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The violations of international humanitarian law against the persons forcibly taken from the Vukovar hospital and murdered at Ovčara

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Abstract

This article contains the analysis of the violations of international law against the persons forcibly taken from the Vukovar hospital after the fall of the city in 1991. It starts from the findings of the historians of the Croatian Homeland War concerning the changes of structure of the Yugoslav National Army (JNA) during the process of dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), then of forces attacking Vukovar, and of the hidden role of the Republic of Serbia (Serbia). With a view to international law, the author analyses the negotiations that should have resulted with the evacuation of the wounded and sick from the Hospital. The analysis also covers the JNA's acts that led to the atrocity at Ovčara. Based on insights into the documentation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the "Vukovar Hospital" case, and available sources from the trials conducted in Belgrade against the immediate executors, the attitudes towards the legal qualification of the armed conflict have been examined, as well as of the victims and of the criminal offences against them. All of that is observed in relation to the Geneva Conventions of 1949, the Additional Protocols of 1977, international customary law, the Statute of the ICTY and the opinions of the selected Croatian and foreign legal writers, including some Yugoslav, as well as some contemporary Serbian legal writers. The conclusion is that both the ICTY and Serbia were not ready to admit the existence (at least as of 8 October 1991) of the international armed conflict. If they did, it would have led to application of a larger body of rules of international treaty

law regarding the variety of victims and, consequently, to more severe punishments for the perpetrators. Instead, the status of persons murdered at Ovčara had not been examined sufficiently, as not all of them were pure Croatian soldiers who became the prisoners of war, as some of them were also hors de combat or even wounded and sick civilians, or medical staff and other Hospital employees, or vulnerable civilians who were entitled to additional protection. Finally, there is a conclusion that the court trials, despite of perennial length and a few final convictions, brought neither the complete establishment of the facts nor sufficiently comprehensive criminal responsibility. Thus, neither satisfaction of international criminal justice nor sufficient contribution to peace and reconciliation process were achieved.

Keywords

Vukovar, hospital, Ovčara, JNA, ICTY, Geneva Conventions.

Introduction

The law of international armed conflict protects certain categories of persons, locations, and objects. It also forbids certain methods and means of warfare. It is not an aggregate of unfeasible rules that impose something impossible on the parties in conflict. It is rather a realistic compromise between the military necessity and the protection of participants of the armed conflict (Bakotić, 1997). Especially, it protects persons who do not participate or no longer take part in combat, such as civilians, the wounded and sick, the prisoners of war, the shipwrecked, the medical and religious staff, etc. It protects them by obligating the parties in conflict to treat them humanely and without discrimination. The wounded and sick must receive an adequate care, while prisoners of war must be given accommodation, food, and legal certainty. At all times the violence is forbidden against life, health and physical as well as mental state of those persons. Also, attacks on their personal dignity, their collective punishing, taking hostages or threats by such acts are forbidden, too (ICRC, 1999).

The Socialist Federal Republic of Yugoslavia (SFRY) ratified the Geneva Conventions of 1949 and Additional Protocols of 1977 on 21 April 1950 and 11 June 1979 respectively. Those Conventions and Protocols were the

first international treaties that Republic of Croatia (Croatia) acceded to by submitting the notification of succession, with effect as of 8 October 1991. With that day Croatia broke up all its state and legal ties with other republics and provinces of the SFRY. Such normative priority was an immediate consequence of tragic circumstances through which Croatia had to gain its independence. It was "a situation which had been imposed on Croatia against its will, within the fulfillment of the Great Serbia expansionist politics which resulted in aggression and armed conflict interwoven with countless violations of international humanitarian law, including a series of genocidal acts, all of that under the uttermost ineffectiveness of the international community mechanisms" (Bakotić, 1997, p. VII). The massacre of the Croatian policemen in Borovo Selo at the beginning of May 1991 was a clear indication of the upcoming grave crimes.

The aggressor's attitude towards the international law of the armed conflict and international humanitarian law in the years preceding the aggression can be found in the edition of the Military Publishing and Newspaper Center from Belgrade in 1986. It was the book entitled „The International Law of Armed Conflict", written by Professor Gavro Đ. Perazić, LL.D. The multi-member Editorial Bord was consisted of twelve generals of the Yugoslav National Army (JNA), including Lieutenant General Veljko Kadijević. Inter alia, Perazić wrote: „The wounded and the sick enjoy the protection in every occasion. However, when such persons are members of the armed forces and become captured, they become prisoners of war and enjoy special protection. They must be treated humanely and are entitled to particular care and medical treatment without any racial, religious, or ethnical discrimination. It is strictly prohibited to kill, exterminate and torture them …" (Perazić, 1986, p. 201).

With respect to the events that happened after the fall of Vukovar, which are in the focus of this analysis, we find appropriate at this point to recall the words of the former Chief Prosecutor of the ICTY, Carla del Ponte. She wrote that Serbian aircrafts, artillery, and tanks leveled Vukovar to the ground, turning it into the ruins and dust. She added that Serbian firing squads killed hundreds of prisoners of war, including the wounded taken from the city Hospital. It was her perception that far away from Vukovar many

Serbs were bewildered and convinced that the whole world had teamed against them. Additionally, Carla del Ponte stated that unfortunately some Serbs, including some of the Serbian leaders, even long after the war kept demonstrating self-pity (Del Ponte, 2008). Hence, there had been a serious discrepancy between the principles and rules proclaimed and taught by Professor Perazić and the JNA generals, who were at the same time proudly evoking the bright tradition of both appropriate rules and behavior of the Yugoslav partisan units during World War II (Perazić, 1986).

The Forces Attacking Vukovar

With a view to Croatia, Vukovar was one of the most important objectives of the aggressive Yugoslav and Serbian politics. In our opinion, it is in the best interest of understanding the complex relationship between the Yugoslav and the Serbian authorities with the JNA, to quote the historian Davor Marijan: „The Army did not initiate the war but did enable it by its active siding with Serbia. Namely, when Slobodan Milošević was threatening with war, it used to be received by neighboring republics with more or less respect, but it was only when the Army adopted his vision of Yugoslavia when his threats amounted to the real scale. Milošević could not materialize his threats from Gazimestan without the active support of the JNA." (Marijan, 2006, p. 41-42). In relation to that, we also find beneficial to mention the standpoint of the lawyer and publicist Tomislav Jonjić, who suggests that simple statement that the atrocities in Vukovar were committed by the JNA and the Chetnik units would mean an unfounded exculpation of the SFRY and Serbia (Jonjić, 2013).

When attacking Vukovar, the JNA was joined by the local Serb population, various volunteering units, even paramilitary forces affiliated with some political parties, as well as members of the Territorial Defense (TO) of Serbia and the Ministry of Interior (MUP) of Serbia. Even before the war, the JNA and the TO together formed the united armed forces of SFRY. With respect to volunteering and paramilitary units Marijan draws attention to the special Instruction which equalized the rights of volunteers with those of the JNA's active personnel and reservists. Marijan also points to the Order by which

the JNA adopted the so-called Territorial Defense of the Autonomous District of Krajina as its own combat component (Marijan, 2001). All that was happening within the process of dissolution of the SFRY, primarily because of the diminishing conscript manpower of the JNA, the loss of the mobilization potential and the poor turnout of reservists. With regard to such unification of the forces, Marijan concludes: „The common objective, the Greater Serbia erased the differences between their ideological convictions and political orientations" (Marijan, 2001, p. 307-308).

When it comes to the TO units that were attacking Vukovar, the differentiation should be made between the local Serb rebel forces who called themselves the TO, and the TO units of Serbia and of the Socialist Autonomous Province (SAP) of Vojvodina. Namely, back in 1968 the SFRY introduced the TO as a new component of its armed forces, which was organized, unlike the JNA, on republic and provincial level. It was then enacted that financing of the TO would be done through the budgets of the republics and the autonomous provinces (Marijan, 2001). That fact is very relevant when judging the role of Serbia in aggression on Croatia, no matter how persistently Serbia claims it had nothing to do with that aggression. The TO units of Serbia and Vojvodina that conducted operations in Vukovar area originated from many Serbian towns. According to Marijan, they were from Bečej, Kragujevac, Kikinda, Kraljevo, Kula, Leskovac, Niš, Požarevac, Senta, Sombor, Srbobran, Srijemska Mitrovica, Subotica, Šid, Užice, Valjevo, Vršac and Zaječar (Marijan, 2013). At the same time, the key positions on senior levels of the TO of the local Serb rebels were often filled with the employees and sometimes even officials of the Serbian state services (for example, Radovan Stojičić-Badža, the official of the State Security Service of Serbia).

