



Mission to Bosnia and Herzegovina

Moving towards a Harmonized Application of the Law

**Applicable in War
Crimes Cases before
Courts in Bosnia and
Herzegovina**

August 2008

Published by OSCE Mission to Bosnia and Herzegovina
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71 000 Sarajevo
Bosnia and Herzegovina
www.oscebih.org

Design & Layout:
PoetaPista | www.poetapista.com

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ISBN 978-92-9235-275-2

Introduction

War crimes cases in Bosnia and Herzegovina are mainly tried under two different criminal codes: the Criminal Code of Bosnia and Herzegovina, adopted in March 2003, and the Criminal Code of the Socialist Federal Republic of Yugoslavia, which was in force during the conflict. The former is applied in proceedings before the Court of Bosnia and Herzegovina, while the latter is used in the Republika Srpska and the Brčko District as well as in the majority of cases before the courts of the Federation of Bosnia and Herzegovina. In a limited number of cases, courts in the latter have also used the interim 1998 Federation of Bosnia and Herzegovina Criminal Code. These three criminal codes differ greatly. The Criminal Code of Bosnia and Herzegovina, for instance, offers a more comprehensive definition of war crimes than do the other two. Only the Criminal Code of Bosnia and Herzegovina foresees provisions for crimes against humanity and only it comprehensively defines command responsibility and excludes “superior orders” as a defense. These criminal codes also differ in how they prescribe sentences.

In its March 2007 decision on the *Maktouf* case,¹ the Constitutional Court of Bosnia and Herzegovina established that the application of different criminal codes by the state and the entities seriously undermined the rule of law and the equal treatment of citizens before the law. It urged entity courts to use the Criminal Code of Bosnia and

1 *Abduladhim Maktouf* was sentenced on 4 April 2006 to imprisonment for a term of five years by the Appellate Division of the Court of Bosnia and Herzegovina for committing War Crimes against Civilians under Article 173 of the Criminal Code of Bosnia and Herzegovina. In his appeal to the Constitutional Court of Bosnia and Herzegovina, Maktouf claimed that the retroactive application in his case of the Criminal Code of Bosnia and Herzegovina violated Article 7 of the European Convention on Human Rights and argued that the Yugoslav Code should have been used instead. On 30 March 2007 the Constitutional Court rejected the appeal and held that the application of the Criminal Code of Bosnia and Herzegovina to punish acts carried out during the conflict was permissible under Article 7, Paragraph 2 because these acts, at the time when they were committed, were already criminal according to the “general principles of law recognized by civilized nations”.

Herzegovina in their war crimes proceedings. The High Representative² and the Parliamentary Assembly of the Council of Europe³ have also expressed their concerns about the lack of harmonization of the law applicable to war crimes. Nevertheless, different criminal codes continue to be applied by the Court of Bosnia and Herzegovina and the entity courts.

This report argues that the application of the Criminal Code of Bosnia and Herzegovina in all domestic war crimes proceedings would result in a more consistent and effective system of justice. It also sees a place in this system for a new, state-level judicial institution that would have the final say in the interpretation and application of the relevant law by all courts in the country. Such an institution would also help ensure consistency in the interpretation of the law and help guarantee equality before the law.

Toward a more effective and just processing of war crimes

The use of the Criminal Code of Bosnia and Herzegovina in all war crimes proceedings in the country would likely result in the more effective administration of justice. Its use would also enhance consistency of sentencing throughout the country. In comparison to the codes previously in force, the Criminal Code of Bosnia and Herzegovina is better able to address the serious violations of humanitarian law and human rights that took place during the recent conflict in Bosnia and Herzegovina as well as the criminal responsibility of individuals involved in committing these violations. It represents an improvement in addressing such crimes because it acknowledges the developments in international criminal law recognized by the Statute and the case-law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as by the Statute of the International Criminal Court. This Criminal Code

2 See BIRN, Justice Report Interview, *Miroslav Lajcak: Bosnia Needs Justice*, 6 August 2007, available on the internet at <http://www.bim.ba/en/75/10/3795/>.

