual intercourse of another person by the use of force or threats, that will directly attack the life or body of that person or a person close to them. He further stated that the criminal offense of rape is an unlawful complex criminal offense consisting of coercion and coercion, which also represents the act of committing this crime. The court stated that coercion against another person is carried out by the use of force or the threat of a direct attack on the life or body of the passive subject of this act or a person close to that person, as well as that the goal of coercion is to break the resistance or demoralize the victim to offer resistance at all, which makes it possible forced marriage. The court states that force exists when the person against whom it is used is unable to make a decision or is unable to implement the decision made, that is, when the person is incapable of resisting. The court also states that compulsive force, i.e. psychological force does not exclude decision-making, does not exclude the possibility of physical resistance, but due to the psychological state in which the victim was brought, it is impossible to resist, and the application of which is determined in the concrete actions of the accused mentioned in the dispositive. For the existence of such a force, it is not relevant what kind of blocking mechanisms the forced person is dealing with, that is, what are his emotional and rational reasons for giving up resistance.

Different legal qualifications of rape committed in war

Rape, according to international and BiH criminal law, is prescribed **as a separate possible way of committing the criminal act of a war crime**. Rape during war/armed conflict is prohibited by Article 27 of the Fourth Geneva Convention from 1949,[454] Supplementary Protocol I from 1977[455] and Additional Protocol II from 1977.[456]

[453] The first-instance verdict in the case of Đ.P. no. 09 0 K 022246 16 K 2 dated 30.01.2017, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/41462, last visited 21.11.2024.
[454] Article 27, paragraph 2 of the Fourth Geneva Convention stipulates: Women shall be especially protected against any attack on their honor, especially against rape, forced prostitution and against any attack on their modesty.
[455] Article 76, paragraph (1). Supplementary Protocol I stipulates: Women will be treated with special consideration and they will be protected especially against rape, forced prostitution and any other form of indecent assault.
[456] Article 4, paragraph (2), point (e). Supplementary Protocol II stipulates in the relevant part:... the following acts... are and remain prohibited at all times and in all places:... rape, forced prostitution and any form of indecent assault

Funded by the European Union

Rape as a war crime was expressly prohibited by Article 142[457] of the CC of the SFRY, which was also applied to Bosnia and Herzegovina in the period from 1992 to 1995, but also indirectly by Articles 143[458] and 144[459] of the CC of the SFRY. In the Furundžija case, the trial panel of the ICTY considered rape during wartime as a special way of committing the crime,[460] and concluded that the prohibition of rape during an armed conflict has become international customary law, as well as that it entails the criminal responsibility of the perpetrators.

Rape, according to international and BiH criminal law, is also provided **as a separate possible crime against humanity**. However, the Criminal Code of SFRY did not prescribe crimes against humanity as a possible way of committing a criminal offense, and it was only in the Criminal Code of BiH, Article 172,[461] that crime against humanity was prescribed as a possible way of committing a crime. The Criminal Code of BiH from 2003 applies retroactively to acts committed in BiH in the period 1992-1995, which were committed as part of crimes against humanity, while the Criminal Code of the SFRY applies to all other acts of war crimes committed in BiH in the period 1992-1995. Rape as a possible way of committing a crime against humanity in BiH is prescribed in Article 172, paragraph 1, item g) of the CC of BiH, and reads:

> *"(1) Who, as part of a broad or systematic attack directed against any civilian population, knowing about such an attack, commits any of the following acts:... g) forcing another person to have sexual intercourse or a sexual act equivalent to it (rape), sexual slavery,... or any other form of serious sexual violence;..".*

Although rape as torture is not explicitly prescribed as a possible way of committing a war crime and a crime against humanity, torture was prescribed as a separate possible way of committing a war crime and a crime against humanity according to international and BiH criminal law, and then judicial practice developed in the direction of rape under certain conditions can turn into torture. The first panel

[457] Article 142 CC SFRY: War crime against the civilian population - (1) Who, in violation of the rules of international law during war, armed conflict or occupation, orders... to commit... rape against the civilian population;... or whoever commits any of the aforementioned acts, shall be punished by imprisonment for at least five years or the death penalty.
[458] War crime against the wounded and sick - Article 143: Who, in violation of the rules of international law during war or armed conflict, orders that the wounded, sick, shipwrecked or medical or religious personnel be subjected to... torture, inhumane treatment,... or the infliction of great suffering or injuries to bodily integrity or health, or who commits any of the aforementioned acts, shall be punished by imprisonment for at least five years or the death penalty.
[459] War crime against prisoners of war - Article 144: Whoever, in violation of the rules of international law, orders murder, torture, inhumane treatment of prisoners of war,... causing great suffering or injury to bodily integrity or health,... or who commits any of the aforementioned acts, shall be punished by imprisonment for at least five years or death penalty.
[460] Paragraphs 165-186 of the first-instance verdict in the *Furundžija case.*
[461] Article 172, paragraph 1, item f) of the CC BiH prescribes in the relevant part: (1) Who, as part of a broad or systematic attack directed against any civilian population, knowing about such an attack, commits any of the following acts:... f) whipping;....

Funded by
the European Union

of the ICTY that treated rape as an act of torture was the first-instance panel in the *Delalić case.*[462] Torture during an armed conflict is expressly prohibited by international treaty law, namely by the Geneva Conventions of 1949,[463] and with two Additional Protocols from 1977,[464] with the fact that no definition of torture is prescribed in any of these documents. Article 142 of the Criminal Code of the SFRY, which was also applied to war crimes committed in Bosnia and Herzegovina in the period from 1992 to 1995, prohibited torture as a possible way of committing a war crime,[465] but did not prescribe the characteristics of torture. Article 172, paragraph 1, item f)[466] of the Criminal Code of BiH from 2003, in which the following definition of torture is given, is retroactively applied to those tortures that were committed as part of crimes against humanity in BiH in the period from 1992-1995:

> " e) *Torture is the intentional infliction of severe physical or mental pain or suffering on a person detained by the perpetrator or under the supervision of the perpetrator, excluding pain or suffering that is a consequence of the execution of lawful sanctions*".[467]

Jurisprudence both before the ICTY and before the courts in Bosnia and Herzegovina developed in such a way that **rape under certain conditions could reach the level of torture**, and the provisions related to torture were applied to such rapes.

Prosecutor against Ante Furundžija - item no. IT-95-17/1-T

The first case before the ICTY that was entirely related to sexual violence was against the accused Ante Furundžija,[468] the commander of the HVO unit " Džokeri " in the

[462] ICTY, IT-96-21-T, *Prosecutor v. Delalić et al.,* First instance verdict of 16.11.1998, section IV, "Rape as torture", paragraphs 475-496.
[463] See common art. 3; Art. 12 and 50 of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in War of August 12, 1949; Art. 12 and 51 of Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Armed Forces at Sea from August 12, 1949; Art. 13, 14 and 130 of Geneva Convention III on the Treatment of Prisoners of War of August 12, 1949; Art. 27, 32 and 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War of August 12, 1949.
[464] Art. 75 of the Additional Protocol to the Geneva Conventions of August 12, 1949 for the Protection of Victims of International Armed Conflicts of June 8, 1977 (" **Additional Protocol I** "); and Art. 4 of the Additional Protocol to the Geneva Conventions of August 12, 1949 for the Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (" **Additional Protocol II** ")
[465] Article 142 CC SFRY: (1) Who, in violation of the rules of international law during war, armed conflict or occupation, orders... that the civilian population be subjected to... torture,... ; or who commits any of the aforementioned acts, shall be punished by imprisonment for at least five years or the death penalty.
[466] Article 172, paragraph 1, item f) of the CC BiH prescribes in the relevant part: (1) Who, as part of a broad or systematic attack directed against any civilian population, knowing about such an attack, commits any of the following acts:... f) whipping;....
[467] Article 172, paragraph 2, item e) of the CC of BiH.
[468] ICTY case no. IT-95-17/1, available at: https://ucr.irmct.org/scasedocs/case/IT-95-17%2F1#hbs

Funded by the European Union

municipality of Vitez. According to the indictment dated June 2, 1998,[469] Dates around 15.05.1993. in the headquarters of " Džokeri " Furundžija and another soldier interrogated victim "A". During the interrogation, that soldier ran a knife along the inside of victim's thighs and lower stomach and threatened to put the knife in her vagina if she did not tell the truth. Victim A and victim B were taken to another room, where Furundžija continued his interrogation. Another soldier then raped victim A in the presence of Furundžija.

On 10.12.1998. year, the Trial Chamber passed the first-instance verdict.[470] The court concluded in the first-instance verdict[471] that at the time of the rape there was an armed conflict in the area where the rape was committed, and applied the criteria for determining the existence of an armed conflict that the Appeals Chamber of the ICTY adopted in the Decision on Jurisdiction in the *Tadić case*, which reads:

> " *Armed conflict exists wherever there is recourse to armed force between states or prolonged armed violence between authorities and organized armed groups, or between such groups within one state.*[493]

After that, the first-instance court determined whether there was a connection between the committed rape and the armed conflict. The court accepted witness A's testimony about the nature of her questioning by the accused. He stated that she was a civilian in the hands of Joker, and she was interrogated by the accused, who was the commander of that unit. He was an active fighter and participated in the expulsion of Muslims from their homes. He also participated in the arrests, as in the cases of witnesses D and E. The first-instance court considered that these circumstances were sufficient to link the criminal acts allegedly committed by the accused to an armed conflict.[472]

When deciding which criminal offense was committed when victim A was raped, the first- instance court first considered the applicability of Article 3 of the Statute of the ICTY,[473] and referred to the interpretation of the Appeals Chamber in the Decision

---

[469] Prosecutor against Ante Furundzija, Amended and Supplemented Indictment, June 2, 1998, available at: http://www.icty.org/x/cases/furundzija/ind/bcs/980602b.pdf, last visited 11/08/2024.
[470] The first-instance verdict in the *Furundžija case.*
[471] Ibid, paragraph 59.
[472] Paragraph 65 of the first-instance verdict in the *Furundžija case.*
[473] Article 3 of the ICTY (violation of the laws and customs of war): The International Tribunal has the authority to prosecute persons who have violated the laws and customs of war. Such violations include, among others: (a) the use of poisonous or other weapons, the use of which causes unnecessary suffering; (b) arbitrary destruction of towns and villages, or devastation not justified by military needs; (c) attacking or bombing, by any means, undefended cities, villages, settlements or facilities; (d) conquering, destroying or deliberately damaging religious objects, objects intended for charitable purposes and education, and art and science, historical monuments as well as artistic and scientific works; (e) looting of public or private property.

Funded by the European Union

on Jurisdiction in the *Tadić* case,[474] stating that Article 3 covers all serious violations of every rule of customary international humanitarian law which, according to customary international or conventional law, entails the individual criminal responsibility of the person who violates the rule, as well as that the list of criminal acts in Article 3 is only illustrative, and that it also covers serious violations of the rules of international humanitarian law that are not on that list,[475] and that although they are not expressly prescribed, rape and torture are still included in Article 3.[476]

Regarding the prohibition of torture, in the Furundžija case, the first-instance court stated[477] that in international humanitarian law, torture can be prosecuted, depending on the specific circumstances of the individual case, also within broader categories such as serious violations of international law, serious violations of the Geneva Conventions, crimes against humanity and genocide. The first-instance court stated that torture during an armed conflict is expressly prohibited by international treaty law, and that there is a basis for the claim that a general prohibition of torture has developed within the framework of customary international law,[478] and that these treaty provisions have grown into customary rules.[479] The Court of First Instance concluded that torture during an armed conflict is prohibited by the general rule of international law.

The Court of First Instance also concluded that according to the Statute of the ICTY, as interpreted by the Appeals Chamber in *the Decision on Jurisdiction in the* Tadic case,[480] the provisions of contractual law of the ICTY can be applied as such if it is proven that they were binding on all parties to the conflict at the relevant time. The court concluded that Bosnia and Herzegovina on December 31, 1992 ratified the

---

[474] Subject no. IT-94-1-AR72, paragraphs 86-94.
[475] Paragraphs 131-133 of the first-instance verdict in the *Furundžija case.*
[476] Ibid, paragraph 158.
[477] Ibid, paragraphs 134-164.
[478] Ibid, paragraph 137. According to the court, this prohibition gradually crystallized from the Lieber Code and the Hague Conventions, especially Articles 4 and 46 of the Rules annexed to the Fourth Convention from 1899/1907, if read together with the "Martens Clause" set forth in the Preamble of that Convention. Torture was not explicitly mentioned in the London Agreement of August 8, 1945, which established the International Military Tribunal in Nuremberg, but it was one of the acts that Article II(1)(c) of Law no. 10 of the Allied Control Council expressly qualified as a crime against humanity.
[479] According to the court, paragraph 138, first of all, these agreements, especially the Geneva Conventions, have been ratified by practically all countries in the world. Admittedly, they still retain the character of contractual provisions insofar as the contracting parties still formally have the right to release themselves from the obligations arising from them by terminating the agreement (which in reality seems extremely unlikely); however, the almost universal adherence to these agreements shows that all states, among other things, accept the prohibition of torture. In other words, such a universal approach clearly speaks of the attitude of states towards the prohibition of torture. Second, no state has asserted that it is authorized to use torture in times of armed conflict, nor has any state shown or expressed opposition to the application of treaty provisions against torture. Whenever a state has been accused of allegedly resorting to torture by its officials, the usual response has been that the allegations are baseless, thereby explicitly or implicitly recognizing the prohibition of the heinous practice. Thirdly, the International Court of Justice authoritatively, although without explicitly mentioning torture, confirmed this process of creating customary law: in the case of *Nicaragua,* it was concluded that common Article 3 of the Geneva Conventions from 1949, which, among other things, prohibits the torture of persons not actively participating in hostilities, has become an established part of the body of customary international law and is applied to both international and internal armed conflicts.
[480] Subject no. IT-94-1-AR72, para. 143.

Funded by
the European Union

Geneva Conventions from 1949 and both Additional Protocols from 1977, and that joint Article 3 of the Geneva Conventions from 1949 and Article 4 of Additional Protocol II, which expressly prohibit torture, were as minimum guarantees of contractual law applicable on the territory of BiH in subject time. In addition, in 1992, the parties to the conflict in Bosnia and Herzegovina undertook to respect the most important provisions of the Geneva Conventions, including the prohibition of torture.[481] Although torture is prohibited, the characteristics of torture were not explicitly prescribed,[482] so it is left to judicial practice to determine which procedures constitute torture. In the Furundžija case, the first-instance court concluded[483] that the elements of torture in an armed conflict are as follows:

(1) *torture must consist in inflicting, by act or omission, severe pain or suffering, physical or mental;*
(2) *the act or omission must be intentional;*
(3) *must be aimed at obtaining information or a confession, punishing, intimidating or coercing the victim or a third party, or discriminating against the victim or a third party on any basis;*
(4) *it must be related to an armed conflict; and*
(5) *at least one of the persons participating in the torture process must be a public official, or at least must act in a non-private capacity, e.g. as a de facto organ of the state or any other entity exercising power.*

The first-instance court also added that it considers that the possible goal of torture may be to humiliate the victim, as well as that "*... the use of rape as a means of torture in situations of detention and interrogation,... constitutes a violation of international law". Rape as a means of punishing, intimidating, coercing or humiliating the victim,*

[481] On May 22, 1992, the parties to the conflict in Bosnia and Herzegovina signed an agreement at the invitation of the International Committee of the Red Cross. The parties undertook to apply common Article 3 of the Geneva Conventions and to "put into effect" several other provisions of the Geneva Conventions, including Art. 27, as well as various provisions of Additional Protocol I, including Art. 77. That agreement was signed by the representatives of the President of the Republic, Mr. Izetbegović, president of the Serbian Democratic Party, Mr. Karadžić and the president of the Croatian Democratic Union, Mr. Brkic. On May 23, 1992, the same parties signed another agreement.

[482] Article 1(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, stipulates that the term "torture" means any act that intentionally causes great suffering, physical or mental, to a person, with the aim of or receive notifications or confessions from a third party, to be punished for an act that they or a third party has committed, or is suspected of having committed, to be frightened or to be acted upon pressure, or to frighten and pressure a third party, or from any other motive based on any form of discrimination, when such pain or such suffering is caused by an official or another person acting in an official capacity or on the basis of an express order or consent of an official. This term does not refer to pain and suffering that result exclusively from, are inseparable from, or are caused by legal punishments. The Convention was adopted and opened for signature, ratification and accession by UN General Assembly Resolution no. 39/46 of 10.12.1984. and entered into force on June 26, 1987. year. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment. Last visited 09.11.2024.

[483] Paragraph 159-162 of the first-instance judgment in the *Furundžija case.*

Funded by the European Union

or obtaining information from the victim or a third party, is resorted to either by the interrogator himself or by other persons participating in the interrogation of the detainee.[484]

In the end, the first-instance court concluded[485] that in this case, at the time the crime was committed, there was an armed conflict between the Croatian Defense Council ("HVO") and the Army of BiH ("ARBiH"). He also referred to the Decision on the Jurisdiction of the Appeals Chamber in the Tadić case, which took the position that it does not matter whether the act occurred in the context of an international or internal armed conflict, provided that the act:

(1) *must represent a violation of some rule of international humanitarian law;*
(2) *the rule must be of a customary nature or, if it falls under contract law, the necessary conditions must be met;*
(3) *it must be "severe", which means that it must constitute a violation of a rule protecting significant values, and that violation must have serious consequences for the victim;*
(4) *violation of the rule must entail, under customary or contractual law, the individual criminal responsibility of the person who violated the rule.*[486]

The first-instance court further concluded that the accused Furundžija tortured the victim A and that he also helped and supported the rape of the victim A, and brought both of them under the violation of the law and customs of war.

On July 21, 2000. The appeals panel confirmed the first-instance verdict.[487]

Prosecutor against Kunarac Dragoljub and others – item no. IT-96-23-T and IT-96-23/1-T

In this case, which was conducted before the ICTY, the accused Kunarac[488] was the Commander of the reconnaissance unit of the Army of Republika Srpska (" **VRS** "), which was part of the Foča Tactical Group from June 1992 to February 1993.

[484] Ibid, paragraph 163.
[485] Ibid, paragraph 258.
[486] Subject no. IT-94-1-AR72, paragraph 94.
[487] Second-instance verdict in the Furundžija case no. IT-95-17/1-A dated 21.07.2000, available at: http://www.icty.org/x/cases/furundzija/acjug/bcs/000721.pdf, last visited 08.11.2024.
[488] The first-instance verdict in the case of *Kunarac and others.*

Funded by the European Union

According to the indictment dated November 8, 1999:[489]

- From July 13 to August 2, 1992, Kunarac and his subordinates regularly took the five victims FWS-48, FWS-50, FWS-75, FWS-87, FWS-95 as well as other women detained in the Partizan sports hall to their headquarters, where Kunarac and his subordinates raped them, including gang rape.
    - The prosecutor claimed that the accused Kunarac thereby committed **torture as a crime against humanity and as a violation of the laws and customs of war,** and **rape as a crime against humanity and as a violation of the laws and customs of war,** as well as that he was responsible for individual and command responsibility.

- On or around July 13, 1992, Dragoljub Kunarac took FWS-48 and two other women to Hotel "Zelengora", where Dragoljub Kunarac raped FWS-48. On or around July 18, 1992, Dragoljub Kunarac took FWS-48 and FWS-95 to a house in the Donje Polje district, where he raped FWS-48.
    - The prosecutor claimed that the accused Kunarac thereby committed **torture as a crime against humanity and as a violation of the laws and customs of war**, and **rape as a crime against humanity and as a violation of the laws and customs of war,** and that he was responsible for individual responsibility.

- On or around August 2, 1992, Kunarac and another military commander transferred FWS- 75, FWS-87, FWS-50 and DB from the Partizan sports hall to Miljevin, where they detained them in an abandoned Muslim house. Dragoljub Kunarac raped FWS-87 there in September or October 1992. The witnesses and seven other women were detained in that house until approximately October 30, 1992. They performed household chores and were often sexually abused.
    - The prosecutor claimed that the accused Kunarac thereby committed **rape as a crime against humanity, and as a violation of the laws and customs of war,** and that he was responsible for individual responsibility.

[489] Prosecutor against Dragoljub Kunarac et al., Amended indictment dated 02.06.1998, available at: https://www.icty.org/x/cases/kunarac/ind/bcs/kun-ai991201b.htm, last visited 10.11.2024, as well as paragraphs 4-8 of the first-instance judgment in the case *Kunarac et al.*

Funded by the European Union

- In mid-July 1992, during the interrogation of FWS-183, she was threatened with death and raped by Kunarac and two of his soldiers.
    - The prosecutor claimed that the accused Kunarac thereby committed **torture as a violation of the laws and customs of war,** and for **rape as a violation of the laws of the customs of war,** and that he was responsible for individual responsibility.

- On August 2, 1992, Dragoljub Kunarac together with his deputy "Gago" and DP 6 took FWS-186, FWS-191 and JG from Ulica Osmana Đikića no. 16 to an abandoned house in Trnovace, where these women were raped. Dragoljub Kunarac raped FWS-191. Witnesses FWS-186 and FWS-191 were kept in that house for approximately six months, and the victim JG was transferred to an abandoned Muslim house in Miljevina. During her imprisonment FWS-186 constantly raped DP 6, while the accused Dragoljub Kunarac constantly raped FWS-191 for at least two months. FWS-186 and FWS-191 also had to perform household chores and obey all orders. After six months, a soldier took both witnesses out of that house.
    - The prosecutor claimed that the accused Dragoljub Kunarac thereby committed enslavement as a crime against humanity, and for rape as a crime against **humanity and as a violation of the laws and customs of war**, and for violations of personal dignity as a violation of the laws and customs of war, and that he was responsible for individual responsibilities.