It is also important to understand how some TO units, both of local Serbs and of Serbia, were manned and even financed, as well as inspired for their activities. For example, within the TO of Vukovar, which was subordinated to the JNA Command, there were even units closely affiliated to the Serbian Radical Party of Vojislav Šešelj, primarily through recruiting and financing. In fact, they were nothing more than the Chetnik groups (Marijan, 2013). While even the TO units of the local Serb rebels were de facto paramilitary structures, such expression was primarily used to mark the Serb forces

coming to Vukovar from other parts of Croatia, from Serbia and from Bosnia and Hercegovina. Some of them were Serbian Volunteering Guard (also known as „Tigers“) of Željko Ražnatović Arkan, then Dušan Silni Squad (mostly volunteers from Stara Pazova who were sympathizers of the Serbian National Renewal, led by Mirko Jović), the unit called The Montenegrin, from the area of Fruška Gora, etc. According to the Serbian sources, all those units together formed the so-called Police Brigade of the Ministry of Interior of Serbia (Marijan, 2013).

Obviously, there was an enormous diversity among the military and paramilitary structures attacking Vukovar, in terms of the ways of their founding, manning, and financing, as well as of their original ideological background and motives. As an illustration, according to the documents available to the ICTY, Lieutenant Colonel of the JNA, Milan Eremija wrote in October 1991 that, for some groups, „the basic motive is not the fight against the enemy but plundering the people's property and abuse of the innocent population of the Croatian ethnicity“ (Marijan, 2013, p. 38). Nevertheless, all of them were formally part of the JNA structure and under the command of the JNA's officers. However, regarding the obedience of international law during the hostilities in the area of Vukovar and elsewhere in Croatia, there was a huge deficit on the side of those military structures. The European Community Monitoring Mission (ECMM) was very much aware of that (see more in: Miškulin, 2010).

That came out in most drastic extent through the treatment of persons from the Vukovar hospital, in particular regarding the requirements that forces must be commanded by a person responsible for his subordinates and that operations must be conducted in accordance with the laws and customs of war. Hence, within the above-described processes and mechanisms of gathering a wide variety of forces into the JNA's structure, the JNA's senior command failed in ensuring the obedience of international humanitarian law in a manner consistent with the doctrine of Professor Gavro Đ. Perazić. Moreover, they fell short of the basic humanity. At the trial against the immediate executors of the atrocity at Ovčara, in Belgrade, the trial chamber's presiding judge Vesko Krstajić said upon delivering the judgment: “It is heroism to protect yourself from the enemy, but humanity is to protect the

others from yourself. You should consider this judgement as the judgement to your humanity." (HLC-RDC, 2005, p. 3). Hence, the above-described enlargement of the JNA forces fell short of measures to mitigate the highly problematic attitude towards the respect for international humanitarian law within various armed groups the JNA consisted of, which implies the large portion of responsibility on the part of the JNA's most senior command.

The Agreement on the humanitarian convoy to evacute the wounded and sick from the Vukovar hospital, signed between Croatia and the JNA on 18 November 1991

Vukovar had fallen into the siege at the beginning of October 1991. After a few unsuccessful attempts to break through by military means, the negotiations between the Croatian authorities and the JNA neither brought the establishment of free corridors. The intended purpose of such corridors was the evacuation of the wounded and the civilians from Vukovar (Granić, 2022). When chief JNA's negotiator, General Andrija Rašeta conducted consultations with Belgrade, the JNA's senior command and the Serbian president Milošević (sic!) declined (Granić, 2022). Finally, after a few days of the negotiations in Zagreb, the solution was reached on 18 November 1991. It was the Agreement on Humanitarian Convoy to Evacuate Wounded and Sick from Vukovar Hospital (the Agreement), signed under the auspices of the ECMM (The University of Edinburgh-Peace Agreements Database, 1990-2023).

Along with the representatives of Croatia, the JNA and the ECMM, the representatives of the International Committee of the Red Cross (ICRC), the Medécins Sans Frontières (MSF) and the Maltese Cross, also took part in the negotiations. The signatories were Andrija Hebrang, Andrija Rašeta and Georges-Marie Chenu. The focus was on the humanitarian convoy, while the Hospital was supposed to become a neutralized zone under the protection of the ICRC. The Vukovar hospital was all the time the civilian institution. It took care of the wounded enemy soldiers, too, so after the fall of Vukovar three wounded JNA soldiers were found there under the medical treatment. For the protection of the Hospital, Croatia and the JNA primarily agreed to

guarantee the ceasefire around the Hospital as well as along the evacuation route. Both sides were also responsible for the security from mines within the areas under their control. The route of the convoy was also agreed upon (Vukovar-Priljevo-Lužac-Bogdanovci-Marinci-Zidine), including the location of transfer of the evacuated persons (Zidine, at the crossroads to Henrikovci).

The JNA had to provide the „suitable military vehicles" for the transfer to Zidine, while Croatia had to provide the „suitable vehicles for the remainder of the journey". Both sides had to provide the „suitably equipped and manned ambulances for some 40 seriously ill and lorries or coaches as appropriate for the remaining 360 or so casualties of whom around a third will be stretcher cases" (sic!) (The University of Edinburgh-Peace Agreements Database, 1990-2023). The evacuation was supposed to include "all those wounded and sick undergoing medical treatment in Vukovar hospital who are judged by the authorities of the Hospital to be fit to make the journey" (The University of Edinburgh-Peace Agreements Database, 1990-2023). The Agreement did not provide for the evacuation of the Hospital staff or members of their families nor other persons (ICTY-Trial Chamber, 2007, para. 131). Both sides concurred to grant the opportunity to the ECMM to monitor the evacuation including the „full access to all elements of the evacuation", as well as to facilitate the involvement of the ICRC, the MSF and the Maltese Cross, as appropriate (The University of Edinburgh-Peace Agreements Database, 1990-2023). As far as the neutralization of the Hospital was concerned, Croatia and the JNA left to the ICRC to advise them of the required period of neutrality.

Although the Agreement did not refer to any rule of international law specifically, the above-quoted provisions show it in fact combined the rules of two Geneva Conventions of 1949 (the First, on protection of wounded and sick soldiers on land during war, and the Fourth, on protection of civilian persons in time of war), as all four Geneva Conventions of 1949 have a character of international customary law and oblige all parties in armed conflicts (Meron, 2017). Article 15, paragraph 3 of the First Convention provides that parties to the conflict may conclude „local arrangements for the removal or exchange of wounded and sick from a besieged or encircled area" (ICRC, 2016). Article 15 of the Fourth Convention sets out rules for the

establishment of „neutralized zone intended to shelter … the wounded and sick combatants or non-combatants". It is left to the parties to agree upon „the geographical position, administration, food supply and supervision of the proposed neutralized zone", followed by „a written agreement … signed by the representatives of the Parties to the conflict" (ICRC, 2016). It is also fair to conclude that the ICRC and the ECMM were in fact recognized by both parties as „impartial organization" that performed the humanitarian functions of „Protecting Power", as provided in Articles 8 and 10 of the First Convention (ICRC, 2016). In conclusion, it is clear that the parties to the Agreement actually leaned upon the legal grounds typical for international armed conflicts.

The events in the hospital and the JNA's obstructions of the implementation of the Agreement on evacuation of the wounded and sick

At the time of the fall of Vukovar, in the Hospital – except the wounded and sick, physicians and other medical staff – there also were, in the nature of things, technical and other auxiliary staff (drivers, cooks, electricians, boiler operators, cleaners, laundresses, etc.). Article 20 of the Fourth Geneva Convention of 1949 especially protects the persons who are "regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases" (ICRC, 2016). There were also a few family members and friends of the patients and the Hospital staff, as well as some Croatian Radio reporters such as Siniša Glavašević. Many civilians sought shelter in the Hospital, deeming it was the safest location in the city. There were also some defenders who believed they would be safe if they reach the Hospital and cover up among the wounded, the medical staff, and the civilians (Lučić, 2017, p. 180). According to the findings of the ICTY's Trial Chamber in the "Vukovar Hospital" case, there were at least 750 people (450 patients and 300 civilians) in the Hospital. All of them were hoping for the evacuation (ICTY-Trial Chamber, 2007, para. 181).

However, already on 18 November 1991 the JNA started telling the representatives of the ICRC about the unfavorable security conditions and its inability to guarantee their security. The gunfire from the left bank of the Danube River had been mentioned, also that the bridge on the Vuka River was mined, etc. The ICRC representative Nicolas Borsinger arrived in Vukovar on 19 November 1991. He was supposed to lead the evacuation the next day. It came out soon that he would neither get the list of persons for the evacuation nor the JNA would allow him to make it himself. On 19 November, the JNA – again talking about the unfavorable security conditions – prevented the arrival of the United Nations' delegation led by Cyrus Vance. Some additional indications of the JNA's reluctance to implement the Agreement came out. For example, Mrkšić told the Hospital's principal, Dr. Vesna Bosanac he had no knowledge of what General Rašeta agreed upon in Zagreb. Then, at the meeting in the JNA's HQ in Negoslavci Nebojša Pavković, the liaison officer of the Federal Secretariat of National Defense (SSNO) denied the ECMM monitors' role in the evacuation.

