Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case No. S1 1 K 003336 10 Kri

Date: **Pronounced:** **29 August 2011**
Written Verdict Issued: **12 October 2011**

Before the Panel composed of: **Judge Darko Samardžić, President**
Judge Davorin Jukić
Judge Jasmina Kosović

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

vs.

Velibor Bogdanović

VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:
Remzija Smailagić

Defense Counsel for the Accused:
Nada Dalipagić

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting as the Panel composed of Judge Darko Samardžić, as the Presiding Judge, and Judge Davorin Jukić and Judge Jasmina Kosović, as members of the Panel, in the presence of Legal Officer Azra Bijedić, participating as the record-taker, in the criminal case against the Accused Velibor Bogdanović for the criminal offence of *War Crimes against Civilians* in violation of Article 173(1)(e), as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC of BiH) and Article 29 of the CC of BiH, following the Indictment filed by the Prosecutor's Office of Bosnia and Herzegovina No. T20 0 KTRZ 0000003 08 of 8 November 2010, confirmed on 10 November 2010, amended on 7 July 2011, following the main trial held in the absence of Accused Velibor Bogdanović and his Defense Counsel, Attorney Nada Dalipagić, and Prosecutor Remzija Smailagić of the Prosecutor's Office of BiH, on 29 August 2011 rendered and publicly announced the following:

V E R D I C T

THE ACCUSED:

VELIBOR BOGDANOVIĆ a.k.a "Veka" and "Veki", son of Vasilije and Mila, née Klemo, born on 31 December 1970 in …, at …, Municipality of …, … by ethnicity, citizen of …, car mechanic by occupation, with completed secondary school, married, father of three minor children, served in the military in Bela Crkva and Belgrade, registered in the military records in Mostar, unemployed, poor financial condition, no prior convictions, no other criminal proceedings pending.

Pursuant to Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC of BiH),

IS GUILTY

because:

During the war in Bosnia and Herzegovina and the armed conflict in the Mostar Municipality between the Army of BiH and the HVO, as a member of the HVO in Mostar he acted in contravention of the rules of international humanitarian law and in violation of Article 3(1)(a) and (c), Article 27(2) and Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, in as much as he:

At around 02.00 hrs on the night of 25/26 May 1993, in Mostar, at 4 Brune Bušića Street, together with five unidentified HVO soldiers, armed with automatic rifles and a pistol and dressed in military camouflage uniforms, with hand grenades attached to the uniforms, he entered the apartment owned by Salko and Mina Zerem and ordered Salko Zerem to get ready in two minutes, which Salko did, whereupon two unidentified soldiers took him in front of the building to a Golf passenger motor vehicle in which there were two other unidentified soldiers dressed in military camouflage uniforms, whereupon Velibor Bogdanović requested money from Salko Zerem's wife - Mina Zerem, and together with unidentified soldiers ransacked the apartment from which they stole appliances and valuables, after which Velibor Bogdanović said to Mina Zerem: "We will now see whether you have money or not." He then ordered her to continue up to the upper level of their split level apartment and once they got inside the bedroom, by the use of force and threats, he coerced her to sexual intercourse by ordering her to kneel and undress while he was holding a pistol in his hand, and when she kneeled down still undressed he ripped her clothes off, pressed the pistol against her forehead, pulled out a pornographic magazine and told her: "We will try this out now." He then pulled her head between his legs, put his sexual organ into her mouth and ordered her to perform oral sex on him threatening her "be careful with the teeth, the pistol is on your forehead," whereupon he pushed her to the twin bed and raped her. After that he went downstairs and left the apartment together with the unidentified soldiers. Salko Zerem, who was held in the passenger motor vehicle in front of the building during that time, was unlawfully taken away by them to the prison known as "the Heliodrom prison camp", from where he was transferred and detained at other locations in which he was detained for around 30 days.