On February 22, 2001, the Trial Chamber rendered the first-instance verdict. In the first- instance verdict, the court[490] first analyzed the elements of individual[491] and

[490] Paragraph 12-47 of the first-instance judgment in the case *Kunarac et al.*
[491] Ibid, paragraphs 387-393. When it comes to individual responsibility, the first-instance court stated that it considers that responsibility for the acts listed in the indictment can be described by the following denominators: "commitment" as a form of execution and "aiding and abetting". An individual can be said to have "committed" a criminal offense when he or she physically commits a relevant criminal act or causes a punishable omission thereby violating one of the rules of criminal law. There can be several perpetrators in connection with the same criminal act, where the conduct of each of them fulfills the necessary elements of the definition of a substantive criminal act. Unlike "committing" a criminal act, aiding and abetting is a form of accomplice liability. The contribution of helpers and supporters can take shape concrete help, encouragement or moral support that significantly affects the execution of the criminal act. The act of assisting does not have to cause the act of the main perpetrator. Assisting can consist of an act or an omission, and it can take place before, during or after the commission of a criminal act. The mens rea of aiding and abetting consists of the knowledge that the actions performed by the aider and abettor aid the commission of a specific criminal offense by the main perpetrator. An aider and abettor does not have to share the same mens rea as the main perpetrator, but he must know the basic elements of the crime (including the mens rea of the perpetrator) and make a conscious decision to act, knowing that he is thereby supporting the execution crime. Mere presence at the scene of the crime is not decisive for aiding and abetting, unless it is shown that this presence had a significant influence on the main perpetrator in terms of justification or encouragement.

Funded by the European Union

command criminal responsibility.[492] When it comes to the command responsibility of the accused Kunarac, the first-instance court concluded that Kunarac is not responsible on the basis of command responsibility.[493]

The Court of First Instance further analyzed the parts of the charge that related to torture and violations of personal dignity that were based on common Article 3 of the Geneva Conventions,[494] as well as the parts of the charge of rape that were partially based on common Article 3 of the Geneva Conventions.[495] The first-instance court then referred to the judgment in the *Delalić case*[496] when considering the general conditions for the application of both common Article 3, as well as for specific criminal offenses charged under common Article 3: (i) The violation must constitute a violation of the rules of international humanitarian law; (ii) The rule by its nature must be customary, or - if it belongs to contract law - it must meet the required conditions; (iii) The violation must be "serious", which means that it must represent a violation of a rule that protects important values, and that violation must involve serious consequences for the victim; (iv) According to customary or conventional law, the violation of a rule must have as a necessary consequence the individual criminal responsibility of the person who violated that rule; (v) There must be a close nexus between the violation and the armed conflict; (vi) The violation must be committed

[492] Ibid, paragraphs 394-400. The following three conditions must be met before a commander can be appointed held responsible for the actions of his or her subordinates: (i) the existence of a superior-subordinate relationship; (ii) the superior knew or had reason to know that a criminal offense would be committed or had already been committed; and (iii) the superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator. Given its findings, the Trial Chamber must address only the first of these elements. In order to recognize this type of responsibility, it is necessary to have a superior-subordinate relationship. However, such a relationship cannot be established by reference to formal status alone. Accordingly, the fact that one is formally designated as a commander is not necessary to establish command responsibility, since such responsibility can be recognized on the basis of a person's de facto or de jure command position. What must be established is that the superior had effective control over the subordinates. This means that he must have a real possibility to exercise his powers in order to prevent and punish the commission of offenses by his subordinates. The relationship between the commander and his subordinates does not have to be formalized. A tacit or implicit understanding of their mutual position is sufficient between them. Issuing orders or exercising powers generally attributed to military command is a strong indication that a person is indeed a commander. However, these are not the only relevant factors. Depending on the circumstances, a commander with superior responsibility under Article 7(3) may be a colonel commanding a brigade, a corporal commanding a platoon, or even a non-ranking person commanding a small group of men. People under the effective control of a specific person can be considered those who are under the permanent command of that person or those who are only temporarily or on an ad hoc basis under such command. The temporary nature of a military unit is not in itself sufficient to exclude a relationship of subordination between the members of the unit and its commander. In order for a commander to be held responsible for the acts of men acting under him on an ad hoc or temporary basis, it must be shown that, at the time the acts charged in the indictment were committed, those men were under effective control. under the control of that particular person.
[493] Ibid, paragraphs 626-629.
[494] Common Article 3 of the Geneva Conventions stipulates in the relevant part: In the event of an armed conflict that does not have an international character and that breaks out on the territory of one of the High Contracting Parties, each party to the conflict is obliged to apply at least the following provisions: (1) With persons who do not directly participate in hostilities, including members of the armed forces who have laid down their arms and persons who are out of combat formation (hors de combat) due to illness, wounds, deprivation of liberty or any other reason, will be treated at every opportunity humanly, without any disadvantage discrimination based on race, color, religion or belief, sex, birth or property status, or any other similar criteria. For this purpose, the following acts are prohibited for the above-mentioned persons, at any time and in any place: (a) violence against life and body, especially all kinds of murder, mutilation, cruel treatment and torture; (b) taking hostages; (c) violations of personal dignity, especially offensive and humiliating acts; (d) the imposition and execution of sentences without prior trial before a regularly constituted court, which affords all the judicial guarantees recognized as necessary by civilized nations. (2) The wounded and sick will be collected and cared for.
[495] Ibid, paragraphs 400-409.
[496] Prosecutor v. *Delalić and others,* paragraph 420.

Funded by the European Union

against persons not actively participating in hostilities.

When it comes to the existence of an armed conflict and legal interpretations, the first- instance court mostly repeated the positions established in the *Prosecutor v. Tadić case*,[497] and stated that:

> "*An armed* conflict exists whenever there is recourse to armed force between states or prolonged *armed violence between authorities and organized armed groups, or between such groups within a single state..... The condition that there is an armed conflict does not require any essential relationship between the act of the accused and the armed conflict, whereby the accused must have intended to participate in that armed conflict..".*[498]

The first-instance court concluded that in this case, in the area of Foča from April 1992 until at least February 1993, there was an armed conflict between Serbian and Muslim forces, and that criminal acts were committed in connection with the armed conflict, and that it is sufficient that they are criminal acts were closely related to the hostilities that continued in other parts of the territory under the control of the parties to the conflict.[499]

The first-instance court further analyzed the criminal acts from the charge which, if committed in the context of an armed conflict and as part of an attack directed against any civilian population, turn into crimes against humanity.[500] The court stated, citing other judgments of the ICTY, that the term "attack directed against any civilian population" encompasses five elements: (1) There must be an attack; (1) The acts of the perpetrator must be part of that attack; (3) The attack must be "directed against any civilian population"; (4) The attack must be "widespread or systematic"; (5) The perpetrator must know the wider context in which his actions take place and know that his actions are part of an attack.

When it comes to the existence of an attack and the condition that the acts must be part of the attack, the first-instance court stated that:

---

[497] Subject no. IT-94-1-A.
[498] Paragraphs 412-413 of the first-instance verdict in the case of *Kunarac et al.*
[499] Ibid, paragraphs 567-569. The court also concluded that the requirement that the crime be closely related to an armed conflict is satisfied if, as in this case, the crimes were committed as a result of fighting and before the cessation of armed activities in a certain area, and if they were committed in order to achieve some goal or exploit situations resulting from fighting.
[500] Ibid, paragraphs 410-435.

Funded by the European Union

> *"The term "attack" in the context of crimes against humanity has a slightly different meaning than it does in the law of war.[501] In the context of crimes against humanity, "attack" is not limited to the conduct of hostilities. It can also cover situations of ill-treatment of persons who are not actively participating in hostilities, such as, for example, holding someone in captivity. However, both terms are based on a similar assumption, namely that war should be fought between armed forces or armed groups, and that the civilian population cannot be a legitimate target.... The relevant criminal offense does not have to constitute an attack, but only part of an attack or,... must be part of a "pattern of widespread or systematic crimes directed against the civilian population".[502]*

The first-instance court also added that there must be a nexus between the act of the accused and the attack, consisting of the following: (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; related to (ii) the accused's knowledge that there is an attack on the civilian population and that his act is part of that attack. The first-instance court also took the position that it is sufficient to show that the act took place in the context of a large number of acts of violence, each of which can differ to a large extent in terms of their nature and severity.

In addition, the first-instance court analyzed whether the attack must be "directed against any civilian population".[503] The first-instance court concluded[504] that in the area and during the period stated in the indictment, Serbian forces carried out a large-scale attack directed against the Muslim civilian population, and that it was a systematic attack by the Bosnian Serb Army and paramilitary units against the Muslim civilian population. The court also concluded that the accused Kunarac knew that an attack was taking place against the civilian Muslim population and that his criminal acts fit into that attack or were part of that attack, and he clearly showed that this was precisely his intention.

The Court of First Instance further analyzed the parts of the charge that referred to

---

[501] Article 49(1) of Additional Protocol I to the Geneva Conventions of August 12, 1949 defines "attacks" as "acts of violence against the enemy, whether these acts are offensive or defensive".
[502] Ibid, paragraphs 415-417.
[503] Ibid, paragraphs 421-432.
[504] Ibid, paragraphs 570-592.

Funded by the European Union

torture as a violation of the laws and customs of war and as a crime against humanity,[505] and concluded that the definition of torture under international humanitarian law does not contain the same elements as the definition of torture generally applied in accordance with the norms of the protection of human rights, where he concluded that he believes that it is not necessary for a civil servant or any other person with authority to be present during the torture process (in contrast to the interpretation in the Furundžija case) in order to with international humanitarian law considered the crime in question to be torture.

The first-instance court took the position that in the field of international humanitarian law, and in accordance with international customary law, the elements of the criminal offense of torture are as follows:

(i) Causing, by act or omission, severe pain or suffering, physical or mental ;

(ii) The act or omission must be intentional ;

(iii) The act or omission must be aimed at obtaining information or confession, or at punishing, intimidating or coercing the victim or a third person, or at discrimination, regardless of the basis, of the victim or a third person.

The trial court further analyzed the parts of the charge that referred to enslavement as a crime against humanity,[506] with the aim of determining what makes "enslavement" a crime against humanity. The Court of First Instance concluded that enslavement as a crime against humanity in customary international law consisted of the exercise of any form or all of the powers arising from the right of ownership over a person, and that:

> "... *considers that the actus reus of the violation is the exercise of some form or all of the powers arising from the right of ownership over a person. The mens rea of that violation consists in the deliberate exercise of such powers".*[507]

The trial court also agreed with the prosecutor's claim that the following factors should be taken into account when determining whether enslavement has been committed: control over someone's movement, control of the physical environment,

---

[505] Ibid, paragraphs 465-497.
[506] Ibid, paragraphs 515-543.
[507] Ibid, paragraph 540.

Funded by the European Union

psychological control, measures taken to prevent or hinder escape, force, threat of force or coercion, duration, exercising the right to exclusivity, being subjected to cruel treatment and abuse, control over sexuality and forced labor. The court of first instance also emphasized that a relevant factor could be the fact that a person could be bought, sold, traded or inherited, i.e. that his work or services could be disposed of in the same way, with the fact that can do is not enough, but the fact that such actions actually took place could be a relevant factor.

The first-instance court further analyzed whether the accused could be convicted of multiple criminal offenses on the basis of the same conduct.[508] The first-instance court noted that in several cases, based on the same conduct and according to the same article of the Statute, the accused was charged with several criminal acts, such as torture and rape under Article 5 of the Statute. The accused was also charged with criminal offenses under two Articles of the Statute, and again on the basis of the same conduct, such as, for example, torture under Article 5 and torture and/or rape under Article 3 of the Statute. The first-instance court decided to apply the position from the *Delalić case*,[509] according to which:

> *"... multiple criminal convictions under different provisions for the same conduct are admissible only if each of the relevant provisions contains a materially different element that the other does not contain. An element is materially different from another element if it requires proof of a fact that the other element does not. If this test is not met, the panel must decide for which criminal offense the accused will be found guilty. When making that decision, one should be guided by the principle that the conviction should be pronounced according to the narrower of the two provisions. Thus, if a set of facts is sanctioned by two provisions, one of which contains an additional element that is materially different, the conviction should be pronounced only under that other provision.* "[510]

When applying it to a specific case, the first-instance court stated that the accused Kunarac, based on the same criminal conduct, was accused *inter alia* of torture as a war crime and a crime against humanity, as well as rape as a war crime and a crime

[508] Ibid, paragraphs 544-557.
[509] Prosecutor against *Delalić and others.*
[510] Ibid, paragraph 412-413.

Funded by the European Union

against humanity. The first-instance court concluded, applying the approach from the *Delalić case,* that for the same act of execution, convictions can be passed for both a criminal offense related to a war crime and a criminal offense related to a crime against humanity, because they differ in at least one key respect feature that does not occur in the other. The key feature that distinguishes a war crime from a crime against humanity is the condition of the existence of a nexus, according to which for a war crime there must be a close connection between the actions of an accused person and an armed conflict, while for a crime against humanity a necessary condition is the existence of a widespread and systematic attack on civilians population. When it comes to allegations of rape and torture, the key distinguishing feature of rape from torture is sexual penetration, while the key distinguishing feature of torture from rape is the infliction of severe pain or suffering in order to obtain information or a confession, punishment, intimidation, coercion or discrimination of the victim or a third person.[511]

The court of first instance convicted the accused Kunarac for those counts of the indictment for which it found beyond a reasonable doubt that the accused Kunarac had committed criminal acts, namely that:

- took FWS-75 and DB to Osmana Đikića street no. 16, where several soldiers raped them. On that occasion, the accused Kunarac raped DB; By personally raping DB and bringing DB and FWS-75 to Osmana Đikić Street No. 16, while bringing the second witness at least twice to be raped by other people, the accused Dragoljub Kunarac committed the crimes of torture as part of a crime against humanity and rape as part of a crime against humanity, as the main perpetrator, while he helped and supported other soldiers in their role as the main perpetrators, bringing two women to Osmana Đikić Street No. 16;
- went to the "Partizan" sports hall, from where he took out FWS-75, FWS-87, FWS-50 and DB and that he drove them to a house in Osmana Đikića street no. 16, where some women from the school in Kalinovik have already been brought. The accused Kunarac took those women to that house knowing that the soldiers would rape them during the night. Accused Kunarac introduced FWS-87 into one of the rooms in the house and forced her to have sex, knowing that she did not consent. On that occasion, FWS-75 and FWS-50 were repeatedly raped by other soldiers, while the accused Kunarac raped FWS-87. FWS-87 was also raped by other soldiers that same night. The fact

[511] Ibid, paragraphs 556-557.

Funded by the European Union

that the accused Kunarac took the girls to the house that night and left them with his men, knowing that they would rape them, represents an act of assistance that had a significant impact on the tortures and rapes later committed by his men. He, therefore, aided and abetted that torture and rape;

- at least twice took FWS-95 from "Partizan" to Osmana Đikića Street no. 16 and that the first time she was raped by him personally and three other soldiers;
- aided and abetted other men, bringing them girls whom they raped and tortured, aware of the fact that they would rape them and encouraging them to do so,
  - and the first-instance court then found him guilty of: count 1 – torture as part of a crime against humanity; count 2 – rape as part of a crime against humanity; point 3 – torture as part of violation of laws and customs of war; and item 4 – rape as part of the violation of laws and customs of war.[512] It remained unclear from the judgment which of these points refers to which of these previous factual descriptions;
- transferred four women, including FWS-75 and FWS-87, from the "Partizan" sports hall to Karaman's house in Miljevina, where they were imprisoned in an abandoned Muslim house where Serbian soldiers were staying, and on one occasion raped FWS-87 while she was held in Karaman's house,
  - and the first-instance court then found him guilty of rape as part of a crime against humanity and of rape as part of a violation of the laws and customs of war;[513]
- together with two Serbian soldiers, came to the apartment where FWS-183 lived, and accused her of sending radio messages, and then they took her to the bank of the Čehotina River in Foča, where the accused tried to get information or a confession from FWS-183 that she allegedly sent radio messages to the Muslim forces and found out where she kept her valuables. At the same time, he threatened to kill her and her son. FWS-183 was raped by all three soldiers. During the rape, the accused Kunarac forced the witness to touch his penis and look at it. He cursed her. The other two soldiers watched this laughing from the car. While the accused Kunarac was raping

[512] Ibid, paragraphs 685-687.
[513] Ibid, paragraphs 699-704.

Funded by
the European Union

her, FWS- 183 heard the accused telling the soldiers that they were waiting for their turn. Later, these other soldiers raped her vaginally and orally;

- and the first-instance court then declared him guilty of torture as part of the violation of the laws and customs of war and of rape as part of the violation of the laws and customs of war;[514]

– that:
  - took out FWS-186, FWS-191 and JG from Osmana Đikića street no. 16 and that together with "Gago" and DP 6 he took them to an abandoned house in Trnovače, where the accused Kunarac raped FWS-191, and DP 6 raped FWS-186
    - that FWS-186 and FWS-191 were kept in a house in Trnovace for about six months. During approximately two months, the accused Kunarac sporadically came to that house and on those occasions raped FWS-191
    - while they were kept in the house in Trnovace, FWS-191 and FWS-186 were treated as property of Dragoljub Kunarac and DP 6;

The first-instance court then found him guilty of enslavement as part of a crime against humanity, of rape as part of a crime against humanity, and of rape as part of a violation of the laws and customs of war.[515]

Accused Kunarac was sentenced to 28 years in prison, and was acquitted on the other counts of the indictment,[516] because they were not proven beyond a reasonable doubt.

On June 12, 2002. The appeals panel confirmed the first-instance verdict.[517] At the same time, the second-instance court, regarding the part of the appeal that referred to the features of torture as stated in the first-instance verdict, stated that "... *mostly agrees with the definition given by the Trial Chamber*", and after analysis concluded that the legal conclusions of the first-instance court fully founded and rejects all grounds of appeal related to the criminal offense of torture.

---

[514] Ibid, paragraphs 705-715.
[515] Ibid, paragraphs 716-745.
[516] Kunarac was acquitted of the rape of FWS-87 by two Montenegrin soldiers (part of count 1 of the indictment, paragraphs 630-635, 685), of the rape that he and others committed against FWS-95 (part of count 4 of the indictment, paragraphs 672, 679, 681-685, 883-884), for items 5-8 in their entirety (paragraphs 688-698), for the rape of JG (Count 13, paragraphs 716-718, 726-727) and for aiding and abetting the rape of FWS-186 during her captivity (Count 21, paragraph 741).
[517] Second-instance verdict no. IT-96-23-T and IT-96-23/1-T dated 12.06.2002, page 139, available at: https://www.icty.org/x/cases/kunarac/acjug/bcs/kun- aj020612b.pdf, last visited on 17.11.2024.

Funded by the European Union

Prosecution of Bosnia and Herzegovina against Milan Todović - case no. S1 1 K 021644

In the case based on the indictment against the accused Todović Milan from 11.12.2017, the accused was accused of having, in the time period between 30.10.1992. until 05.03.1993:

- after the Bosnian woman S1 was captured on July 3, 1992. in the village of Trošanj- Mješaja in the municipality of Foča by the military forces of the Republika Srpska, and then she was raped in different places and by different members of the armed forces of the Republika Srpska, after which she was raped on an unspecified day in the period between October 30, 1992. and at the end of December 1992, a member of the Army of the Republika Srpska brought and imprisoned the injured S1 in the area of the city of Foča, and then a council brought Milana Todović there and told the injured S1 that she "must make Milan happy", and that Milan would return her to take care, after which he left Todović Milan alone with the injured S1, and Todović Milan told the injured S1 that she was saved, and then Todović Milan raped the injured S1 on the couch that was in that room.
- in the period between December 1992 and March 5, 1993. in the area of the municipality of Foča, Todović Milan forced the injured S1 into sexual slavery and forced her to have sexual intercourse, by buying the injured S1 from a member of the Republika Srpska Army on an unspecified day in December 1992, and then taking her away to an empty studio apartment in a residential building in the Čohodor Mahala settlement in Foča, where he kept the injured S1 in inhumane conditions, without food, water, electricity and heating, where he beat and raped her several times, initially forcing her to have sexual intercourse every night, then every second or third day, until the end of January 1993, when three soldiers of Serbian nationality came to the studio apartment near Milan Todović, after which Todović Milan forced the injured S1 to strip naked and dance for them on the table, which these soldiers did not allow, after which these soldiers threatened Todović Milan to make the injured S1 "more he must not rape or else he will have to deal with them", after which Todović Milan once again tried to rape the injured S1 and on that occasion he beat her, after which on 05.03.1993 In the early hours of the morning, with the help of two persons of Serbian nationality, the damaged S1 secretly managed to escape from this studio apartment and from the area of the municipality of Foča.