Pavković also said the prisoners of war will not be allowed to leave the Hospital, that they were under the control of the JNA and if they would leave the Hospital, then Serbian paramilitary units and the local Serb civilians would attack the convoy (sic!). He also said that the prisoners of war will subsequently be exchanged for imprisoned members of the JNA, while the Hospital's management will be replaced with the military physicians and other JNA's staff (ICTY-Trial Chamber, 2007, para. 139). Considering Pavković's formal capacity, it is reasonable to conclude he spoke in line with the guidelines received from the SSNO. Hence, the JNA had just started to „convert" all the persons that will be forcibly taken from the Hospital on 20 November 1991, into the soldiers-combatants and, consequently, into the prisoners of war, irrespectively of their factual status. The ICTY's Prosecutor will later use a different terminology (more will be said later in this article), while the final „conversion" of the persons forcibly taken from the Hospital will be done by the ICTY's chambers.

In accordance with Pavković's words, later in the afternoon of 19 November 1991, instead of implementation of the Agreement, the JNA's security officers Šljivančanin and Karan came to the Hospital. Major Veselin Šljivančanin

was the chief security officer of both the brigade and the Operational Group (OG) "South". Among his subordinates were Captains Mladen Karan, Borče Karanfilov and Srećko Borisavljević. Šljivančanin's superior was Colonel Mile Mrkšić, both the commander of the Guards Motorized Brigade of the JNA and of the OG "South", subordinated to the Command of the First Military District as well as to the SSNO, both in Belgrade. Captain Miroslav Radić was the commander of the Third Company in the First Motorized Battalion of the afore-mentioned brigade. Among his subordinates were two commanding officers of the Vukovar TO, Miroljub Vujović and Stanko Vujanović (both later sentenced in Belgrade for having committed the atrocity at Ovčara).

At the time when Šljivančanin and Karan arrived to the Hospital, the detention center for soldiers and civilians who could not escape from Vukovar, already existed at the „Velepromet" company's premises. The members of the JNA were making lists of the detainees there, while members of the Serbian TO and paramilitary, mostly Chetnik units were selecting detainees to physically maltreat them. Some of those detainees have never been seen again. On the other hand, it must be noted that the members of the Croatian forces who surrendered on 18 November 1991 at Mitnica, were transferred to Ovčara, where – in accordance with Mrkšić's order – the hangar had been prepared for the prisoners of war. Subsequently, already on 19 November, they were transferred to Srijemska Mitrovica, without any incident.

Upon arrival in the Hospital, Šljivančanin and his subordinates demanded Dr. Bosanac to hand them over the list of the persons planned for the evacuation. They took away all the copies of the list, as well as the patients' records and records of entries into the Hospital for past two months. „As they had both the evacuation list and the Hospital records, they had the entire Hospital in the palms of their hands" (Starešina, 2017, p. 174). They captured Dr. Bosanac and took her to Negoslavci. In the evening, the representatives of the ECMM received the guidelines from their superiors from Zagreb, that when they will be monitoring the evacuation the next day, the Geneva Conventions will be applied upon all wounded prisoners of war, including the conduct of interviews with them in order to establish where they would prefer to go, while the ICRC will be making the list of the evacuated persons (ICTY-Trial Chamber, 2007, para. 144). Such guidelines might have been formulated due

to the awareness that the wounded and sick would fall into the hands of the JNA.

Although the Agreement provided for the opportunity of the parties to withdraw from the Agreement at any moment if they assess there are no conditions for its implementation, especially with respect to security, neither party (nor even the JNA) seized such opportunity explicitly. With due respect to the context in which negotiations and conclusion of the Agreement were conducted, and based on the content of the Agreement, the ICTY's Trial Chamber concluded that the Agreement was not a result of capitulation of the Croatian forces neither it depended on that. Hence, the evacuation should have been carried out irrespectively of the course of the combat operations (ICTY-Trial Chamber, 2007, para. 132). Moreover, in the Agreement there was no provision that soldiers of any party would be allowed to enter the Hospital after the ICRC would have taken it over. Based on all available evidence, the Trial Chamber did not accept the JNA's claims that there were no security conditions for the arrival of the international staff and for the evacuation of the wounded and sick (ICTY-Trial Chamber, 2007, para. 143).

In his recent general deliberations on the issue of security conditions for the execution of humanitarian activities, irrespectively of the events in Vukovar in 1991, the Serbian legal writer Kreća points out the „inherent weakness" of the respective regulations, as well as of the regulations for the protection of the prisoners of war. In his opinion, that weakness lies in „subjective nature of the criteria that require the warring parties to provide the wounded, the sick and the shipwrecked with the medical care „to the fullest extent practicable" and "with the least possible delay". He adds that „impartial oversight and control over the implementation of these rules barely exists". Regarding that, Kreća continues that „the Red Cross and other humanitarian organizations, in most cases, are prevented from reaching the battlefield, even the front, usually with the explanation that their security cannot be guaranteed" (Kreća, 2022, p. 837).

On 20 November 1991, when the evacuation under the auspices of the ICRC should have commenced, during morning hours the JNA had already taken from the Hospital approximately 270 persons selected by its security officers led by Šljivančanin. Five civil buses and one military bus had been ordered

from Serbia for the transportation of those persons. That was an indisputable indicator of ignoring the previous negotiations about the appropriate means of transportation, as well as of lack of care for people. A very illustrative case is of the wounded Martin Došen who was on the stretchers that could not be loaded on the Serbian bus. The disturbing testimony before the ICTY was presented by his daughter. Basic principle of both Geneva Conventions for the protection of the wounded and sick is that those persons must be protected and taken care of irrespectively of the party of the conflict they belong to. Not only their murder or torture is prohibited, but also the intentional deprivation of medical care (Andrassy, Bakotić, Seršić&Vukas, 2006). Apart from the wounded and sick, there were also Hospital's technical staff, family members of Hospital's employees, but also other persons such as radio reporter Siniša Glavašević and his sound technician Branko Polovina, and other civilians. Later, the ICTY's Prosecutor stated it was found indisputable that nobody from the Hospital resisted. Hence, the JNA arbitrarily and without distinction made all those persons prisoners of war (such legal qualification was formally declared in the ICTY-Trial Chamber's Judgement, 2007, paras 479-480).

All those persons were first taken to the JNA barracks in the vicinity of the „Velepromet" company's premises. It was around noon when the military bus went there first. The persons who were loaded on that bus at the Hospital site were those who did the most effort in resistance during the defense of Vukovar. Other buses arrived in agricultural compound at Ovčara somewhat later. The members of the Serb military and paramilitary units were already there, ready for mistreatment of the prisoners. Simultaneously with the transportation of the prisoners from the Hospital, the session of the so-called Government of the Serbian Autonomous Area of Eastern Slavonia, Baranja and Srijem was held. A few representatives of the JNA were present there, too. The session was chaired by Goran Hadžić, while mayor of Vukovar (and the minister of agriculture in the afore-mentioned „Government") was present, too. Later at the trials, the JNA's officers claimed that Hadžić and his government decided to take over the prisoners from the Hospital to try them in Vukovar. By saying that, the JNA most probably attempted to find the excuse for the subsequent dereliction of protection and control over the

prisoners.

Despite the intention to implement the Agreement in accordance with the outcome of negotiations and as soon as possible, the representatives of the ICRC were finally allowed to enter the Hospital only around 10:30, i.e., after the JNA had already taken many of the wounded and other persons. The evacuation of the remaining persons was also organized by the JNA. Initially, they were all taken to Serbia, but after a night spent in Srijemska Mitrovica, some of them ended up in five different detention camps in Serbia, while others arrived in Croatia near Županja, via Bosnia and Herzegovina (Lučić, 2017). On the same day, in late afternoon, the members of the JNA's military police received the order to withdraw from Ovčara, which they obeyed around 21:00 hours. The executions of the prisoners followed, performed by the members of the TO and paramilitary units, while some prisoners died earlier due to the beatings at the hangar. At least 97 of all murdered at Ovčara were patients from the Vukovar hospital, while around twenty of murdered persons were the Hospital's employees (Lučić, 2017). Years later, at the trial in Belgrade, the permanent court expert witness Professor Miloš Tasić, MD, the forensic medicine specialist, employed at the Faculty of Medicine of the University of Novi Sad, said inter alia that 32 persons murdered at Ovčara were shot in the nape.

To sum up, the Agreement on the evacuation was not implemented because the JNA de facto declined it. Referring to the Agreement, the ICTY's Trial Chamber later established that the JNA did not get the authority to select persons to be evacuated nor the Agreement provided that the wounded and sick would be finally handed over to anyone else but to the Croatian side (ICTY-Trial Chamber, 2007). There are some well-argued opinions that it was the JNA's hidden agenda to specially punish some wounded and sick persons, as well some other persons from the hospital, including some employees (Starešina, 2017). It could have been noticed even a few days before the fall of the city. It was when the JNA leadership from Belgrade, through its representative in Zagreb, General Rašeta, initially refused the Croatian and international proposals for the evacuation of the hospital, by claiming that security risks were too high. However, they also refused the risk-free option of the evacuation via the Danube River through Hungary,

for which the Austrian government offered support in implementation.

