

DISTURBED PRECEDENTING OF THE LAW IN PRACTICE OF THE COURT OF BOSNIA AND HERZEGOVINA

***Abstract:** The subject of this paper is one model developed in practice of the Court of Bosnia and Herzegovina, and it is related to unconstitutional retroactive implementation of incrimination crimes against humanity. Foundations of this problem are laid in the decisions of Hague Tribunal, and then in the decisions of the European Court for Human Rights. These decisions are afterwards accepted without any critique in practice of the Court of Bosnia and Herzegovina in criminal proceedings led regarding this incrimination. This is the model of disturbed precedenting of the law. In the paper this problem has been clarified by the author on one case from the Court practice, which unfortunately is not the only example in reality. The essence of this problem is in the Court sentencing verdicts reached against individuals. Namely, assertions that widespread and systematic attack against civilian population is carried out by the Army and Police of the Republic of Srpska are expounded in these verdicts, but not confirmed by valid proofs and arguments. This is the way for criminal sentencing of not only individuals (natural persons) but the Republic of Srpska as well, without enabling it to defend itself from such unfounded accusations. When the Court of Bosnia and Herzegovina is trying to find arguments for such verdicts in the decisions of the Hague Tribunal and in the decisions of the European Court of Human Rights, it is defective since decisions of these international institutions are defective as well. All this in final can cause serious consequences against the Republic of Srpska, which (these consequences) can be not only of criminal nature but of constitutional nature as well.*

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Keywords: *crimes against humanity, unconstitutional retroactive implementation of incrimination, precedencing of the law, widespread attack, systematic attack, civilian population.*

Сажетак: *Предмет овог рада је модел који је развијен у пракси Суда Босне и Херцеговине и повезан је са неуставном ретроактивном примјеном инкриминације злочина против човјечности. Основе овог проблема налазе се у одлукама Хашког трибунала, као и у одлукама Европског суда за људска права. Ове одлуке су послије прихваћене без критике у пракси Суда Босне и Херцеговине у кривичним поступцима вођених у вези ове инкриминације. Ово је модел нарушавајућих преседана у праву. У раду се овај проблем објашњава на једном случају судске праксе Суда Босне и Херцеговине, који најжалост није једини примјер у стварности. Суштина проблема је у судским осуђујућим пресудама против појединаца. Наиме, тврдње да је распрострањен и систематски напад на цивилно становништво извршен од стране војске и полиције Републике Српске се излаже у овим пресудама, али није потврђено провјерљивим доказима и аргументима. Ово је начин за кривично кажњавање не само појединца (физичка лица), већ и Републике Српске, без пружања могућности да се брани од таквих неоснованих оптужби. Када Суд Босне и Херцеговине покушава пронаћи аргументе за такве пресуде у одлукама Хашког трибунала и одлукама Европског суда за људска права, то је неисправно јер су одлуке ових међународних институција такође неисправне. На крају све ово може проузроковати озбиљне посљедице против Републике Српске, које не морају бити само кривичне, већ и уставне природе.*

Кључне ријечи: *злочини против човјечности, неуставна ретроактивна примјена инкриминације, преседани у праву, распрострањени напади, системски напади, цивилно становништво*

I. Introductory remarks

The subject of this paper is one form of practice developed through the practice of the Court of Bosnia and Herzegovina, and it refers to the unconstitutional retroactive implementation of incrimination crimes against humanity. The grounds of this problem have been set up in the decisions of the Tribunal in the Hague, and then in the decisions of the European Court of Human Rights, which cannot withstand serious legal criticism. Despite representing quasi-law, the understandings of these international institutions

are canonized in practice of the Court of BiH. Considering the attitude of the Court of BiH towards these understandings, what follows below is not a simple description of the process of canonization, but it is a concrete (scholarly) example of disturbed precedencing of the law.

The case we are referring to below, to the extent relevant to the issues we deal with, is of multiple importance. In fact, through this case, we shall see how *the pronouncements of judgments* of the Court of BiH *represents criminal and legal conviction of not only individually specified natural persons to who these judgments refer but also the same kind of condemnation of the Republic of Srpska*. However, the reasoning of the judgment after that offers no valid evidence or argument for such claims. Referring in these judgments to the relevant parts of the judgments of the European Court of Human Rights and War Crimes Tribunal in the Hague is defective, since the judgments of those institutions are also defective. Unsoundness of such behavior is the result of persistent, legally unfounded insistence on the fact that the crimes (in this case, crimes against humanity) can be determined through legal principles, i.e. custom. Therein, this claim also lacks valid arguments, which should not be a surprise due to the fact that the being of crimes against humanity is not derived from a legal principle nor the result of customary behaviour. Instead, the content of being of this crime, as it exists in the Article 172 of the Criminal Code of BiH (*especially concerning the widespread and systematic attack against civilian population and knowledge of the perpetrator of such attack*), was made through contracting, adoption and entry into force of the Rome Statute of the International Criminal Court. This is, among other things, clearly indicated by the fact that the specific meaning (in terms of the principle *lex certa*) of the notion *attack (widespread or systematic) directed against the civilian population*, as well as *the policy to commit such attack*, has been determined in the elements of the crime, adopted pursuant to the Article 9 of the Rome Statute.

II. Judgment of the Court of BiH in the case of the Prosecutor’s Office of BiH against Ratko Dronjak

This case consists of two judgments of the Court of BiH. One of them is the judgment of the Trial Chamber (first-instance judgement), No. S1 1 K 003420 10 Kri (H-KR-09/684) from 1st June, 2012, and the second one is the judgment of the Appellate Division of the Court of BiH (second-instance judgment), No. S1 1 K 003420 12 Krž 7 of 21st February, 2013. First-instance judgment found Ratko Dronjak guilty of, among other things, crimes against humanity determined by the Article 172 of the Criminal

Code of BiH due to which he was sentenced to imprisonment for seven years. Second instance verdict altered the first instance judgment in a way that the defendant Ratko Dronjak was found guilty of the *persecution* as a form of execution of the criminal offense crimes against humanity under the Article 172 of the Criminal Code of BiH, for which he was sentenced by the second-instance judgment to imprisonment of ten years.

Although the first-instance judgment was altered by the second-instance judgment in the sense that we have previously indicated, there are three things that these judgments have in common. One of them is the fact that the second-instance judgment accept the existence of a widespread or systematic attack of the Army of the Republic of Srpska and the Police of the Republic of Srpska against the Muslim, Croatian and other non-Serb civilian population, in the way this alleged attack has been determined by the first-instance judgment, as well as the "arguments" given by the first-instance judgment explaining why the defendant may be found guilty of crimes against humanity under the Article 172 of the Criminal Code of BiH. The second thing these judgments have in common is the fact that in both of them the Court of BiH, regarding the existence of the alleged widespread and systematic attack by the Army and Police of the Republic of Srpska, as well as the "legal possibilities" for implementation of the given incrimination, calls for "argumentation" given related to these issues by the Hague Tribunal or the European Court of Human Rights in their decisions. Finally, the third thing the judgments have in common, even when its makers are not aware of it, is the need to use such judgments to present the Republic of Srpska and its institutions (state leadership, Army and Police of the Republic of Srpska) as criminal entities. This need is primarily manifested by the first-instance judgment which, as we will show below, states that the actions of individually specified natural person are done "*... in the context of a widespread and systematic attack by the Army and Police of the Republic of Srpska directed against a civilian population and with that person's awareness of such an attack*". When the things are put in this way, and they are put initially in the indictment issued by the Prosecutor's Office of BiH and then in the first-instance judgment by the Court of BiH, and when they are after that accepted as such and confirmed by the second-instance judgment of the Court of BiH, then this, without any doubts, reflects the need to criminally and legally prosecute, or adjudicate, the Republic of Srpska as well. Thereby, the Republic of Srpska is not allowed to defend itself against such accusations, which is defective practice which the Court of BiH undertook from the Tribunal in The Hague, and thus it represents a kind of disturbed precedencing of the law.

The case we are referring to below is only a tile in a mosaic of such judgments against the Republic of Srpska. It is related to the area that represents the western part of the Republic of Srpska. When we add to this other judgments of the Court of BiH in other cases, related to the other parts of the territory of the Republic of Srpska, the cases in which the Republic of Srpska was found guilty of incrimination crimes against humanity through indictments against the individually specified natural persons, we can form a mosaic on the basis of which the ignorant of the essence of such an unconstitutional and illegal behavior may conclude that the Republic of Srpska is a criminal creation, which is not true.

At the end of the process in the case of BiH Prosecutor's Office against Ratko Dronjak there comes the decision of the Constitutional Court of BiH by which the Constitutional Court of BiH re-enabled flagrant unconstitutional retroactive implementation of incrimination crimes against humanity under the Article 172 of the Criminal Code of BiH. In doing so, the Constitutional Court of BiH for the purpose of reasoning its decision assumes (or rather, canonizes) the appropriate "arguments" of the European Court of Human Rights, on the basis of which this court, legally groundless, believes that the incrimination crimes against humanity, with the content of being of that crime prescribed by the Criminal Code of BiH, existed at the time of the last war in BiH.