Funded by
the European Union

On 04.12.2018. the first-instance court rendered a verdict, by which it retroactively applied the CC of BiH in terms of the application of the substantive law and the legal qualification of the act,[518] and in terms of the qualification of the individual actions taken by the accused, the first-instance court found that the actions described under items 1 and 2. the sentences of the verdict acquired all the essential features of the crime Crimes against humanity from Article 172 of the Criminal Code of Bosnia and Herzegovina.[519] Regarding the explanation of this retroactive application of the Criminal Code of BiH from 2003 to the criminal offense committed in the period 1992-1993, the court also referred to the Decision of the European Court of Human Rights in case number 51552/10, which stated the following:

> *"Crimes against humanity at the time the incriminated acts were committed were not prescribed as a criminal offense in the Criminal Code of the SFRY, but they constitute an imperative principle of international law and it is indisputable that in 1992 they were an integral part of customary international law".*[520]

The court considered what are the general elements of the criminal offense of crimes against humanity according to the Criminal Code of BiH,[521] and concluded that, in addition to the elements of specific criminal offenses, the Prosecution must primarily prove the general elements of this offense:

- *that there was a widespread and/or systematic attack;*
- *that the attack is directed against any civilian population; and*
- *that the accused knew about the existence of such an attack and that his actions represent or could represent part of that attack, or more precisely, that there is a nexus between the attack and the actions of the accused.*

After evaluating the evidence individually and in relation to each other, the Court of First Instance found that the Prosecution proved these circumstances, that is, that the general elements of the criminal offense from the provisions of Article 172 of the CC of BiH were proven.[522]

---

[518] First-instance judgment in the *Todović case*, paragraphs 76-91.
[519] Ibid, paragraph 92.
[520] Decision of the European Court of Human Rights, Šimšić v. Bosnia and Herzegovina, No. 51552/10 dated August 26, 2010.
[521] Paragraphs 94-96 of the first-instance judgment in the *Todović case.*
[522] Ibid, paragraphs 97-154.

Funded by the European Union

After establishing the existence of the general elements of the criminal offense Crimes against humanity from Article 172 of the BiH CC, the first instance court determined which criminal offense the accused committed with his actions.[523] The first-instance court concluded in relation to point 1 of the indictment, that the accused Todović, on an unspecified day in the period between October 30, 1992. and the end of December 1992, raped the victim "S 1" in an apartment in one of the residential buildings in Foča, to which the victim was previously brought by a member of the VRS. Bearing in mind:

> "... *given the general elements of the crime of crime against humanity, i.e. that the accused knew at the critical time of a widespread and systematic attack, and that his actions were part of that attack, the first-instance court concluded that he consciously took advantage of his position and the vulnerability of the victim as would have sexual intercourse with her. Thus, at the time of the commission of the criminal act, the accused knew that the victim belonged to the part of the civilian population against whom the attack was directed, that is, that she had a feeling of fear for her safety, which would prevent her from offering any resistance, as well as the fact that in armed soldiers were also present at the house where she was raped, one of whom ordered her to "please" the accused, and the accused, aware of such a situation, had sexual intercourse with her, fully aware that she had not consented to it voluntarily, so it is by the actions described in point 1 of the sentence with direct intent, knowingly and willingly, with undoubted knowledge of the nature of the actions taken, committed the criminal offense of crimes against humanity by the act of rape".*

The first-instance court then analyzed point 2 of the indictment, according to which the accused Todović held the victim "S 1" in sexual slavery and forced her to have sexual intercourse, and after he bought her from a member of the VRS. When it comes to sexual slavery, the first-instance court analyzed Article 7 of the Rome Statute of the International Criminal Court, which established the following elements that make up this action:

- *the offender has used one or all of the powers related to the*

[523] Ibid, paragraphs 155-214.

Funded by the European Union

right of ownership of one or more persons, such as buying, selling, lending or exchanging such persons, or similarly depriving those persons of their liberty;

- *the perpetrator forced such a person or persons to commit one or more acts of a sexual nature;*
- *the action was carried out as part of a broad or systematic attack directed against the civilian population;*
- *the perpetrator knew that the conduct constituted, or intended the conduct to be part of a broad or systematic attack directed against the civilian population.*

The Court of First Instance also analyzed the decision of the Appellate Panel of the Court of Bosnia and Herzegovina in the case of Gojko Janković,[524] which established that the elements that make up the act of sexual slavery are the following:

- *deliberate exercise of any or all powers related to the right of ownership over a person;*
- *the perpetrator caused the victim to participate in one or more acts of a sexual nature.*

The first-instance court concluded that the accused, during a wide and systematic attack on civilians of Bosniak nationality in the municipality of Foča, knowing about such an attack, held the injured "S 1" in sexual slavery, thereby violating the basic rules of international law, thereby committing the criminal offense Crimes against humanity from Article 172, paragraph 1, item g) of the CC of BiH in connection with Article 180, paragraph 1 of the CC of BiH. The accused was aware of the widespread and systematic attack by the army of the RS against the Bosniak population in the area of Foča, and he undertook criminal legal actions precisely against a person of Bosniak nationality who was even an object of trade, over whom he exercised authority in connection with the right to property, and he is aware of such situation with the same person repeatedly had sexual relations with the full awareness that she did not consent to these relations voluntarily, so by the actions described in point 2 of the sentence of the verdict with direct intent, knowingly and willingly, with with undoubted knowledge of the nature of the actions undertaken, committed the criminal offense of crimes

[524] Verdict of the Appellate Panel of the Court of Bosnia and Herzegovina in the case of *Gojko Janković,* available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/9413, last visited on November 23, 2024.

Funded by the European Union

against humanity by the act of sexual slavery.

The court of first instance did not accept the legal qualification of the Prosecutor's Office that the actions of the accused for which it found him guilty represented two independent criminal acts, in which case there would be room for the application of Article 53, paragraph 1 of the CC of BiH. Namely, when it comes to the criminal offense Crimes against humanity from Article 172 of the CC of BiH, it is possible to realize the features of this criminal offense with several actions, given that the actions of execution do not represent an independent offense by themselves, but together with the other actions of execution, form one independent criminal offense A crime against humanity.[525]

On March 12, 2019. The appeals panel confirmed the first-instance verdict.[526]

Prosecution of BiH against Milomir Davidović - item no. S1 1 K 005151 18

In the case of the amended indictment against the accused Milomir Davidović from September 21, 2018, **the accused was accused** of having captured several Bosniak women on July 3, 1992. in the village of Trošanj-Mješaja in the municipality of Foča by the VRS, the captured women were then placed in the High School Center in Foča, from which they were taken out for rape, so Milomir Davidović a.k.a. "Liči", together with other persons, forced some of the Bosnian girls taken out of the Secondary School Center in Foča to have sexual intercourse in such a way that:

- On an unspecified day, in the period between 03-18-07-1992, from the Secondary School Center in Foča, Dragan Zelenović a.k.a. Zelja, took out the damaged "S1" and "S4", took them to the apartment of the residential building called "Lepa Brena" which was located in Foča, in which apartment came Milomir Davidović a.k.a. "Liči" and several other Serbian soldiers, where the accused Milomir Davidović, known as "Liči" forced "S1" to have sexual intercourse, who was then raped by other Serbian soldiers, after which they returned the injured "S1" and "S4" to the Secondary School Center.

- On an unspecified day in the period between July 3-18, 1992. from the Secondary School Center in Foča, Dragan Zelenović, known as "Zelja" took out

[525] Paragraph 221 of the first-instance verdict in the *Todović case.*
[526] Second-instance judgment in the Milan Todović case no. S1 1 K 021644 19 Krž from 12.03.2019. Available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/49306, last visited on November 20, 2024.

the damaged "S1" and "S4" and another captured Bosniak woman, who together with Milomira Davidović, known as "Liči" and another Serbian soldier drove them to an abandoned Muslim house in the village of Gornje Polje - Foča municipality, where they were raped, and on that occasion, Milomir Davidović, known as "Liči" forced "S1" as well as "S4" and this third injured Bosniak woman to have sexual intercourse, after which they were returned to the High School Center.

On February 27, 2019. the first-instance court rendered a verdict, declaring the accused Davidović guilty of the first count of the indictment, and acquitting him of the second count of the indictment due to lack of evidence.[527] The first-instance court concluded with regard to the qualification of the individual actions taken by the accused and for which the panel found him guilty, that in the actions described under point 1 (the condemning part) of the sentence, all the essential features of the criminal offense Crimes against humanity from Article 172 were acquired. Paragraph 1, item g) (forcing another person to engage in sexual intercourse or an act equivalent to it (rape) of the Criminal Code of Bosnia and Herzegovina.

Regarding the first count of the indictment for which the accused was found guilty, the first- instance court stated in terms of the application of substantive law, given that the defense proposed the application of the Criminal Code of the SFRY, considering it more lenient for the perpetrator, that it is justified to retroactively apply the Criminal Code of BiH to this case.[528] The first-instance court explained this by the fact that at the time the crime was committed, the criminal offense of Crimes against humanity was not explicitly provided for in the criminal laws of BiH, and was only prescribed in 2003 in Article 172 of the Criminal Code of BiH. However, despite this, it is indisputable for the court of first instance that in 1992, crimes against humanity were part of customary international law, and the retroactive application of the CC of BiH was justified, and the Appellate Division of the Court of BiH in several of its decisions took an identical position regarding the justification of application Central Committee of Bosnia and Herzegovina.[529]

The Court of First Instance also referred to the decision of the Constitutional Court of Bosnia and Herzegovina in case *AP 1553/15* (the case following the appeal of

---

[527] The first-instance verdict in the Milomir Davidović case no. S1 1 K 005151 18 Kri from 27.02.2019, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/49299, last visited 20.11.2024.

[528] Ibid, paragraphs 85-101.

[529] Judgment of the Court of Bosnia and Herzegovina number: S1 1 K 017741 17 Krž 2 dated 23.03.2017. year, paragraphs 36 – 44; Decision of the Court of Bosnia and Herzegovina number: S1 1 K 003472 18 Krž dated October 26, 2018. year; Judgment of the Court of Bosnia and Herzegovina number: S1 1 K 003359 14 Kžž dated 18.09.2014. year, paragraphs 210 – 228.

Funded by
the European Union

convicted Zoran Babić) where the question of application of the criminal law and punishment was considered, and the following was stated:

> Considering *that international law does not prescribe sufficiently clear sanctions for war crimes, in the appellant's case, the Court of Bosnia and Herzegovina could only apply the Criminal Code of Bosnia and Herzegovina, as the relevant domestic criminal legislation, in the appellant's case, both in terms of the criminal offense and the punishment (see, European Court, Konovov v. Latvia, judgment of May 17, 2010, paragraph 212), given that the CC of the SFRY, as a law that was (Case number: AP 1553/15 29 Decision on admissibility and merits) in force at the time of the commission of the criminal offense and did not prescribe either the specified criminal offense or, therefore, the sanction for such an offense. Therefore, the appellant's claim that the SFRY CC should have been applied as a milder law cannot be accepted, that is, it does not result in a violation of the appellant's right from Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7, paragraph (1) of the European Convention.*[530]

The court considered what are the general elements of the criminal offense of crimes against humanity according to the Criminal Code of BiH,[531] and concluded that, in addition to the elements of specific criminal offenses, the Prosecution must primarily prove the general elements of this offense: that there was a wide (widespread) and/or systematic attack; that the attack is directed against any civilian population; that the accused knew about the existence of such an attack and that his actions represent or could represent part of that attack, or more precisely, that there is a nexus between the attack and the actions of the accused. The court concluded, after evaluating the evidence individually and in relation to each other, that the Prosecution proved these circumstances, the general elements of the criminal offense from the provisions of Article 172 of the CC of BiH, and that the first-instance court:

- established beyond a reasonable doubt the existence of a widespread and systematic attack in the area of the municipality of Foča, which lasted both before and after the time of the execution of the actions by

[530] Paragraphs 60-61 of the Decision of the Constitutional Court of Bosnia and Herzegovina No. AP 1553/15 on the appeal of the convicted Zoran Babić dated 25.10.2017.
[531] Paragraphs 102-106 of the first-instance verdict in the *Davidović case.*

Funded by the European Union

the accused, and that this attack lasted at the time when the accused committed the incriminated actions against the victim "S1";[532]

- concluded beyond any reasonable doubt that the broad and systematic attack that took place in the area of the municipality of Foča was exclusively directed against the civilian population of non-Serb nationality, and in the specific case it undoubtedly established the civilian status of the injured witness "S-1";[533]
- undoubtedly concluded that the accused Davidović knew of the existence of a series of widespread and systematic crimes directed against the civilian Bosniak population of the municipality of Foča, and there is no doubt that he knew and wanted his act to be part of an attack and to contribute to such and such an attack, and that criminal acts undertaken precisely against a civilian, of Bosniak nationality. The first-instance court added that the acts of the accused must be "part" of a widespread or systematic attack directed against the civilian population, and not merely coincide with it in time or space. The incriminated act cannot be an isolated act. An act is considered isolated when it is so far removed from the attack itself that it cannot, after considering the context and circumstances under which it was committed, reasonably be said to be part of the attack.[534]

After establishing the existence of the general elements of the criminal offense Crimes against humanity from Article 172 of the BiH CC, the first-instance court determined which act of execution, within the criminal offense of crimes against humanity, was committed by the accused.[535] The prosecutor charged the accused with forcing another person to have sexual intercourse, that is, rape. The first-instance court reiterated that rape implies the cumulative existence of two elements,[536] and when interpreting rape and the characteristics of rape, it also took into account the relevant case law of the ICTY.[537] The first-instance court considered and analyzed the evidence based on the circumstances of point 1 of the amended indictment, and determined that the accused with direct intent, knowingly and willingly, with undoubted knowledge of the nature of the actions taken, committed the criminal

[532] Ibid, paragraphs 107-157.
[533] Ibid, paragraphs 158-165.
[534] Ibid, paragraphs 166-177.
[535] Ibid, paragraphs 178-223.
[536] Forcing another person through the use of force or the threat of a direct attack on his life or body (...), on sexual intercourse or a sexual act equivalent to it.
[537] In the case of *Kunarac and others*, in the case of *Kvočka and others*, and in the case of *Furundžija*.

Funded by the European Union

offense of Crimes against humanity by the act of rape "S1", thereby has fulfilled all the essential features of the existence of a criminal offense from Article 172, paragraph 1, item g) of the Criminal Code of BiH, and everything in connection with Article 180. paragraph 1 of the BiH CC, which is why the court declared him guilty.

On 09.07.2019. The appeals panel confirmed the first-instance verdict.[538]

The Prosecutor's Office of the Federation of BiH against Đ. Q. - item no. 09 0 K 022246

In the case of the amended indictment against the accused Đ. P. from 22.12.2016, **the accused accused himself that on** an unspecified day, during the winter period, at the end of 1992, in the night hours:

– uniformed and armed with an automatic rifle and bombs around his belt, ordered BS to take him to the apartment of his son BA, whom he had known well since childhood, and where BA lived with his unmarried wife SZ and her mldb. S.'s daughter, and when he arrived at the apartment, he ordered S. to knock on the door and call his son and daughter-in-law to open it, and when Z. opened the door, he chased A. out of the apartment, which he left, taking him with him. Z. mld. daughter, and Z. threatened to kill her child and put a bomb in her mouth, forcibly pulled her by the hand and took her to the neighboring abandoned building, where he continued to threaten her, telling her that he would slaughter her and kill her child if she ran away, and ordered Z. to take off her blouse, skirt and underwear and lie on the floor, and then lay on top of her and raped her, all the while saying that he had a weapon and that he was going to kill her if she is not obedient and that she must not tell anyone what happened, and after hearing the voices of passers-by, he quickly got up and left in an unknown direction.

The indictment charged Đ. Q. That he thereby committed a war crime against the civilian population from Article 142 of the adopted CC SFRY.

On 30.01.2017 The Cantonal Court in Sarajevo, as a first-instance court, issued a verdict

[538] Second-instance judgment in the Milomir Davidović case no. S1 1 K 005151 19 Krž from 07/09/2019, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/49300, last visited 11/20/2024.

Funded by the European Union

in which it accepted the legal qualification that the accused had committed the criminal offense of War Crimes against the Civilian Population under Article 142, Paragraph 1 of the adopted CC SFRY,[539] in terms of the application of substantive law and the legal qualification of the act. during the war and armed conflict against the civilian population, by raping a female person. The first-instance court stated that the general elements of the criminal offense War crime against the civilian population from Article 142, paragraph 1 of the adopted CC SFRY are as follows:

1) *The offense must be committed in violation of International Law, in such a way that the commission of the offense is directed against the civilian population, i.e. persons who do not participate in an armed conflict or have laid down their arms or are disabled from combat and who are protected by the provisions of the Geneva Convention on the Protection of Civilians for the time of war from 12.08.1949. Violation of the aforementioned provisions must take place during war, armed conflict or occupation;*

2) *The act of the perpetrator must have a connection (nexus) with a wartime armed conflict or occupation*

3) *The perpetrator must undertake the act of execution of this act, which consists in doing or ordering some of the actions alternatively set out in the subsections of this article.*

Based on the evaluation of the evidence, the court found beyond dispute that the injured party, SZ, against whom the criminal offense was committed, was a civilian, so it is a female person, who at the critical time was not a member of any of the parties to the conflict, nor did she have any weapons or tools., nor did she take an active part in the hostilities, which was also confirmed by the testimony of all the witnesses heard.

The court stated that the injured party is protected by the provisions of the Geneva Convention on the Protection of Civilian Persons in Time of War from August 12, 1949. year, and above all the provision of Article 3, paragraph 1, item c) which prescribes:

> *"In the event of an armed conflict that does not have the character of an international conflict that breaks out on the territory of one of the High Contracting Parties, each of the*

[539] The first-instance verdict in the case of *Đ.P.*

Funded by the European Union

parties to the conflict shall be obliged to apply at least the following provisions:

1. persons who do not directly participate in hostilities, including members of the armed forces who have laid down their arms and persons who are unable to fight due to illness, wounds, deprivation of liberty or any other cause, will be treated humanely on every occasion, without any unfavorable discrimination based on on race, color, religion or belief, sex, birth or property or any other similar criterion.

To this end, the following actions against the above-mentioned persons are prohibited and will continue to be prohibited at all times and in all places:... c) violations of personal dignity, especially offensive and humiliating actions"

The court also stated that the provision of Article 3 of the Geneva Convention from 1949 is a principle provision that provides for the applicability of the Convention during the duration of hostilities and the character of these hostilities, while determining the characteristics of protected persons, and specifies the minimum prohibited procedures that the signatories of the Convention must adhere to and is binding on all parties in the conflict, and it was valid during the war and the armed conflict at the place of the event for which the accused is charged.

The court also analyzed Article 4, paragraph 2, point e) of Additional Protocol II to the Geneva Conventions of August 12, 1949. on the protection of victims of internal armed conflicts, which prescribes:

"Without affecting the principle character of the aforementioned provisions, the following acts against the persons mentioned in paragraph 1 are and remain prohibited at all times and in all places - insulting human dignity, especially humiliating and degrading treatment, rape, forced prostitution and any form of indecent assault ", and paragraph 1) of the mentioned article defines the fundamental nature of the humane procedure, namely: "All persons who do not directly participate or who have stopped participating in hostilities, regardless of whether whether their freedom is limited or not, they have the right to have their personality, honor, belief and religious belief

Funded by
the European Union

> *respected. They will be treated humanely on all occasions, without any discrimination. It is forbidden to order that there should be no survivors".*

The court concluded that when interpreting this provision, it is clear that it is not necessary for the perpetrator to know or intend to violate international norms, but it is sufficient that the commission itself is contrary to the rules of international law. The court concluded that it is not in dispute that during the period indicated in the indictment as the time of the commission of the criminal act, there was and continued an armed conflict between the Military Forces of the Army of Bosnia and Herzegovina and the VRS, and that the area of Vraca is the Municipality of Novo Sarajevo, which is indicated in the indictment as the place where the crime was committed was under the control of the RS Army. He also concluded that this criminal offense was committed in violation of these international norms against a protected person-civilian.

The court further stated that when it comes to the elements of the criminal offense War crime against the civilian population, it referred to the position in the *Prosecutor v. Dragoljub Kunarac case,* according to which an armed conflict exists " *everywhere where armed force is resorted to between states or prolonged armed violence between the Government and organized armed groups or between the Armed Forces within one country* ". The court established in this case that at the critical time in the area of the city of Sarajevo, and the area of Vrac itself, there was an armed conflict between the VRS and the BiH Army.

The court further stated that the accused Đ. P. was not a member of any formal military or paramilitary group at the time the crime was committed. The court stated that the provision of Article 142, paragraph 1 of the Criminal Code of the SFRY does not specifically prescribe the nature of the perpetrator of this criminal act, but indicates the possible perpetrator of the criminal act with the word " *who* ", which means that this crime can be committed by an unspecified group of persons, and concluded that the fact that the accused was not a soldier at the incriminated time does not mean that he could not have committed a war crime. The court stated that international courts have also expressed the view that the accused does not necessarily have to have formal military status in order to be considered responsible for war crimes, nor do his actions have to be part of an official plan or policy or be carried out in an active combat zone. It is enough that his actions were sufficiently

Funded by
the European Union

closely related to the armed conflict.[540] Also, the first-instance court stated that the Court of Bosnia and Herzegovina adopted the standards of the ICTY and ICTR in its judicial practice, and, for example, in the Bošković judgment, the Court of Bosnia and Herzegovina found that the fact that the perpetrator has no special relationship with one of the parties to the conflict - that is, that he does not have any special military status - does not prevent his responsibility for committing war crimes against civilians according to Article 142, paragraph 1 of the CC of the SFRY.