It is fair to conclude that the JNA did it intentionally, being aware that there in the hospital were people who severely resisted them in the combat (Starešina, 2017). Even the Serbian media were preparing for quite a long time to create the atmosphere supportive to the execution, and intensified that campaign after the fall of the city (Lučić, 2017). In essence, it was all about the continued and systematic media „dehumanization" and „satanization" of the defenders of Vukovar in order to establish an „excuse" for obviously earlier planned execution. During the trial before the ICTY, the witness Jovan Dulović, who was the Serbian war correspondent from Vukovar during the autumn 1991, quoted Vojislav Šešelj (ICTY, Prosecutor v. Slobodan Milošević, transcripts, p. 43453). After Dulović's diary, Šešelj said on 13 November 1991 in Vukovar, in Stanko Vujanović's house that „the JNA, TO and volunteers are all one army" and that „not one Ustasha must leave Vukovar alive" (HLC-RDC, 2004, p. 8-9). In Dulović's opinion, that particular statement very much affected the behavior of the members of the TO and the volunteers. Hence, it can be reasonably judged from various sources that the JNA, from the beginning, did not intend to respect the Agreement signed in Zagreb. After the atrocity at Ovčara, the Serbian media conducted efforts to cover-up that crime, for what also many firm indicators exist (Lučić, 2017). The former ICTY's investigator Vladimir Dzuro described in detail various aspects of the atrocity committed at Ovčara, including the discovery of the mass grave (Dzuro, 2019).

The statute of the ICTY and the legal framework of the indictments in „Vukovar hospital" case

Regarding the crimes that could have been included in the Indictment in ICTY's „Vukovar Hospital" case (number IT-95-13/1), both the Prosecutor and the Chambers were bound by the Statute of the ICTY. The crimes were enacted in Articles 2, 3 and 5. The Article 2 deals with the „Grave breaches of the Geneva Conventions of 1949", Article 3 deals with the „Violations of the laws or customs of war" and Article 5 deals with the „Crimes against humanity" (ICTY Statute, 2009). As far as the „Grave breaches of the Geneva Conventions of 1949" are concerned, it should be noted that Article 2, when enumerating the offenses, does not specifically mention the wounded and sick, or hors de combat, or medical staff, or any additionally protected category of civilian persons, etc. Namely, apart from the general coverage of "persons or property protected under the provisions of the relevant Geneva Convention" in Article 2, only the prisoners of war and civilian persons are specifically mentioned, but only in the context of „compelling to serve in the forces of a hostile power" and „willfully depriving … of the rights of fair and regular trial". The civilian persons are also mentioned in relation to „unlawful deportation or transfer or unlawful confinement", as well as in relation to „taking … as hostages". However, the fact that Geneva Conventions of 1949 protect all afore-mentioned categories of persons, makes Article 2 of the Statute of the ICTY applicable to the facts presented in the „Vukovar Hospital" case.

In spite of that, the Prosecutor did not charge the accused JNA's officers with the „Grave breaches of the Geneva Conventions of 1949" at all (the exception was the first Indictment, what will be explained later in this article). The officers were not charged even with the „willful killing", „torture or inhuman treatment", nor „willfully causing great suffering or serious injury to body or health", not even with „willfully depriving … of the rights of fair and regular trial" and „unlawful deportation or transfer or unlawful confinement". In the ICTY's work in general, the application of the Article 2 of the Statute was practiced only in the context of international armed conflict. However, Sandra Fabijanić Gagro points out the view of Davor Krapac on the possibility to consider the application of Article 2 even on

the non-international armed conflicts in cases of grave breaches of the rules of international humanitarian law which constitute international customary law (Fabijanić Gagro, 2007). In our opinion, non-application of Article 2 in „Vukovar Hospital" case was a result of reluctance or unwillingness of the ICTY's Prosecutors and Chambers to admit the existence of the international armed conflict in Croatia, as Geneva Conventions are international treaties originally negotiated and concluded for application to international armed conflicts primarily.

Hence, the Indictment in the „Vukovar Hospital" case included the „Violations of the laws or customs of war" (Article 3) and the „Crimes against humanity" (Article 5). The review of the course and evolution of indicting in that case will be presented later in this article. Regarding the application of Article 5, we find important to highlight immediately that wording of that Article recognizes only civilians as the victims. It should also be noted that in „Vukovar Hospital" case the civilians were among the victims, but only as a part of the wider population of the victims. When it comes to the „Violations of the laws or customs of war", the list of crimes listed in Article 3 as examples shows they refer to forbidden methods and means of warfare only, and not to protection of persons in armed conflict. We generally find the application of Article 3 inadequate in the "Vukovar Hospital" case. Firstly, because of subsuming under the Article 3 of the Statute solely the violations of common Article 3 of four Geneva Conventions of 1949. Secondly, because common Article 3, unlike common Article 2, refers to "armed conflict not of an international character". Finally, as opposed to Article 3 of the Statute, common Article 3 is focused on protection of persons and not on prohibition of certain methods and means of warfare. What we only find applicable from Article 3 of the Statute is "plunder of public or private property".

However, the Prosecutor in „Vukovar Hospital" case deduced from common Article 3 of four Geneva Conventions the crimes of murder, torture and cruel treatment. As the reason for such a „legal maneuver" regarding the Article 3 of the Statute we see avoiding on the part of the Prosecutor, Trial Chamber and Appeals Chamber, to clearly and unambiguously determine the existence of the international armed conflict. Moreover, the reference to common Article 3, which is clearly related to „armed conflict not of an international

character occurring in the territory of one of the High Contracting Parties", indirectly suggests that non-international armed conflict i.e. „civil war" existed in the area of Vukovar (and in Croatia). That is exactly what Serbian side consistently claims even nowadays, both in sphere of the state politics and in legal doctrine. For example, the judge of the Constitutional Court of Serbia and Professor at the Faculty of Law of the University of Belgrade, Milan Škulić writes that "the only genuine international armed conflict, i.e. war between international actors on the territory of the former SFRY in 1990s" was the NATO's aggression on the Federal Republic of Yugoslavia (SRJ) in 1999, while all other previous wars on the territory of the former SFRY were actually civil wars, i.e. non-international armed conflicts (Škulić, 2022, p. 167).

Even when the Prosecutor decided to refer to common Article 3, in our opinion it did it only partially, as it did not take into account some other relevant crimes. Such crimes would primarily include „outrages upon personal dignity, in particular humiliating and degrading treatment". Regarding that, as illustrations, let us quote two testimonies from the book of Danijel Rehak, about the acts against the prisoners at Ovčara: „Along the line they deprived us of items, jackets, watches, valuables, throwing them on one pile. They were taking away our personal documents." (statement code: mla1); „They were especially beating Ekrem Kemal, stomping at him, forcing him to sing the Chetnik songs." (statement code: mla1) (Rehak, 2000, p. 192). Apart from that, we find another crime deduced from common Article 3 that the Prosecutor could have charged the accused with. It is a crime of „passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

As far as the „Crimes against humanity" (Article 5) are concerned, we find beneficial to quote the whole provision, as its implementation led to many different interpretations at the ICTY in the „Vukovar Hospital" case: „The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict,

whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.".

Instead of analyzing the different interpretations immediately (it will be done later in this article), it is useful at this point to stress that the Prosecutor and the Chambers dealt with the crimes of murder, extermination, persecutions on political, racial, and religious grounds and other inhumane acts. Taking into account all the facts presented during the trials before the ICTY in the „Vukovar Hospital" case, it is our opinion that crimes of imprisonment and rape were unjustifiably omitted.

The analysis of the evolution of indicting in the „Vukovar Hospital" case shows that when the ICTY's Prosecutor submitted the final Indictment (Third amended consolidated indictment) against Mrkšić, Šljivančanin and Radić, in November 2004, they were charged with the crimes against humanity and violations of the laws and customs of war (ICTY-Prosecutor, 2004). As a matter of fact, between 1995 and 2004 there was a total of six Indictments. The Indictment of 2004 referred to maltreatment and execution of persons forcibly taken from the Vukovar hospital on 20 November 1991. Those crimes were provided for in Articles 3 and 5 of the Statute of the ICTY. As mentioned earlier, the accused were not charged with the grave breaches of the Geneva Conventions of 1949 (Article 2). As far as legal qualification of the conflict is concerned, the Indictment finally stated that „a state of armed

conflict existed in the territory of the former Yugoslavia“ (ICTY-Prosecutor, 2004, para. 21).