The continuation of this chapter will be divided into two parts. In the first of them, we shall present the corresponding parts of the first-instance judgment of the Court of BiH in the case of Prosecutor's Office of BiH against Ratko Dronjak, whereby we will criticize not only those parts of the said judgment, but also the relevant parts of the judgments of the Hague Tribunal and the European Court of Human Rights which the Court of BiH refers to in the first-instance judgment. Then we shall expose relevant parts of the second-instance judgment in the same case of the Court of BiH, after which is a chapter dedicated to a brief analysis of the decision of the Constitutional Court of BiH adopted in the proceedings on the appeal in this case. Concluding remarks are at the end of the paper.

II.1. First-instance judgment of the Court of BiH no. S1 1 K 003420 10 Kri (X-KR-09/684) of 1st June 2012 and the relevant decisions by the Hague Tribunal and the European Court of Human Rights

Defects included in the first-instance judgment of the Court of BiH which we are talking about below can not be fully explained without bring-

ing it in a relationship with the relevant decisions of the Hague Tribunal in the cases the Prosecutor vs. Dusko Tadic and the Prosecutor vs. Radoslav Brdjanin, as well as the decisions of the European Court of Human Rights in the case Boban Simsic against Bosnia and Herzegovina. Specifically, defects from the judgment of the Court of BiH are the result of defects contained in the decisions of the Tribunal in the Hague and the European Court of Human Rights in the mentioned cases. Since the Court of BiH in the stated judgment uses the "reasons" given by those decisions in order to "explain" that a defendant may be found guilty of incrimination crimes against humanity (cases the Prosecutor vs. Dusko Tadic and Boban Simsic against Bosnia and Herzegovina), or to "explain" the existence of the alleged widespread and systematic attack against a civilian population (the Prosecutor vs. Radoslav Brdjanin), we shall also criticize, at the appropriate places below, the mentioned decisions of the Tribunal in the Hague and the European Court of Human Rights.

The pronouncement of judgment of 1st June, 2012, in its factual substrate, as well as in other cases of this kind, begins with a stereotypical formulation. It founds a defendant guilty of (our italics in the quote):

„In the period from May 1992 until the end of 1995 in Bosnia and Herzegovina during the war *as part of a widespread or systematic attack of the Army and Police of the Republic of Srpska* as well as the paramilitary formations *directed against the civilian population* in the Autonomous Region of Krajina (ARK), which was established by the Decision of the Assembly of the people of Serbian nationality in 1991 which was supposed to consist of 19 municipalities, including Drvar, Kulen Vakuf, Bosanski Petrovac, Kljuc, Sanski Most, Kupres, Bosanska Krupa, in order to persecute *Muslims, Croats and other non-Serb population* from the Autonomous region of Krajina, which lasted from May 1992 to May 1993, and *being aware of such an attack ...*”.

The quoted part (the beginning) of the factual substratum of the pronouncement of the first-instance judgment represents, therefore, a framework within which the Court of BiH then placed several individual actions of the accused, to find him, at the end of the verdict, also guilty of incrimination crimes against humanity under the Article 172 of the Criminal Code of BiH. These individual actions are not the subject of this paper, but only the mentioned framework because without it there is no specified incrimination, which is the only subject of our interest.

Regarding this, at the beginning it is necessary to point out two contradictions contained in the above quote. One of them concerns the claims of

the Court on the character of the attack which, according to the Court, happened against the civilian population. Namely, the Court did not say that the alleged attack was widespread and systematic, but "widespread *or* systematic" which was then confirmed by the second-instance judgment of the Court of BiH in this case. The thing about this that represents a contradiction is the used conjunction "*or*" (not the conjunction "*and*") regarding the notions of widespread, i.e. systematic attack, which does not show clearly what in fact the Court thinks about the character of the alleged attack. According to the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission of the United Nations at its 48th session in 1996, *the notion of a widespread attack* indicates that these are the acts directed against a large number of victims. This excludes from this notion an act of the offender taken on its own initiative and directed at an individual victim. Unlike the concept of a widespread attack, *the concept of a systematic attack*, according to the same Draft Code of the International Law Commission means that the individual actions of the attack have been taken in accordance with previously designed plan or policy, which in turn implies the existence of a particular organization (as the creator of such a plan or policy) that has control over some area. This organization can be a state one, but not necessarily, because it can even be the organization exercising real power on the ground and it is not a state (e.g. a terrorist organization). The aim of this particular idea is to exclude random attacks on the civilian population which have not been taken as part of a broader plan or policy². Having in mind the foregoing, it is unclear what kind of attack against the civilian population the Court had in mind, that is, whether the Court referred to widespread or systematic attack. From this we can conclude something that is more important than the above omission of the Court. Namely, it is actually obvious that the Court (and the Prosecutor's Office of BiH in the indictment) in this section use only specific, pre-prepared text template, which is used as a template form (according to a computer *copy-paste* model) in all cases of this kind.

Second contradiction is related to the time interval in which the alleged widespread or systematic attack against the civilian population happened. In fact, in the quoted part of the first-instance judgment pronouncement (and this is confirmed by the second-instance judgment of the Court of BiH, of 21st February, 2013) it is initially said:

² More on this see in: International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996, *Yearbook of the International Law Commission, 1996*, vol. II, Part Two.

„In the period from May 1992 until the end of 1995 in Bosnia and Herzegovina during the war as *part of a widespread or systematic attack of the Army and Police of the Republic of Srpska* and the paramilitary formations *directed against the civilian population* in the Autonomous Region of Krajina (ARK) .. .”.

This would mean that the said attack existed from May 1992 until the end of 1995. However, after that the final part of the above quote says:

„...*in order to persecute Muslims, Croats and other non-Serbs* from the territory of the Autonomous Region of Krajina, which lasted from May 1992 to May 1993, *and being aware of such an attack...*”.

So, from this part it can be concluded that the said attack lasted from May 1992 to May 1993. This contradiction was tried to be eliminated by the Trial Chamber by stating the following when reasoning the first-instance judgment of 1st June 2012 (p. 26, our italics in the quote):

„116. However, regarding the existence of the attack on the civilian population *in the period from May 1993 until the end of 1995*, it should be noted that the defense successfully refuted the Prosecution's thesis, that is, the Court did not find it proven that in the quoted period, there was an attack on the civilian population.”

Having in mind the above quoted part of the first-instance verdict, there is a very logical question then is why the Court of BiH at the beginning of the operative part of this judgment in the factual substratum nevertheless said the words: "In the period from May 1992 until the end of 1995 in Bosnia and Herzegovina during the war *as part of a widespread or systematic attack of the Army and Police of the Republic of Srpska* and the paramilitary formations *directed against the civilian population* in the Autonomous Region of Krajina (ARK) ...". In our opinion, there are two possible explanations for this. One of them is that which we have already mentioned, and which says that also in this part the Court of BiH only takes over a specific, pre-prepared template from the indictments of the Prosecutor's Office of BiH. It is, as we can see, a kind of standardized form in all cases of this kind. Another explanation is that in this way (and through this judgment as one of the tiles of mosaic of judgments against the Republic of Srpska which we have previously discussed) the picture is being maintained based on which we should later draw conclusions according to which the Republic of Srpska existed as a criminal creation *during the war* in Bosnia and Herzegovina.

After pointing out these contradictions, we will focus our attention on two claims in the first-instance judgment of 1st June, 2012. One of them is the claim of a "widespread or systematic attack of the Army and Police of the Republic of Srpska" against the civilian population, i.e. the claim that these state bodies of the Republic of Srpska (therefore the Republic of Srpska itself) attacked the Muslim, Croatian and other non-Serb civilian population of the given area. According to the second claim, the defendant (and thus the Republic of Srpska) may be held guilty of incrimination crimes against humanity under the Article 172 of the Criminal Code of Bosnia and Herzegovina, despite the fact that this incrimination was not defined as a criminal offense during the war in BiH.

Related to the first claim, the Court of BiH in the first-instance judgment refers to the judgment of the Trial Chamber of the Hague Tribunal in the case of the Prosecutor versus Radoslav Brdjanin. In this regard, the first-instance judgment on p. 41 and 42 states (our italics in the text):

„179.when it comes to the relevant events we should start with the decision of the Court number H-KR-09/684 of 13th October, 2010, by which a larger number of facts established by the judgment of the ICTY Trial Chamber in the case of the Prosecutor vs. Radoslav Brdjanin was accepted.

180. Namely, as *defined in the above mentioned facts*, the establishment of the ARK represented only a part of the overall political developments in Bosnia and Herzegovina since 1991. *In accordance with these facts, which among other things, define that the leadership of Bosnian Serbs made a plan to link areas in BiH with the Serbian population and to create a separate Bosnian Serb state based on these areas, which meant to cause fear and use force to remove most of non-Serbs from the territory in which they planned to establish the state of Bosnian Serbs.*

181. Furthermore, after the strategic plans had been defined, as pointed out above, the next phase in their implementation foresaw the establishment of Serbian autonomous regions, among which was the ARK. After its establishment there were certain actions undertaken, apparently aimed at the implementation of a strategic plan. Among other things, they implied the imposition of such life conditions to non-Serbs in Krajina, whose aim was to permanently remove the non-Serb population, or the destruction of the homes of non-Serbs, and allocation of homes that were not destroyed to Serbian refugees.