When it comes to the existence of a nexus between the rape of the victim "SA-1" by the accused and the ongoing armed conflict, in order to hold him responsible for war crimes under Article 142, paragraph 1 of the Criminal Code of the SFRY, the court considered the following elements:

1) *the accused knew about the existence of an armed conflict;*
2) *the armed conflict played a significant role in the defendant's ability to commit the crime;*
3) *the armed conflict played a significant role in the manner in which the accused committed the criminal act;*
4) *the victim was not a combatant, did not directly participate in hostilities; and*
5) *the victim belonged to the opposing party.*

The court concluded that there was an armed conflict in BiH, especially the occupation of Grbavica at a critical time by the VRS. The court states that the accused knew about the existence of an armed conflict and that he was aware of the ongoing conflict, and that the armed conflict played a significant role in the ability of Đ. P. to commit a crime, then that the armed conflict played a significant role in the way the accused committed the criminal offense, and that the victim was not a combatant, did not directly participate in the hostilities, and that the victim belonged to the opposing side.

The court also concluded, with regard to the specific actions of the accused, that the last element of the criminal offense War crime against the civilian population from

[540] The court referred to the *Akayesu case,* in which the appeals panel of the ICTR expressly confirmed that responsibility for war crimes also extends to perpetrators who have no " *special connection with one of the parties to the conflict* ".

Funded by
the European Union

Art. 142. Paragraph 1. CC SFRY, i.e. accused Đ. P. raped the victim.

The court found that the victim SZ was forcibly taken away at night, in winter, with the previous forced removal of her family members, from the house where she was staying with the threat of intimidation by an armed and uniformed defendant, to an abandoned house where the robbery was carried out with threats of intimidation, and the fact that the assault was also accompanied by threats of intimidation addressed to the victim, the injured party in order to break the resistance, i.e. demoralize the victim to resist at all, indicates that the accused used compulsive force - psychological force, i.e. that he brought the injured party into such a psychological state as a result of which she was unable to offer resistance, i.e. which made the victim particularly vulnerable and unable to express an informative refusal, which made forced escape possible, which precisely indicates that the actions undertaken by the accused achieved his goal coercion, and that the rape occurred without the consent of the victim.

In this context, the court appreciated the relevant, objective circumstances that indicated beyond any doubt that the rape took place without the consent of the victim, and that the victim was unable to offer any form of resistance during the rape in order to successfully thwart the accused in his intention, because the victim, based on all the circumstances of the specific case, held that the force and threat were serious and that the accused could carry out the threat with the means he threatened. The possibility of the injured party's possible consent in the specific situation was completely excluded, while the intention of the accused to carry out the crime and the knowledge that it was taking place without the injured party's consent are clearly derived from all the evidence presented.

The court concluded that the accused, when committing the criminal act, acted with direct intent, considering the actions taken, that is, he was aware of his act and wanted it to be committed. In this regard, the court particularly appreciated the circumstances under which the injured party was taken from the house where she was staying with her family by force, in the middle of the night, in a skirt and blouse, without a winter coat even though it was snowing outside, with previous expulsion from the apartment with a threat the wife and her mldb were injured with a rifle. daughter, and taking her by force to a nearby abandoned building, and expressed threats of intimidation that they would kill her and slaughter her and the child if she resisted. The above in itself represented a traumatic experience for the injured party, and in such a hopeless situation, the injured party had no real choice. This was

Funded by
the European Union

mentioned especially for the reason that immediately before the mentioned event, the injured party's sister was taken from the house and raped by the same soldier in an almost identical way, and according to the testimony of the heard witnesses, the injured party was also aware of this at the time of the mentioned event.

The court found that the accused Đ. P. in violation of the rules of International Law during the war and armed conflict between the VRS and the ARBiH committed a violation of personal dignity with particularly insulting and humiliating actions, by forcing a tall person to have sexual intercourse with the use of force and rape of a civilian of the SZ using threats of intimidation, which was civilian, and therefore Đ. P. declared guilty of having committed the criminal offense War crime against the civilian population from Article 142, paragraph 1 of the adopted CC of the SFRY, which was in force at the time the criminal offense was committed.

On June 20, 2017, the Supreme Court of the Federation of Bosnia and Herzegovina, as a second-instance court, issued a verdict in which it confirmed the first-instance verdict, except in the part that referred to the amount of the sentence imposed on the accused.[541]

Proving war rape

Corroboration of the victim's statement - different standards before the ICTY and in BiH

In principle *unus testis nullus testis* (one witness is not enough), which requires corroboration of the testimony of the only witness to some relevant fact by another witness, is no longer invoked by almost any modern continental legal system. When it comes to proving sexual crimes before the ICTY, that proof was facilitated by the application of Rule 96 of the Rulebook.[542] This rule stipulated imperatively that additional corroboration of the victim's testimony ***would not*** be requested. Thanks to this provision, it was possible to prove rape before the ICTY only on the basis of the

[541] The second-instance verdict in the case of Đ. P. no. 09 0 K 022246 17 Kž 5 of 20.06.2017, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/odluka-text/41461, last visited 21.11.2024.
[542] ICTY, Rules of Procedure and Evidence, Rule 96 "Evidence in cases of sexual offences": "In cases of sexual offences: (i) additional corroboration of the victim's testimony shall not be sought; (ii) consent cannot be used as a defense if the victim (a) was exposed to violence, coercion, detention or psychological pressure, or was threatened with the same, or had reason to fear it, or (b) reasonably believed that, if she did not comply, someone would the other could be exposed to it, or could be threatened or intimidated by it; (iii) before the evidence of the victim's consent is accepted, the accused must satisfy the Trial Chamber that this evidence is relevant and credible; (iv) earlier the sexual behavior of the victim is not accepted as evidence in the proceedings"

Funded by the European Union

testimony of the victim herself, without the need to present supporting evidence. The ICTY confirmed the legality of convictions of those accused of grave violations of international law based on the testimony of one witness, as elaborated in the Tadić case, which was the first to consider this issue.[543]

However, unlike the ICTY, in BiH there was and is no such provision that explicitly stipulates that it is not necessary to corroborate the statements of victims of rape/sexual violence with other evidence, and the courts in BiH applied general rules related to proving any other criminal offense, including rape/sexual violence. Most of the rapes were committed without the presence of witnesses, so essentially the only direct evidence of the committed rape was the victim's statement. In contrast to proving rapes committed in peacetime, when there is a functioning justice system, this is mostly not the case in war, and the perpetrators are directly or indirectly protected by ruling structures that do not investigate the rapes committed at all, nor collect material evidence that could be used to prove the committed rape. In the case of the so-called "peacetime rapes", most of them are reported shortly after they are committed, so that police officers and prosecutors can collect physical evidence that confirms that rape has been committed, i.e. material evidence that confirms the use of force and penetration, and this evidence includes evidence from the scene of the crime crimes including DNA traces (blood, semen, saliva), physical materials that link the victim to the perpetrator and the crime scene (such as dirt, dust or carpet traces on clothing, torn clothing, condoms,...), samples collected during the gynecological examination of the victim, which can prove that penetration occurred, medical examination and recording of injuries on the victim or perpetrator, digital evidence (surveillance camera recordings,...), etc. However, during war, victims, if they survive, rarely report rapes, because the collection of evidence is entrusted to persons who belong to the same military or police structures as the perpetrator at the time he committed the rape. Even when they report rape, the case or the investigation is not handled adequately or not at all.[544] After the end of the war, it is

---

[543] The first-instance verdict in the *Tadić case,* paragraphs 536 – 539: "However, regardless of the Ordinance, it is not correct to claim that the corroboration of evidence in today's systems of continental law remains a general requirement. The powers that judges have in the adjudication process in continental law can best be described by referring to the principle of free evaluation of evidence: which, in short, is the inherent right of a judge, as a fact finder, to decide only on the basis of deep personal conviction. This very broad discretion is subject to a number of limitations. However, the principle expressed in the Latin saying unus testis, nullus testis, which requires the corroboration of the testimony of the only witness to some relevant fact by another witness, is no longer invoked by almost any modern continental system. Similarly, this principle does not exist in Marxist legal systems, including the Yugoslav one which mainly follow the principle of free evaluation of evidence from the continental legal system"

[544] See e.g. paragraph 70 Second-instance judgment of the Court of Bosnia and Herzegovina no. S1 1 K 003426 11 Krž from September 27, 2011. year. " *After the rape, the injured party sought medical help at the hospital in Doboj, but from the testimony of the victim's mother it follows that it was a superficial examination on which no findings were ever made. The testimony of the victim's mother indicates that the victim was put in an uncomfortable position during the examination when the doctor told her that he did not consider her case to be rape because "it is not force when there is one, but when there are five". It is clear to the appellate panel that the doctor did not examine the injured party in a proper and*

Funded by the European Union

too late to collect material evidence, which has been destroyed or lost in the meantime.

When it comes to the standards of proof and evaluation of evidence before the courts in Bosnia and Herzegovina:

- the basic obligation of the panel with regard to all evidence is prescribed by Article 281, paragraph 2 of the CPC of BiH, which states: " *The court is obliged to conscientiously evaluate each piece of evidence individually and in connection with other pieces of evidence and, based on such evaluation, draw a conclusion as to whether a fact proven".*

- Jurisprudence has defined the standard of *"proof beyond a reasonable doubt" for a conviction*, and evidence beyond a reasonable doubt is evidence based on which it can be reliably concluded that there is *a higher degree of probability* that the accused committed a criminal offense.

- Article 15 of the CPC BiH foresees the principle of free evaluation of evidence, which is limited only by the principle of legality of evidence, which means that the evaluation of evidence is free from formal legal rules that would determine the value of individual evidence *a priori*. By establishing this principle, the legislator gave the necessary freedom to the judicial authority and showed confidence in the judgmental power of judges.

- Article 10 of the BiH CPC (legality of evidence) provides that: "The court cannot base its decision on evidence obtained by violations of human rights and freedoms prescribed by the constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained by significant violations of this law".

Because of this, when the prosecutors in BiH based the indictment solely on the victim's statement, they exposed themselves to a very high risk that the accused person would be acquitted by the Court of BiH, and as can be seen from some of the

professional manner, which, according to the conviction of this panel, explains the absence of material evidence of the visit of the injured party to the hospital in Doboj.

Funded by the European Union

judgments of the Court of BiH:[545]

> "... *The appellate panel, like the first instance panel, finds that the prosecution did not prove beyond a reasonable doubt that the accused... committed the criminal offense... and that with acts of... rape, by the fact that in early June 1992 in the Vilina Vlas hotel participated in the rape of Bosniak women who were illegally imprisoned in that facility, among whom was the witness under protection measures OK 14... In connection with the rape of OK-14, as stated by the prosecution itself, the only witness heard was witness-injured OK-14. It is true that in these types of cases the only witness is usually the person against whom the incriminating action was taken, and that a conviction can be based on his testimony, however, when such a situation arises, the testimony must be carefully considered, and it must not leave no doubt as to accuracy and truthfulness,... In such a state of affairs, given the uncertainty of the injured party, and in the absence of any other evidence that would complete her testimony and lead to the undeniable conclusion that it was precisely accused, the first-instance court could not reach a different conclusion except to acquit the accused... this Council, and as it was correctly established by the first- instance verdict, could not establish the responsibility of the accused beyond any reasonable doubt, and therefore, guided by the fundamental principle of the CPC of BiH "in dubio pro reo" according to which, in the case of "doubts regarding the existence of facts that make up the characteristics of a criminal offense or on which the application of some provision of criminal legislation depends, the court resolves with a verdict in a manner that is more favorable for the accused", this Council found that it was not proven that the accused OK committed the criminal offense charged with this point of the indictment".*[546]

[545] See e.g. Second-instance judgment of the Court of Bosnia and Herzegovina No. S1 1 K 006028 16 Krž 4 of 21 April 2016, paragraphs 17, 18 and 22, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorje-vijesti/141 /odluka-text/51462, last visited: 17.11.2024.

[546] [567]See e.g. Second-instance judgment of the Court of Bosnia and Herzegovina No. S1 1 K 006028 16 Krž 4 of 21 April 2016, paragraphs 17, 18 and 22, available at: https://csd.pravosudje.ba/vstvfo/S/142/kategorje-vijesti/141 /odluka-text/51462, last visited: 17.11.2024.

Funded by the European Union

Thus, without supporting evidence, including physical evidence of the existence of penetration,[547] because the key evidence of the existence of penetration were the victims' statements, which were often judged to be insufficient to establish the responsibility of the accused due to e.g. inconsistencies caused by the passage of time, etc.,[548] and as the Court of Bosnia and Herzegovina emphasized the importance of evaluating all presented evidence when establishing the existence or non-existence of facts,[549] in order to secure a conviction for the perpetrators of wartime sexual violence in BiH, it was necessary to secure evidence that corroborates the victim's testimony about the committed rape/sexual violence. In the event that corroborating evidence was collected, then it was much more likely that the perpetrator would be convicted.[550]

Rule 96 of the Rulebook before the ICTY, which expressly stated that there is no need for corroborating evidence in cases of rape, also contained additional provisions that enabled/facilitated the proof of rape/sexual violence against the victims, by:

> (ii) *consent cannot be used as a defense if the victim:*
>
> > (a) *was exposed to violence, coercion, detention or psychological pressure, or was threatened with the same, or had reason to fear it, or*
> >
> > (b) *reasonably believed that, if she did not comply, someone else might be exposed to it, or might be threatened or intimidated thereby;*
>
> (iii) *before the victim's consent evidence is admitted, the accused must satisfy the Trial Chamber in camera that the evidence is relevant and credible;*

---

[547] In the rare cases when rape victims after rape would seek medical help in medical institutions that were in the area where they were raped by the members under whose control that territory was, the medical documentation was not created or would mysteriously disappear and could not be found after the end of the war.. See e.g. Judgment of the Court of Bosnia and Herzegovina no. S1 1 K 003426 10 Krl of 27.09.2011, page 7: "... *in the records of the Hospital... there is no recorded examination of the injured..*"..

[548] In the rare cases when rape victims after rape would seek medical help in medical institutions that were in the area where they were raped by the members under whose control that territory was, the medical documentation was not created or would mysteriously disappear and could not be found after the end of the war.. See e.g. Judgment of the Court of Bosnia and Herzegovina no. S1 1 K 003426 10 Krl of 27.09.2011, page 7: "... *in the records of the Hospital... there is no recorded examination of the injured..*"..

[549] See e.g. Judgment of the Court of Bosnia and Herzegovina no. S1 1 K 012024 14 Krl of 24.06.2015, paragraph 184: " *So, the Council was guided by the principle that when making a decision, it has the discretionary right to evaluate the inconsistencies that have been highlighted and to consider whether the witness, taking the testimony as a whole, is reliable, and that whether his testimony is credible".*

[550] See e.g. Judgment of the Court of Bosnia and Herzegovina no. S1 1 K 003426 11 Krž dated 09/27/2011, paragraph 66: " *When it comes to the absence of material evidence of rape, the panel points out as a general principle that legal determinations about the commission of the act are not reached by applying a concrete formula". Article 15 of the CPC BiH (Free Evaluation of Evidence) is a manifestation of the old principle of testimonia panneranda sunt, non numeranda (Evidence is appreciated, not counted). This principle emphasizes consideration of the value, weight and quality of the evidence rather than the quantity, multiplicity or nature of the evidence. The Trial Chamber therefore has the right to rely entirely on evidence in the form of witness statements when determining the existence or non-existence of facts".*

Funded by the European Union

(iv) *previous sexual behavior of the victim is not accepted as evidence in the proceedings".*

Evidence used to prove rape
Prosecutor against Ante Furundžija

In the Furundžija case, the prosecutor proved that:

- there was an armed conflict at the time and in the area where the rape was committed, by hearing six witnesses,[551] while the defense contested the existence of an armed conflict but did not present a single piece of evidence to that effect;
- there was a connection between the committed rape and the armed conflict, by hearing the same four witnesses who also testified about the existence of an armed conflict,[552] while the defense claimed that there was no armed conflict with which the accused could be connected;
- committed rape by questioning victim A and witness D.[553] The defense defended itself by claiming that victim A is making mistakes due to the traumatic events she has survived and the passage of time, and that she was given suggestions while she was in the sensitive stages of physical and psychological recovery and that she was therefore memory unreliable. When it comes to witness D, the defense argued that his testimony directly contradicted the testimony of victim A and was therefore unreliable. The defense heard witness E to dispute the claims of witness D, heard an expert on the circumstances of the witness' memory weakness due to the shock he experienced, and presented several material pieces of evidence.

After both the presentation of evidence and presentation of closing arguments were brought to an end, the prosecution disclosed to the defense for the first time a document entitled "Certificate of Psychological Treatment" from the Center for Women's Therapy dated July 11, 1995.[554] That document referred to victim A and it was stated that she died on 24.12.1993. contacted the center regarding the

[551] Witnesses Mujezinović Muhamed, Kavazović Sulejman and protected witnesses A, B, C and D - paragraphs 51 to 57 of the verdict.
[552] Witnesses Mujezinović Muhamed and Kavazović Sulejman, and protected witnesses A and D.
[553] Paragraphs 66-130 of the first-instance verdict in the *Furundžija case.*
[554] Exhibit D37.

Funded by the European Union

psychological trauma she had suffered since being abused. The prosecution also disclosed the statement of an unidentified witness from September 16, 1995. who said that she saw victim A for the first time in the center on 24/12/1993, and that she last saw her on 11/07/1995. After that, the center's report on the treatment of victim A was obtained, from which it could be concluded that the patient has symptoms of PTSD. In the attached report dated December 24, 1993. drawn up by a psychologist, it is stated that victim A cannot sleep without medication and is afraid to fall asleep, that she thinks she is unimportant, that she has uncontrollable memories of those events and that she can cry and repress thoughts of rape. And on July 11, 1995. it is said that he sometimes comes to the interview, takes the sedative apaurin, suffers from insomnia and occasional bouts of crying.

The first-instance court reopened the proceedings and presented additional evidence, by hearing victim A and others. Mujezinović, who were called again for cross-examination, and both sides called two experts and presented their arguments. This evidence related to whether the reliability of victim A's testimony was or could be affected by any psychological disorder she may be suffering from as a result of what she went through, that is, whether she had PTSD and, if she did, that whether he influenced or could influence her memory.

The trial court concluded that victim A's memory was not impaired by any disorder she may have had, and that there was no evidence of any form of brain damage, nor that her memory was in any way contaminated by any treatment she may have undergone. The first-instance court pointed out that "... *even when a person suffers from PTSD, it does not mean that he necessarily gives an incorrect statement. There is no reason why a person with PTSD could not be a perfectly reliable witness".*[555] When it comes to the inconsistencies between the statements of victim A that she gave during multiple hearings, the Court of First Instance concluded that despite the inconsistencies when it comes to smaller details, which the defense rightly pointed out that it is a reliable witness. The first-instance court also added that: "... *it is not reasonable to expect persons who survive such traumatic experiences to remember the minute details of the event, such as the date or time. It is also not reasonable to expect them to remember every single element of a complicated and traumatic sequence of events. In fact, inconsistencies can, under certain circumstances, indicate the truth and the fact that the witnesses were not influenced".* When evaluating the testimony of victim A, the first-instance court added the following: " *The testimony of the witness before the court was convincing, and although her*

[555] Paragraphs 108-109 of the first-instance verdict in the *Furundžija case.*

Funded by the European Union

testimony, consistent rule 96 of the Rulebook, no independent confirmation is required, the Trial Chamber notes that witness D has repeatedly confirmed her testimony".

On 10.12.1998., the Trial Chamber passed a first-instance verdict in which it *inter alia* convicted Furundžija for the criminal offense of torturing victim A and for aiding and abetting the rape of victim A.[556] On July 21, 2000. In 2008, the Appeals Council rejected Furundžija's appeal against the conviction and confirmed the first-instance verdict.[557]

Prosecutor against Kunarac Dragoljub and others

In the Kunarac case, the first-instance court stated that it evaluated the evidentiary material in accordance with the Statute and Rulebook, and where these sources did not provide guidelines, it evaluated it in a way that supports the making of a fair decision and in the spirit of the Statute and general legal principles. In doing so, he applied the presumption of innocence in relation to the accused, the prosecutor bore the burden of proving the accused's guilt, and the standard of proving guilt was beyond a reasonable doubt.