More detailed inspection of the course and the content of indicting in the „Vukovar Hospital“ case shows that initially there was indictment regarding Article 2, too. However, it was omitted in the second Indictment (Second amended indictment) in 2002, against Mrkšić (ICTY-Prosecutor, 2002). On that occasion, the previous indictment for violations of the laws or customs of war (Article 3) was additionally tied with the violations of common Article 3 of four Geneva Conventions of 1949. It is important to notice that Indictment from 2002, despite of having omitted the accusation regarding Article 2, still stated that Mrkšić „at all times relevant to this indictment, …, was required to abide by the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 1949 and the Additional Protocols thereto“ (ICTY-Prosecutor, 2002, para. 16). Also, in comparison with the Indictments from 1995 (Indictment against Mile Mrksic, Miroslav Radic and Veselin Sljivancanin) and 1997 (Amended Indictment, which also included Dokmanović), an explicit reference to Additional Protocols had been made.

However, the Indictment from 2002, also differently from the Indictments from 1995 and 1997, no longer stated that „all persons described … as victims were protected by the Geneva Conventions of 1949“. Also in comparison with the previous two Indictments, it was no longer mentioned in the Indictment from 2002 that „a state of international armed conflict existed in the territory of the former Yugoslavia“. Instead, it was stated that „a state of armed conflict existed in Croatia“, but without the attribute „international“ (ICTY-Prosecutor, 2002, para. 15). Additionally to his obligation to respect the Geneva Conventions of 1949 and Additional Protocols of 1977, the Indictment from 2002 stated, for the first time, that Mrkšić, „as an officer in a command function in the JNA, … was bound by the regulations of the JNA as set out in the „Strategy of Armed Conflict“ (1983), the „Law on All-Peoples Defence“ (1982), the „Law on Service in the Armed Forces“ (1985), the „Rules of Service“ (1985), and the „Regulations on the Application of the International Laws of War on the Armed Forces of the SFRY“ (1988)“ (ICTY-Prosecutor, 2002, para. 14).

The afore-mentioned omission of the accusation regarding Article 2 and the rephrasing of the accusation regarding Article 5, were later transferred into the Indictment from 2003 (Consolidated Amended Indictment). Hence, it encompassed Šljivančanin and Radić. However, in comparison with the Indictment from 2002, the Indictment from 2003 no longer listed the obligations related to the obedience of the Geneva Conventions of 1949 and Additional Protocols of 1977. Instead, it stated only generic obligation „to abide by the laws and customs governing the conduct of armed conflicts" (ICTY-Prosecutor, 2003, para. 23). Moreover, according to the Indictment, they were „bound by the law and regulations as set out in the „Law on All-Peoples Defence" (1982), the „Law on Service in the Armed Forces" (1985), and the „Regulations on the Application of the International Laws of War on the Armed Forces of the SFRY" (1988)" (ICTY-Prosecutor, 2003, para. 21). In addition, it was stated that „these laws and regulations governed the roles and responsibilities of the JNA's officers, set out their positions in the chain of command and obligated those officers, and their subordinates, to observe the laws of war" (ICTY-Prosecutor, 2003, para. 21).

As far as legal qualification of the armed conflict is concerned, the Indictment from 2003 again contains the earlier formulation about „a state of armed conflict … in the territory of the former Yugoslavia", but without the attribute „international", which was listed in Indictments from 1995 and 1997 (ICTY-Prosecutor, 2003, para. 22). Finally, like the Indictment from 2002, the Indictment from 2003 neither stated that „all persons described … as victims were protected by the Geneva Conventions of 1949". Hence, from the Indictment from 2003 (as a kind of the turning point) until the final, the sixth Indictment from November 2004, the Prosecutor established the statement that armed conflict existed in Yugoslavia, avoiding both to add attribute "international" and to mention Croatia. Hence, the Prosecutor did not declare the legal character of the armed conflict. However, we deem that starting from the first Indictment in 1995 until the final Indictment in 2004, enough factual substrate accumulated not only for the irrefutable statement of existence of international armed conflict, but also for accusing the JNA's officers of grave breaches of the Geneva Conventions of 1949, as it was the

case with the first Indictment from 1995 and Amended Indictment from 1997 (willful causing of great suffering and willful killing).

With regard to obligation of the accused to implement international law, the Prosecutor finally set out the generic standard of obligation „to abide by the laws and customs governing the conduct of armed conflicts". In addition, the Prosecutor pointed out the obligation regarding the respect for military regulations of the SFRY and the JNA (including those demanding respect for international law of armed conflict). The only connection of the final Indictment with the Geneva Conventions of 1949 was only indirect – through the reference to common Article 3, within the wider context of violations of the laws and customs of war, as an offense listed in Article 5 of the Statute („inherited" from the Indictment of 2002). Ultimately, the final Indictment not even stated that victims were protected by the Geneva Conventions of 1949, which was omitted yet in the Indictment from 2002.

Why do we keep stressing the importance of referring to the Geneva Conventions of 1949? First, because those Conventions emphasize the protection of human beings as such and not only as members of armed forces (Andrassy, Bakotić, Seršić&Vukas, 2006). Furthermore, because the protected persons cannot renounce their rights, even if they wished so (Article 7 of First, Second and Third Geneva Convention, and Article 8 of Fourth Convention of 1949). Finally, because we deem the Prosecutor in the first place, but also both the Trial and Appeals Chambers, omitted to clearly state that international armed conflict existed in Vukovar and elsewhere in Croatia. As of 8 October 1991, the Croatian state had been constituted as an independent, which had immediate effect on legal qualification of the conflict that existed on its territory (Fabijanić Gagro&Vukas, Jr., 2008). The confirmation can be found in Opinion 1 of the Badinter Commission (Pellet, 1993). Also, the International Court of Justice (ICJ) found that Croatia declared itself independent from the SFRY on 25 June 1991, which declaration took effect on 8 October 1991 (ICJ, Judgment Croatia v. Serbia, 2015, paras 55 and 68). For its part, the Bassiouni Commission advocated the application of the law applicable in international armed conflicts, with regard to the armed conflicts in the territory of the former Yugoslavia (UN-Final Report, 1994). Ultimately, the final Report of the Bassiouni Commission spoke about the

„grave breaches of the Geneva Conventions of 1949" (and other violations of international humanitarian law) committed in the territory of the former Yugoslavia (UN-Final Report, 1994, para. 42).

Considering the physical, geographical aspect, we already presented that many aggressor's forces came to Vukovar area from Serbia. In addition, some forces attacked Croatia even without coming to its territory, by shelling Vukovar from the territory of Serbia. Furthermore, the main military headquarters of all those forces was in Belgrade. Also, the prisoners of war from Vukovar were taken to prisons and detention camps in Serbia, etc. All that confirms the existence of international armed conflict. As Fabijanić Gagro and Vukas rightly point out, it is exactly the state border as a clear criterion for delineation between international and non-international armed conflicts (Fabijanić Gagro&Vukas, Jr., 2008). Finally, it must be noted that former SFRY, whose armed forces (the JNA) were attacking Vukovar, had ratified the Geneva Conventions and the Additional Protocols several decades ago.

If the ICTY was ready to pronounce an irrefutable qualification of the armed conflict, we deem that it would have substantially contributed to more precise establishment of facts, as well as to much stronger international, both legal and moral, stigmatization of the committed atrocity. Also, the ICTY would have made more appropriate contribution to international jurisprudence, for the sake of future cases of similar violations of legal status of victims of war, especially of the wounded and sick, as well as of the prisoners of war and civilians. Against such an attitude of the ICTY, there is a an everlasting necessity of stigmatization, both in ethical and political sense, of the war crimes and the crimes against humanity, including crimes against the city of Vukovar as a whole, as well as the necessity of deserved, including not yet fulfilled criminal responsibility (see more in: Jonjić, 2013).

By omitting to do so, the ICTY brought injustice to the victims, as well as to Croatia as indisputably independent and sovereign state and victim of aggression at the time of the atrocity at Ovčara. Unfortunately, inadequate factual substrate, then inadequate legal qualification of the crimes, as well as certain legal opinions in „Vukovar Hospital" case, still provide the opportunity for those who negate the international character of the armed conflict in Croatia. Consequently, even nowadays and even eminent Serbian

legal experts such as previously quoted Škulić, categorically deny the aggression on Croatia, i.e. the existence of the international armed conflict.