3 See the Parliamentary Assembly of the Council of Europe's *Resolution 1564 (2007)* on the prosecution of offenses falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), which in paragraph 21.2.1 calls upon the authorities of Bosnia and Herzegovina to "ensure the harmonisation of case law, consider setting up a national supreme court, or grant the powers of a supreme court to an existing court so as to secure legal certainty.

incorporates the customary notion of *crimes against humanity* and offers a comprehensive definition of *command responsibility*.⁴

Prosecuting crimes against humanity is important, because this takes into consideration the broader context in which such crimes were committed and the policies that motivated them. According to the official Commentary to the United Nations Draft Code of Crimes against the Peace and Security of Mankind, “the gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author.”⁵ Crimes against humanity are never isolated or accidental acts of violence, as may be the case with war crimes, because by definition they must be perpetrated in the context of a widespread or systematic attack against a civilian population. According to ICTY case law, “widespread” may be further defined as a large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims. Systematic may be defined as “thoroughly organized” and following a regular pattern based on a common policy that involves substantial public or private resources.

Crimes against humanity also criminalize gross and fundamental violations of human rights regardless of the international or internal nature of the armed conflict. This is decidedly different than the jurisprudence for war crimes, which generally provides a higher level of protection to civilians in international than to those in internal conflicts. ICTY case-law demonstrates, however, that it is not always easy for prosecutors to establish the nature of hostilities that occurred in Bosnia and Herzegovina. This uncertainty has raised problems in war crimes trials in entity courts.⁶ The protection of human life and dignity during a conflict should not vary according to the nature the conflict; the notion of crimes against humanity overcomes those problems. As noted above, only the Criminal Code of Bosnia and Herzegovina includes this category of crimes. It may therefore offer the only effective means to try such cases in entity courts. The use of the other, earlier codes in place of the Criminal Code of Bosnia and Herzegovina would prevent these courts from classifying an offense as a crime against humanity.

4 See the Criminal Code of Bosnia and Herzegovina, Articles 172 and 180. The prosecution of crimes against humanity has been rooted in customary law since at least the Nuremberg trials. In 1946, the U.N. General Assembly adopted the Principles recognized by the Charter of the Nuremberg Tribunal (*Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal*, G.A. Res. 95(II), U.N. Doc. A/64/Add.1, 1946.), including the criminalization of crimes against humanity. Further, the “Principles of Cooperation” adopted by the U.N. General Assembly in 1973 provide that “crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment” (*Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 79, U.N. Doc. A/9030, 1973).

5 International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, Commentary.

6 See the Supreme Court of the Republika Srpska’s verdict in the case of *Dragoje Radanović* of 22 March 2007. For an analysis of this verdict, see the annex to this report.

The Criminal Code of Bosnia and Herzegovina also includes a comprehensive definition of command responsibility. ICTY has stated that command responsibility was a generally recognized rule of customary law at the time when the conflict in the former Yugoslavia began.⁷ In a recent verdict rendered by a cantonal court, however, a defendant was acquitted of the charges that, as the prison warden, he had failed to prevent the prison guards from maltreating prisoners-of-war and that he had failed to initiate disciplinary or criminal proceedings against these prison guards. The grounds for this acquittal were that such conduct was not a criminal offense under Article 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia.⁸ If this defendant had been tried under the Criminal Code of Bosnia and Herzegovina, these acts would not have been questionable, for there command responsibility is clearly defined as the criminal responsibility of superiors for the failure to prevent or punish crimes perpetrated by their subordinates.

Usage of different criminal codes also leads to marked discrepancies between the sentences delivered in state and entity courts for war crimes. This stems from the wide variances in the sentences enforceable under these codes.⁹ For instance, an entity court has sentenced a defendant convicted of cruel treatment of prisoners to a term of one year and eight months' imprisonment even as the State Court has sentenced another defendant charged with a comparable act to imprisonment for a period of ten-and-a-half years.¹⁰ On average, sentences delivered by the Court of Bosnia and Herzegovina in war crimes cases have been almost double the length of those delivered by entity courts.¹¹ Such differing sentences do not only affect the appearance of fairness of the

7 ICTY Appeals Chamber Decision in *Hadžihasanović et al* on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16 July 2003, para.32-36.

8 See the verdict of the Cantonal Court of Mostar in *Čupina et al.* of 24 January 2007.

9 According to the Criminal Code of the Socialist Federal Republic of Yugoslavia, war crimes could be punished by a maximum of 15 years imprisonment or by death, which could be commuted to 20 years imprisonment. With the adoption of the Constitution of Bosnia and Herzegovina in December 1995, the death penalty could no longer be imposed, for it would be in violation of Protocol No. 6 to the European Convention on Human Rights; as a result, the highest sentence applicable under that code is 20 years. The Federation of Bosnia and Herzegovina Criminal Code of 1998 formally abolished the death penalty and substituted for it 40 years of imprisonment. On the other hand, the Criminal Code of Bosnia and Herzegovina prescribes a maximum punishment of 45 years for war crimes, crimes against humanity, and genocide.