He carefully evaluated the evidence related to the identification of the perpetrator, bearing in mind that the evidence "*relating to the identification is inherently uncertain*", and the essential question regarding the identification is not whether the testimony is honest, but whether it is reliable. In doing so, the first-instance court gave particular weight to the description of the person whom the witnesses claim raped them and "*carefully considered whether the testimonies of other witnesses corroborate the given descriptions* ". Although each of these witnesses was asked if they could identify the person who raped her in the courtroom, the first-instance court did not give any positive evidentiary weight to those identifications in the courtroom.[558]

The first-instance court also emphasized that the very nature of the experiences they went through was very traumatic for the witnesses and that, therefore, they cannot reasonably be expected to remember the small details of the specific events for which the accused is accused, such as the exact sequence of events, or the exact dates and times of the events they described. The court stated that it did not consider minor differences in the testimony of various witnesses or differences in the

[556] Paragraphs 82, 124-30, 264-275 in the *Furundžija case.*
[557] Second-instance judgment in the *Furundžija case*, p. 79.
[558] Paragraphs 558-563 of the first-instance judgment in the case of *Kunarac et al.*

Funded by the European Union

testimony of a certain witness and the statement she gave earlier as a factor that discredits their testimony, if it is a witness who nevertheless remembered the essence of the alleged event in acceptable detail, while bearing in mind that these events took place approximately eight years before their testimony. The first-instance court also took into account that many of the witnesses were minors, some were only fifteen years old, at the time of the commission of the criminal acts, and that the details that can be expected to be remembered by these witnesses differ from those that can be expected from female witnesses. who were more mature at the time of the relevant events, but that this does not mean that any lower standard of persuasiveness is required before accepting the testimony of these young witnesses.[559]

In some cases, only one witness testified about an event for which the accused is charged. Rule 96 expressly rejects the requirement that exists or has existed in some national legal systems that the testimony of a rape victim must be corroborated. Only one witness testified about a given event, usually because she, with the exception of the accused, was the only person present when the event for which the accused was charged allegedly took place, and the court "*considered this testimony with great care*" before accepting it. accepted as a basis for concluding the guilt of the accused. Regarding the issue of rape, the first-instance court evaluated the testimony of three expert witnesses called by the defense, but rejected their opinions on the basis that they were based either on legal requirements that do not exist in international law or on the need for the existence of factual consequences, which the first-instance court the court did not accept.[560]

The first-instance court had in mind that the allegations against the accused Kunarac in the indictment refer to the period from approximately July 13, 1992. to the date in October 1992. The Court of First Instance states that the prosecution must present evidence for each element of the criminal offense with which the accused is charged, but the dates of events, generally speaking, do not constitute a material element of the crime, and their proof is not essential for a specific charge, except in the case that the indictment and the evidentiary material differ too much or in the case that one such date, as in the specific case, constitutes an essential part of the criminal act.

Accused Kunarac defended himself with an alibi[561] for certain periods[562] in which he

[559] Ibid, paragraph 564-565.
[560] Ibid, paragraph 566.
[561] Ibid, paragraphs 593-625.
[562] He defended himself with an alibi for the following periods: from July 7, 1992 to July 21, 1992; from July 23, 1992 to July 26, 1992; for August 2, 1992; and from August 3, 1992, from 5:00 p.m. to August 8, 1992.

Funded by the European Union

was accused of having committed certain criminal acts. The first-instance court stated that when evaluating the evidentiary material, it took into account the difficulties of the defense in cases where an alibi is given for a period lasting as long as a month, but noted many gaps and contradictions that characterize the alibi given by the accused. For some periods, apart from the accused, no other witness could testify where the accused was at that time. Even for the periods about which other witnesses testified, the alibi they gave him usually covered limited periods: hours, and sometimes even just a few minutes. After offering an alibi defense, the accused did not bear the burden of establishing that alibi. It was up to the prosecutor, despite the evidence in support of the alibi, to prove that the facts stated in the indictment were nevertheless true. The first-instance court did not accept the reasonable possibility that the accused Kunarac was not in the places where the rapes took place at the time they took place.

Regarding the prosecutor's claim that the accused Kunarac was a commander and that he should be held accountable on that basis for certain counts of the indictment, the first-instance court concluded that the prosecutor failed to prove that the soldiers who committed the crimes from the indictment were indeed under the effective control of Kunarac at the time when committed these crimes.[563]

Regarding counts 1 to 4 of the indictment, the first-instance court found:

- that he took FWS-87 to a house at least twice, and that both times she was raped by two Montenegrin soldiers who were under the command of the accused. This count of the indictment was based on the testimony of the witness FWS-87, while " *there was no supporting material that would fill in the gaps in the testimony of FWS-87 regarding that event".*
    - The court accepted the testimony of FWS-87 in the part that the accused Kunarac took her out of the "Partizan" sports hall several times and took her to a house where there were always Montenegrin soldiers, who then raped her personally and the other girls who were brought there. the house. However, the trial court states that FWS-87 was only able to clearly testify about one situation when she was taken to the house and one other incident that occurred prior to that, but that FWS-87 could not provide any specifics about what happened to her.

[563] Paragraphs 626-629 of the first-instance verdict in the case of *Kunarac et al.*

Funded by the European Union

happened during that second incident and she could not say whether she was raped during that incident and who did it. Based on the evidence presented, the first-instance court was not convinced that these acts were established beyond reasonable doubt and acquitted the accused Kunarac of this part of the allegations in the indictment.

- that, together with "Gago", he took FWS-75 and DB to a house, where he raped DB, while FWS-75 gang-raped at least 15 soldiers, and that FWS-75 raped up to three on other occasions in the same house soldiers. As it follows from the verdict, the prosecutor questioned the witnesses FWS-75 and DB about these circumstances, submitted photos of the house where the witnesses were raped, and which house these witnesses clearly recognized and identified, and these witnesses also identified the accused Kunarac. The Prosecution also filed the Minutes of the interrogation of the accused Kunarac, who himself admitted that he took FWS-75 and DB from "Partizan" to that house and that he spent two and a half to three hours there with DB behind closed doors, and he admitted that on that occasion had sexual intercourse with DB.
  - The first-instance court concluded that the proven rapes of FWS-75 and DB were beyond reasonable doubt, and that the accused personally raped DB and brought DB and FWS-75 to the house, while he brought the second witness at least twice to be raped by other people, the accused Kunarac committed the crimes of torture and rape as the main perpetrator, while he aided and abetted other soldiers in their role as the main perpetrators, bringing two women into the house.
- that he took FWS-75, FWS-87, FWS-50 and DB to a house, where he and three other soldiers raped FWS-87, while FWS-75 and FWS-50 were raped by other soldiers. According to the verdict, the prosecutor heard witnesses FWS-75, DB, FWS-50, FWS-186, FWS-191, FWS-96, FWS-48, FWS-190, FWS-87,
  - The court of first instance established that the accused Kunarac went to the "Partizan" sports hall, from where he took FWS-75, FWS-87, FWS-50 and DB and then drove them to the house, where some women from the school in Kalinovik had already been brought. The first-instance court stated that it is also convinced that Kunarac took those women to that house

Funded by the European Union

knowing that the soldiers would rape them during the night. The first-instance court concluded that Kunarac took FWS-87 to one of the rooms in the house and forced her to have sex, knowing that she did not consent, and on that occasion FWS-75 and FWS-50 were repeatedly raped by other soldiers, while Kunarac raped FWS-87, and that FWS-87 was also raped by other soldiers that same night. The fact that Kunarac took the girls to the house that night and left them with his men, knowing that they would rape them, represents an act of assistance that had a significant impact on the torture and rapes later committed by his men. Therefore, he helped and supported that torture and rape.

- that FWS-95 took her from "Partizan" to a house at least twice and that the first time she was raped by him personally and three other soldiers. During the second incident, this witness was allegedly raped by two or three soldiers, but not by the accused himself. As it follows from the verdict, the prosecutor heard witnesses FWS-95 and FWS-105 in connection with this count of the indictment.
    - The testimony of FWS-95 was sufficient for the first-instance court to convict the accused Kunarac of the rape of FWS-95, but it acquitted him of the other allegations from this point because they were not proven beyond a reasonable doubt.[564]
- Regarding counts 5-8 of the indictment, the accused was accused of two rapes of witness FWS-48. As it follows from the verdict, the prosecutor questioned the witness FWS-48 about these circumstances.
    - The trial court concluded that the testimony of FWS-48 was not sufficiently credible. The court also stated that " *there is no corroborating evidence* " that would remove important inconsistencies in the statement of this witness, and acquitted the accused Kunarac of charges 5-8.[565]
- In relation to counts 9-10 of the indictment, the accused was accused of having transferred four women, including FWS-75 and FWS-87, from the "Partizan" sports hall to Karaman's house in Miljevina, and that on one occasion he raped FWS-87, while she was kept in

[564] Ibid, paragraphs 630-687.
[565] Ibid, paragraphs 688-698.

Funded by the European Union

Karaman's house. As it follows from the verdict, the prosecutor heard the witness FWS-87 regarding these points and read the statement of the accused Kunarac given in the investigation.

- The first-instance court evaluated the testimony of FWS-87, and also took into account that the accused Kunarac did not deny that he went to that house, nor that he took FWS- 87 to the room upstairs, but he claimed that he did not have sex with her. The first- instance court accepted the testimony of FWS-87, and did not accept that the version of events of the accused Kunarac could reasonably be true, and concluded that the allegations from this part of the indictment were proven beyond a reasonable doubt, and declared him guilty of these two counts.[566]

– Regarding counts 11-12 of the indictment, the accused was accused of raping FWS-183. As it follows from the verdict, the prosecutor heard FWS-183 and FWS-61 in connection with these points, while the accused Kunarac defended himself with an alibi in connection with these points.

- The first-instance court rejected the alibi of the accused Kunarc, and stated that he was convinced that in relation to these acts FWS-183 and FWS-61 identified the accused Kunarc beyond a reasonable doubt, as well as that these acts were proven beyond a reasonable doubt, and announced him I blame.[567]

– Regarding counts 18-21 of the indictment, the accused was accused of:

- took FWS-186, FWS-191 and JG out of the house and took them together with "Gaga" and DP 6 to an abandoned house in Trnovače, where Dragoljub Kunarac raped FWS- 191, and the other two men raped the other girls. As it follows from the verdict, the prosecutor heard FWS-191, FWS-186, and additional evidence supporting the identification of the accused, witness FWS-192, who is the mother of FWS-191, in connection with these points. Accused Kunarac defended himself with an alibi regarding these points.

  - The first-instance court rejected the alibi of the

[566] Ibid, paragraphs 699-704.
[567] Ibid, paragraphs 705-715.

Funded by the European Union

accused Kunarc, and concluded that all these acts, with the exception of the rape of JG, were proven beyond a reasonable doubt, and declared him guilty.

- that FWS-186 and FWS-191 were kept in an abandoned house in Trnovače for approximately six months, and that during their detention the accused Kunarac repeatedly raped FWS-191, while DP 6 repeatedly raped FWS-186. The accused was also accused of treating the girls as the personal property of Kunarac and DP 6 and that they had to perform household chores and fulfill all requests. As it follows from the verdict, the prosecutor heard the injured parties FWS-191 and FWS-186 regarding these points, as well as additional evidence supporting the statements of the injured persons, namely FWS-175 and FWS-192, the mother of FWS-191. Accused Kunarac defended himself with an alibi regarding these points.

- The first-instance court rejected the alibi of the accused Kunarac and accepted the testimony of the prosecution witness, concluding that it was convinced that it had been proven beyond a reasonable doubt that the accused Kunarac had constantly and regularly raped FWS-191, and Ex. 6 FWS-186, while they were kept in the house in Trnovace. Moreover, Kunarac showed that he claimed exclusive rights to FWS-191 by forbidding the other soldiers to rape her. The Trial Chamber was convinced that Kunarac was aware of the fact that DP 6 was constantly and regularly raping FWS- 186 during that period, just as he himself had raped FWS-191. However, it was not established that Kunarac DP 6 provided any help, encouragement or moral support that would have had a significant impact on the commission of individual rapes. Kunarac continued to come to the house for approximately two months, but except for one occasion, it was not established that the accused was present while DP 6 raped FWS-186. In addition, the prosecutor failed to show in any way that Kunarc's presence or actions would have helped Ex. 6 to rape FWS-186. In the case of specific rapes committed by DP 6, the connection between the events in the house and Kunarč's sporadic presence there is so weak that the concept of aiding and abetting would go beyond its scope. The first-instance court was convinced that the accused Kunarac and DP 6 denied FWS-191 and FWS-186 any possibility of control over their own lives during their stay in that house. They had

Funded by
the European Union

to carry out all orders, do household chores, without any real possibility to escape from the house in Trnovace or from those who abused them. They were also abused in other ways, for example when Kunarac invited a soldier to the house and told him that if he wanted, he could rape FWS-191 for 100 German marks. On another occasion, Kunarac tried to rape FWS-191 in front of other soldiers while he was in a hospital bed. These two women were treated as personal property of Kunarac and Ex. 6. The first-instance court was convinced that Kunarac imposed such living conditions on the victims in agreement with Ex. 6. Both of them personally committed the act of enslavement. By helping to establish such conditions in that house, Kunarac also aided and abetted DP 6 in his enslavement of FWS-186, and declared him guilty.[568]

From this verdict for the accused Kunarac, it is evident that although it is possible to pass a verdict based on the testimony of only one rape victim and without additional supporting evidence, it is also obvious that the accused was acquitted of several counts of the indictment due to the lack of supporting evidence that could clarify the ambiguities that were stemmed from the testimony of the victim, whose testimony was the only evidence for that count of the indictment. So, although formally supporting evidence is not required, in practice, even before the ICTY, the victims' testimony was more convincing if their statements were supported by other evidence.

Prosecutor's Office of Bosnia and Herzegovina against Milan Todović

In the Todović case, evidence was presented by the prosecutor, the accused and the injured party "S 1".

The prosecution presented evidence by hearing nine witnesses and reading over 200 material pieces of evidence. The court rejected certain evidentiary proposals of the prosecution.[569]

[568] Ibid, paragraphs 716-745.

[569] Paragraphs 58-60 of the first-instance judgment in the *Todović case.* The court refused to review the verdicts of the ICTY, namely the verdicts: Prosecutor v. Dragoljub Kunarac and others, Prosecutor v. Milorad Krnojelac and Prosecutor v. Momĉilo Krajišnik, considering that the prosecution could have introduced the relevant parts of the aforementioned verdicts through a motion to accept established facts based on the Law on assignment, which it ultimately did, while there was no basis for the introduction of entire judgments in order to prove the facts of the specific case. Also, the court refused to present evidence at the main hearing: Video attachments on DVD, which were submitted by the ICTY with Letter no. RFA 20170328-01: (a. "Children of War: Children of Foĉe", video number: V000-0500-V000-0500, to which is also attached a brief overview of the contents of the attachment in English and our language with ERN code no. 0672 9065; b "Rape as a tactic of war", video number: V000-0655-V000-0655; c. "Getting away with murder", video number: V000-

Funded by the European Union

The Prosecution proposed that instead of directly hearing the witness EZ, his statement given from May 5 to 7, 1999 to the ICTY investigators should be read, because the witness EZ is in Finland and that summoning him would be much more difficult or even impossible, which would ultimately had an impact on the economy and efficiency of the criminal procedure in question. The court of first instance accepted this proposal of the prosecution,[570] based on the provisions of the Law on the transfer of cases by the ICTY to the Prosecutor's Office of BiH and the use of evidence obtained by the ICTY in proceedings before the courts of BiH (" **Law on Transfer** "), noting that during the final evaluation of the evidence, the accepted EC testimony is subject to the provisions of Article 3, paragraph 2 of the Law on Transfer, which stipulates that courts cannot base a conviction exclusively or to a decisive extent on the previous testimony of witnesses who are not gave oral testimony at the main trial.

The defense heard one witness and did not present evidence of a material nature. The injured party "S 1" heard a neuropsychiatrist and a psychology expert on the circumstances of the realization of her property-legal claim and filed a written report and opinion of the aforementioned experts.

The prosecutor proved that:

- there was a wide (widespread) and systematic attack at the time and in the area where the criminal offense was committed - proved by a motion to the court to accept the facts established in the proceedings before the ICTY,[571] by hearing six witnesses,[572] and by providing more than 60 pieces of material evidence,[573] while the defense did not dispute this;
    - The first-instance court stated with regard to the proof of these facts by the prosecutor that it had: " *in view of the numerous established facts in the proceedings before the ICTY which were accepted in this proceeding,...* " and then from paragraph 103 to paragraph 122 it stated the established facts in the proceedings before the ICTY that related to these facts. The court of first

---

0222-V000-0222), and for the reason that they are not relevant for making a decision on a specific criminal legal matter, while appreciating the principles of economy and efficiency of court proceedings.
[570] Ibid, paragraphs 47-56.

[571] Ibid, paragraph 57. The Prosecution proposed to accept the established facts from the judgments of the ICTY, number: IT-00-39-T against Momĉilo Krajišnik (judgment of September 27, 2006), number: IT-97-25-T in the case against Milorad Krnojelac (judgment of 15 March 2002) and number: IT-96-23/1-T in the case against Dragoljub Kunarac (judgment dated February 22, 2001), based on Article 4 of the Law on Assignment. The first-instance court accepted some of the proposed established facts, which it provided in Annex II of the verdict and forms an integral part of it.
[572] Ibid, paragraphs 123-132. Witnesses OS, U. Č., injured party "S 1", PK, NB and witness EZ, whose testimony was read at the main trial, also testified about the events in the area of the municipality of Foĉa and the surrounding villages in the incriminated period.
[573] Evidence of the Prosecutor's Office of BiH from T-19 to T-79, T-167, T-171, T-173, T-187 to T-195.

Funded by the European Union

instance also stated that it accepted the contents of the testimony of these witnesses who spoke about the events in the area of the municipality of Foča as credible and true,[574] and that it established, beyond a reasonable doubt, the existence of a widespread and systematic attack in the area of the municipality of Foča from the numerous material evidence of the Prosecution during which attack the incriminating actions were undertaken by the accused. It is clear from the analyzed evidence that a broad and systematic attack lasted both before and after the time of the execution of the actions by the accused (as it follows from the established facts and material evidence previously analyzed), but what is important for the panel and indisputably proven is that this attack lasted at the time when the accused committed the incriminated acts against the injured "S 1".[575]

- the target of the attack was the civilian population of Bosniak nationality in the municipality of Foča - proved by hearing witnesses, reading material documents, and by proposing to accept established facts before the ICTY. This fact was not contested by the defense of the accused
  - The first-instance court, in terms of proving these facts by the prosecutor, stated that based on the factual findings that were explained in detail during the assessment of the existence and nature of the attack, it finds that there is no doubt that all the persons towards whom the attack was directed were, therefore, harmed. With 1", were civilians.[576] The damaged "S 1" was not engaged in the military, was not in uniform, and did not offer any resistance. She was taken from her village to the collection center, and then to various other facilities where she was sexually abused.

- the accused knew about the attack and that his acts were part of that attack - he proved by reading the testimony of the accused Todović given in the presence of the defense counsel before the prosecutor, by hearing four witnesses,[577] by reading the material documentation from T-7 to T-11 (which were also undisputed for the defense), and a proposal for the acceptance of established facts before the ICTY

[574] Ibid, paragraph 133.

[575] Ibid, paragraphs 135-139.
[576] Ibid, paragraphs 140-147.
[577] Witnesses PR, AV, NB and the brother of the accused Ž. T.

Funded by the European Union

  - The first-instance court, regarding the proof of these facts by the prosecutor, stated that based on the facts and circumstances that were presented during the case, it established the existence of a connection between the accused's actions and the attack, in such a way that his actions and actions were directly related to the attack.[578]

- the accused on an unspecified day in the period between 30.10.1992. and the end of December 1992, raped the victim "S 1" in an apartment in one of the residential buildings in Foča, where the victim was previously brought by a member of the VRS - proved by hearing the victim "S 1" and corroborating her testimony with indirect witness statements NB and OS
  - The first-instance court, with regard to the proof of these facts by the prosecutor, stated that he established the responsibility of the accused for this rape,[579] and stated that the testimony of the victim - the injured party "S 1" is credible, objective, impartial and consistent in essential elements and during cross-examination by defense of the accused and the president of the trial panel, the panel based the conviction for incrimination, in the decisive part, on the same, which was also supported by the indirect statements of witnesses NB and OS. The first-instance court also stated that when evaluating the testimony of the injured party, it took into account the findings and opinions of the neuropsychiatrist and the psychological expert on the state of health of the injured party, who in their findings concluded as indisputable that the injured party "S 1" suffered permanent personality changes (which are reflected, among other things, in social isolation and fear, loss of ability for emotional closeness with other people, nightmarish dreams about survived events) and retrograde depression and chronic PTSD. The experts also determined that the victim's general ability to live was reduced by 45%.

- the accused in the time period between December 1992 and March 5, 1993. year, held the victim "S 1" in sexual slavery and forced her to have sexual intercourse, and after he bought her from a member of the VRS " - proved by reading the testimony of the accused Todović given in the

[578] Ibid, paragraphs 148-154.
[579] Ibid, paragraphs 156-182.

Funded by the European Union

presence of the defense attorney before the prosecutor, hearing the victim "S 1" and corroborating her testimony indirect statements of witness U. Č. whose testimony was confirmed by Prosecution's material evidence T-12,[580] as well as by the hearing of corroborating witnesses: brother of the accused Ž. T., NB, PR and AV. The defense heard the defense witness RF, and the thesis of the defense was that it was about the "voluntary life of the injured party" with the accused Todović.

- The first-instance court, in terms of proving these facts by the prosecutor, stated that from the testimony of the injured party,[581] which was fully confirmed by the Prosecution's witnesses heard during the main trial, namely: the brother of the accused Ž. T., NB, PR and AV, as well as defense witness RF, could not accept the defense thesis about the voluntariness of the relationship between the injured party and the accused Todović,

The first-instance court found it established that the accused, during a wide and systematic attack on civilians of Bosniak nationality in the municipality of Foča, knowing about such an attack, held the victim in sexual slavery, thereby committing the criminal offense of Crimes against humanity under Article 172, paragraph 1, item g) of the CC BiH in connection with Article 180, paragraph 1 of the CC BiH.

Defense counsel for the accused *Todović* filed an appeal against the first-instance verdict, in which he claimed, *inter alia,* that it was not a case of classic rape because the accused did not deliberately create inhumane conditions that would make it unbearable for the victim, that he did not lock the victim when he left, that the accused came from a conservative environment where girls buy, so the accused bought the injured party, counting on the fact that he would live with her, and that the accused's intention when he met the injured party and when he bought it was to marry her. The appeal of the defense counsel of the accused Milan Todović was rejected as unfounded.[582]

---

[580] Information from the Department for Spatial Planning, Housing and Communal Affairs of the Municipality of Foĉa No.: 06-36-2-3/17 dated September 5, 2017. with the attached certified copy of the cadastral plan of Dusan Fundić Street in Foĉa;
[581] Paragraphs 183-214 of the first-instance verdict in the *Todović case.*
[582] The first-instance verdict in the *Todović case,* which was confirmed by the second-instance verdict of March 12, 2019.