182. Also, besides destroying homes, the implementation of the plan included the establishment of detention facilities in which Bosnian Muslims and Bosnian Croats were largely detained, as well as actions of firing non-

Serb professionals, *selective disarmament of paramilitary groups and individuals who possessed weapons* and resettlement of the population."

From the quoted part of the first-instance judgment, and this is its core when it comes to the claim of the Court of BiH that there was a "widespread or systematic attack of the Army and Police of the Republic of Srpska against the civilian population", it can be concluded that the Court, simply put, is trying to say the following:

1. that the leadership of the Serbs in BiH (in fact the leadership of the Republic of Srpska, which means the Republic of Srpska itself) devised a strategic plan;
2. that the plan *included* the creation of the Serbian state (the Republic of Srpska) *using fear and force*, in order to permanently remove non-Serbs from the territory of that state;
3. that the plan *involved* the selective disarmament of paramilitary groups and individuals who possessed weapons;
4. and that the plan *included* the dismissal of non-Serbs.

As we can see, the basis of all is the alleged strategic plan of creating the Republic of Srpska, which according to the Court of BiH primarily *involves the use of fear and force* for allegedly permanent removal of non-Serbs from the territory of the Republic of Srpska. In respect to this claim of the Court of BiH we should bear in mind what we have just said, i.e. that *the concept of the systematic nature of the attack*, according to the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission of the United Nations, means that the individual actions of the attack are undertaken according to a previously prepared plan or policy, which in turn implies the existence of a particular organization (as the creator of such a plan or policy) that has control in some area. We should also have in mind that the Elements of Crimes, adopted pursuant to the Article 9 of the Rome Statute of the International Criminal Court, determined that the *policy* implying the implementation of an attack against the civilian population requires that the state or organization *actively promote*³ or encourage attacks against the civilian population, as well as that policies aimed at the attacks against the civilian population should be applied by the state or organization that has the real power over a particular territory. When this is taken into account, it is clear that the creation of a

³ And the above formulation of a strategic plan should imply, in accordance with the intention of the Court of BiH, such a policy, i.e. an active promotion.

formulation of a "strategic plan of creating the Republic of Srpska which *involves the use of fear and force* in order to permanently remove non-Serbs from the territory of the Republic of Srpska" is needed not only to construct at all costs "facts" whose existence is required by the being of incrimination crimes against humanity, but also to create an image of the Republic of Srpska as a criminal creation, not a legitimate creation of the Serbian people on this side of the Drina river. When such a formulation is made, then the other formulations discussed above under items 3 and 4 can be derived from it.

The quoted part of the first-instance judgment also indicates that what it wants to present as facts has not been determined by the Court of BiH, but has only been taken over from a judgment of the Hague Tribunal. This option resorted by the Court of BiH is the result of one law with a fairly long name. However, we do not find that legal defection of this law so important as the fact that it provides, as we shall see below, disturbed preceding of the law, through a “solution” which has not been known in our practice until the adoption of this law. So, it is the Law on the Transfer of Cases from the International Criminal Tribunal for the former Yugoslavia to the Prosecutor's Office of Bosnia and Herzegovina and the use of evidence obtained by the International Criminal Tribunal for the former Yugoslavia in proceedings before courts in Bosnia and Herzegovina⁴. Article 4 of this Law provides (our italics in the quote):

„After hearing the parties, *the court may*, on its own initiative or at the request of one of the parties, *decide to accept as proven the facts that had been determined by legally binding decision in some other proceeding before the ICTY*, or to accept documentary evidences from proceedings before the ICTY if related to important issues in the current proceedings.”

In the quoted provision we can recognize the intention of the legislator to use it in order to enable all courts in BiH, not only the Court of BiH, not to determine legally relevant facts in criminal proceedings conducted for war crimes before them, but instead to simply accept those facts (in the form of a decision), as determined by the Hague Tribunal in the specific case. This is a kind of preceding the law in its disturbed form, which at any price tries to impose the opinion of the mentioned Tribunal on certain factual issues as the “truth”. If acted in this way, then there is no more any chance to refute those “facts” but to accept them as the irrefutable “truth”.

⁴ “Official Gazette of BiH”, no. 61/04, 46/06, 53/06 and 76/06.

To understand our statement that in this case we have a disturbed precedencing, we need to remind you of the meaning of the terms *ratio decidendi* and *obiter dictum* in common law. This law understands the term of *ratio decidendi* as a *legal rule derived from those parts of the judicial decision which offer legal reasons (legal concepts) of the court for the judgment rendered in a specific case*. Opposite to this term, the notion of *obiter dictum* implies remarks or observations of a judge, which although contained in the judgment, are not its necessary part (as opposed to *ratio decidendi* which is, by its nature, a mandatory part of the judgment). So, *obiter dictum* is not the subject of a court decision. As a result, only *ratio decidendi*, as a *legal rule*, has legally binding character and it becomes a precedent. However, the quoted legal solution tried to impose that the facts, as determined by the Hague Tribunal, should be accepted as a precedent, and not only legal understandings of that Tribunal which as a sort of canon have already been already accepted, especially in the practice of the Prosecutor's Office of BiH and the Court of BiH. Therefore, in our opinion, the foregoing also represents a form of disturbed precedencing of the law. The fact that the quoted provision of the Article 4 of the mentioned law provides that the courts *may* accept facts as determined by the Hague Tribunal has been turned into a rule, which is proven by the practice of the Court of BiH, even by the example from the judgment we deal with here. In other words, what the law defines as a possibility has been turned into an obligation in the court practice.

Therefore, the facts stated in the judgment of the Trial Chamber of the Hague Tribunal (case the Prosecutor vs. Radoslav Brdjanin - Judgment No. IT-99-36-T of 1st September, 2004) are accepted by the Court of BiH as a sort of precedent, and it only takes them over by its first-instance judgment in a way that we have previously quoted. Such treatment is defective, and the result of defects which in this regard are contained in the mentioned judgment of the Hague Tribunal.

When the Court of BiH in the first-instance judgment of 1st June, 2012 states that, "180. the leadership of Bosnian Serbs made a plan to link areas in BiH with the Serbian population and to create a separate Bosnian Serb state based on these areas, *which meant to cause fear and use force to remove most of non-Serbs from the territory in which they planned to establish the state of Bosnian Serbs*", it thus, in essence, takes over that part of the judgment of the Trial Chamber of the Hague Tribunal in the case of the Prosecutor vs. Radoslav Brdjanin in which it is stated (our emphasis in the quote):

„71. In early 1992, while the international negotiations were still on, trying to solve the status issue of Bosnia and Herzegovina, *the Bosnian Serb*

leadership enforced its plan to separate territories they considered to be theirs from the existing structures of SRBiH and to create a separate Bosnian Serb state. The Assembly of the Serbian Republic of Bosnia and Herzegovina on 9th January 1992, declared the Serbian Republic of Bosnia and Herzegovina, which was renamed the Republic of Srpska on 12th August 1992 (hereinafter: RS). It consisted of so-called of Serbian autonomous regions and districts, including the Autonomous Region of Krajina.

72. Discussions taking place in the Assembly of the Serbian Republic of Bosnia and Herzegovina during the next few months showed that *the Bosnian Serbs leadership was still determined to create a state in which there will be no place for non-Serbs. In achieving this goal, they planned to permanently remove non-Serbs from the territory of the proclaimed Serbian Republic of Bosnia and Herzegovina by force and fear.*"

The quoted text of the judgment of the Hague Tribunal, in the part concerning the alleged plan of its leadership to create a state in which there would be no place for non-Serbs, presented the untruths about the Republic of Srpska. From these untruths, fundamental to the Tribunal, other conclusions are derived. According to them: "118. crimes committed in Bosanska Krajina from April 1992 until the end of December 1992, i.e. at the time of the indictment, occurred as a direct result of a comprehensive Strategic Plan. Ethnic cleansing was not a by-product of the criminal activity, but, on the contrary, it was the main goal and thus an integral part of the Strategic Plan."