10 See Cantonal Court of Novi Travnik's verdict in the case of *Mato Đerek* of 21 June 2005, in which the accused was sentenced to one year and eight months imprisonment for cruel treatment of six prisoners by severely beating, hitting, mistreating, humiliating, and intimidating them. The Supreme Court of the Federation of Bosnia and Herzegovina upheld this verdict on 3 August 2006. On the other hand, the Court of Bosnia and Herzegovina issued a decision in the case of *Goran and Zoran Damjanović* in June 2007 in which, for very similar criminal acts, it sentenced one of the defendants at first instance to ten years and six months imprisonment.

11 According to information available to the OSCE Mission, since the adoption of the Criminal Code of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina has found 12 individuals guilty of war crimes and crimes against humanity and imposed upon them an average sentence of 17 years of imprisonment. In the same period, courts in the two entities and in the Brčko District have 47 individuals guilty of war crimes with an average sentence of nine years.

judicial system as a whole, they also leave room for speculation whether political or ethnic bias is behind the disparity. Moreover, the average sentence awarded by the entity courts in both the Republika Srpska and the Federation of Bosnia and Herzegovina for the murder of a civilian as a war crime is approximately seven years; in some cases, sentences as brief as four or five years have also been imposed.¹² Such a term is comparable to sentences handed down in domestic courts for crimes against property such as aggravated robbery or theft. This then gives the impression that crimes committed during the conflict were less serious than those committed subsequently in times of peace. It also undermines the deterrent value of the punishment in dissuading potential perpetrators in future from engaging in similar actions. It is therefore important that war crimes not be judged less severely than so-called ordinary crimes.

Harmonizing the Interpretation of the Law through a State-level Institution

In its decision in the *Maktouf* case,¹³ the Constitutional Court of Bosnia and Herzegovina established that the retroactive application of the Criminal Code of Bosnia and Herzegovina in war crimes cases was not a violation of Article 7(1) of the European Convention on Human Rights.¹⁴ This stance appears to be in accordance with the most recent case-law of the European Court of Human Rights.¹⁵ Although the Constitutional Court also urged the entity courts to begin applying the Criminal Code of Bosnia and Herzegovina in their proceedings, these courts have nevertheless continued to apply the old codes – both the Yugoslav and 1998 Federation Crimi-

12 See, for example, the verdict of the Cantonal Court of Mostar in the *Omanović* case issued on 20 January 2006 (and later upheld by the entity Supreme Court), in which the accused was sentenced to 14 years imprisonment for the killing of three civilians and the Cantonal Court of Novi Travnik's verdict of 12 June 2006 in the *Pravdić* case, in which the accused was sentenced to four years for the murder of one civilian. The sentence was subsequently increased to six years by the Federation Supreme Court.

13 See note no. 1.

14 *Ibid* para 79.

15 See ECtHR's decision in *Karmo v. Bulgaria* on admissibility of 9 February 2006. In this decision the European Court held that the retroactive imposition of life imprisonment after the abolition of the death penalty was not in violation of Art. 7(1) of the European Convention, since "the amendment of the forms of penalties envisaged in the Criminal Code for the most severe offence for which the applicant was found guilty operated in the applicant's favour and he received a more lenient penalty than was envisaged for that offence at the time it was committed." The Court of Bosnia and Herzegovina has cited this case in a number of decisions in order to argue that the retroactive application of the Criminal Code of Bosnia and Herzegovina is in compliance with the ECHR. See, for example, the first instance verdict in the case of *Radmilo Vuković*, 16 April 2007, p.16.

nal Codes -- in war crimes trials.¹⁶ The diverging approaches adopted by the state and the entity courts appear to be motivated by differences in interpreting the “principle of leniency,” which prescribes that, if the law has been changed or amended after the commission of the crime, the law that is more lenient to the accused should be applied.¹⁷