Therefore,

during the war in Bosnia and Herzegovina and the armed conflict between the HVO

and the Army of BiH in Mostar, violating provisions of the Geneva Convention that prohibit outrages upon personal dignity, in particular humiliating and degrading treatment, provisions protecting women against rape, and provisions prohibiting unlawful detention of civilians, he coerced a woman to sexual intercourse (raped her) by the use of threat and by an immediate attack upon her life and limb, and unlawfully detained one civilian person,

whereby he committed the criminal offense of:

War Crimes against Civilians in violation of Article 173(1)(e) as read with Article 180(1) and Article 29 of the Criminal Code of Bosnia and Herzegovina,

therefore, pursuant to Article 285(1) of the CPC of BiH, and with the application of Articles 39, 40, 42 and 49 of the CC of BiH, the Panel of the Court of Bosnia and Herzegovina

SENTENCES HIM

TO IMPRISONMENT FOR A TERM OF 6 (SIX) YEARS

Pursuant to Article 188(2) and (4) of the CPC of BiH, the Accused shall be relieved of the duty to reimburse the costs of the criminal proceedings, which shall be borne by the Court.

Pursuant to Article 198(2) of the CPC of BiH, all injured parties are instructed to pursue their potential claims under property law in a civil action.

REASONING

I. INTRODUCTION

A. EVIDENCE ADDUCED BY THE PARTIES

1. Prosecutor's Office of BiH

1. The Prosecutor's Office of Bosnia and Herzegovina filed the Indictment No. T20 0 KTRZ 000003 08 of 8 November 2010 charging the Accused Velibor Bogdanović with the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e) as read with Article 180(1) and Article 29 of the Criminal Code of BiH. The Preliminary Hearing Judge confirmed the Indictment on 10 November 2010, and the Accused entered a not guilty plea on 15 December 2010. The main trial commenced on 11 January 2011, and the Prosecutor's Office amended the Indictment in the course of the main trial, specifically on 7 July 2011. The amendments were made to the operative part of the Indictment and included as follows: line 13 of the operative part of the Indictment - after the word “jewelry” - the words “one necklace” were replaced with “two necklaces”, and after the word necklaces the following words were added: “1 necklace, 1 yellow medallion and 1 pendant necklace”, and in line 23 the following phrases were added after the word “teeth” - “the pistol is on the forehead” as well as “a pistol can fire at any moment” and in the penultimate line the following words were added after the word Heliodrom “wherefrom he was removed and imprisoned at other locations as well”, and the words “in which”, were replaced with the word “wherein”, and in the ultimate line, the word “around” was added after the word “imprisoned”. The Court invited the Defense to make submissions, if any, with respect to the amended Indictment; however, no submission were made by the Defense in relation to the amended Indictment.

2. In the course of the evidentiary proceedings, the Prosecutor’s Office of BiH heard the evidence of the following witnesses: Mina Zerem, Salko Zerem, Anica Pudar, Blaž Šimunović, Junuz Vajzović, Jusuf Numanović, Fatima Pehlić, Senad Velić, dr. Alma Bravo

Mehmedbašić, a medical expert witness and Senadin Fadilpašić – an expert witness specialized in clinical psychology. The list of documentary evidence adduced and placed on the record by the Prosecution is given in Appendix 1 to the Verdict and shall be considered as an integral part thereof.

2. Defense

3. In the course of the evidentiary proceedings the Defense for the Accused Velimir Bogdanović heard the following witnesses: Mario Cvitković, Emil Ćorić and Damir Rozić. The evidence adduced is listed in Appendix 2 of the Verdict and shall be considered an integral part thereof.

B. CLOSING ARGUMENTS

1. Prosecutor's Office of Bosnia and Herzegovina

4. In its Closing Argument, the Prosecutor's Office of BiH minutely dealt with the evidence given by both the Prosecution and the Defense witnesses and the documentary evidence placed on the record. The Prosecution submitted that through the evidence adduced they had proven beyond a doubt that the Accused Velibor Bogdanović committed the criminal acts charged against him under the circumstances, in the place and at the time as alleged in the original Indictment and in the Indictment amended during the main trial.

5. The Prosecution submitted that both the witnesses' testimonies and documentary evidence show that the Accused committed the criminal offence charged against him during the war in Bosnia and Herzegovina and the armed conflict between the Army of BiH and the HVO. The evidence also showed that the acts charged against the Accused constituted gross violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and that the aggrieved parties – witnesses were civilian persons protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and that the criminal offense charged was perpetrated by the Accused in the Mostar Municipality while he was a member

of the HVO, one of the parties to the conflict, and that those criminal acts were not justified by military necessity. The evidence has also shown that there exists a *nexus* between the criminal offence described under the operative part of the Indictment and the war and/or armed conflict, and that the Accused made use of his "superior" military position and the position of the injured parties who were in a "subordinate" position to commit the incriminating acts.