The victims in the „Vukovar hospital" case in light of the ICTY's indictments and judgements, with reference to their international legal protection

The Prosecutor described the victims as „Croats or other non-Serbs who were present in the Vukovar hospital after the fall of Vukovar" (ICTY-Prosecutor, 2004, para. 5). It was stated in all six Indictments that "among those removed were wounded patients, hospital staff, family members of hospital staff, former defenders of the city, Croatian political activists, journalists and other civilians". The women were also mentioned. Hence, the Prosecutor did factually correctly establish the general structure of the persons forcibly taken from the hospital. However, it did not undertake a more precise, individual categorization of victims across their respective international legal protection. From the third Indictment on, the Prosecutor generically named all those persons „the detainees" (ICTY-Prosecutor, 2002, para. 25). In the first Indictment they were „captive non-Serb men" (ICTY-Prosecutor, 1995, para. 1). In the second Indictment the terms „persons" and "captives" were used (ICTY-Prosecutor, 1997, paras 1 and 12). The status of victims was only partially considered during the trial and only a bit more effort was invested during the appeals proceedings. If that was done precisely and thoroughly, it would have justified even more severe punishments, particularly because of the crimes committed against specifically protected categories of persons among the civilians murdered at Ovčara, who were not eligible for the status of prisoners of war.

The Trial Chamber established that at Ovčara „not less than 200 of the male persons (with two women) removed from Vukovar hospital in the morning of 20 November 1991.", were murdered (ICTY-Trial Chamber, 2007, para. 477). It further established that out of 194 identified victims 181 were active in the Croatian forces, while for 13 of them it could not establish any involvement in military activities (ICTY-Trial Chamber, 2007, para. 479). The Trial Chamber asserted that all those persons were selected based on the

criterion of known affiliation with the Croatian forces or due to the suspicion they belonged to those forces. For that reason, the Trial Chamber named them „prisoners of war" (ICTY-Trial Chamber, 2007, para. 480). Although the Trial Chamber did recognize that some mistakes had been committed during the selection, it concluded that the Serb forces thought all persons taken from the hospital were actually prisoners of war with no civilians among them (sic!) (ICTY-Trial Chamber, 2007, para. 480). Legal consequence of such conclusion was renunciation of implementation of the Article 5 of the Statute, which prescribes the civilians as a target of the crimes against humanity. The Judgement stated they were all prisoners of war who were not armed and who no longer participated in hostilities, while many of them were wounded or sick (ICTY-Trial Chamber, 2007, paras 509 and 510). It is reasonable to conclude that the Trial Chamber considered the selection by the JNA as the moment when status of prisoners of war became effective.

The Prosecutor appealed that the Trial Chamber mistakenly excluded hors de combat from the victims of the crimes against humanity due to inappropriate interpretation of the definition of civilians as provided in Article 50 of the Protocol I of 1977 (ICTY-Prosecutor, 2007, paras 19 and 20). For that reason, the Prosecutor claimed that, in accordance with the Article 5 of the Statute, Šljivančanin should be sentenced for torture and Mrkšić for murder, torture and other inhumane acts, while their punishments should be increased. However, in the Appeals Chamber's opinion, „whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the chapeau requirement of Article 5 of the Statute that an attack be directed against a „civilian population" is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be „civilians"". Although the Appeals Chamber accepted a great deal of the Prosecutor's reasoning, it still did not decide that crimes against humanity had been committed, as it reasoned that Serb forces „acted in the understanding that their acts were directed against members of the Croatian armed forces", and not against civilians (ICTY-Appeals Chamber, 2009, paras 32 and 42-44). Hence, the Appeals Chamber unjustifiably disregarded at least 13 civilians whose status must have been known to the members of

the JNA who conducted the selection in the hospital, as well as to Serb forces at Ovčara. It primarily relates to pregnant woman Ružica Markobašić and to radio-reporter Siniša Glavašević.

As far as hors de combat are concerned, already the Hague Regulations concerning the Laws and Customs of War on Land from 1907 prohibited to kill or wound an enemy "having no longer means of defense" (ICRC, 1988, p. 6). First of all, hors de combat must be a combatant. According to Protocol I, such person must fulfill the criterion of being in the power of an adverse party, or clearly expresses an intention to surrender, or has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself (ICRC, 1987). Dinstein clarifies that the first category of hors de combat are healthy combatants who are „in the power of an adverse Party", which means that they have been "captured or otherwise detained" (Dinstein, 2022, p. 214). The second category are combatants who are also healthy and not in hands of the enemy yet, but who want to be safe from the attack, so must express an intent to surrender (Dinstein, 2022). The third category are combatants who are not capable of defending themselves because they are wounded or sick (Dinstein, 2022). If combatant falls within any of these categories, abstains from hostility acts and does not attempt to escape, he must not be attacked and must be treated humanely. The combatant who became hors de combat remains to be a member of armed forces, so cannot be considered, or treated as a civilian (ICRC, 1987). Hence, hors de combat are combatants who because of their particular vulnerability enjoy additional protection by international law – immunity from attacks and human treatment guaranteed. International legal protection of hors de combat can also be found in common Article 3 of all four Geneva Conventions of 1949, which relates to non-international armed conflicts.

When judging the responsibility of Šljivančanin, the Appeals Chamber pointed out first that the Trial Chamber did not determine whether the conflict was international or non-international (ICTY-Appeals Chamber, 2009, para. 69). Although the Appeals Chamber also did not pursue such determination, it asserted that preconditions for the implementation of the Third Geneva Convention exist even in non-international armed conflicts

if the parties to the conflict have agreed upon. The Appeals Chamber drew the conclusion that such agreement was reached, from the following facts. First, that the ECMM instructed its monitors regarding the implementation of the Agreement reached in Zagreb, that Geneva Conventions should be observed with respect to prisoners of war. Second, that on 18 November 1991 General Panić issued order to all JNA forces around Vukovar, that all aspects of the Third Convention should be respected. Third, that Colonel Pavković made clear to representatives of the ECMM, that according to the directives of General Rašeta, the Croatian forces will not be evacuated with the humanitarian convoy but will be kept as prisoners of war under the Geneva Conventions. Ignoring the fact that the Agreement reached in Zagreb did not mention the prisoners of war at all, the Appeals Chamber concluded there is sufficient evidence that the JNA accepted the treatment of the Croatian forces as prisoners of war, i.e., the implementation of the Third Geneva Convention.

The Appeals Chamber also stated that common Article 3, which constitutes the customary law applicable in all armed conflicts, provides for equal protection of the prisoners of war as the Third Convention as a whole and its Article 13, in particular. Regarding common Article 3 with respect to the prisoners of war, the Appeals Chamber primarily deemed the protection enshrined in that Article (as well as in international customary law) of all those persons who no longer actively participate in hostilities, which covers hors the combat including those among them who are wounded or sick (ICTY-Appeals Chamber, 2009, para. 70). The Chamber further pointed out that the prisoners of war enjoy protection from the moment they fall into the hands of the enemy, which lasts until their final release. The Chamber highlighted that all that is not an obligation of the parties of the Convention only, but an individual obligation of every person in charge of the prisoners of war (ICTY-Appeals Chamber, 2009, paras 71 and 72). It pointed out that individual responsibility regarding the prisoners of war was prescribed by the JNA Rules, too.

Moreover, the Appeals Chamber even deemed that an individual is responsible if in charge of the prisoners of war only de facto, i.e., irrespectively of his de jure obligations, and even after de jure obligations ceased. In addition, the

Chamber accentuated that "in the context of preventing the commission of a war crime, an officer may be expected to act beyond the strict confines of his de jure authority", "within the limits of his capacity to act" (ICTY-Appeals Chamber, 2009, paras 73 and 94). In Chamber's opinion, Šljivančanin was under a duty to protect the prisoners of war, which included his "obligation not to allow the transfer of custody of the prisoners of war to anyone without first assuring himself that they would not be harmed". The Appeals Chamber continued that Mrkšić's order for the withdrawal of the military police could not relieve Šljivančanin of his position in the JNA's structure and his obligations originating from such capacity (ICTY-Appeals Chamber, 2009, para. 74). In our opinion, the ICTY should have applied such point of view to Radić, too, as well to some other JNA's officers subordinated to Mrkšić and Šljivančanin and involved in security of persons taken from the hospital and brought to Ovčara. Namely, according to the Indictment, after having realized that crimes had been committed, Radić took steps to hide and conceal those acts. Jovan Dulović, the Serbian war correspondent from Vukovar in autumn 1991 witnessed in detail about Radić's knowledge (HLC-RDC, 2004, p. 15). Without any doubt, both Miroljub Vujović and Stanko Vujanović, who were sentenced in Belgrade to 20 years imprisonment, were subordinated to Radić (HLC-RDC, 2017, p. 2).