The failure of the entity courts to comply with the Decision of the Constitutional Court may be due to the fact that the matter before the Court was not directly related to war crimes trials conducted in the entities. As the Court itself clarified, at issue in this case was the respect of the rights safeguarded by the ECHR in the criminal proceedings against Maktouf before the Court of Bosnia and Herzegovina and not “the legal arrangements or the case-law applied at the level of the entities”.¹⁸ The differing practices in entity courts, the Constitutional Court reasoned, were probably the “result of the lack of a court at the level of Bosnia and Herzegovina that would harmonise the case-law of all courts in Bosnia and Herzegovina.”¹⁹ Such an institution would appear to offer the most effective and rational means to harmonize the legal framework for war crimes proceedings.²⁰ It would presumably also have the final say in the interpretation and application of the criminal and criminal procedural law applied by all courts in Bosnia and Herzegovina in war crime cases.

Without such a court, discrepancies in the interpretation of the laws related to war crimes may continue to impinge upon the basic principles of the certainty of²¹ and equality before the law. For example, the Supreme Courts of the Federation of Bosnia and Herzegovina and Republika Srpska have resolved the question whether it is necessary to establish the nature of an armed conflict in order to determine a vio-

16 In three recent indictments submitted by the District Prosecution Office in Doboj, charges were filed under the Criminal Code of Bosnia and Herzegovina. The District Court of Doboj, however, refused to confirm the indictments and referred the cases to the State Court on the grounds that, based on the Law on the Court of Bosnia and Herzegovina (Art.13), the only Court competent to adjudicate crimes prescribed under the Criminal Code of Bosnia and Herzegovina is the Court of Bosnia and Herzegovina.

17 These criminal provisions are included in art. 4 and art. 4a of the Criminal Code of BiH.

18 State Constitutional Court, *Abduladhim Maktouf*, cit., para. 87.

19 *Ibid.* para. 90.

20 The Constitutional Court of Bosnia and Herzegovina cannot play this role for the following reasons: its competence under article IV(3)b of the Constitution of Bosnia and Herzegovina as appellate jurisdiction on judgments of any court in Bosnia and Herzegovina is limited to grounds of violation of the Constitution and its competence under Article IV(3)c of the Constitution of Bosnia and Herzegovina is limited to issues of compatibility between laws applied by courts in their decisions and the Constitution, the ECHR and other laws of Bosnia and Herzegovina or to issues of existence or scope of a general rule of public international law. None of these competences covers the issues strictly related to the legality of the interpretation and application of criminal and criminal procedural law.

21 According to the definition of the European Court of Human Rights, the certainty of law principle means that: “A norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the person to regulate his or her conduct: he or she must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail” (*Busuioc v. Moldova*, Judgment, 21 December 2004, para. 52).

lation of international humanitarian law differently. The Federation Court has taken the position that, to be held responsible for war crimes under domestic law, it was not necessary to do so²² when applying the 1949 Geneva Conventions, while the Republika Srpska, arguing for the need for a strict interpretation of the Conventions, held instead that the international nature of the conflict needed to be established when such a grave breach was alleged.²³ The issue of the nature of the conflict has, by contrast, played a minor role in determining the criminal responsibility of defendants before the Court of Bosnia and Herzegovina. This is because the majority of the accused have been charged with crimes against humanity.

The Supreme Court of the Republika Srpska and the Court of Bosnia and Herzegovina have also addressed the question whether “superior orders” should be considered an exculpatory ground differently. The State Court has never accepted such a defense as it is expressly excluded by the Criminal Code of Bosnia and Herzegovina.²⁴ Rather the Supreme Court of Republika Srpska has made reference to the notion of “superior orders” as grounds for excluding criminal responsibility in war crimes in at least two acquittal verdicts.²⁵

It is also evident that different courts are interpreting elements of the applicable criminal procedures in divergent ways. This is a marked phenomenon because, unlike the substantive criminal laws, criminal procedure is fairly uniform in war crimes cases. For instance, all Criminal Procedure Codes applicable in Bosnia and Herzegovina contain the principle that the court can *ex officio* re-classify an offense by establishing whether the conduct of the accused amounts to an offense different from the one alleged by the prosecutor. Some courts, however, apply this principle in differing ways. This sometimes leads to opposite outcomes in similar circumstances.