6. The Prosecution contends that the foregoing conclusions are based on the documentary evidence adduced by the Prosecution, specifically the Decision Proclaiming the State of War of 20 June 1992 which became effective on the date of its issuance, and the Decision on Termination of the State of War of 20 June 1995.

7. The Prosecution further submits that it indisputably follows from the testimony of the Prosecution witnesses that there was a conflict between the HVO and the Army of BiH in early May 1993 in the Mostar Municipality, and that it started on 9 May 1993. The Prosecution further submits that the documentary evidence adduced shows that Accused Velibor Bogdanović was a member of the HVO during the relevant time. This fact was corroborated through evidence of both the Prosecution and the Defense witnesses.

8. In reference to the elements pertaining to the responsibility of the Accused, the Prosecution submitted that the Accused was aware that, as an armed member of the HVO, he was entering the apartment owned by Bosniak civilians, who were unarmed, and that by doing so he was in a way instilling fear among Bosniak population.

9. The evidence corroborating the factual substratum of the Indictment and *mens rea* of the Accused at the time of perpetration of the criminal offence, as submitted by the Prosecution, follows from the testimony of Mina Zerem, Salko Zerem, Anica Pudar, Blaž Šimunović, Junuz Vajzović, Jusuf Numanović, Senad Velić and Fatima Pehlić. The Prosecution submits that the testimonies of Mina Zerem and Salko Zerem are relevant in their entirety on the grounds of their consistency and the motive behind which they were given which was devoid of any desire for revenge or retaliation.

10. In its closing argument the Prosecution made specific reference to the Report of the expert witnesses' team, which shows that the injured party does not meet the criteria for a PTSD diagnosis, but that she evidently suffers from …. The expert witnesses

testified that it is not unusual to see that a person diagnosed with … has led an active and busy lifestyle for 17 years, adding that in many instances, it was observed that rape victims decided to report to a psychiatrist for the first time in 2011.

11. The Prosecution further submits that it follows from the documentary evidence that the aggrieved party made a positive identification of the accused. A positive ID of the Accused was also made by witness Salko Zerem. It follows from the documentary evidence that Salko Zerem was not a member of the Army of BiH during the relevant time and that, in fact, he was a civilian, whilst the employment record card and the Decision issued by the Pension and Disability Insurance Bureau show that Mina Zerem was employed in the period from 30 April 1992 and 1 August 1995.

12. In its closing argument, the Prosecution also commented on the Defense evidence and underlined that the witnesses examined were not able to corroborate the circumstances pertaining to the movement and presence of the accused Velibor Bogdanović during the night in question. The Prosecution submitted that the Defense offered no documentary evidence with the tendency to disprove the averment that the Accused committed the acts he is charged with or with the aim to provide him with an alibi, which is why the Prosecution objects to the admittance of such evidence on the grounds of its relevance and legality.

13. The Prosecution addressed in detail Article 3 of Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, explaining that the evidence adduced at the main trial clearly shows that the Accused committed the acts against the injured party which by its character fall into a category of crimes of violence against life and limb and outrages upon personal dignity carried out in a particularly offensive and degrading manner, adding that the aggrieved party was, in terms of her status, a person protected under Article 3(1) subparagraphs (a) and (c) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

14. With respect to Article 173(1)(e) of the Criminal Code of BiH, the Prosecution submitted that it clearly follows from the testimony of the aggrieved parties and witnesses that the victim was a Bosniak female, and that the accused raped her by the use of force and attack on her limb in the manner as described in the Indictment, while armed, wearing

a military uniform, in a dominating position, whereby he acted with discriminatory intent to cause severe suffering and mental pain to the aggrieved party.

15. Having due regard to the evidence adduced, the fact that there was an armed conflict at the relevant time, the provisions of the Geneva convention, the status of the victims and the role of the Accused, the Prosecution proposed that the Court should render a convicting verdict finding the defendant guilty of the criminal offence of *War Crimes against Civilians* in violation of Article 173(1)(e) as read with Article 180(1) and Article 29 of the Criminal Code of BiH.