Epilogue of the criminal responsibility findings before ICTY and in Belgrade trials

Finally, the ICTY did not find the existence of joint criminal enterprise in „Vukovar Hospital" case. Mrkšić was sentenced to 20 years imprisonment for having aided and abetted the violations of the laws or customs of war (Article 3 of the Statute), including the murder of 194 individuals, the torture of the prisoners of war and the cruel treatment through maintenance of inhumane conditions of their detention (ICTY-Appeals Chamber, 2009, VII. Disposition, p. 169). However, it was established that he did not order the murder of the prisoners. He was not found guilty of crimes against humanity (persecution, extermination, murder, torture, and other inhumane acts). The Trial Chamber sentenced Šljivančanin to 5 years imprisonment, only for having aided and abetted the torture of the prisoners of war in the hangar

at Ovčara, as a violation of the laws and customs of war. However, he was not found guilty of having aided and abetted the murder of 194 individuals, neither for persecution, extermination, murder, torture, and other inhuman acts. He was also not found guilty for having aided and abetted the maintenance of inhumane conditions of detention of the prisoners of war, because the Trial Chamber concluded that conviction for that crime would constitute an impermissible cumulation with the conviction for torture" (ICTY-Trial Chamber, 2007, paras 677-681). Miroslav Radić was not found guilty already by the Trial Chamber, primarily because the Chamber did not accept the testimonies of three witnesses who stated that Radić was present at the location of hangar at Ovčara (ICTY-Trial Chamber, 2007, para. 714). As an illustration, one of the witnesses (statement code: Pen 58) said: „Upon arrival to Ovčara, we were leaving the bus one after another and had to run a gauntlet of soldiers. There was one Captain, Radić who coordinated the drawing up of a list of us, walking from bus to bus. He was a kind of their security officer there." (Rehak, 2000, p. 192).

The Appeals Chamber established that the Trial Chamber made an error by not finding Šljivančanin guilty for having aided and abetted the murder of 194 individuals at Ovčara. In the opinion of the Appeals Chamber, the only reasonable conclusion was that Šljivančanin – upon learning that Mrkšić issued the order for the withdrawal of the military police – should have realized that members of the TO and paramilitary forces will most probably kill the prisoners of war. Also, if he does nothing that his inaction will contribute to their murder. For that reason, the Appeals Chamber sentenced Šljivančanin for murder, too and increased his punishment to 17 years imprisonment. However, in subsequent trial initiated by his defense, Šljivančanin was finally not found guilty of murder of 194 prisoners of war. Namely, the JNA's officer Miodrag Panić testified that Mrkšić did not tell Šljivančanin about his order for the withdrawal of the military police from Ovčara. Consequently, Šljivančanin was finally sentenced to 10 years imprisonment, for having aided and abetted the torture of the prisoners of war only. He did not serve even that term entirely, as he was released after having served two thirds of the punishment.

In 2004 in Belgrade, then still in the Federal Republic of Yugoslavia, the trial commenced against the persons who were, according to the Indictment, the immediate executors of the atrocity at Ovčara. They were members of the TO of Vukovar and members of the Serb paramilitary unit named „Leva Supoderica". Miroljub Vujović and Stanko Vujanović were among them. According to the Indictment, they were charged with the violations of international law during the conflict that did not have a character of international armed conflict. In relation to the prisoners of war, they acted contrary to the Article 3 of the Third Geneva Convention, as well as contrary to the Protocol II (HLC-RDC, 2005, p. 1). Although the first Judgement, by which 14 persons were pronounced guilty, was reached already at the end of 2005, due to various remedies the trial lasted until 2018, when eight persons were finally sentenced to imprisonment. Miroljub Vujović, Stanko Vujanović and Predrag Milojević were sentenced to 20 years imprisonment, and Goran Mugoša to 5 years. While Nada Kalaba's punishment was increased to 11 years imprisonment and Ivan Atanasijević's into 15 years. The punishments of Miroslav Đanković and Saša Radak were reduced to 5 years imprisonment, while Jovica Pejić, Milan Vojnović, Milan Lančužanin and Predrag Dragović were finally not found guilty. Đorđe Šošić died before the end of the trial (HLC-RDC, 2017).

The Indictment was based on the testimonies of two penitent-witnesses, who were both among the immediate executors. It came out that they did not place any burden of responsibility on the JNA's officers. The representatives of the injured parties claimed that the "indictment was selective" and that prosecutor was „very forethoughtful to the JNA's officers who appeared as witnesses in the course of the trial, although some of them should have been accused" (HLC-RDC, 2005, p. 1). Namely, regarding some officers some very serious circumstantial evidence of their possible co-responsibility came out during the trial. Such circumstantial evidence was presented by some witnesses, as well as by some of the accused, regarding the course of events that started with the arrival of the JNA's officers to Vukovar hospital, and until the execution at Ovčara, as well as after the atrocity. For example, regarding Šljivančanin, that he was briefly present at the meeting of the so-called Government, that he demanded to personally execute the last detainee

at Ovčara, etc. According to Jonjić, the senior military leadership of the JNA, "which actually mostly participated in the destruction of the city and the occupation of the city and those parts of Croatia, remained spared" (Jonjić, 2013, p. 234). According to the Indictment prepared by the Croatian District State Attorney in Vukovar in December 2002, the senior military leadership of the JNA included Veljko Kadijević, Blagoje Adžić, Zvonko Jurjević, Božidar Stevanović and Života Panić (Jonjić, 2013).

Finally, it must also be noted that the trial chamber too lightly accepted the statement from the Indictment that the only victims at Ovčara were prisoners of war. Like at the trials in The Hague, insufficient focus was made in Belgrade, too, to establish the facts regarding all the categories of persons who had been murdered at Ovčara. Finally, the trials in Belgrade, like the ones before the ICTY, did not bring the cognition about the location were the remaining persons forcibly taken from the Vukovar hospital are buried.

Conclusion

As recognition of a state does not have a constitutive effect in international law, Croatia had to be considered an independent state as of 8 October 1991. As of that day, by having submitted the notification of succession with respect to international treaties concluded by the former SFRY, Croatia obligated itself to respect the Geneva Conventions of 1949 and Additional Protocols of 1977. However, neither the Prosecutor nor Chambers of the ICTY were ready to establish that fact during the trials in "Vukovar Hospital" case. Consequently, they did not recognize the existence of international armed conflict (i.e., aggression on Croatia), which affected the implementation of the Statute of the ICTY regarding the qualification of the crimes and the application of international humanitarian law. The customary law got the significant advantage before the international conventions.

The unwillingness became apparent on the part of the ICTY's Prosecutor and the Chambers regarding the clear establishment who was who among the victims of the atrocity at Ovčara in relation to international humanitarian law. The respective status of each and every individual should have been determined – soldiers, combatants, non-combatants, the wounded and

sick, medical staff, journalists, pregnant civilian woman, elder persons, etc. Instead of that, all the victims had been subsumed under the category of the prisoners of war, exactly the category not recognized by international law of non-international armed conflicts. In that way, hors de combat and other wounded and sick persons including some civilians among them, fell by the wayside, and medical staff, the elderly, the pregnant woman, the journalists, and some others, even more. The distinction between the categories of victims for the purpose of more precise criminal law qualification and responsibility was neither established during the trials in Belgrade.

The achievements of the ICTY's Prosecutor and the Chambers deserve respect regarding Mrkšić's responsibility and punishment, but only partially and insufficiently regarding Šljivančanin, but not at all regarding Radić. The feeling of injustice towards Croatia as a sovereign and independent state at the time of the fall of Vukovar, towards the victims at Ovčara and their families and fellow defenders is still present and hard to erase. Unfortunately, incompletely established factual substrate, partially adequate and somewhat inadequate legal qualification of the crimes, as well as some doubtful legal opinions and interpretations in judgements against the JNA's officers, offer continued opportunity and reasoning not only to political, but also to academic opponents of the fact of dissolution of former Yugoslavia and of international character of the armed conflict in Croatia. At the same time the comprehensive role and responsibility of the JNA and its officers, including the most senior ones, remains out of sight. That includes the role of Serbia and the Great Serbian political circles, including the individuals such as still alive and in the Serbian society very vocal, but unpunished ideologist of the atrocity at Ovčara, Vojislav Šešelj. All that became apparent at the trials in Belgrade, too, no matter of how those trials were generally beneficial. Among the contemporary Serbian most eminent experts in international public law, Kreća (exactly like Gavro Perazić almost four decades ago) writes in detail, inter alia, about the forbidden methods of warfare, including the prohibition of ordering that there shall be no survivors, the specific prohibition of attacks against persons manifestly unable to defend themselves, about the treatment of the prisoners of war, about the protection of combatants who do not

take part in hostilities, about the role of the Red Cross in evacuation of the wounded and sick, etc. (Kreća, 2022).

If the ICTY's bodies in trials against Mrkšić, Šljivančanin and Radić were ready to establish doubtless legal qualification of the conflict, at least at the time of the fall of Vukovar and in that particular area of Croatia, and the clear distinction among the variety of victims, they would have significantly contributed not only to precise establishment of the facts, but also to stronger international condemnation of the atrocity at Ovčara. Surely, they would have contributed to stronger moral stigmatization not only of committed crimes, but also of the perpetrators and other direct and indirect participants in those events. In sum, by doing so, they would have significantly contributed to international judiciary for future similar cases of grave violations of international humanitarian law, as well as of the right to self-determination. Various political considerations within the complexity of international circumstances and relations had been given primacy before the legal norms and complete justice for the victims.