22 See the Supreme Court of the Federation of Bosnia and Herzegovina's verdict in the matter of *Fikret Smajlović* of 16 March 2006. See also its verdict in the case of *Dragan Stanković* of 20 March 2002, in which the Court rejected the argument made on appeal that the first instance court had failed to establish whether the conflict was international or internal and stated that there was an international armed conflict caused by the aggression of Serbia and Montenegro in the territory of Bosnia and Herzegovina at that time. Furthermore, the Court stated that this was a notorious fact that the Court was not obliged to establish.

23 See the Supreme Court of the Republika Srpska's verdict in the case of *Dragoje Radanović* of 22 March 2007. For an analysis of this verdict, see annex to this report.

24 See the Criminal Code of Bosnia and Herzegovina, Article 180.3, which reads: “The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the court determines that justice so requires.”

25 See the Supreme Court of the Republika Srpska in the matter of *Ranko Jakovljević et al.* and *Dragoje Radanović*, where the Court established that the accused, as an ordinary soldier whose duty it was to execute the orders of his superiors, could not have been conscious of the illegality of his actions and could not be expected to assess the unlawfulness of detaining the medical personnel. The failure to take steps to secure the release of the personnel was excusable, it found, because the defendant did not have the capacity to change the orders of his superiors. In a different decision, the Court has also ruled in the similar manner, finding that the accused should not be held responsible for an order issued by his superior that he had no capacity to change. For an analysis of the verdict in the *Radanović* case, see the Annex to this report.

For instance, whereas the Cantonal Court of Mostar²⁶ has used its *ex officio* powers to convict an individual of inhumane treatment of civilians for conduct that the prosecutor had qualified as torture, even though in the view of the Court the prosecutor had failed to prove the elements of torture, the Cantonal Court of Zenica has acquitted some of the accused in a war crimes case because the prosecutor had failed to prove that their acts against civilians amounted to torture.²⁷ Unlike the Mostar Court, the Zenica Court did not exercise its power to establish whether the acts in question could amount to a different crime (e.g., inhumane treatment). Although different interpretations of the law within the judicial system are, to a certain extent, legitimate and natural, the divergent practices illustrated by these examples undermine the principle of equality before the law. A state-level judicial institution would have the authority to resolve such discrepancies. Its establishment would also result in a more rational judicial structure more closely resembling that of many European federal states.

26 See the verdict of the Cantonal Court of Mostar in the matter of *Niko Obradović* of 29 May 2006.

27 See the decision of the Cantonal Court of Zenica of 5 June 2007 in the case of *Sabahudin Operta et al.* The decision is under an appeal.

Conclusions

The OSCE Mission to Bosnia and Herzegovina makes the following recommendations:

- As instructed by the Constitutional Court of Bosnia and Herzegovina in the *Maktouf* Decision, prosecutors and courts at the Entities and Brčko District should apply the Criminal Code of Bosnia and Herzegovina in future war crimes trials;
- Those involved in prosecuting and ruling on war crimes in entity courts could profit from training in international humanitarian law and the jurisprudence of ICTY, the Court of Bosnia and Herzegovina, and other relevant jurisdictions. The Judicial and Prosecutorial Training Centers of the Federation of Bosnia and Herzegovina and the Republika Srpska should therefore review and update their current training in humanitarian law.
- In order to promote consistency in practices throughout the country, Bosnia and Herzegovina should consider establishing a state-level judicial institution as the final authority on the interpretation and application of the laws pertaining to war crimes by all courts in the country.

Annex

Problems in the Application of the Law in War Crimes Cases:

An Analysis of the *Radanović* Case

Introduction

On 22 March 2007 the Supreme Court of the Republika Srpska (hereinafter, the Supreme Court) delivered its final verdict in the case against Dragoje Radanović, acquitting him of all charges of war crimes committed against the civilian population. In particular, the Supreme Court held that the defendant's participation in the detention of four medical staff inside the hospital in Foča on 11 April 1992, which included forcing one of the doctors to call upon Bosniacs in Foča to lay down their arms under the threat of force, did not amount to war crimes under Article 142(1) of the Criminal Code of Republika Srpska (which succeeded the Criminal Code of the Socialist Federal Republic of Yugoslavia)²⁸. This verdict was partly affected by some apparent flaws in the interpretation of the law applicable to war crimes cases as well as in the interpretation of international humanitarian law by both the prosecutor and the Supreme Court. The *Radanović* case illustrates the problems created by the lack of harmonized domestic legislation and jurisprudence applicable to war crimes cases.