Funded by the European Union

Prosecutor's Office of Bosnia and Herzegovina against Milomir Davidović

In the Davidović case, evidence was presented by the prosecutor and the accused.

The Prosecution presented evidence by examining ten witnesses,[583] **reading 176 pieces of material evidence, examining** neuropsychiatrist and psychological experts on the circumstances of the property claim of the injured party "S 1", and submitted a written report and opinion of the aforementioned experts.[584] The court accepted the prosecution's proposal to read the statements of two dead witnesses.[585] The court partially accepted the prosecution's proposal to accept the established facts in the proceedings before the ICTY, **therefore, a total of 65 proposed facts,** which relate to the general context of events in the wider area of Foča municipality in 1992, were accepted as established.[586] The court rejected certain evidentiary proposals of the prosecution.[587]

---

583 Witnesses: " S1", Zoran Glodić, Husein Mandžo, Spomenka Kovaĉ, Snežana Rašević, "S2", "S9", "S8", Dragan Zelenović, "S7".

584 The proposal for the realization of a property legal claim together with the findings and opinions of the aforementioned experts is included in the file as Prosecution Exhibit T-174.

585 Paragraphs 53-55 of the first-instance judgment in the *Todović case.* The statements of witnesses Mevla Barlov and Safet Avdić were read.

586 Ibid, paragraphs 56-60. Court decision number S1 1 K 005151 18 Kri of 27.09.2018. year on the proposal of the Prosecutor's Office number: T20 0 KTRZ 0003050 05 dated 20.03.2018. for the acceptance of established facts from ICTY judgments in the case against Momĉilo Krajišnik number IT-00-39-T (49 facts), judgment of September 27, 2006. year, then in the case against Milorad Krnojelac, number: IT-97-25-T (8 facts), judgment of March 15, 2002. year and in the case against Dragoljub Kunarac, number: IT-96-23/1-T (8 facts), judgment of February 22, 2001. based on Article 4 of the Law on the transfer of cases by the ICTY to the Prosecutor's Office of BiH and the use of evidence obtained by the ICTY in proceedings before the courts in BiH, it is given in Annex II of the verdict and forms an integral part of it.

587 Ibid, paragraphs 61-63. The court refused to include in the court file as evidence the judgment of the ICTY, namely the judgment: Prosecutor v. Dragoljub Kunarac and others, Judgment no. IT-96-23-T&IT-96-23/1-T dated February 22, 2001. year; Prosecutor against Dragoljub Kunarac and others, Judgment no. IT-96-23 & IT-96-23/1-A dated 12.06.2002. Prosecutor against Milorad Krnojelac, Judgment no. IT-97-25-T of 15.3.2002. year; Prosecutor against Milorad Krnojelac, Judgment no. IT-97-25-A dated September 17, 2003. year; Prosecutor against Momĉilo Krajišnik, Judgment no. IT-00-39-T of September 27, 2006. year; Prosecutor against Momĉilo Krajišnik, Judgment no. IT-00-39-A of 17.03.2009. year, appreciating that these are public documents, and that the Prosecution could have introduced the relevant parts of the aforementioned judgments through a proposal for the acceptance of established facts on the basis of the Law on Transfer, which it did, while the basis for introducing entire judgments in order to prove the facts of the specific case was not either.
Finding that the defense correctly indicated that part of the proposed material evidence is not relevant for making a decision on a specific criminal legal matter, and appreciating the principles of economy and efficiency of court proceedings, the panel refused to allow the following material evidence to be introduced at the main trial: Newspaper article published in the newspaper Evening newspaper from 07.10.1994. under the title "List of prisoners exchanged from the camp - From the camp to the tram"; Newspaper articles about Foĉa by Saliĉehajić Ahmed published in the newspaper OsloboĊenje - European Sunday edition, in the period from 07/22/1993. until 10.09.1993. year, namely: "The city of horror and horror: the Drina flows muddy and bloody: Foĉa"; "Foĉa: crime, for the second time (1): Drina even bloodier"; "Foĉa: crime, for the second time (2): Ultimatum to Muslims: surrender your weapons!";
"Foĉa: crime, for the second time (3): Prison in Aladža"; "Foĉa: crime, for the second time (4): "Forest" hunts people"; "Foĉa: crime, for the second time (5): The night has no witnesses"; "Foĉa: crime, for the second time (6): Not all bridges are destroyed"; "Foĉa: crime, for the second time (7): Serbs die, Muslims are killed"; List of missing Foĉaks (3); Newspaper articles about Foĉa by Preljub Tafre published in the newspaper OsloboĊenje - European Sunday Edition, in the period from October 8, 1993. until February 3, 1994. year and that:
"How the mosques of Foĉa disappeared"; "Upper bloody field"; "Neighbors, the biggest villains"; "Bloody Night"; "Chetniks played football with human heads" "Balije, don't come back!" Screams from the Drina Bridge - Chetnik concentration camp in Foĉa - what /not/ is known about this concentration camp", notes of Tafro Preljub, refugee from Foĉa from September 1994; Newspaper articles about Foĉa by Preljub Tafre published in the newspaper OsloboĊenje - European Sunday edition, in the period of September 29, 1994. – 18.5.1995. namely: "How it was at Tjentište - A massacre prepared for a long time"; "The day Trošanj was killed" c) "Testimony from Ljuboviĉ near Foĉa - The day the pilgrim was killed"; Newspaper article about Foĉa authored by Preljub Tafra published on 22.12.1997. under the title "Memory of Foĉa: April-August 1992: I have an obligation to slaughter"; Newspaper articles about Foĉa under the titles: "Story from the eastern side
- Foĉa summer 1992 (I) - People die watching"; "A story from the east side - Foĉa summer 1992 (/I) - Killing is like drinking a glass of water" "A story from the east side - Foĉa summer 1992 (III) - Lunch for neither cats nor dogs" Video attachments provided by the ICTY with Letter no. RFA 20170328-01: "Children of War: Children of Foĉa", video number: V000-0500-V000-0500, with a brief overview of the contents of the attachment in English and our language with ERN code no. 0672

Funded by the European Union

The defense heard one witness,[588] she also heard the accused Milomir Davidović as a witness, and **submitted two material pieces of evidence**. The court rejected certain evidentiary proposals of the defense.[589]

The prosecutor proved that:

- there was a wide (widespread) and systematic attack at the time and in the area where the crime was committed - proved by a proposal to the court to accept the facts established in the proceedings before the ICTY, by hearing ten witnesses,[590] and by submitting more than 100 material pieces of evidence;
    - The first-instance court stated with regard to the proof of these facts by the prosecutor that he had in mind numerous established facts in the proceedings before the ICTY which were accepted in this proceeding,[591] as well as the statements of witnesses[592] heard during the main trial and the material evidence[593] entered in the court file. Based on all the evidence presented, the court of first instance undoubtedly concluded that in the period from the beginning of April 1992 to the end of October 1994, a wide and systematic attack by military, paramilitary and police forces took place in the area of Foča municipality. of the Serbian Republic of BiH, and then of the Republika Srpska, directed against the civilian Bosniak population of the municipality of Foča, and established beyond a reasonable doubt that this attack took place at the time when the accused committed the incriminated

9065; "Rape as a tactic of war", video number: V000-0655-V000-0655, with a brief overview of the contents of the attachment in English with ERN code no. 0672 9199; "Getting out of the murder", video number: V000-0222-V000-0222, with a brief overview of the contents of the attachment in English with ERN code no. 0672 9304.

[588] Witness Tamara Vrećo

[589] Paragraphs 64-65 of the first-instance verdict in the *Davidović case.* Defendant Milomir Davidović, lawyer Slaviša Prodanović at the hearing held on March 29, 2018. year, during the hearing of the witness with protection measures "S1", he suggested that the transcript of the testimony of this witness before the Hague Tribunal be accepted as evidence of the defense in the court file, and in order to indicate to the trial panel that in that testimony she did not mention the accused as the person who raped her. The panel did not accept this evidentiary proposal of the defense counsel for the reason that the defense did not indicate that there were any differences in the testimony of the witness about the same event, but only that she did not mention the accused, and for which the witness gave a logical and acceptable explanation that during her testimony she concentrated on the persons against whom the procedure is conducted. This decision was made by the Council taking into account the number of traumatic events witnessed by the witness "S1", which the Council will give a more detailed explanation of when evaluating the testimony of this witness in the factual determinations section. The Trial Chamber did not accept the defense's proposal to include in the court file the statements of witness "S4" that she gave in the proceedings before the ICTY, and for the reason that the witness was not heard at the main trial, nor was permission obtained from the ICTY for the use of her earlier statements. The Trial Chamber gave the defense the opportunity to apply to the ICTY, that is, the MMKS, in order to obtain a permit to change the protection measures for this witness, in order to obtain the conditions for summoning her to the main trial. However, the defense, appreciating that the procedure is taking too long, and that it is therefore not in the interest of the accused to prolong the procedure, gave up the proposal for hearing "S4".

[590] Ibid, paragraphs 123-132. Witnesses OS, U. Č., injured party "S 1", PK, NB and witness EZ, whose testimony was read at the main trial, also testified about the events in the area of the municipality of Foĉa and the surrounding villages in the incriminated period.

[591] Established facts no. 2, 4, 9, 10, 11, 12, 13, 15, 18, 20, 21, 22, 24-30, 33, 35-39, 47-49.

[592] Witnesses S1, S2, S7, S8, S9, Zoran Glodić, Husein Mandžo, Dragan Zelenović, read statements of witnesses Mevla Barlov and Safet Avdić.

[593] Evidence of the Prosecutor's Office of BiH T-7, T-34 - T-45, T-48 - T-63, T-65, T-66, T-72, T-76, T-86, T-87, T-89 to T-91, T-120, T-122, T-123, T-125 - T-129, T-131 to T-138, T-171...

Funded by
the European Union

acts against the victim "S1".[594]

- the target of the attack was the civilian population of Bosniak nationality in the municipality of Foča - proved by hearing witnesses, reading material documentation, and by proposing to accept established facts before the ICTY. This fact was not contested by the defense of the accused
    - The first-instance court, regarding the proof of these facts by the prosecutor, stated that based on the presented evidence, it concluded beyond any reasonable doubt that the wide and systematic attack that took place in the area of the municipality of Foča was exclusively directed against the civilian population of non-Serb nationality. In this particular case, based on the evidence presented, the Council undoubtedly established the civil status of the injured witness "S-1".[595]

- the accused knew about the attack and that his acts were part of that attack - proved by reading the testimony of the accused Davidović given in the presence of the defense attorney before the prosecutor, by reading the material documentation[596]
    - The first-instance court, in terms of proving these facts by the prosecutor, stated that based on the facts and evidence that were presented during the main trial, the presented material evidence, and the testimony of the accused Davidović himself, given in the investigation before the Prosecutor's Office of BiH, but also at the main trial, established the existence of a connection between the act of the accused and the attack, in the way that his actions and actions were directly related to the attack, and that the accused Davidović knew of the existence of a series of widespread and systematic crimes directed against the civilian Bosniak population municipality of Foča, and there is no doubt that he knew and wanted his act to be part of the attack and to contribute to such and such an attack, and that he was undertaking criminal acts against a civilian, of Bosniak nationality.[597]

- the accused in the period between July 3, 1992 and 18.07.1992. year, and

[594] Paragraphs 107-157 of the first-instance verdict in the *Davidović case.*
[595] Ibid, paragraphs 158-165.
[596] T-14, T-16, T-17, T-175,
[597] Ibid, paragraphs 166-177.

Funded by the European Union

after Dragan Zelenović called Zelja took the damaged "S1" and "S4" out of the High School Center, which he took to the apartment used by Dragan Zelenović, which was located in a residential building called "Lepa Brena" in Foča, where he came with several other Serbian soldiers to the apartment, after which the accused Milomir Davidović forced the victim "S1" to have sexual intercourse, who was then raped by other Serbian soldiers, after which the victim "S1" and "S4" were returned to the Secondary School Center - proved by hearing the injured party "S 1" and by corroborating her statement with indirect statements of witnesses "S2", "S9", "S8", "S7", Spomenka Kovač, Snježana Rašević, and Dragan Zelenović, by reading the statement of the accused given in the investigation when he gave in the capacity of a suspect,[598] by hearing a neuropsychiatrist and a psychology expert, and submitting material evidence T-2. The defense used the statement "S 1" which it gave to the investigators of the Hague Tribunal on 15-18 November 1995.[599]

- The first-instance court stated with regard to the proof of these facts by the prosecutor that the accused knew of a widespread and systematic attack at the critical time, and that his actions were part of that attack, the panel concludes that he consciously used his position and the victim's inability to offer any resistance in such circumstances in order to have sexual relations with her.[600] At the time of the commission of the crime, the accused knew that the victim belonged to the part of the civilian population against whom the attack was directed, i.e. that she had a sense of fear for her safety, which would prevent her from offering any resistance, as well as the fact that they were in the house where when the victim was raped, other soldiers were also present, aware of such a situation, he had sexual relations with her, fully aware that she did not consent to it voluntarily, so he committed the actions described in the condemning part of the sentence with direct intent, knowingly and willingly, with undoubted knowledge of the nature of the actions undertaken, committed the criminal offense Crimes against humanity by the act of rape "S1". In contrast, "S4" was not heard in this case, while the victim "S1" could not state precisely what happened to "S4"

[598] T-175.
[599] O-1.
[600] Ibid, paragraphs 178-223.

Funded by the European Union

while they were staying in the apartment in the building "Lepa Brena" on critical occasions. Witness "S1" confirmed that "S4" was taken out of the high school center together with her, that they were together in the apartment in the "Lepa Brena" building, that they stayed in separate rooms and that she remembers that Dragan Zelenović "S4" " dressed in a military uniform and taken somewhere, she thinks to her parents' house, to show how beautiful she is. However, witness "S1" could not confirm in her testimony that she saw or heard that "S4" was raped on that occasion by the accused Milomir Davidović aka. Looks like it. Given that based on the testimony of witness "S1", the panel could not be convinced that the accused Milomir Davidović also raped "S4" on critical occasions, and in the absence of other evidence from which this circumstance could be established, the panel omitted the condemning part of the verdict "S4", and in this connection made corrections to the factual description in the part of the indictment that refers to the rape of "S4" by the accused Milomir Davidović.

The first instance court rendered a verdict, declaring the accused Davidović guilty of the first count of the indictment, and declaring him guilty of the criminal offense Crimes against humanity from Article 172, paragraph 1, point g) (forcing another person to have sexual intercourse or sexual intercourse equated with it) action (rape) of the Criminal Code of BiH.

- on an unspecified day after Dragan Zelenović took the damaged "S1" and "S4" and another captured Bosniak woman from the premises of the Secondary School Center in Foča, together with Zelenović and another Serbian soldier, he took them to an abandoned Muslim house in Gornje Polje - municipality Foča, where they were raped, and on that occasion the accused Milomir Davidović forced "S1" as well as "S4" and this third one to have sexual intercourse. Bosniak woman, after which they were returned to the High School Center - proved by hearing the injured party "S 1" and Dragan Zelenović. The defense heard the accused as a witness.
    - The first-instance court, in terms of proving these facts by the prosecutor, stated[601] that after a comprehensive analysis of the available evidence, the testimony of the key victim witness "S1", he came to doubt the factual allegations of the indictment accusing

[601] Ibid, paragraphs 266-277.

Funded by the European Union

Davidović of raping "S1", "S4". and the third Bosniak woman, since the only one of them who was heard, witness "S1" could not give a precise statement on that issue, so the prosecutor specifically asked if Liči was there raped, the witness stated: ***"Prosecutor:** Liči. Okay, did Liči rape you there? **Witness:** Now, I'm not saying I'm not sure if it is or not. **Prosecutor:** Good. **Witness:** But I know, in any case, that out of all of them they raped me the most, they raped me the most".* At the same time, the first-instance court emphasizes that it does not question that "S1", "S4" as well as the third Bosniak woman were injured. survived severe and ferocious physical and sexual abuse, which also follows from the testimony of "S1", but from her statement, and in the absence of other evidence, the Council could not conclude beyond a reasonable doubt that the accused Davidović was also in the premises of the house that located in Gornji Polje, participated in the aforementioned actions. Witness Dragan Zelenović also testified about the circumstances of the stay and the events in the house in Gornji Polje, in addition to the victim "S1" and the accused himself at the main trial. He confirmed that he took the injured "S1" and "S4", but that he does not know whose house he took them to, denying that he took them there for the purpose of rape, claiming that he brought them to take their clothes from the closet to change clothes and take a bath.

As a result of the above, and given that the court could not establish beyond a reasonable doubt that the accused Milomir Davidović committed the actions for which the prosecution charges him in point 2 of the factual description, based on her testimony alone, the Council for this incrimination, applying the principle of *in dubio pro reo,* passed acquittal, in accordance with Article 284, item c) of the BiH CPC.

On 09.07.2019. The appeals panel confirmed the first-instance verdict.[602]

The Prosecutor's Office of the Federation of BiH against Đ. P.

In the case against Đ.P. evidence was presented by the prosecutor and the accused.

[602] Second-instance verdict in the *Davidović case.*

Funded by the European Union

The prosecution presented evidence by examining three witnesses,[603] reading the record of the examination of witness SZ, examining neuropsychiatry experts,[604] submitting the findings and opinions of the team-court psychiatric examination, and reading dozens of material evidence.[605]

The defense presented evidence of a material nature.[606] The prosecutor proved:

- general elements of the criminal offense War crime against the civilian population from Article 142, paragraph 1 of the assumed SFRY, - by hearing all proposed witnesses and presenting nine material pieces of evidence, namely:
  - that there was and was an ongoing armed conflict between the Military Forces of the Army of Bosnia and Herzegovina and the Army of the Republika Srpska ;
    - Regarding the proof of these facts by the prosecutor, the court of first instance stated that on the basis of the material documentation submitted by the prosecution, as well as the statements of the examined witnesses, it concluded that during the period indicated in the indictment as the time of the commission of the criminal act, there was and was an armed conflict between the Military Forces of the Army of Bosnia and Herzegovina and the Army of the Republic of Srpska, and that the area of Vraca, Municipality of Novo

---

[603] BA, HH, SN,

[604] For the reason that the examined person, witness-damaged SZ, is mentally ill, and is procedurally incapable of following and understanding and adequately answering the questions asked at the trial, as well as for the reason that her appearance and hearing at the trial would lead to a deterioration of her mental state and would have character of secondary traumatization, which was stated in the presented team-court psychiatric report.

[605] Decision of the Court of Bosnia and Herzegovina No. S1 1 K 009222 12 KV dated March 15, 2012. on the adoption of the proposal of the Prosecutor's Office of BiH transferring the proceedings to the Cantonal Court in Sarajevo, Opinion and conclusion of the team forensic-psychiatric expert examination on behalf of SZ, born in 1963, from November 6, 2014. made by permanent court experts in the medical profession, sub-field of neuropsychiatry prof. Ph.D. KA, prof. Ph.D. sci.med. A.-BM and Psychological report in the name of SZ dated November 3, 2014. year, made according to the permanent court expert in the subfield of psychology, M.Sc. ED, a graduate psychologist, in the Addendum to the team forensic-psychiatric expert examination in the name of SZ from 14.11.2014. year, which were explained orally by an expert in the field of neuropsychiatry, prof. Ph.D. KA at the main trial, as stated above, in the forensic psychiatric report in the name of SZ prepared by the permanent medical expert, sub-department of psychiatry, prim.dr. S. Lj., dated April 15, 2013, in Extract from criminal record number: 02/1-1-2-04-8-2/1626 dated May 10, 2012. year in the name of Đ. P., in Photocopy of the judgment of the Basic Court of Sokolac, number K-102/04 dated 02.10.2006. year, along with the original accompanying act of the Basic Court in Sokolac dated August 20, 2012. year, in the Photocopy of the judgment of the District Court in East Sarajevo, number: 014-0-KŽ-06- 000 089 dated April 12, 2007. year, in the Record of the Cantonal Prosecutor's Office of the Sarajevo Canton, number T09 0 KTRZ 0034714 12 dated 08.22.2012. on the examination of witness SZ, Record of the Federal Police Administration No. 11/8-1-256 of 21 November 2011. year on the hearing of witness SZ

[606] A certified copy of the medical history in the name of Đ. P., ID number 699/92 with the date of admission to the hospital on April 29, 1992. year and the date of discharge from the hospital on May 5, 1992. year; a certified copy of the registration certificate of the Koran Hospital Health Organization, registration number: 699/92 in the name of Đ. P. with certified photocopies of accompanying documents-medical documentation in the name of Đ. P. with diagnosis and therapy, and referral-finding, record number: 699 from 04/29/1992. with the indication VP 2264 Koran in the column "to whom it is sent"; certified copy of discharge certificate VP 2264 Koran Pale, in the name of Đ. P. with identification number in the hospital: 699/92 and date of admission 04/29/1992. year and date of discharge 05.05.1992. year; The original medical history of the public health institution of the Istoćno Sarajevo hospital, department-surgery, registry number: 436/93 in the name of Đ. P. with date of receipt 15.03.1993. and the date of discharge on April 23, 1993. year, and it is indicated on the same that Đ. P. soldier-wounded; A certified copy of the University Medical Center Sarajevo OOR, Clinic for Thoracic and Vascular Surgery registry number: 168 in the name of Đ. P. with date of receipt 04/05/1992. year and date of discharge 17.04.1992.