References

Andrassy, J., Bakotić, B., Seršić, M. & Vukas, B. (2006). *Međunarodno pravo 3*. Zagreb, Školska knjiga.

Bakotić, B. (ed.) (1997). *Ženevske konvencije za zaštitu žrtava rata s dopunskim protokolima – zbirka propisa*. Zagreb, Narodne novine.

Del Ponte, C. & Sudetic, C. (2008). *Gospođa tužiteljica – suočavanje s najtežim ratnim zločinima i kulturom nekažnjivosti*. Zagreb, Profil Internacional.

Dzuro, V. (2019). *The Investigator – Demons of the Balkan War*. Lincoln: Potomac Books, University of Nebraska Press.

Fabijanić Gagro, S. (2007). Nemeđunarodni oružani sukobi u praksi Međunarodnog kaznenog tribunala za bivšu Jugoslaviju. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, *28*(2), 1113–1138. https://hrcak.srce.hr/file/39797 [Accessed 23rd August 2023]

Fabijanić Gagro, S. & Vukas (2008). Pravna priroda i politička pozadina oružanih sukoba u Hrvatskoj i Bosni i Hercegovini. *Zbornik Pravnog fakulteta u Zagrebu*, *58*(5) 1159–1199. https://hrcak.srce.hr/file/45824 [Accessed 23rd August 2023].

Granić, M. (2022). *Diplomatska oluja*. Zagreb, Večernji list.

Humanitarian Law Center (2003–2017). *HLC Archives*. https://www.hlc-rdc.org/Transkripti/ovcara.html [Accessed 13th October 2023].

ICJ (2015). Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment. *I.C.J. Reports 2015*. https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf [Accessed 1st December 2023].

ICRC (2016). *Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (12 August 1949)* https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949 [Accessed 23rd August 2023].

ICRC (2020). *Convention Relative to the Treatment of Prisoners of War (12 August 1949)* https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949 [Accessed 23rd August 2023].

ICRC (1958). *Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949)* https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949 [Accessed 23rd August 2023].

ICRC (1987). *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977)* https://ihl-databases.icrc.org/en/ihl-treaties/api-1977 [Accessed 23rd August 2023].

ICRC (1988). *Regulations concerning the Laws and Customs of War on Land (18 October 1907)* https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf [Accessed 17th October 2023].

ICRC (1999). *Respect for International Humanitarian Law – Handbook for Parliamentarians*, No. 1. Geneva.

ICTY (2009). *Statute of the Tribunal*. https://www.icty.org/en/documents/statute-tribunal [Accessed 16th October 2023].

ICTY (1995–2004). *Indictments ("Vukovar Hospital" Case)*. https://ucr.irmct.org/scasedocs/case/IT-95-13%2F1#eng [Accessed 23rd August 2023].

ICTY (2007). *Trial Judgement ("Vukovar Hospital" Case)*. https://ucr.irmct.org/scasedocs/case/IT-95-13%2F1#trialJudgement [Accessed 23rd August 2023].

ICTY (2009). *Appeals Chamber Judgement ("Vukovar Hospital" Case)*. https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-95-13%231-A/JUD204R0000259801.pdf [Accessed 12th October 2023].

ICTY (2010). *Appeals Chamber Review Judgement ("Vukovar Hospital" Case)*. https://ucr.irmct.org/scasedocs/case/IT-95-13%2F1#eng [Accessed 12th October 2023].

Jonjić, T. (2013). Razaranje Vukovara i Međunarodni kazneni sud za bivšu Jugoslaviju. *Vukovar '91 – istina i/ili osporavanje (između znanosti i manipulacije)*, 218-238. https://www.pilar.hr/wp-content/images/stories/dokumenti/zbornici/43/Zbornik_VU_sv42-217.pdf [Accessed 23rd August 2023].

Kreća, M. (2022). *Međunarodno javno pravo*. Beograd, Univerzitet u Beogradu – Pravni fakultet.

Marijan, D. (2001). Jugoslavenska narodna armija u agresiji na Republiku Hrvatsku 1990.-1992. godine. *Časopis za suvremenu povijest*, *33*(2), 289–321. https://hrcak.srce.hr/208496 [Accessed 23rd August 2023].

Marijan, D. (2006). Jugoslavenska narodna armija – važnija obilježja. *Polemos*, *9*(1), 25–43. https://hrcak.srce.hr/17159 [Accessed 23rd August 2023].

Marijan, D. (2013). *Obrana i pad Vukovara*. Zagreb: Hrvatski institut za povijest.

Meron, T. (2017). "The Geneva Conventions as Customary Law". *American Journal of International Law*, *81*(2), 348–370. https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/geneva-conventions-as-customary-law/3FBDE550C786BFB40AC75C305640E22F [Accessed 30th November 2023].

Miškulin, I. (2010). "Sladoled i sunce" – Promatračka misija Europske zajednice i Hrvatska 1991.-1995. *Časopis za suvremenu povijest*, *42*(2), 299–337. https://hrcak.srce.hr/63646 [Accessed 23rd August 2023].

Pellet, A. (1993). The Opinions of Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples. *European Journal of International Law*, *3*(1), 178–185. http://www.ejil.org/pdfs/3/1/1175.pdf [Accessed 23rd August 2023].

Perazić, G. Đ. (1986). *Međunarodno ratno pravo*. Beograd, Vojnoizdavački i novinski centar.

Rehak, D. (2000). *Putevima pakla kroz srpske koncentracijske logore 1991 … u 21. stoljeće*. Zagreb, Hrvatsko društvo logoraša srpskih koncentracijskih logora.

Škulić, M. (2022). *Međunarodno krivično pravo*. Beograd, Službeni glasnik.

The University of Edinburgh (1990–2023). *Peace Agreements Database*. Agreement on Humanitarian Convoy to Evacuate Wounded and Sick from Vukovar Hospital, 1991. https://www.peaceagreements.org/viewmasterdocument/1650 [Accessed 21st August 2023].

United Nations (1994) Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992). https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Accessed 13th October 2023].

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Kršenja međunarodnog humanitarnog prava na štetu osoba nasilno odvedenih iz vukovarske bolnice i ubijenih na Ovčari

Sažetak

U članku se analiziraju kršenja međunarodnog prava na štetu osoba nasilno odvedenih iz vukovarske bolnice nakon pada obrane grada. Polazi se od istraživanja povjesničara Domovinskog rata o promjenama u sastavu Jugoslavenske narodne armije (JNA) tijekom raspada Socijalističke Federativne Republike Jugoslavije (SFRJ), o snagama koje su napadale Vukovar te o prikrivenoj ulozi Republike Srbije (RS). Kroz prizmu međunarodnog prava analiziraju se pregovori koji su trebali dovesti do evakuacije ranjenika i bolesnika iz bolnice, kao i postupanja JNA-a koja su dovela do zločina na Ovčari. Na osnovi uvida u dokumentaciju Međunarodnog kaznenog suda za bivšu Jugoslaviju (MKSJ) u predmetu „Vukovarska bolnica", pa i dostupnih izvora o suđenju neposrednim izvršiteljima u Beogradu, analizira se pristup kvalifikaciji oružanog sukoba, žrtava zločina te kaznenih djela počinjenih na njihovu štetu. Navedeno se promatra u svjetlu Ženevskih konvencija iz 1949., Dopunskih protokola iz 1977., međunarodnog običajnog prava, Statuta MKSJ-a te mišljenja pojedinih hrvatskih i stranih pravnih autora, uključujući neke jugoslavenske autore uoči raspada SFRJ-a i neke srbijanske u sadašnje doba. Analiza rezultira zaključkom o nespremnosti MKSJ-a i RS-a za priznanje činjenice postojanja, najkasnije od 8. 10. 1991., međunarodnog oružanog sukoba. Da je bilo takve spremnosti, to bi bilo dovelo do primjene šireg kruga pravila međunarodnoga ugovornog prava glede raznih kategorija žrtava i, posljedično, do još težih kazni za počinitelje. Umjesto toga, status osoba ubijenih na Ovčari nije bio ispitan u dovoljnoj mjeri jer svi oni nisu bili isključivo pripadnici hrvatskih snaga koji su postali ratni zarobljenici, već je bilo i hors de combat, kao i ranjenih i bolesnih civila, sanitetskog osoblja i drugih zaposlenika bolnice te ranjivih kategorija civila pod dodatnom zaštitom. Konačno, zaključak je i kako suđenja, unatoč višegodišnjem trajanju i nekoliko pravomoćnih osuda, nisu donijela potpuno utvrđivanje činjeničnog stanja, niti dovoljno opsežnu kaznenopravnu odgovornost. Tako u kaznenopravnom smislu nije zadovoljena međunarodna pravda niti je dan dovoljan doprinos procesima mira i pomirbe.

Ključne riječi

Vukovar, bolnica, Ovčara, JNA, MKSJ, Ženevske konvencije