Overview of the Procedural History

On 9 December 2005, pursuant to Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia, the District Court of Trebinje found Dragoje Radanović guilty of participation in the illegal detention of civilians. Finding as well that this amounted to war crimes against civilians, it sentenced him to two years in prison. The District Court established that the defendant, a member of the Serb

paramilitary forces, together with others had occupied the Foča hospital, detained medical personnel under the threat of force, and ordered a civilian doctor to call out from the hospital to “eminent Bosniaks”²⁹ in the area in order to persuade them to surrender. The defendant had guarded the doctor, aimed his rifle at him, and prevented the rest of the medical personnel from leaving the hospital before they were transferred to the Livade internment camp. The District Court found it an aggravating circumstance that, as a consequence of his actions, while one of the doctors was held prisoner at the Livade internment camp for a long period of time but eventually released, another doctor disappeared and is still missing.

Following an appeal by the defense, the Supreme Court overturned the initial verdict reached on 20 April 2006 on the grounds that the verdict did not explain why the conduct of the defendant constituted a war crime. Consequently, the Supreme Court decided to hold a re-trial.³⁰ On 22 March 2007 the Supreme Court issued a final verdict acquitting the defendant of all charges of war crimes. The Supreme Court did not contest the facts established by the court of first instance, but rather found that such facts did not amount to war crimes against the civilian population and that the conduct of the defendant was not in violation of Common Article 3 of the 1949 Geneva Conventions and Articles 20, 31, and 147 of the Fourth Geneva Convention.

29 From the part of the verdict of the District Court in Trebinje which reads: “...ordered doctor... to go on the window of hospital and call loudly eminent Bosniaks whose houses were located nearby to surrender themselves...”

30 The Supreme Court based its decision on Article 303(1)i of the Republika Srpska’s Criminal Procedure Code, which states that “if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts” an essential violation of the provisions of criminal procedure has occurred.

Grounds on Which the Supreme Court Acquitted the Defendant

THE FACTS DO NOT AMOUNT TO A VIOLATION OF COMMON ARTICLE 3³¹ OF THE 1949 GENEVA CONVENTIONS

The prosecutor relied on the provisions contained in Common Article 3 of the 1949 Geneva Conventions to argue that the accused was guilty of illegal detention of civilians, which amounted to war crimes against civilians under Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia. Common Article 3 prescribes a set of core provisions applicable in internal conflicts for the protection of persons taking no active part in the hostilities. The court of first instance held that a violation of Common Article 3 had occurred. The Supreme Court departed from this view. The Court correctly observed that illegal detention of civilians is not included in the list of prohibited acts under Common Article 3 and that this act cannot therefore constitute a war crime on the basis of that provision.

The prosecutor in the *Radanović* case had, in other words, attempted to base the case against the defendant on an underlying violation – i.e., illegal detention – not included in the provision itself. It is difficult to understand why the prosecutor did not instead try to prove that the defendant had violated Common Article 3 by committing one of the acts that this provision actually prohibits. It would have been possible, for instance, for the prosecutor to argue that the actions of the defendant amounted to the offense of taking of hostages,³² which is prohibited under both Common Article

31 Common Article 3 reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

32 According to ICTY case-law, the elements of the war crime of taking of hostages are the following: 1) the unlawful confinement or deprivation of liberty of civilians; 2) the issuance of a conditional threat to the physical and mental health of the detainees, so as to prolong detention or inflict injury or death; 3) the threat is intended as a coercive measure to achieve the fulfilment of a condition (see *Prosecutor v Kordić and Čerkez*, IT-95-14/2-T, Trial Chamber, 26.2.2001, para. 312-313). These elements seem to correspond to the facts established that threats against the security of the detained civilian medical personnel were carried out by the defendant, together with others, in order to obtain the surrender of the Bosniac forces.

3 and Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia.

The Supreme Court did not, in turn, make a comprehensive assessment whether the actions committed by the defendant constituted perpetration of any of the acts prohibited under those provisions.³³ In fact, apart from briefly arguing that the conduct of the defendant did not amount to “humiliating and degrading treatment,” the Court provided no further reasoning in support of its finding that no violation had taken place at all. Its verdict instead stated that “none of the actions committed by the accused according to the indictment constitute a violation of Common Article 3 of the 1949 Geneva Conventions.” The Court apparently failed to consider whether the offense of taking of hostages mentioned above had even been committed.