This behaviour is a result of the fact that the Hague Tribunal does not take into account, although it is aware of it, several facts of cardinal importance, concerning the constitutional relations in BiH in the period prior to the war. These facts are related to the notion of *constitutionality of peoples* in pre-war Bosnia. Concerning the notion of constituent peoples it is said that: "... in political sense and within a specific state legal framework it implies a certain degree of **autonomy** from which derives the ability of a constituent entity to **self-determination** and **independent action** in areas relevant to the aspect of maintaining its constituent status, but also the **codetermination** on equal basis with other constituent entities on matters of common interest⁵." The roots of this notion can be found in the conclusions

⁵ Dejan Vanjek: Representatives and members of the constituent peoples - issue of constitutionality and legitimacy (*Predstavnici i pripadnici konstitutivnih naroda – pitanje konstitutivnosti i legitimizeta*): available at <http://www.idpi.ba/konstitutivnost-legitimitet/>, the approach of 14/01/2015. About the constitutionality of peoples see the monograph by Dr. Snezana Savic: Constitutionality of peoples in Bosnia and Herzegovina (*Konstitutivnost naroda u Bosni i Hercegovini*), Banja Luka,

of the ZAVNOBIH Resolution adopted at its session held on 26th and 27th November 1943. The fifth conclusion of the Resolution says (our italics in the quote):

„5. Today *the peoples* of Bosnia and Herzegovina through their only political representation, the Territorial Anti-Fascist Council for the National Liberation of Bosnia and Herzegovina, *want their country, which is neither Serbian nor Croatian, nor Muslim - but Serbian, and Muslim, and Croatian* to be free and fraternized Bosnia and Herzegovina, *which shall provided a full equality of all Serbs, Muslims and Croats.*⁶

For all the time of the existence of Bosnia and Herzegovina in the former Yugoslavia, BiH was in its constitutions determined in a way that, in its essence, matched the one we have pointed out in the above quote. The basic principles of (I) of the Constitution of the Socialist Republic of Bosnia and Herzegovina from 1974 stated that *the People's Republic of Bosnia and Herzegovina was created by the working class, working people and the peoples of Bosnia and Herzegovina - Serbs, Muslims and Croats*, and members of other nations and nationalities. Consistent with this constitutional principle, the Article 1 of the Constitution of the Socialist Republic of Bosnia and Herzegovina from 1974, determines BiH in the following way (our italics in the quote):

“*Socialist Republic of Bosnia and Herzegovina* is a socialist democratic state and a socialist democratic community of working people and citizens, *the peoples of Bosnia and Herzegovina - Muslims, Serbs and Croats*, and members of other nations and nationalities who live in it, *based on the power and self-management of the working class and all working people and the sovereignty and equality among the peoples of Bosnia and Herzegovina* and members of other nations and nationalities who live in it.”

As we can see, *BiH* was not only the state of working people and citizens, but also *the state of each of the individually mentioned peoples which were recognized for their sovereignty and equality*. In other words, a constituent entity of Bosnia and Herzegovina was each of these individually specified peoples. In July 1991 many amendments (precisely 31 of them) to the Constitution of the SRBiH were adopted. One of them defined BiH as "a

2000, as well as the monograph by Dr. Kasim Trnka: *Constitutionality of Peoples (Konstitutivnost naroda)*, Sarajevo, 2000.

⁶ Quoted according to Dr. Kasim Trnka: *Ibidem*, p. 145.

democratic and sovereign state of equal citizens, peoples of Bosnia and Herzegovina - Muslims, Serbs, Croats and members of other nations and nationalities that live in it." Therefore, BiH was again defined as a country of each individually specified peoples - Muslims, Serbs and Croats, which in the constitutional and legal sense resulted in the fact, that none decision of vital importance and constitutional validity could have been adopted only by the will of citizens but also the will of the majority of each constituent peoples. Such decisions are definitely represented by a Memorandum (Letter of Intent) and Platform on the position of BiH, adopted in October 1991 by the rump Assembly of SR BiH (by the voices of Croatian and Muslim members only) without members of the Serb people, "... which clearly highlighted that Bosnia and Herzegovina did not want to remain in the Yugoslav community (since Croatia was also out), but that it wanted to allocate as an independent state".⁷

It is obvious that these decisions were made by only two peoples, without the participation of the Serb people as a constituent people in the former SR BiH, which is why these decisions were issued *contra constitutionem*. Due to this (and only due to this) it can be explained why the political representatives of the Serb people⁸ at that time at the meeting held on 24th October 1991 adopted a Decision on the Establishment of the Assembly of the Serb people in Bosnia and Herzegovina, as it became apparent that the representatives of the other two nations did not care about the Serb people opinions regarding the future constitutional status of BiH. Soon after the Assembly of the Serb people in Bosnia and Herzegovina adopted a decision to call and hold a referendum (plebiscite better to say) that was held on 9th and 10th November 1991, at which the Serb people as a constituent people, with the vast majority of about 96,4% pleaded for an independent Serb state, which may be part of Serbia and Yugoslavia.

Therefore, the legitimate will of one constituent people is the basis of creating the Republic of Srpska, and not some strategic plan of this people's leadership which is persistently and legally groundlessly insisted on first through the decisions of the Hague Tribunal (as seen in the aforementioned judgment in the case *The Prosecutor vs. Radoslav Brdjanin*), followed by the decision of the Court of BiH in its judgments (like for example the first-instance judgment we are talking about here). Therefore, the Republic of Srpska has not been established "... in the process of implementation of important state projects ..." nor in some unconstitutional manner,

⁷ Rajko Kuzmanovic: *Constitutional Law (Ustavno pravo)*, Banja Luka, 2006, p.297

⁸ Previously elected to the Assembly of FR BiH in a democratic way, in the first multi-party elections held in the Federal Republic of Bosnia and Herzegovina on 18th October, 1990.

which is by the way the thing on which insists Dr. Kasim Trnka⁹ although legally unfounded, because the solutions contained in the Constitution of the SR BiH valid at that time guaranteed to the Serb people a status of constituent and nation-building peoples. When a nation has such constitutionally guaranteed status in one country, and when the opinions of its democratically elected and legitimate political representatives on the future constitutional position of that country are not recognized by the representatives of other constituent peoples, then that nation has the right to self-determination (up to secession), which includes the right to freely organize itself in state and political sense.

As opposed to this, the referendum (on the state independence of BiH) held on 29th February and 1st March of 1992, was not valid in the constitutional sense, because the Serb people did not participate in it, but only the other two constituent peoples (Muslims and Croats). This is in a specific way testified by the data according to which 2,073,568 voters out of the total 3,253,847 participated in the referendum. If we have in mind that according to the census in BiH from 1991 there was 1.366.104 or 31.21 % of the Serbs in BiH, it is clear that the remaining number of over one million voters who did not vote in the referendum represents the Serb people. Therefore, only the other two nations (Muslims and Croats) voted for the independence of BiH, but not the Serb people, which was a clear message for the Serb people that they must accept the will of the other two nations imposed by such legally damaged referendum or the referendum will be imposed against this nation by force. Everything aforementioned makes this referendum invalid in the constitutional and legal sense, considering that at the time of its execution was effective provision of the Constitution, according to which BiH is a democratic and sovereign *state* of equal citizens, *peoples of Bosnia and Herzegovina* - Muslims, Serbs and Croats. This, in turn, means that it is not possible, and constitutionally valid, if only two of those peoples vote for independence, but it should be done by the majority of every one of those nations. If that fails to happen in this way, which is exactly what happened in this referendum, then the only right thing to do is to have those constituent peoples continue with the further negotiations on the constitutional and legal future of certain political-territorial unit. Since it failed, then this fact also speaks in favor of the legality and legitimacy of the plebiscite of the Serb people in BiH in November 1991, by which the Serb people then, not its political leadership, pleaded for an independent Serb state, which may be a part of Serbia and Yugoslavia.

⁹ Dr Kasim Trnka: *Ibidem*, p.66.

This lengthy departure in the field of constitutional law was necessary in order to understand how baseless are the claims of the Hague Tribunal regarding the Republic of Srpska and its organs (the Republic of Srpska Army and Police). The essence of these claims (thesis) can be reduced to the following:

1. that the leadership of the Serbs in BiH (in fact the leadership of the Republic of Srpska, and that means the Republic of Srpska itself) devised a strategic plan;
2. that the plan *included the establishment of the Serbs state* (the Republic of Srpska) *by using fear and force*, in order the permanently remove non-Serbs from the territory of that state, whereby this force (in the form of the alleged widespread and systematic attack) was applied by the Army and Police of the Republic of Srpska;
3. that the plan involved the selective disarmament of paramilitary formations and individuals who possessed weapons;
4. and finally, that the plan *implied* the dismissal of non-Serb workers.

If, regarding the first thesis of the Tribunal, a plebiscitary expressed will of the Serb people in Bosnia and Herzegovina to create a Serb state (the Republic of Srpska) is taken into account, then it is clear that the formation of the Republic of Srpska and its duration are not the result of any strategic plan made by certain group of people (the one that the Tribunal called the leadership of the Serbs in Bosnia and Herzegovina). Considering the absence of such plan, a subsequent thesis of the Tribunal in the Hague which indicated that, as stated in paragraph 77 of the judgment of the Trial Chamber of 1st September 2004, in the case of the Prosecutor vs. Radoslav Brdjanin "... the first strategic objective implied the permanent removal of a significant portion of non-Serbs from the territory of an imaginary Bosnian Serbs state."¹⁰ Especially invalid character gets the thesis by the Hague Tribunal that this force was not used by the Army and Police of the Republic of Srpska in any way, not to mention widely and systematically, against the non-Serb population.