Funded by the European Union

Sarajevo, which was designated in the indictment as the place where the crime was committed, was under the control of the Army of the RS. In their statements, the witnesses confirmed the existence of a state of war and an armed conflict, and that the area of Vrac, municipality of Novo Sarajevo was under the control of the forces of the Army of the Republika Srpska, that there was a conflict, that shots were fired, and that as members of the "other" side, i.e. of the non-Serb civilian population were exposed to suffering and their position was difficult, that they were forbidden to leave their homes and that they were under "house arrest", that they were in work units, that Serbian soldiers ransacked the houses, that they had broken the electricity lines so that they could not use the TV, radio, etc. The court of first instance also stated that in the case *Prosecutor v. Stanislav Galić,* the ICTY established the existence of an armed conflict in the city of Sarajevo and the area of Vrac, a settlement within the city of Sarajevo, in a critical period.

- that the act must be directed against the civilian population ;
  - The first-instance court, regarding the proof of these facts by the prosecutor, stated that from the testimony of the victim, the direct victim of this criminal offense of the SZ, he clearly concluded that it was a civilian, a female person in civilian clothes, who lived with her family in an apartment in the Sarajevo area of Vraca, Municipality of Novo Sarajevo. The evaluation of the evidence established that the victim SZ, against whom the criminal offense was committed, was a civilian, that is, a female person, who at the critical time was not a member of any of the parties to the conflict, nor did she have any weapons or tools. nor did it take an active part in the hostilities, which was confirmed by the statements of all the heard witnesses:
- the nexus between the actions of the accused and the armed conflict taking place at the time of the commission of that act
  - The first-instance court stated that the nexus between the actions of the accused and the armed conflict was clearly proven. Witness statements say that the accused held the

Funded by
the European Union

position of deputy commander of the Grbavic work platoon, that he openly carried a gun on his belt and ordered the non-Serb population of that settlement what they should do. As a result of this position of power, he was known and feared by the non-Serb population in the area. On the night of the initial rape of the victim "SA-1", the accused and a member of the VRS acting together broke into the victim's apartment, after which the victim tried to run away and screamed asking her neighbors to help her. Although the neighbors heard her cries, being part of the non- Serb population, they were afraid to intervene for fear of reprisals from the VRS, which had effective control over the area at the relevant time. The accused was able to commit this crime with impunity due to the climate of terror created in Grbavica by the control of the VRS; as evidenced by witness statements, victims of rape and other crimes during that period were too afraid of reprisals to report such crimes or seek justice in some other way. This de facto impunity existed as a result of the ongoing armed conflict. The armed conflict directly influenced the way in which the accused committed the crime. The violent beating that the accused and his co- perpetrator committed on the victim SA-1 before they raped her, including hitting her in the face with a firearm, occurred due to the existence of an armed conflict, when both the accused and the other perpetrator openly carried firearms as part of his official duty. The armed conflict gave the accused and his co-perpetrator a reason to carry firearms and a motive for discriminatory treatment against non-Serb civilians, thus significantly influencing the manner in which the accused committed the crime. There is no doubt from the available evidence that the accused was in fact aware of the ongoing conflict. Grbavica was under the control of the VRS at the time, and the accused, in his role as deputy commander of the work platoon, was directly involved in the procurement of manpower for VRS military operations. He was closely associated with members of the VRS and committed the crime together with a uniformed member of the VRS. Therefore, he was fully aware of the existence of the armed conflict, and its connection with the village of Grbavica, in

Funded by the European Union

September 1992, when the crime took place. The victim was a civilian, not involved in ongoing hostilities, and belonged to the opposing side. As already stated, the accused was fully aware of her status as a non-combatant and a member of the opposing party. By reviewing the data from the military records, it was established that Đ. P. was engaged in VP 7536/3 in the period from April 5, 1992. until May 15, 1992. year, i.e. before the formation of the territorial defense of the Republika Srpska BiH, i.e. at the time when the Army of the Republika Srpska was formed in BiH, that he participated in the war in VP number 7563/3 in the period from 04/05/1992. until May 15, 1992. year, therefore, before the incriminated event. The aforementioned data from military records indisputably indicate that Đ. P. registered as a soldier and that he participated in the war, before the incriminated event, which fact indicates that he was aware and that he knew about the existence of an armed conflict.

- That the accused Đ. P. during the winter period, at the end of 1992, raped the victim SZ at night in such a way that he was uniformed and armed with an automatic rifle and bombs around his belt, he came to the apartment where the victim lived with her unmarried husband and mldb. daughter S., and with the threat of killing her child and putting a bomb in her mouth, took the victim to a nearby abandoned building, and with repeated threats of slaughtering her child, ordered her to undress and lie down on the floor, after which he laid down on and raped her, all the while threatening the victim that he had a weapon and that he would kill her if she did not obey and that she must not tell anyone what happened - by reading the testimony of the victim SZ, whose the statement is supported by the testimony of witnesses BA, SN, and HH, as well as the written findings and opinion of the team forensic-psychiatric expert opinion along with the psychological report, and the findings and opinion of the additional team forensic-psychiatric expert opinion, explained orally by an expert in the field of neuropsychiatry;
    - The first-instance court stated that the statements of the victim "SZ" clearly describe the actions of the accused that represent the commission of rape, and her testimony was supported by the statements of indirect witnesses, and based on the evaluation of the evidence, the court qualified the actions of the accused in

Funded by the European Union

relation to the victim as rape.

On June 20, 2017, the Supreme Court of the Federation of Bosnia and Herzegovina, as a second-instance court, issued a verdict in which it confirmed the first-instance verdict,[607] except for the part that referred to the amount of the sentence imposed on the accused.

Mitigating and aggravating circumstances when sentencing

When sentencing, the ICTY applied the provisions of Article 24 of the Statute and Rule 101 of the Rulebook, according to which it could impose prison sentences without the prescribed minimum,[608] as well as life imprisonment.[609]

In BiH, when sentencing, two criminal laws are applied, namely the Criminal Code of BiH for crimes committed within the scope of crimes against humanity from Article 172 of the Criminal Code of BiH and the Criminal Code of the SFRY for all other criminal offenses committed within the framework of war crimes from Article 142 of the Criminal Code SFRY. If the rape was committed as part of a crime against humanity, then the perpetrator could be sentenced to a minimum prison sentence of 10 years, and a long-term prison sentence ranging from 21 to 45 years could be imposed.[610] In all other cases of rape, when they are not qualified as part of a crime against humanity, the courts in BiH apply the provisions of the Criminal Code of the SFRY,[611] which prescribes a prison sentence of 5 to 15 or 20 years in prison for rape.[612]

When it comes to the circumstances that should have been taken into account by the ICTY court panels when determining the appropriate prison sentence for convicts, the ICTY applied Article 24 of the Statute and Rules 100 and 101 of the ICTY Rulebook:

---

[607] The second-instance verdict in the case of *Đ. P.*

[608] The Statute of the ICTY in Article 24, paragraph 1, in the relevant part regarding criminal sanctions, prescribes: *Criminal sanctions imposed by the trial panel are limited to imprisonment.*

[609] The Rulebook of the ICTY in Rule 101 (adopted on February 11, 1994, amended on January 30, 1995, July 10, 1998, December 1, 2000, and December 13, 2000), in the relevant part, prescribes: *A person found guilty may be sentenced to imprisonment, including life imprisonment.* (amended on November 12, 1997)

[610] Long-term prison sentence - Article 42b.: (1) For the most serious forms of serious crimes committed with intent, a long-term prison sentence of 21 to 45 years may be prescribed.

[611] Since the European Court of Human Rights on 18.07.2013. adopted the decision in the Maktouf case against Bosnia and Herzegovina. The decision is available at: http://www.mhrr.gov.ba/PDF/UredPDF/default.aspx?id=3989&langTag=bs-BA, last visited on August 28, 2023.

[612] Article 38 of the Criminal Code of SFRY: (1) Imprisonment may not be shorter than fifteen days or longer than fifteen years. (2) For criminal offenses for which the death penalty is prescribed, the court may also impose a prison term of twenty years.

Funded by
the European Union

„ Article 24 Criminal sanctions

1. *... When determining the prison sentence, the trial panel will take into account the general practice of imposing prison sentences in the courts of the former Yugoslavia.*
2. *When imposing sentences, trial panels take into account factors such as the gravity of the crime and the personal circumstances of the convict. "*

Rule 100 - [613] Sentencing Procedure in the Case of a Guilty Plea

(A) If the trial panel finds the accused guilty after a guilty plea, the prosecutor and the defense can submit all relevant information that can help the trial panel determine the appropriate sentence.[614]

Rule 101 – Penalties[615]

...

(B) When determining the sentence, the trial panel takes into account the factors mentioned in Article 24(2) of the Statute, and factors such as:

(i) *all aggravating circumstances;*

(ii) *all mitigating circumstances, including significant cooperation of the convicted person with the prosecutor before or after the sentencing;*

(iii) *the general practice of imposing prison sentences in the courts of the former Yugoslavia;... "*

Courts in BiH, when determining punishments, they are obliged to apply the provisions of the Criminal Code of BiH to criminal offenses committed within the framework of crimes against humanity, that is, the Criminal Code of the SFRY to all other acts of war crimes, which relate to the purpose of punishment, and what circumstances should be taken into account when imposing the appropriate punishments.

Article 39 of the Criminal Code of BiH prescribes the purpose of punishment, which

[613] Adopted on February 11, 1994, amended on July 10, 1998.
[614] Amended on 06/25/1996, amended on 07/05/1996.
[615] Adopted on February 11, 1994. amended 30.01.1995, amended 10.07.1998, amended 1.12.2000, amended 13.12.2000

Funded by the European Union

the courts must be guided by in the decision on punishment, namely: to express social condemnation of the committed criminal act, to influence the perpetrator not to commit criminal acts in the future and to encourage his re-education, to influence others not to commit criminal acts, to influence citizens' awareness of the danger of criminal acts and the justice of punishing perpetrators. Article 33 of the CC SFRY contains similar wording that was adapted to the socialist self-governing system of the time, and the purpose of punishment was also " *strengthening the morale of the socialist self- governing society and influencing the development of social responsibility and discipline of citizens* ".[616] However, there is also an additional purpose, which the Court of Bosnia and Herzegovina does not take into account when imposing appropriate punishments, and which is prescribed by the Criminal Code of Bosnia and Herzegovina, which is that the purpose of criminal sanctions is the protection and satisfaction of the victim of a criminal act.[617] In none of the judgments did the Court of Bosnia and Herzegovina have this purpose in mind when it imposed appropriate penalties according to the CC of Bosnia and Herzegovina.[618]

In addition to the purpose of punishment, when the courts impose punishments on the perpetrators, they are obliged to apply the provisions related to taking into account mitigating and aggravating circumstances related to the committed criminal act and the perpetrator. Article 48, paragraph (1) of the Criminal Code of BiH (identical to Article 41, paragraph (1) of the Criminal Code of the SFRY) stipulates that the court will impose a punishment on the perpetrator of a criminal offense within the limits prescribed by law for that criminal offense, taking into account the purpose of punishment and taking into account all the circumstances that influence the punishment to be lower or higher (mitigating and aggravating circumstances), and in particular:

- degree of guilt,
- motives from which the act was committed,
- the severity of the threat or violation of the protected property,
- the circumstances under which the act was committed,
- the earlier life of the perpetrator, his personal circumstances and his demeanor after the crime, as well as

[616] Article 33 of the Criminal Code of SFRY: Within the general purpose of criminal sanctions (Article 5, paragraph 2), the purpose of punishment is: 1) preventing the perpetrator from committing criminal acts and re-educating him; 2) educational influence on others to commit criminal acts; 3) strengthening the morals of the socialist self-governing society and the impact on the development of social responsibility and discipline of citizens.
[617] Article 6, item b) CC of BiH.

[618] According to the CC SFRY, in the era of the socialist system, this purpose was prescribed by Article 5, paragraph (2): The general purpose of prescribing and imposing criminal sanctions is to suppress socially dangerous activities that violate or threaten social values protected by criminal legislation.

Funded by the European Union

– other circumstances relating to the perpetrator.

This is not a definitive list of mitigating and aggravating circumstances and courts are allowed to determine additional circumstances in accordance with the stated purpose of punishment.

The sentence for crimes against humanity is prescribed in the Criminal Code of BiH for 10 years, and in the Criminal Code of the SFRY it is 5 years for war crimes against the civilian population, both laws allow the reduction of the sentence below the limit prescribed by law. According to Article 49(b) of the BiH CC (same as Article 42, point 2) of the SFRY CC, the court may impose a sentence below the limit prescribed by law when it determines that there are "special mitigating circumstances" and when the purpose of punishment can be achieved with a reduced sentence. However, when it comes to crimes against humanity, a prison sentence of less than 5 years cannot be imposed even by mitigating the sentence,[619] while for war crimes the prison sentence can be reduced to a prison sentence of one year.[620]

Prosecutor against Ante Furundžija

On 10.12.1998, the Trial Chamber passed a first-instance verdict which *inter alia* convicted Furundžija for the criminal offense of torturing victim A and for aiding and abetting the rape of victim A.[621]

Regarding the circumstances relevant to sentencing, before sentencing, the defense called a witness who had known the accused as a neighbor since birth, and who testified that the accused is married and has a daughter aged about three years, that before his arrest he lived in Vitez with mother and family, and as far as he knows, the accused has never been arrested for any criminal offense before. The witness also stated that although the accused was a member of the Territorial Defense and then the HVO, he was never a nationalist. The witness also stated that the accused was "popular among his friends, communicative, lively", and "honest and fair".

In terms of aggravating circumstances, the first-instance court stated that in terms of:

– the first count of the indictment had in mind that "... *the accused*

[619] Article 50, paragraph 1, point a) of the Criminal Code of BiH: When there are conditions for mitigating the sentence from Article 49 (Mitigation of the sentence) of this law, the court will mitigate the sentence within the following limits: if the minimum penalty for the criminal offense is a prison sentence of ten years or more, the sentence may be reduced to five years in prison.

[620] Article 43 of the Criminal Code of SFRY: (1) When there are conditions for mitigating the punishment from Article 42 of this law, the court will mitigate the punishment within the following limits: 1) if the minimum punishment for the criminal offense is imprisonment for three or more years, the sentence can be reduced to one year in prison;

[621] Paragraphs 82, 124-30, 264-275 of the first-instance verdict in the *Furundžija case*.

Funded by the European Union

played the role of a co- perpetrator in the torture. His function was to interrogate victim A in the big room, and then in the storeroom, where he also interrogated witness D, while the accused B tortured them both. In such circumstances, the role of the co-perpetrator has the same weight as the role of the person who specifically inflicts pain and suffering. Torture is one of the most serious crimes known to international criminal law, which must always be taken into account when sentencing".

– the second count of the indictment had in mind that: "... *the accused did not personally commit the rapes, but assisted and contributed to the rapes and severe sexual abuse of witness A. The circumstances of this abuse were particularly horrible. They detained the woman, kept her naked and helpless in front of the interrogators and treated her in the most cruel and barbaric manner. The accused not only did not prevent these crimes, but played a prominent role in their initiation.* "

In conclusion, the first-instance court stated that it considers this case to represent extremely cruel examples of torture and rape, and considers the active role of the accused as the commander of the "Joker" an aggravating circumstance, as well as the fact that victim A was a detained civilian as an additional aggravating circumstance. and completely at the mercy of those who kept her in captivity.

With regard to mitigating circumstances, the first-instance court stated that it had in mind the age of the accused and that he was 29 years old at the time the verdict was pronounced, and 23 years old at the time the criminal acts were committed, in May 1993. The court also stated that it also took into account the testimony of defense witnesses, including the fact that the accused has no criminal record and is the father of a small child. However, the court added that the same can be said for many other accused persons, and in such a serious case it cannot be given significant weight.

The first-instance court also stated that:

– took into account the general practice of sentencing in courts in the former Yugoslavia, and after quoting the content of Article 41, paragraph 1 of the Criminal Code of the SFRY, he added that he also had in mind Article 142 of the Criminal Code of the SFRY, which prescribes torture and rape as part of a war crime a prison sentence of at least five years or the death penalty.

– himself must interpret the CC SFRY since the parties have not submitted to him the decisions of the courts in the former Yugoslavia dealing with

Funded by the European Union

similar situations.

– had in mind the serious physical pain and severe emotional trauma of victim A that she " *had to suffer as a result of the depraved acts committed against her* ". He also had in mind the severe pain and suffering caused to witness D.

– had in mind the mandate and duty of the ICTY to, as part of its contribution to reconciliation, deter such crimes and fight impunity. He stated: " *It is just not only punitur quia peccatur (an individual should be punished because he has broken the law), but also punitur ne peccatur (he should be punished so that he and others do not continue to break the law). The Trial Chamber agrees that retribution and deterrence are two essential functions of punishment.*

– the accused is guilty of both counts charged in the indictment.

For the aforementioned reasons, the accused Anto Furundžija was sentenced to 10 years in prison for the crime of torture and 8 years for violations of personal dignity, including rape.[622]

On July 21, 2000. In 2008, the Appeals Council rejected Furundžija's appeal against the conviction and confirmed his sentence.[623]

Prosecutor against Kunarac Dragoljub and others

On February 22, 2001. The Trial Chamber rendered a first-instance verdict, inter alia, convicting Kunarc of several criminal offences. In doing so, the first-instance court referred to the position from the Delalić case when it comes to the effect of the cumulation of convictions based on the same procedure on sentencing, and expressed the opinion that when determining the sentence, the damage that could be caused to the perpetrator by the cumulation of convictions must be taken into account for the same behavior.[624]

The first-instance court stated that when sentencing the accused, it considered the relevant provisions of the Statute and Rulebook,[625] the general practice in sentencing

[622] Ibid, paragraphs 276-296.
[623] Second-instance judgment in the *Furundžija case*, p. 79.
[624] Paragraph 551 of the first-instance judgment in the *Kunarac case.* The Appeals Panel in the Delalić case took the position that it must be ensured that the final or collective sentence reflects the totality of the criminal conduct and the overall culpability of the perpetrator.
[625] Ibid, paragraphs 825-828.

Funded by the European Union

in the former Yugoslavia[626] and the practice of the International Court in sentencing.[627]

The first-instance court also considered certain claims made by the prosecutor regarding the circumstances that should be taken into account when determining the amount of the penalty,[628] and concluded:

- that the principle of fairness requires the prosecutor to prove beyond a reasonable doubt the existence of aggravating circumstances, and that for the defense to prove extenuating circumstances, it is sufficient to have more convincing arguments;

- that the accused can be punished only for that for which [he] was convicted, and for that for which he was not convicted, he cannot be punished either. The Trial Chamber does not allow the criminal offense for which the accused is not charged in the indictment to be applied as an aggravating circumstance. Mitigating and aggravating circumstances must be taken into account when sentencing. Mitigating circumstances that are not directly related to the crime can be taken into account, such as cooperation with the Prosecutor's Office, sincere remorse and a guilty plea. However, the situation with aggravating circumstances is quite different. Only those circumstances that are directly related either to the commission of the criminal offense for which the perpetrator is charged, or to the perpetrator himself at the time of the commission of that criminal offense - such as the manner in which the criminal offense was committed - can be taken into account as aggravating circumstances. In other words, circumstances that are not directly related to the criminal act cannot be used as an aggravating factor when determining the punishment for that criminal act. Allowing something else would mean gradually reducing the purpose and meaning of the indictment. The prosecutor should charge such behavior as a criminal offense, or, when it is not directly related to another criminal offense for which the accused is charged, refrain from citing such behavior as an aggravating factor.

- that there is no difference in severity between crimes against humanity and war crimes;[629]

- that it cannot be accepted that the assessment of the severity of a criminal

[626] Ibid, paragraphs 829-835.
[627] Ibid, paragraphs 836-844.
[628] Ibid, paragraphs 845-853.
[629] The same position was expressed in the decisions of the Appeals Chambers in the Delalić case and the Aleksovski case, as well as in the Furundžija case.

Funded by the European Union

offense could or should concern the effect of that criminal offense on third parties. Consideration of the consequences of the criminal act on the victim who was directly harmed by it is always, however, relevant for sentencing the perpetrator. However, where such consequences are an inseparable part of the definition of a criminal offense, care should be taken not to consider them separately when determining the punishment. For example, the fact that the perpetrator took someone's life cannot be considered as a separate circumstance relevant to sentencing when sentencing for murder - it is an inseparable part of the crime charged.

- that part of the legitimate conduct of the defense of the accused is defense with false allegations, false alibi, perjury and misconduct in the courtroom, unless the prosecutor is able to demonstrate that the alibi was not presented in a legitimate manner.