THE FACTS DO NOT AMOUNT TO A VIOLATION OF ARTICLES 20 AND 31³⁴ OF THE FOURTH GENEVA CONVENTION

The prosecutor also claimed that the conduct of the defendant was in violation of Articles 20 and 31 of the Fourth Geneva Convention. These two articles provide for the respect and protection of medical personnel of civilian hospitals and prohibit the use of physical or moral coercion against people so protected. In its judgment, the Supreme Court pointed out that one of the elements required to find a violation of these provisions was that the breaches had occurred in the context of an international armed conflict. The prosecutor seems to have made no effort to prove that the conflict was of an international character. To bolster his case, he submitted an ICTY Judgment in evidence. But he chose the case of *Kunarac et al.*, which established only that “on 8 April 1992 an armed conflict between Serb and Muslim forces broke out in Foča”³⁵ and that it lasted at least until February 1993; the judgment did not come to any conclusion as to the nature of this conflict. There exist, however, other ICTY decisions that would seem to indicate that the conflict in the area of Foča may well have

33 As a matter of fact, under Article 286(2) of the Republika Srpska Criminal Procedure Code, reflecting the *iura novit curia* principle, “the court is not bound to accept the proposals regarding the legal classification of the act” and is therefore free to consider whether the conduct of the accused amounts to an offense not alleged by the prosecutor.

34 Article 20(1) reads: “Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.” Article 31 reads: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”

35 See ICTY Trial Chamber, *Kunarac et al.*, Judgment, 12 June 2002, para. 567.

been of an international character.³⁶ The Supreme Court concluded that, since no evidence was presented to prove the international character of the conflict that began in Foča in April 1992, it was not possible to find a violation of Articles 20 and 31.

The Supreme Court further argued, however, that even if the international character of the conflict had been proven the conduct of the defendant would not have amounted to a violation of Articles 20 and 31. The rationale proffered was that since the Foča hospital happened to be on the front line between two belligerent parties, the entry of military forces into the hospital could not be considered a violation of humanitarian law in general or a violation of Articles 20 and 31 in particular. Such reasoning, with no further elaboration, seems to imply that the mere location of a hospital in the middle of the battlefield is sufficient reason to deprive its medical personnel of legal protection against physical or moral coercion under international humanitarian law.

In cases before the Court of Bosnia and Herzegovina concerning crimes committed in the area of Foča,³⁷ by contrast, the issue of the nature of the conflict has played no role in determining the criminal responsibility of the defendants. This is because all of those defendants were charged with crimes against humanity under Article 172 of the Criminal Code of Bosnia and Herzegovina, which makes gross and fundamental human rights violations a crime regardless of the nature of the armed conflict. In the case of *Gojko Janković*, the Court of Bosnia and Herzegovina found the defendant guilty of the crime against humanity of imprisonment of civilians. This was committed on 14 April 1992 as part of a widespread and systematic attack against Bosniac civilians in the area of Foča from 8 April 1992 onward³⁸ — that is, during the same period and in the same place in which Mr. Radanović committed his acts. The prosecutor and the Supreme Court in the Radanović case, however, did not have the alternative of qualifying his conduct as a crime against humanity, since the Criminal Code of the Socialist Federal Republic of Yugoslavia was applied.

36 See ICTY Trial Chamber, *Tadić*, Opinion and Judgment, 7 May 1997, para. 569: “...it is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina”; ICTY Trial Chamber, *Delalić*, Judgment, 16 November 1998, para. 234: “...the Trial Chamber is in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature.”

37 See Court of Bosnia and Herzegovina, *Gojko Janković*, 1st Instance Verdict, 16 February 2007; Court of Bosnia and Herzegovina, *Radovan Stanković*, 2nd Instance Verdict, 28 March 2007; Court of Bosnia and Herzegovina, *Nedo Samardžić*, 2nd Instance Verdict, 13 December 2006.

38 See Court of Bosnia and Herzegovina, *Gojko Janković*, cit., pp. 19 and 35. The conviction for this crime was confirmed by the Appellate Panel of the Court of Bosnia and Herzegovina on 19 November 2007.