Now quite logically arises a question of the cause of suffering at the time of the Muslim and Croatian civilian population. Suffering of this population, as well as the suffering of the Serb civilians in territory under

¹⁰ In its English version this part of the mentioned judgment says: "77. The Trial Chamber is satisfied beyond reasonable doubt that the first strategic goal entailed the permanent removal of a significant part of the non-Serb population from the territory of the planned Bosnian Serbian state."

the control of the so-called Army of BiH¹¹, i.e. the Croatian Defence Council, should be look for into each other's deep-rooted animosities, which (unfortunately) has been present as a constant for centuries in the local population. Even the present time (the time of writing of this monograph) offers numerous examples of such animosity. It is enough to read the comments appearing on social networks, or comments on the articles published in the electronic editions of the local daily newspapers, to realize the extent to which the nationalist hatred is still smoldering in the local man, waiting for the next convenient moment to burst into something that will, by all means, be even dirtier than the last war in BiH.

The existence of such hatred during the war in BiH is pointed out by the Hague Tribunal itself, in the judgment of the Trial Chamber in the case of the Prosecutor vs. Radoslav Brđjanin. It does so, even when not aware of it, in several places, some of which shall be mentioned for the purpose of this paper. Thus, paragraphs 81 and 82 of the judgment say:

81. Regarding Bosanska Krajina particularly, a paramilitary group known as the "Wolves from Vučjak" that was supported by SDS took over a television relay on Kozara in August 1991. The frequencies were redirected and consequently the majority of municipalities in Bosanska Krajina could no longer keep track of television and radio programs from Sarajevo, but only programs from Belgrade and occasionally from Croatia, and from March 1992 onwards from Banja Luka too.

82. Since that time the meaning of the message that SDS spread through the media was that the Bosnian Serbs were threatened with persecution and genocide by the Bosnian Muslims and Bosnian Croats, and that the Serbs must protect themselves in order not to experience the same crimes committed against them during the Second World War..."

¹¹ On this suffering see more in the monograph by Marko Mikerević: "Sarajevo's cauldrons of death" (*Sarajevski kazani smrti*), Doboš 2004. This monograph represents a valuable documentary material, because it offers (p. 110-287) information about the suffering of 845 individually specified persons of Serbian nationality, who were systematically murdered by the members of the so-called Army of BiH and Muslim paramilitary formations during the war, in the part of Sarajevo, which was under the control of the so-called Army of BiH. A special value of the monograph lies in the fact that its author was living in the mentioned part of Sarajevo during the war in BiH and also worked as a lay judge in the District Military Court. So, it is a firsthand testimony. Due to the fact that he worked as a lay judge in the said court, Marko Mikerević in the mentioned monograph points out that "... about 5,000 detainees of Serbian nationality" walked through the camp "Viktor Bubanj" (in which the Prosecutor's Office of BiH and the Court of BiH are located today) - p. 51 of the said monograph. Having in mind these, as well as numerous other data encountered in it, this monograph is not only an evidence for the suffering of Serbs in Sarajevo during the war in BiH, but it is also a kind of confirmation of the local constant inter-ethnic hatred.

In paragraph 81 of the judgment the Tribunal overlooks the fact (or rather that does not say it, although it is aware of it) that at that time the media under the Muslim and Croatian control were leading a campaign in Sarajevo (and it is a form of hatred towards anyone who was thinking differently) which was solely focused on promoting the idea of independence of BiH, in spite of the will of the Serbs who were against it. When we add the results of this unconstitutional bi-national (Muslim-Croatian) referendum, it is clear that the Serbian people did not need any campaign, not even the one lead by the Serbian Democratic Party and the media in the Republic of Srpska, to realize that through the referendum, the other two nations sent them a clear message that the Serbs could choose between accepting the will of the two peoples which is imposed on them by such legally invalid referendum, and the fact that, otherwise, the referendum will be imposed on them by the use of force. Further confirmation of the tragic inter-ethnic hatred and the need to suppress the Serbian people by the use of force is listed in paragraph 89 of the judgment. Specifically, the following is said in this paragraph (our emphasis in the quote)

89. *The Muslims were also preparing for the war and correspondingly arming themselves.* In June 1991 the SDA leadership established the Council for National Defence of the Muslim people, whose paramilitary branch was the Patriotic League. However, the efforts of the Bosnian Muslims to obtain and distribute weapons were not nearly as successful as the efforts of Bosnian Serbs, both in terms of quantity, but also in terms of quality of the obtained weapons. Partly, the reason for this was due to the fact that *the Bosnian Muslims weapons obtained mainly individually.* Some acquired their weapons by buying it from the Bosnian Serbs who were returning from the front in Croatia. *Many Bosnian Muslims* who had obtained their weapons in this way were identified and subsequently arrested. *The efforts of the Bosnian Croats to arm* were also significantly behind the arming of the Bosnian Serbs.”

It is more than clear from the quoted part that the Muslims (many of them, as stated by the Tribunal itself in the appropriate place in the quote) were also preparing for the war, which implied their arming too. In this regard, there are two very logical questions: against whom the Muslims were preparing for the war, and why? Bearing in mind what we have previously discussed, it is obvious that they were preparing for the war against the Serbs (which is a confirmation of the hatred that exists between these two units). The reason for this war can be found in the need of the Muslims to make the Serbs accept by force BiH voted in the unconstitutional, binational

referendum and thus destroy the Republic of Srpska. This need is found also on the Croatian side, because they, too, were arming for the same reasons. Such situation could have resulted in nothing else but civil and inter-ethnic war. In such a war (as in any other war), each of the conflicting parties normally tends to defeat the enemy, because that is a *conditio sine qua non* for its survival. And one more proof that the war was indeed such is given through several parts of the judgment of the Trial Chamber in the Prosecutor vs. Radoslav Brdjanin, which we shall quote below. Thus, in paragraphs 103 and 104 of the judgment the following is said (our emphasis in the quote):

"103. An armed attack on Bosanska Krupa took place on 21st April 1992, after the negotiations between members of the SDS and the civil authorities which were held in Bosanska Krupa failed. Previously, the Bosnian Serbs authorities from Jasenice sent an ultimatum to all non-Serbs that they had to remove all barricades which were set up when they heard that the Bosnian Serbs were going to attack the city, and that citizens had to leave the left bank of the river Una. Until that moment, nearly all Bosnian Serbs who lived there have been already gone. *In April 1992 the Bosnian Muslims tried to improvise a defense of the city with the help of automatic and semi-automatic rifles and some hand grenades*, but - after the Bosnian Serbs bombarded it – the Bosnian Serbs infantry entered the town. The armed attack lasted until 25th April 1992.

104. On 30th April 1992, in the municipality of Prijedor, the army and the police physically took control over the city hall and other vital facilities in the city. Between May and July of 1992 the areas and villages predominantly inhabited by Bosnian Muslims and Bosnian Croats - Hambarine, Kozarac, Kamicani, Biscani, Carakovo, Brisevo and Ljubija – *were attacked by the Bosnian Serbs army together with the police and the paramilitary groups. These attacks mostly started after the expiry of the deadline in which the non-Serbs should have surrendered their weapons*. Sometimes *an incident caused by the non-Serbs* would have been used as an excuse for the attack. *The attacks were carried out by merciless shelling with heavy weapons*. The targets were also the indiscriminately shelled houses in the Muslim villages and settlements, which led to significant destruction and civilian victims. Many survivors run away from their villages and sought shelter in the nearby forests. After the shelling, the armed soldiers entered the villages, plundered and torched houses, and expelled or killed some of the villagers who remained in the villages. In some situations, women were raped. *The Bosnian Muslims and the Bosnian Croats from Prijedor municipality failed to provide effective*

resistance to such attacks. They were not organized well enough and did not have enough weapons to confront the attackers."

From the paragraph 103 of the judgment it can clearly be concluded that the Muslims of Bosanska Krupa obtained the weapons, which indicated their intention to take over and hold power in the city. So, not only local Serbs obtained weapons but the Muslims in that area did the same. In such a conflict, each party tends to defeat the other one. The same can also be observed in the case of the municipality of Prijedor. It is indicative that in paragraph 104 of the judgment of the Tribunal there are several parts that talk about *the attacks* performed by the Serbian army. This suggests that on the opposite (Muslim) side there existed an organized armed resistance, especially since, as the Tribunal itself points out, "... *These attacks mostly started after the expiry of the deadline in which the non-Serbs should have surrendered their weapons.*" Even more indicative is the fact that the Tribunal, at the end of paragraph 104, besides eliciting its observation according to which "*The Bosnian Muslims and Bosnian Croats from Prijedor municipality failed to provide effective resistance to such attacks.*", but in a certain way it also expresses its regret due to such state of the Muslims and Croats: "*They were not sufficiently well organized and did not have enough weapons to confront the attackers.*" In this way the Tribunal itself confirms not only the existence of hate, which at that time escalated into an armed conflict, but it also indirectly expresses its (biased) attitude (or rather its regret) that the Muslims and Croats would not have been militarily defeated by the Serbs if they had been better organized (better than the Serbs) and if they had obtained more weapons.