The first-instance court stated that when imposing the sentence, it imposed a single sentence that reflected the totality of the accused's criminal actions, while considering every cumulative conviction concerning the accused and made sure that, in accordance with the decision of the Appeals Chamber in the Delalić case, the accused did not is repeatedly punished for the same actions. He stated that the following general factors played a role when sentencing: the severity of the accused's actions, retaliation or punishment of the perpetrator for his specific criminal actions, general deterrence, the importance of the role of the accused in the wider context of the conflict in the former Yugoslavia, the death penalty could be imposed in Bosnia and Herzegovina and the extent of the criminal acts of the accused Kunarac require that a sentence of more than twenty years be considered.[630]

Accused Kunarac was found guilty on counts 1 - torture as part of a crime against humanity, 2 - rape as part of a crime against humanity, 3 - torture as part of a violation of the laws and customs of war, 4 - rape as part of a violation of the laws and customs of war, 9 - rape as part of crimes against humanity, 10 - rape as part of violation of laws and customs of war, 11 - torture as part of violation of laws and customs of war, 12 - as part of the violation of laws and customs of war, 18 - enslavement as part of crimes against humanity, 19 - rape as part of crimes against humanity and 20 - rape as part of violations of laws and customs of war.

Of the aggravating circumstances, the first-instance court appreciated:[631]

---

[630] Paragraphs 856-861 of the first-instance verdict in the *Kunarac case*.
[631] Ibid, paragraphs 862-867.

Funded by the European Union

- although the accused is not responsible as a superior, he still played a leading organizational role and had a significant influence on some of the other perpetrators - the criminal responsibility of those who lead others is greater than that of those who follow others;

- the youth of some of the victims of the crimes committed by the accused, so at the time when these crimes were committed against them, FWS-87 was approximately fifteen and a half years old, AS and DB were approximately nineteen years old, FWS-50 was approximately sixteen years old, FWS-191 was approximately seventeen years old, and FWS-186 approximately sixteen and a half years old;

- in relation to some of his victims, the accused committed these criminal acts over a long period of time, for example during the two months regarding the enslavement of FWS-191 and FWS-186;

- there was more than one victim in the criminal acts of the accused;

- some of the criminal acts were committed by more than one perpetrator at the same time, so the accused was a co-perpetrator in the rape of FWS-183, or he aided and abetted the rape of FWS-75 by fifteen soldiers, as well as the rape of FWS-87 by three soldiers.

- discriminatory grounds - ethnic origin and gender - on the basis of which he committed all criminal acts, except acts of torture, which were committed for the purpose of discrimination

- these crimes were committed against extremely vulnerable and helpless women and girls.

With regard to mitigating circumstances, the first-instance court stated that it had in mind:[632]

- the fact that the accused voluntarily surrendered to the International Court. Considering that every accused is obliged to surrender to the International Court, does not mean that those who have done so will not be taken into account as a mitigating factor. Accepting such voluntary surrender as a mitigating circumstance could encourage other defendants to surrender in a similar way and thus increase the effectiveness of the work of the International Tribunal;

---

[632] Ibid, paragraphs 868-870.

Funded by
the European Union

- substantial cooperation of the accused with the Prosecution in terms of giving two statements;
- his statement that he felt guilty about the fact that FWS-75 was gang-raped while he was raping DB in the next room can be interpreted as an expression of remorse.

For the aforementioned reasons, the accused Dragoljub Kunarac was sentenced to a single prison sentence of 28 (twenty-eight) years.[633]

On June 12, 2002. The appellate panel made a decision on the appeal against the first- instance verdict regarding the sentence,[634] and stated, among other things,[635] that it believes that the first-instance court should have "... *taken into account the family situation of... Kunarc... as a mitigating circumstance". However, these errors are not serious enough to warrant modification of the sentences imposed by the Trial Chamber. The Appeals Chamber rejects Kunarc's other appeals against his sentence.*[636]

Prosecutor's Office of Bosnia and Herzegovina against Milan Todović

On 04.12.2018. the first-instance court rendered a verdict, which *inter alia* convicted *Todović* for two acts of committing a criminal offense which he qualified as rape and sexual slavery, but which he did not qualify as two independent criminal offenses, but as several actions characteristic of the same criminal offense, Crime against humanity. He sentenced him to 10 years in prison.[637]

When imposing the sentence, the court considered as mitigating circumstances the accused's previous lack of conviction, his behavior during the main trial (although correct behavior and respect for the Court is expected, the panel nevertheless appreciated that the accused behaved extremely appropriately and respected the court's decisions), and the fact that certain circumstances and the facts concerning the subject of incrimination were not contested by the defense, which accelerated the

[633] Ibid, paragraph 885
[634] The accused Kunarac filed an appeal against the imposed sentence because: 1) the Rulebook does not allow the imposition of a single sentence, and each criminal offense for which the accused was convicted should be the subject of a separate sentence; 2) The Trial Chamber should adhere to the range of sentences applicable in the former Yugoslavia so that the sentence appealed against should not exceed the maximum sentence imposed in the courts of the former Yugoslavia; 3) the crimes committed by the appellant do not deserve the maximum sentence because some aggravating circumstances related to these crimes were not adequately evaluated; 4) two mitigating circumstances should have been aken into account when sentencing; 5) The Trial Chamber did not clearly state on the basis of which version of the Ordinance the time spent in detention is included in serving the sentence.
[635] Second-instance judgment in the *Kunarac et al. case,* paragraphs 336-362.
[636] Ibid, paragraph 33.
[637] First-instance judgment in the *Todović case,* paragraph 228.

Funded by the European Union

court process.[638] The first-instance court did not establish any aggravating circumstances on the part of the accused.[639]

On March 12, 2019. The appeals panel confirmed the first-instance verdict.[640]

Prosecutor's Office of Bosnia and Herzegovina against Milomir Davidović

On February 27, 2019, the first-instance court issued a verdict declaring the accused Davidović guilty of the first count of the indictment. When sentencing the accused for the criminal offense for which he was found guilty, the first-instance court stated that although the legislator prescribes a range of punishments for each individual criminal offense within which range the court is obliged to move, that the provision of Article 49 of the CC of BiH stipulates that the court may impose a sentence on the perpetrator below the limit prescribed by law when it is determined that there are particularly mitigating circumstances that indicate that even with a reduced sentence the purpose of punishment can be achieved.[641] The court states that it had in mind the limits of the punishment prescribed by law for the criminal offense for which the accused Davidović was found guilty, that is, that the specified criminal offense was prescribed a prison sentence of **at least 10 (ten) years** or long-term imprisonment.

When imposing the sentence, the court stated that it found no aggravating circumstances on the part of the accused, and when it comes to mitigating circumstances, it took into account:

- the previous life of the classrooms, i.e. the fact that this is a person who has not been convicted before and that no other criminal proceedings have been and are not being conducted against him;
- that the accused is a family man, the father of two children whom he is obliged to raise and support, especially since one child is still a minor;
- that the accused helped some Bosniaks during the war;
- that he expressed his regret before the court for everything that the rape victims survived in Foča;

[638] Ibid, paragraph 226.
[639] Ibid, paragraph 227.
[640] Second-instance judgment in the *Todović case.*
[641] Paragraphs 224-234 of the first-instance judgment in the *Davidović case.*

Funded by the European Union

- that the defense of the accused contributed to the efficiency and economy of the proceedings, given that they did not dispute certain facts and circumstances, as well as
- that the accused behaved correctly during the main trial, which is expected, but which should be highlighted in the case of exceptionally appropriate behavior and respect for the court's decisions.

The first-instance court then concluded that this combination of various details on the part of the accused in its correlation, in the specific case, undoubtedly reflects the nature of particularly mitigating circumstances in the sense of Article 49 of the CC of BiH, which is why the court decided to impose a prison sentence of **7 (seven) years,** finding that the purpose of special and general prevention will be realized with the same, and ultimately provide some satisfaction to the victim of a criminal act, which is also one of the elements of the purpose the utterance of the same.

On 09.07.2019. The appeals panel confirmed the first-instance verdict.[642]

The Prosecutor's Office of the Federation of BiH against Đ. P.

On 30.01.2017 The Cantonal Court in Sarajevo passed a verdict,[643] by which the accused Đ. P. found him guilty and sentenced him to 8 (eight) years in prison. When sentencing the accused for the criminal offense for which he was found guilty, the first-instance court stated that it valued all the circumstances that influence the punishment to be higher or lower, so that it particularly valued the degree of responsibility of the accused, the motives from which the offense was committed, the severity of the threat and the violation of the protected property as well as the circumstances under which the crime was committed, and the court did not find the existence of particularly mitigating circumstances, so it sentenced the accused within the framework of the prescribed punishment for the said criminal offense.

The court considered the following as aggravating circumstances:

- the fact that the accused was previously convicted 9 (nine) times for various criminal offences,
- the fact that the accused was convicted of the criminal offense of rape in 2007 when he was sentenced to eight years in prison, so it is evident

[642] Second-instance verdict in the *Davidović case.*
[643] Second-instance verdict in the case of *Đ.P.*

Funded by the European Union

that the accused was sentenced for the same basic criminal offense and to eight years in prison, which fact the court appreciated as an extremely aggravating circumstance, given that it is a returnee committing the same, or more serious, crimes.

- severe and lasting consequences of the committed criminal offense in terms of the victim's mental health, established by the expert's findings, i.e. that she was severely traumatized by sexual torture in 1992 with the development of chronic post-traumatic stress disorder, which led to severe dysfunctions in terms of memory, attention, thinking, emotional and willing spheres. The subject is experiencing a re-experiencing of the traumatic experience on a cognitive, emotional and behavioral level, while avoiding all situations that remind her of the traumatic experience of wartime rape. The subject has a permanent impairment in terms of sexuality, with irritability, irritability, increased anxiety, hyper-arousal, resistance and aversion to sexuality.

The court found no extenuating circumstances for the accused.

On June 20, 2017, the Supreme Court of the Federation of Bosnia and Herzegovina, as a second-instance court, issued a verdict by which it confirmed the first-instance verdict,[644] except for the part that related to the amount of the sentence imposed on the accused, by accepting the appeal of the defense attorney of the accused Đ.P. and changed the first-instance verdict in the sentencing decision, so that the accused Đ.P. sentenced to imprisonment for 6 (six) years. As the reason for this decision, the second-instance court stated that the prison sentence imposed on the accused Đ.P. for the committed criminal offense is not adequate to the degree of his guilt and the gravity of the criminal offense itself. The second-instance court considered that the first-instance court overestimated the aggravating circumstances on the part of the accused, and that the first-instance court's conclusion that the fact that he is a returnee committing the same or more serious crimes should be taken as an extremely aggravating circumstance on the part of the accused is wrong. The second-instance court states that the accused was not previously convicted of war crimes and this allegation from the contested verdict has no basis in the actual state of the case file.

[644] The second-instance verdict in the case of *Đ. P.*

Funded by
the European Union

Literature

1. Judgments of courts in Bosnia and Herzegovina, available at; https://csd.pravosudje.ba/vstvfo/S/142/kategorije-vijesti/141/simple, last visited on November 23, 2024.
2. Decisions of the Constitutional Court of Bosnia and Herzegovina, available at: https://www.ustavnisud.ba/en/decisions?sp=DatumDesc&, last visited on November 23, 2024. ;
3. Decisions of the European Court of Human Rights, available at: https://hudoc.echr.coe.int, last visited on November 23, 2024. ;
4. Judgments of the International Criminal Tribunal for the former Yugoslavia, available at: https://ucr.irmct.org/, last visited on November 23, 2024. ;
5. I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in War; II. Geneva Convention for the Position of Wounded, Sick and Shipwrecked Armed Forces at Sea; III. Geneva Convention for the Treatment of Prisoners of War; IV. Geneva Convention for the Protection of Civilian Persons in Time of War.;
6. Supplementary Protocol to the Geneva Conventions of August 12, 1949 on the Protection of Victims of International Armed Conflicts of June 8, 1977;
7. Supplementary Protocol to the Geneva Conventions of August 12, 1949 for the Protection of Victims of Non-International Armed Conflicts of June 8, 1977.
8. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
9. Rulebook on procedure and evidence of the International Criminal Tribunal for the former Yugoslavia;
10. Resolution of the UN Security Council no. 827 of May 25, 1993;
11. Statute of the International Criminal Tribunal for the former Yugoslavia;
12. Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette of SFRY No. 44/76-1392, 36/77-1478, 56/77-1982, 34/84-895, 37/84-933, 74/87-1743, 57 /89-1441, 3/90-63);
13. Criminal Code of the Socialist Republic of Bosnia and Herzegovina ("Official Gazette of the Socialist Republic of Bosnia and Herzegovina" No. 16 of June 10, 1977);
14. Criminal Code of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", no. 3/2003, 32/2003 - amended, 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018, 46/2021, 31/2023 and 47/2023);
15. Law on Criminal Procedure of Bosnia and Herzegovina ("Official Gazette of

Funded by
the European Union

BiH", No. 3/2003, 32/2003 - amended, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007,58/2008, 12/2009, 16/2009, 53/2009 - Dr. Law, 93/2009, 72/2013 and 65/2018);

16. Law on Criminal Procedure of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH", No. 35/2003, 56/2003 - corrected, 78/2004, 28/2005, 55/2006, 27/2007, 53/2007, 9 /2009, 12/2010, 8/2013, 59/2014 and 74/2020);
17. Law on Criminal Procedure of the Republika Srpska ("Official Gazette of RS", 53/2012, 91/2017, 66/2018 and 15/2021);
18. Law on Criminal Procedure of Brčko District of Bosnia and Herzegovina ("Official Gazette of Brčko District of Bosnia and Herzegovina", No. 34/2013 - revised text, 27/2014, 3/2019 and 16/2020).

Funded by
the European Union

BIOGRAPHICAL NOTES OF AUTHOR AND OTHER CONTRIBUTORS

Dr.sci Sabina Subašić-Galijatović

Dr.sci Sabina Subašić-Galijatović, Senior Research Fellow at the Institute for Research of Crimes Against Humanity and International Law, University of Sarajevo. She graduated in Public International Law from the Faculty of Law, Paris Nanterre University, France, in 1998. At the same faculty, she earned a Master's degree in Legal Sciences in 2001 and defended her master's thesis titled "Ethnic Principles versus Human Rights". She obtained her PhD from the Faculty of Law, University of Sarajevo, in 2018, specializing in State and International Law, where she defended her doctoral dissertation titled "Sexual Abuse of Women in Bosnia and Herzegovina 1992–1995 in Light of the Theory and Practice of International Law".

She works on scientific research projects at the Institute. Dr. Subašić Galijatović is a participant in numerous national and international scientific conferences and gatherings and has published several scientific works, including:

- *Genre et conflits armés: le droit pénal international transformateur des sociétés*, a chapter in the book "L'avenir de la justice pénale international", edited by Jean Albert, Bruylant, Bruxelles, 2024 (*Gender and armed conflicts: international criminal law transforming societies*, in the book "The Future of International Criminal Justice");

Link to the publication: (https://www.lgdj.fr/l-avenir-de-la-justice-penale-internationale-9782802773450.html)

- *L'héritage de l'œuvre du « Mécanisme » et la perception locale,* in the book "Permanence et renouveau de la justice pénale internationale", edited by Julian Fernandez, Olivier de Frouville, and Didier Rebut, Centre de recherche sur les droits de l'homme et le droit humanitaire, éd. A. Pedone, Paris, 2023 (*The legacy of the work of the 'Mechanism' and local perception*, in the book "Permanence and Renewal of International Criminal Justice")

Link to the publication: (https://pedone.info/livre/permanence-et-renouveau-de-la-justice-penale-internationale/)

- *Zločini seksualnog zlostavljanja u Bosni i Hercegovini 1992-1995 u svjetlu teorije i prakse međunarodnog prava*, an authorial monograph, Sabina Subašić Galijatović, University of Sarajevo – Institute for Research of Crimes Against Humanity and

Funded by the European Union

International Law, Sarajevo, 2021 (*Crimes of Sexual Abuse in Bosnia and Herzegovina 1992–1995 in Light of the Theory and Practice of International Law*)

Link to the publication: (https://unsa.ba/index.php/en/novosti/book-crimes-sexual-abuse-bosnia-and-herzegovina-1992-1995-light-theory-and-practice)

Prof. Dr. Adnan Fočo

Prof. Dr. Adnan Fočo, Doctor of Sociological Sciences. He earned his PhD on the topic "*The Impact of Judgments of the International Court in The Hague on Reconciliation in Bosnia and Herzegovina: (A Sociological Approach)*". He is employed at the University of Sarajevo – Faculty of Philosophy as an Assistant Professor in the Department of Sociology.

He is the author of the book titled "*The Impact of the Judgments of the International Criminal Tribunal for the Former Yugoslavia on the Reconciliation Processes in Bosnia and Herzegovina*", as well as numerous original scientific articles, professional articles, reviews, book presentations, and critiques.

For many years, Prof. Dr. Adnan Fočo has been studying war crimes committed in the territory of the former Yugoslavia, the work of the Hague Tribunal, and the passing of judgments for war crimes committed in the region of the former Yugoslavia.

State Prosecutor Mersudin Pružan

Mersudin Pružan was born in Travnik, Bosnia and Herzegovina. He graduated from the Law Faculty in Sarajevo and obtained an M.A. in 2005, passing his bar exam in 2006. His involvement with war crimes prevention and prosecution started in 1996, when he worked for the NATO-led Implementation Force responsible for carrying out the military component of the Dayton Peace Accords, during which he witnessed the first exhumations of mass graves. From 1997 to 2002, he worked for the United Nations dealing inter alia with the assistance of refugees and displaced persons.

Mersudin started his legal career as a lawyer for the American Refugee Committee in 2002, and continued working as a lawyer in the Independent Judicial Commission of the Office of the High Representative. Between 2006 and 2010, he was a contact point of Bosnia and Herzegovina in the Council of Europe's European Commission for

Funded by
the European Union

the Efficiency of Justice. Additionally, Mersudin served until 2010 as the Deputy Chief Disciplinary Prosecutor of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina. In 2010 and 2011, Mersudin worked as a lawyer in a private practice representing inter alia defendants indicted for war crimes. In 2011, he was appointed as a prosecutor, and since 2016, he has focused on war crimes. In 2018, Mersudin was appointed as Bosnia and Herzegovina's contact point in the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes.

Mersudin has also contributed in multiple ways to the creation and instruction of criminal prosecution programming. In 2020, he was a member of the UN expert group that developed and produced the "United Nations Manual on Investigative Interviewing for Criminal

Investigation," while also assisting in the creation and preparation of numerous manuals concerning the investigation and prosecution of different criminal acts. Currently, Mersudin is a trainer at the Centre for Education of Judges and Prosecutors in the Federation of Bosnia and Herzegovina and at the BiH State Civil Service Agency.

Prof. Dr. Tomislav Tadić

Tomislav Tadić, PhD, is a Professor and Head of Department of Sociology, Faculty of Philosophy - University of Sarajevo. His research work examines the role of religion in shaping social identities, cultural norms, gender roles and collective behaviors, as well as its impact on broader social, political, and economic dynamics. He graduated Philosophy and Sociology, then obtained his master's and doctoral degree in Sociology at the Faculty of Philosophy University of Sarajevo. In addition to his academic pursuits, Tadic is actively engaged in scholarly activities beyond the classroom and is publishing his research findings in academic journals, participates in interdisciplinary collaborations, presenting his work at conferences, seminars and workshops.

He is a member of ZINK (Scientific-Research Incubator), ACADEMIA - ANALITICA - Society for the Development of Logic and Analytical Philosophy in Bosnia and Herzegovina, philosophical society Theoria, the Regional Religious Network and editorial boards member of the indexed journals SOPHOS and PREGLED: JOURNAL FOR SOCIAL ISSUES and Editor of the Publishing Department (electronic and printed monographs) of the Faculty of Philosophy, UNSA.

Funded by
the European Union

Mr. sci. Benjamin Plevljak

Benjamin Plevljak is a security expert and researcher from Bosnia and Herzegovina. He is currently a PhD candidate in Security Studies at the University of Sarajevo's Faculty of Criminalistics, Criminology, and Security Studies. Holding an MA in Political Science with a focus on security and peace studies, as well as a Bachelor's degree in Criminalistics, he has built a strong academic foundation in security-related disciplines.

Plevljak has been the Secretary General at the Centre for Security Studies in Sarajevo since 2020, where he contributes to research and policy analysis on security issues. His professional experience includes roles as a researcher and project assistant in various organizations focused on security policy and governance. Over the years, he has successfully implemented dozens of projects addressing security sector reform, organized crime, gender and security, and international security challenges.

An accomplished author, Plevljak has published numerous papers in the field of security, covering topics such as organized crime, counterterrorism, law enforcement, and gender perspectives in security institutions. His expertise is further recognized through participation in prestigious programs, including the European Security Seminar at the George C. Marshall European Center for Security Studies.

Dr. sci. Arben Murtezić

Arben Murtezić was born in Sarajevo in 1973, where he graduated from the Faculty of Law at the University of Sarajevo. He obtained his master's degree at the University of Portsmouth in the United Kingdom. In December 2018, he was awarded a doctorate in international law from the American University in Bosnia and Herzegovina.

From 2010 to 2016, he served as the Chief Disciplinary Prosecutor of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina. He is currently the Director of the Center for Judicial and Prosecutorial Training of the Federation of Bosnia and Herzegovina.

He is the author of several articles in the fields of cybercrime, judicial ethics, and judicial independence.

Funded by
the European Union

NO-OBLIVION

Promoting Universal Jurisdiction while Evoking the Crimes Committed within Former Yugoslavia

The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Funded by the European Union

EaSI

IPS Innovative Prison Systems

Camino

Victim Support Europe

Documenta Centar za suočavanje s prošlošću

Centar za sigurnosne studije - BH / Centre for Security Studies - BH

Helsinški odbor za ljudska prava u Srbiji / Helsinki Committee for Human Rights in Serbia

KCD