THE FACTS DO NOT AMOUNT TO A VIOLATION OF ARTICLE 147³⁹ OF THE FOURTH GENEVA CONVENTION

In exercising its powers under Article 286(2) of the Criminal Procedure Code of the Republika Srpska, the Supreme Court examined *ex officio* whether the actions of the defendant could amount to a grave breach of the Geneva Conventions and in particular of Article 147 of the Fourth Geneva Convention, which proscribes, among other things, the unlawful confinement of persons protected by the Convention. The Supreme Court found that the defendant could not be held accountable for such a violation, because he was an ordinary soldier whose duty was to execute the orders of his superiors and thus he could not have been expected to assess the legality of the detention of the medical personnel or to contravene such orders. The Court failed to indicate on which legal provision it based its finding, thus making it difficult to assess whether such exculpatory grounds were applicable in the present case or whether, in fact, they existed at all. The Court's reasoning seemed to refer to the defense of "superior orders," which some national jurisdictions admit, under which a subordinate cannot be held responsible for the commission of a war crime if he or she committed it while carrying out an order. The order must not have been manifestly unlawful or the subordinate must have had no knowledge of the illegality of the order.⁴⁰ Such a defense, however, is not recognised in the Criminal Code of the Socialist Federal Republic of Yugoslavia, which the Court used in this case, when the order is directed at committing a war crime.⁴¹ It is also explicitly excluded by the relevant international instruments⁴² as well as by the Criminal Code of Bosnia and Herzegovina.⁴³ Against

39 This provision reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

40 This defense is recognized, for example, in the relevant law applicable in the Netherlands, Germany, Switzerland, USA, Israel, and Italy.

41 Article 239 of the Criminal Code of the Socialist Federal Republic of Yugoslavia foresees in this regard that "No punishment shall be imposed on a subordinate if he commits a criminal offence pursuant to order of a superior given in the line of official duty, unless the order has been directed toward committing a war crime or any other grave criminal offence, or if he knew that the carrying out of the order constitutes a criminal offence".

42 See Article 8 of the Agreement establishing the Nuremberg International Military Tribunal, Article 6 of the Tokyo Charter of the Far East International Military Tribunal, Article 7(4) of the Statute of the International Criminal Tribunal for the former Yugoslavia, and Article 6(4) of the Statute of the International Criminal Tribunal for Rwanda. Article 33 of the Rome Statute of the International Criminal Court, which permits a defense of superior orders in the case of war crimes, presents an exception.

43 Under Article 180(3) of the Criminal Code of Bosnia and Herzegovina, superior orders do not exclude criminal responsibility but may be considered a mitigating circumstance.

this background, the legal basis for the Supreme Court's application of a defense of "superior orders" remains unclear.

Moreover, even if such a defense were admissible under the law of Bosnia and Herzegovina, the Court did not adequately reason why it was applicable in the present case, nor did it explain why it came to the conclusion that the defendant could not have been expected to assess the unlawfulness of the detention. The Court did cite an ICTY decision as justification for its reasoning.⁴⁴ But the passage it cited does not concern "superior orders," a defense excluded by the ICTY Statute, but rather the type of conduct and degree of responsibility required in order to be found guilty of the crime of unlawful detention. The same passage to which the Supreme Court referred clearly indicates that such responsibility "is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention."⁴⁵

The facts established in the *Radanović* case make it indisputable that the defendant personally participated in placing the medical staff in detention. The provisions of humanitarian law, which concern respect for and protection of medical personnel and hospitals, are so widely recognized by States that they have arguably reached the status of international customary law.⁴⁶ It therefore seems difficult to accept as valid legal reasoning the finding that the defendant should be acquitted on the grounds that he could not have had knowledge of the unlawful nature of the detention of the hospital's medical staff, who, according to the facts established in the court proceedings themselves, were not deemed to pose any security threat.

44 The Republika Srpska Supreme Court quoted in the verdict the following passage from para. 342 of the ICTY Appeals Chamber Judgment in *Delalić and others* ('Čelebići') of 20 February 2001: "In the Appeals Chamber's view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has committed a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk ... The Appeals Chamber, however, does not accept that a guard's omission to take unauthorized steps to release prisoners will suffice to constitute the commission of the crime of unlawful confinement".

45 ICTY Appeals Chamber, *Delalić and others*, cit., para 342.

46 Such a conclusion was reached by the International Committee of the Red Cross (ICRC) in its recent study on Customary International Humanitarian Law. See ICRC, HENCKAERTS and DOSWALD-BECK, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge Press, 2005, pp.79, rule 25: "Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances."