The same conclusion can be made on the basis of the paragraph 108 of the judgment, which states the following (our emphasis in the quote):

"108. The events *in the municipality Kljuc are characterized by more effective resistance of the Bosnian Muslims.* When the Bosnian Serbs captured the city of Kljuc the Bosnian Muslims who were resisting, retreated to the Muslim village Pudín Han. On 27th May, 1992, the Muslim soldiers attacked a military convoy of the Bosnian Serbs near Pudín Han. On the same day the deputy commander of the SJB Kljuc, Dusan Stojakovic, was killed. The next day the Crisis Staff of Kljuc issued an *ultimatum* to the Bosnian Muslims to surrender their weapons, Prior to the expiration of the ultimatum the Bosnian Serbs army started *shelling* Pudín Han, and after that Velagici, Prhovo and other *villages* of the Bosnian Muslims in the municipality of Kljuc. The result of this attack was the death of

many inhabitants of Pudín-Han and Prhovo. The next day the murders continued, and most of *those killed* were on their way to Peci and in school in Velagici."

From this quote it is also obvious that in the said municipality not only Serbs obtained weapons and militarily organized for the war, but the same was done by the Muslims, who, as the Tribunal itself admits, provided an *effective resistance*. The Muslim *soldiers* then withdrew to the village Pudín Han. In this regard, we must not forget that the Tribunal in the above quote says that the Serbian army *shelled* that and other Muslim villages, but it does not say (and it should, because that is the task of any court in such situations) why these villages *were shelled* and what kind of the armed resistance was provided from them, although it is clear that it was *a strong armed resistance* since the shelling followed. Not wanting to say this, the Tribunal after that does not either want to say anything about whether many killed *inhabitants* were soldiers or civilians, although from all aforementioned it is clear that they were the Muslim soldiers, not civilians.

The foregoing considerations indicate that it was an armed conflict between the organized military formations (Serbian and Muslim) in the whole area referred to in the judgment of the Trial Chamber of the Court of BiH in the case of the Prosecutor vs. Ratko Dronjak. In other words, these were not the attacks performed by military forces aimed at defenseless civilian population. Therefore, in the absence of such an attack we cannot speak (on legally justified basis) about a widespread and systematic attack against the Muslim civilian population, and especially not about the Republic of Srpska (its army and police) having planned and carried out such an attack.

In situations when there are everyday armed conflicts all over a wide area it is quite natural to disarm the people who are against the state, because, as such, these individuals represent a danger to it. In other words, the disarmament of such persons simply must be done, because there is no state, particularly the one in the process of establishing, if it wants to survive, that would allow to have in its territory the armed persons, and formations such persons created, and whose existence endangers the state. If it fails to do so, the state shall bring its survival into question. The same is true for employees, especially those in the military, other state agencies and companies of great importance for the state, if they are opposed to this country, since there is no other way to ensure proper and effective functioning of these systems and prevent possible sabotage in moments crucial for the defense and survival of the state.

Thus, the reasons that we have previously presented indicate the legal groundlessness of the claims made by the Tribunal in the judgment of the Prosecutor vs. Brdjanin about the alleged "strategic plan of the Serbs leadership in BiH". As such plan had not existed, it is logical that the Hague Tribunal had to say that such a plan *implied* (or from it could be derived) the creation of the Serbs state (the Republic of Srpska) by the use of fear and force in order to permanently remove the non-Serbs from the territory of that State. Specifically, since being unable to determine and provide legally valid evidence for the existence of such a plan (the existence of something that does not exist cannot be proved), then it is not surprising that the Tribunal, due to this lack, had to use the construction of the *implied* use of force and fear, i.e. the construction according to which, as stated in paragraph 77 of the judgment of the Trial Chamber of 1st September 2004, in the case of the Prosecutor vs. Radoslav Brdjanin (our emphasis in the quotation) "... *the first strategic objective* entailed the permanent removal of a significant portion of the non-Serb population from the territory of an imaginary Bosnian Serb state." Such constructions are usually used to when we know that something does not exist (or it has never happened), but it must be said it had existed due to someone's needs, to which particularly prone are the holders of power and force whose understanding of the law lies in the mace.

However, despite this, the Court of BiH accepts such views of the Hague Tribunal, taking them over as a kind of canons on these matters in its judgment of 1st June 2012. Therefore, this was the way in which the Court of BiH in that judgment "determined" the existence of the alleged widespread and systematic attack of the Army and Police of the Republic of Srpska against civilians in the said area, in which way it also adjudicated the Republic of Srpska.

In this direction also go the "arguments" which the Court of BiH used to "explain" its claim according to which crimes against humanity (as contained in the Article 172 of the CC BiH) were prescribed during the war in BiH. For this purpose, the Court of BiH in its verdict in the trial of 1st June 2012, refers to the principles and practices. Below we will quote parts of that judgment which are relevant to this issue:

„136. The Court points out that the criminal offense for which the accused is found guilty constitute crimes under customary international law and therefore can be treated in accordance with the "*general principles of international law*" stipulated under the Article 4a. of the Law on Amendments to the Criminal Code of BiH, and the "*general principles of law recognized by civilized nations*" prescribed by paragraph 2 of the Article 7 of

the European Convention. Following the above reasons, the CC BiH can be applied in this case. ...

138. Finally, when it comes to the application of the CC BiH, particularly a provision of the Article 172 (crimes against humanity) it should be pointed to the decision of the European Court of Human Rights in case no. 51552/10 (Boban Simsic against Bosnia and Herzegovina), which states how bearing in mind the terrible, illegal nature of ... offenses which include murder and torture of Bosniaks in the context of a widespread and systematic attack against the Bosniak civilians even a hasty response would imply that the acts are risky containing a crime against humanity the reasons due to which the appeal of convicted Boban Simsic was rejected as obviously unfounded.

148. Similarly, the customary status of criminal responsibility for crimes against humanity and individual responsibility for war crimes committed in 1992 was confirmed by the Secretary General of the UN, the International Law Commission, as well as the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).

149. These institutions have established that criminal responsibility for crimes against humanity represent an imperative norm of international law, i.e. *ius cogens*. Therefore, it seems indisputable that crimes against humanity and war crimes against the civilian population in 1992 were part of international customary law. This conclusion was confirmed by the Study on Customary International Humanitarian Law made by the International Committee of the Red Cross. According to that Study "serious violations of international humanitarian law represent war crimes" (Rule 156), "individuals are responsible for war crimes they commit" (Rule 151) and "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if necessary, they must prosecute the suspects. They must also investigate other war crimes within its jurisdiction and, if necessary, prosecute the suspects "(Rule 158)."

Therefore, this is the source from which the Court of BiH concluded that an offense crimes against humanity (as contained in the Article 172 of the CC BiH) was prescribed during the war in BiH. To highlight the legal groundlessness of this conclusion it is necessary to analyze several claims presented by the Court of BiH in the above quote. In this analysis, we shall start with the statement that "the customary status of criminal responsibility for crimes against humanity was confirmed by the Secretary General of the UN, the International Law Commission, as well as the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)."

When presenting this claim the Court of BiH disregards the fundamental question important for this incrimination, and that is the question regarding the content of its being. Until the Rome Statute of the International Criminal Court became effective crimes against humanity in its being did not contain elements of a widespread and systematic attack against the civilian population and the knowledge of the perpetrator of that offense for the existence of such an attack. How important these elements are can be explained by the fact that, for the purpose of explaining them, it was necessary to determine the meaning of the notion attack directed against a civilian population, which is finally done in the Elements of Crimes adopted pursuant to the Article 9 of the Rome Statute, which (these elements) entered into force on 9th September 2002. When this is taken into account, it is obvious that neither the Secretary General of the UN, nor the International Law Commission or the Tribunal in The Hague and the International Criminal Tribunal for Rwanda, could not determine nor they have determined, to use the terminology of the Court, "the customary status of the criminal responsibility for crimes against humanity. "When saying this, the Court of BiH means that the aforementioned institutions have determined the customary status of not only crimes against humanity, as incrimination, but the widespread and systematic attack against civilian population also, and the knowledge of the perpetrator of that offense for the existence of such an attack, as elements contained within the being of this crime. However, such an assertion is invalid, because the Court of BiH does not care about (and it should have) the fact stating that it is not disputable that crimes against humanity in its being did not contain the elements listed until the Rome Statute of the International Criminal Court entered into force.

The following statement of the Court of BiH is the one according to which crimes against humanity are "criminal acts according to the customary international law". This statement does not contain anything that is originally created by the Court of BiH. Instead, at this point the Court of BiH essentially repeats what is presented by the Hague Tribunal, in the judgment of the Trial Chamber on 7th May 1997 in the case of the Prosecutor vs. Dusko Tadic (paragraphs 622 and 623 of this judgment), as well as in the decision of this Tribunal on interlocutory appeal in the same case (decision of 2nd October 1995, paragraphs 138-142). Following the reasoning of the Tribunal in the Hague, the Court of BiH makes the same mistake as the Tribunal. Namely, by expressing its claim that crimes against humanity "are crimes under customary international law" the Hague Tribunal in the mentioned decisions did not take into account the fact that a widespread and systematic attack against civilians and the knowledge of the perpetrator of the act for the existence of such an attack, did not exist as the elements of

the being of this crime at the time when the Tribunal issued the mentioned two decisions in the *Tadic* case, because these elements became part of the being of this offense only after coming into force of the Rome Statute of the International Criminal Court in 2002. In addition, referring to customary practices very often, particularly by the Court of BiH, points to another deficit of its decisions. In fact, as we have just seen the Court of BiH, in this regard, in its judgment only asserted "... that the offenses for which the defendant was found guilty represent crimes under customary international law", but then failed to give any reasons on how that Court determined the existence of customs whose application it pleaded in its judgment. Regarding this, it should be recalled that the literature from the Anglo-Saxon legal climate indicates that during examining whether there is a certain custom it is necessary to determine the following:

1. that the custom exists continuously for a long time;
2. that it exists more by common agreement than the use of force;
3. that it must be consistent to other customs;
4. that it must contain a certainty;
5. that it must be accepted as compulsory;
6. to be of significant importance;
7. it must be a reasonable custom.¹²

In considering the question that is the subject of this paper of particular importance are the elements under 4 and 5. The first of them shows that the custom must contain *a certainty*, while the next one says that the custom should be adopted as compulsory. This is indicated because the Court of BiH, and initially the Hague Tribunal, fail to deal with this incrimination in its decisions, in a manner that is certain, by identifying the elements of which the being of incrimination crimes against humanity has been made before and after the entry into force of the Rome Statute of the International Criminal Court. If having done so, they would have determined that prior to the entry into force of the Rome Statute there was no international legal practice (nor international legal rules) by which this incrimination in its being contained a widespread and systematic attack against the civilian population and the knowledge of the perpetrator of the acts for the existence of such an attack. In the absence of such practices, specifying the elements that are an indispensable part of certainty of customs, it is futile to continue to explore whether such a practice was adopted as required. That will happen only after coming into force of the Rome Statute, and that statute is not

¹² Mary Ann Glendon, Michael W. Gordon, Paolo G. Carozza: *Comparative Legal Traditions*, second edition, St. Paul, Minn, 1999, p. 270

international custom but international legal treaty as a source of international law and, consequently, international criminal law. As a result, the reference of the Court of BiH to the decision of the European Court of Human Rights in the case no. 51552/10 (Boban Simsic against Bosnia and Herzegovina) is also groundless, since the Court in the aforesaid decision only presents legally unfounded claim that this act during the last war in BiH *in the form* prescribed in the Article 172 of the Criminal Code of BiH constituted a crime against humanity. The groundlessness of this claim lies in the fact that this incrimination, *in the form prescribed by the Criminal Code of BiH*, shall have arisen only after the end of the war, first by adopting the Rome Statute of the International Criminal Court, from which it is then transferred to the Criminal Code of BiH. Therefore we cannot say that the claim by the European Court of Human Rights in the same case is legally founded. According to it the acts of the applicants, at the time when they were committed, represented, as that Court arbitrarily claimed, "... an offense defined with sufficient accessibility and foreseeability according to the international law".

The statement of the Court of BiH, rather its reference to the Study on Customary International Humanitarian Law made by the International Committee of the Red Cross does not deserve any serious criticism. This is due to the fact that the mentioned Court only cited the content of the rules 151, 156 and 158 from the above Study, and that content has nothing to do with the essential issue we deal with in this paper, that is with the question whether a widespread and systematic attack against the civilian population and knowledge of the perpetrator for such an attack were the elements of crimes against humanity during the war in BiH.

Finally, the referring of the Court of BiH to the principles of international law cannot withstand serious criticism. This is due to the fact that legal principles, including the principles of international law, do not contain any details nor can contain them. Namely, the nature of the legal principles does not imply any detailing, and if it would, then the legal principles would transform into legal norms. This is indicated since the determination of a being of any crime is done primarily through detailing (by the detailed description of the elements of the being), not by legal principles, as otherwise the principle of legality would be perturbed, precisely one element of that principle called *lex certa*. When this is taken into account, it is not surprising then that the Court of BiH nor the Hague Tribunal in their judgments, could not have mentioned any specific legal principle from which it could have been concluded that the widespread and systematic attack against the civilian population and the knowledge of the perpetrator of such attack had been the elements of crimes against humanity during the war in BiH. They

could not have done so due to the fact that such a legal principle (with such content) simply does not exist.

II.2. Second-instance judgment of the Court of BiH No. S1 1 K 003420 12 Krz 7 of 21st February 2013

This judgment of the Appellate Division of the Court of BiH (as the second instance) has modified the first-instance judgment of 1st June, 2012, in a way that the accused Ratko Dronjak was found guilty of the persecution as a form of execution in which way he committed the criminal offense of crimes against humanity under the Article 172 of the Criminal Code of BiH. After that, by the second-instance verdict for that crime he was sentenced to imprisonment for ten years, which is three years more severe punishment than a prison sentence that was determined for him in the first-instance verdict.

With regards to the topic we are dealing with, a discussion on this second-instance judgment will not be long. The reason for this is to be found in the fact that this judgment only confirmed all unconstitutional understandings of retroactive implementation of incrimination crimes against humanity under the Article 172 of the Criminal Code of BiH, presented in the first-instance judgment of 1st June 2012. This was done in a way that we shall literally transmit below. So, the second-instance judgment of 21st February 2013 in connection with an alleged widespread and systematic attack directed against a civilian population says the following:

"37. The question of the existence of a widespread and systematic attack directed against a civilian population in the territory of ARK has been properly observed by the Trial Chamber within the general factual framework, within the events which are tied to the implementation of the strategic plan of the Bosnian Serbs, with the ultimate goal to create a separate Bosnian Serb state from which most of non-Serbs will be permanently removed...".

As we can see, it is again about the claims that are not argued nor supported by legally valid evidence. Namely, just like the first-instance judgment from 1st June 2012, the second-instance judgment also lacks arguments for the claim of the existence of the Strategic Plan of the Republic of Srpska leadership, and the proofs of it. For example, there are no explanations for the persons (by name, nor by their function) from the Republic of Srpska leadership who, according to the Court of BiH, conceived such

alleged plan, what part of the alleged plan was directed towards the area to which those two judgments refer, etc. Instead, there are only sheer assertions, based on which the conclusions are then made on the existence of the alleged widespread and systematic attack of the Army and Police of the Republic of Srpska against the civilian non-Serb population.

Regarding the application of crimes against humanity under the Article 172 of the Criminal Code of BiH, the second-instance judgment states the following:

"82. When it comes to crimes against humanity, the Appellate Division's conclusion is that the Trial Chamber properly applied the CC of BiH.

83. Namely, the Trial Chamber correctly pointed out that the derogation from the principle of time constraints regarding the criminal law is exactly the case in relation to crimes against humanity under the Article 172 of the CC of BiH where the Article 4a) of the CC BiH should be applied. In fact, it is a criminal offense which, as such, was not prescribed by the criminal law that was in effect at the time of the offense (SFRY Criminal Code). However, since we here talk about incrimination that includes violation of international law, and these are the acts which have generated the essential elements of the being of the crime against humanity under the Article 172, paragraph (1) of the CC BiH, in which way the conditions from the Article 4a. CC BiH were met

84. The Trial Chamber gave detailed and thorough arguments which showed that the crimes against humanity during the relevant period were part of customary international law, which is evaluated as completely valid and correct by the Appellate Division, and accepted in whole by this Chamber."

At the end of this section, having in mind that these attitudes have already been criticized at the appropriate places in the paper, here we will present some less known details. They are not related to the judgment only, but also to one of the judges who participated in making it. Namely, the quoted as well as other words in the second-instance judgment of 21st February 2013, are written by a member of the Appeals Chamber, the judge Mirko Bozovic (as judge rapporteur). In the biography of this judge, available on the website of the Court of BiH, among other things, it is said that he was born in 1950 in Precani, Trnovo municipality, *and that he was appointed a judge of the Municipal Court in Sarajevo, named then-Serbian Sarajevo, on 30th October 1992, and that from August 1995 he also held the position of the President of the Court for two terms.* So, this man was a judge of the Republic of Srpska during the war, which means that he was a

judge in that, as he called it now "a separate state of Bosnian Serbs from which, as the ultimate goal of the implementation of the strategic plan of the Bosnian Serbs leadership ..." (leadership which, among other things, appointed him a judge, and then the President of the Court in then-Serbian Sarajevo) "...most non-Serb will permanently be removed."

The foregoing can be observed not only with this judges, but also, for example, the judge Ljubomir Kitic. Specifically, this judge was a member of the Trial Chamber which rendered the first-instance judgment of 1st June 2012, while as a single judge rendered a verdict number X-KR-10/928 of 19th July 2010. In the pronouncement of the judgment of 19th July 2010, inter alia, he states the following:

“...that the members of ARS and the Ministry of Internal Affairs of the Republic of Srpska (MIA RS) conducted a widespread and systematic attack against the Bosniak civilian population from the UN safe area of Srebrenica, *the attack that was in accordance with state or organizational policy and aimed at the implementation of those policies...*”.

During the war in Bosnia the judge Ljubomir Kitic worked as a judge of the Military Court in Bijeljina, that is the judge at one of the military courts of the Republic of Srpska, about which later, as a judge of the Court of BiH, says that *its state and organizational policy*" involved a widespread and systematic attack against the Bosniak civilian population from the UN safe area of Srebrenica."

We presented the above observations without any intention to offend or belittle any of these judges. Simply, we wanted to reveal certain facts. What we said should not be understood as if we were referring that these judges, due to their belonging to a particular nation, should favour that nation in their judgments. Such behavior would be unacceptable, because every judge should judge only on the basis of facts and law.

III. The decision of the Constitutional Court of Bosnia and Herzegovina No. AP 3280/13 of 7th October 2014

When it comes to this decision of the Constitutional Court of Bosnia and Herzegovina, we shall keep our exposure regarding it short. As in the case of the second-instance judgment of the Court of BiH of 21st February 2013, the reason for this is to be found in the fact that the above mentioned decision only confirmed all unconstitutional understandings of retroactive implementation of the incrimination crimes against humanity under the Ar-

ticle 172 of the Criminal Code of BiH, expressed in the previously analyzed judgments of the Court of BiH. In the said decision the Constitutional Court of BiH first refers to its decision no. AP 2789/08 of 28th March 2014, after which it states:

"In the aforementioned decision, among other things, it is emphasized that the European Court in the decision *Šimšić against Bosnia and Herzegovina* found irrelevant the fact that crimes against humanity had not constituted a criminal offense under the national law during the war in the period 1992-1995, considering the fact that these acts at the time of commitment constituted a crime under the international law.

53. By putting the mentioned principles in connection with a specific case, the Constitutional Court observes that the appellant for the actions described in Sections I to III (1-4), based on a detailed analysis of the evidence presented, was found guilty in the relevant period of the act of crimes against humanity (by persecution) under the Article 172, paragraph 1, item h) of CC of BiH. In fact, both Chambers of the Court of BiH accepted the fact that a criminal act of war crime against humanity is a criminal offense under the customary international law, and that it is regulated by the general principles of international law provided by the provision of the Article 4a of the Law on Amendments to the CC of BiH, whereby the Court of BiH was referring to the practice of the European Court regarding the case *Šimšić against Bosnia and Herzegovina* in which the European Court had to discuss similar factual and legal issue. Based on everything aforementioned, the Court of BiH concluded that the criminal act of crimes against humanity in 1992 constituted part of customary international law and that its legal formalization within the framework of national legislation through the CC of BiH and the implementation of the said law in the circumstances of the present case did not constitute a violation of the rights guaranteed by the European Convention. Thus, from the reasoning of the contested judgments it is clear that the offense of war crimes against humanity represents an incrimination which includes a violation of international law, which is clearly and thoroughly explained, and finally, which fully correspond with the jurisprudence of the European Court and the Constitutional Court in cases due to which the identical legal issues were initiated. Therefore, the Constitutional Court in the circumstances of the case does not see any reason to express a different view in the present case, and, accordingly, the Constitutional Court considers that the application of substantive law, in particular the CC of BiH, in relation to a crime against humanity, was in line with guarantees provided by the Article 6, paragraph 1 of the European Convention."

Thus, the Constitutional Court of BiH, as it was first done by the Court of BiH in this case, just brings unfounded and unproven assertions whose essence comes down to the fact that crimes against humanity (Article 172 of the Criminal Code of BiH), " in 1992 represented part of customary international law ", i.e. " that they are under the general principles of international law taken into account by the provision of the Article 4a of the Law on Amendments to the CC of BiH". Unfortunately, this Court, as the highest authority when it comes to appellate proceedings, misses the essence of the problem. The question is not whether this incrimination was part of international law, but whether it was in force during the war in BiH containing all the elements of the being of that offense defined in the Article 172 of the Criminal Code of BiH. In other words, one question is whether the incrimination crimes against humanity was part of international law. When answering this question it cannot be denied that this incrimination is part of that law, but not of the customary international law nor of some principle of international law. Instead, it is part of international law, since it is prescribed by the Nuremberg Tribunal Statute, the Statute of the International Military Tribunal for the Far East and the Principles of International Criminal Law adopted by the General Assembly of the United Nations, and these acts are neither customs nor the principles of international law. However, none of these international legal acts, nor the Statute of the Tribunal in the Hague, in the being of this crime prescribed as its elements a widespread and systematic attack directed against a civilian population and knowledge of the perpetrator of such an offense for such an attack. This is precisely the essence of the problem we are dealing with in this paper. Therefore, the mentioned elements became part of this incrimination in 2002, when the Rome Statute of the International Criminal Court entered into force, which represents the moment when this incrimination was essentially given different content in terms of quality. That is why in such state of affairs we cannot, in legally valid¹³ manner, accuse and condemn individuals for the incrimination under the Article 172 of the Criminal Code of BiH, when it and its being as defined by that article simply did not exist at the time of the past war in BiH.

IV. Concluding remarks

In this part of the paper we shall focus our attention on an issue that can be formulated in the following way: what is the legal tool to fight against those who committed crimes against the civilian population in the

¹³ From the aspect of achieving the principle of legality, and especially its element called *lex certa*.

past war in BiH, considering that the previous exposure showed that it cannot be considered incrimination crimes against humanity?

The answer to this question requires to remind on the Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY). This article had already been noticed by the Court of BiH and the Constitutional Court of BiH in, *for example*, decision number X-KRŽ-05/04 of August 7th 2007 of the Court of BiH, i.e. in the case no. AP 3620/07 of the Constitutional court of BiH. Namely, both, the Court of BiH and the Constitutional Court of BiH observed that "*... one should not ignore the fact that the criminal acts enumerated in the Article 172 of the Criminal Code of BiH can be found in the law that was in force at the relevant time (Criminal Code of SFRY), i.e. that the acts of the accusation were punishable under the then applicable criminal law*". Here we repeated the quote from the second-instance verdict of the Court of BiH, number X-KRZ-05/04 of August 7th 2007 (para. 41 of the verdict). This is also stated by the Constitutional Court of BiH in its decision regarding the appeal against the mentioned second-instance verdict of the Court of BiH, when on p.6 of the decision of April 14th 2010 in the case no. AP 3620/07 it says: "In this sense, the Appellate Division of the Court of BiH pointed to the fact that the acts enumerated in the Article 172 of the Criminal Code of BiH were punishable under the Criminal Code of SFRY, which was in force at the time of committing the crime".

So, when, as in the case of the Court of BiH no. X-KRŽ-05/04, by the second-instance judgment of August 7th 2007 the defendant is found guilty of participating in June 1992 "*... in the group with more members of the military and police armed with rifles in the attack against the village Kuka in the municipality of Višegrad, arresting and the illegal imprisonment of dozens of Bosniak civilians* ", then in that case there exists an indiscriminate attack that affects the civilian population *as a war crime against civilians*, and not the crime against humanity that was not determined as a criminal offense at the specified time (June 1992). Or, when in the case of the Court of BiH no. X-KR-08/549-2 of September 10th 2009, the indictment charged the accused with having participated in the actions: "*... a) depriving another person of his life (murder), d) deportation or forcible transfer of population, e) imprisonment or other severe deprivation of physical liberty opposite to the fundamental rules of international law k) other inhumane acts of a similar character, done intentionally so to cause great suffering or serious physical or psychological injury or damage to health*", then these actions, if proven, are related to death (under item a), displacement or relocation of population (under item d), unlawful confinement (under item e), that is killings, torture, inhumane treatment or

intimidation and terror conducted against the civilian population (under paragraph k), as acts of war crimes committed against the civilian population, and not a crime against humanity.

Therefore, if everything just quoted is a fact, and it is, then the actions of Prosecution of BiH and the Courts mentioned are troublesome because, despite all this, they do not accuse, and do not find the accused guilty of the criminal offense of war crimes against civilians under the Article 142 of the SFRY Criminal Code, although these crimes exactly were prescribed at the time such acts were being committed during the war in Bosnia, and not incrimination crimes against humanity.

At the end of this paper we would like to point out that the proceeding of the Court of BiH, which we discussed here, has already resulted in a large number of judgments in which in legally invalid way, even the Republic of Srpska was judged and adjudicated for the mentioned incrimination, *without being allowed to defend itself against such alleged accusations*. All of this can ultimately lead to very serious consequences for the Republic of Srpska, which go beyond the scope of criminal law and enter the field of constitutional law. How? Well, simply by the fact that the forces wishing the disappearance of the Republic of Srpska, which would like to make this happen through the legal system (without getting their hands dirty),¹⁴ shall extensively use the above judgments, as well as other judgments made in the practice of the Court of BiH, Constitutional court of BiH and the Hague Tribunal, in order to "prove" their opinion that the Republic of Srpska should not continue to exist because in their view it is criminal and as such cannot represent the constitutional structure of the state regulation of any state.

That is why we wanted to prove in this paper that there is neither legal nor moral ground for such claims, as well as that this should be fought against and that it is worth of that fight.

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¹⁴ Although these forces, if unable to do it in this way, shall not hesitate to use the military force to make the Republic of Srpska disappear at the convenient time.

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