2. Defense

16. In its closing argument, the Defense for the Accused underlined that in their opinion the Prosecution failed to prove the averments of the Indictment, specifically that the Accused Velibor Bogdanović committed the criminal offence of *War Crimes against Civilians* in violation of Article 173(1)(e) of the CC of BiH, in particular because there were no elements of any criminal offence in the conduct of the Accused either during, before or after the relevant period.

17. The Defense submitted that the Prosecution failed to offer any evidence with the tendency to prove that during the relevant night it was precisely the Accused in this case who entered and ransacked Mina and Salko Zerem's apartment together with unidentified soldiers, on which occasion they stole appliances and valuables. The Defense further contends that none of the Prosecution witnesses saw that the appliances and valuables were stolen from Mina and Salko Zerem, let alone that it was done by Velibor Bogdanović.

18. As far as the issue of rape against Mina Zerem is concerned, the Defense submits that Mina Zerem has failed to furnish any medical documents to this end, although it is known that she had health insurance coverage throughout the war. The Defense placed particular emphasis on the fact that it was only 17 year after the incident that Mina Zerem came forward with the revelation that she was raped, which instills absolute doubt when it comes to the truthfulness and accuracy of the incident itself.

19. In its closing argument the Defense raised the issue of legality of identification of the Accused which, according to the Defense, was carried out contrary to Article

85 of the CPC. The Defense submitted that the Accused was available to the criminal prosecution bodies and that the evidence in this case was obtained illegally through violation of human rights and freedoms enshrined in the Constitution and international treaties.

20. With respect to the issue that Salko Zerem was taken away, the Defense submitted that Salko Zerem's testimony cannot be considered credible as it was intentionally given to go against the accused. Further, Salko Zerem had the status of a military person and not a civilian, which is evident from the evidence placed on the record by the Defense. Further, the Defense submits that the trier of fact should consider the fact that witness Salko Zerem insulted the Accused and his family on several occasions in the course of the proceedings and these incidents were reported to the Mostar Police Department.

21. The Defense submits that the Prosecution acted contrary to Article 14 of the CPC which prescribes that the Court, the Prosecutor and other bodies participating in the proceedings are bound to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the accused.

22. The Defense submits that the Prosecution has failed to prove a single averment of the Indictment through their witnesses. Specifically, none of the witnesses confirmed that Mina Zerem was raped, and they learned about the incident no sooner than in 2010. The same witnesses testified that they did not know the accused and that they saw him for the first time in the courtroom, except for Fatima Pehlić who had known him from before. However, her testimony has shown, and the Court should take this into account, that she and Mina Zerem often talk about the incident and browse the online photo gallery of this trial.

23. The Defense submits that the Report by expert witness Alma Bravo Mehmedbašić, MD, and Senadin Fadilpašić is irrelevant because it fails to give a clear and explicit answer to the question as to where and when Mina Zerem Mina started her psychiatric treatment. The Report does not indicate that Mina Zerem suffered any negative psychological consequences, this even more so if combined with the fact that she had been employed for over 17 years and did not seek any professional help.

24. The Defense contends that the Prosecution has failed to prove that Mina

Zerem was raped, and in particular that she was raped by the Accused Velibor Bogdanović. The Defense managed to prove through their witnesses that from the onset of conflicts on 9 May 1993, three of four days later, the Accused Velibor Bogdanović set off to the Bokševica Rama front line, at a 100 km distance from Mostar, and did not return until 20 June 1993.

25. Therefore, the Defense submits that at the time of the alleged incident described in the Indictment, the Accused was not in Mostar at all and did not commit the criminal offence charged against him.

26. The Defense finds it unusual that Mina Zerem was granted war victim status 17 years after the war, specifically on 16 December 2010, and that Salko Zerem was granted prison camp inmate status on 3 June 2010, which means at the time when the investigation in this case was still ongoing. A question arises as to why Mina Zerem and Salko had failed to file petitions for recognition of their respective status at an earlier stage but decided to do so 17 years following the incident in question.

27. As the Prosecution has failed to prove a single averment from the Indictment, and since it is clear that Velibor Bogdanović did not commit the criminal offence he is charged with, the Defense proposes that the Court apply Article 284 of the CPC of BiH and acquit the Accused of all charges.

II. PROCEDURAL DECISIONS

A. WITNESS-PROTECTION RELATED DECISIONS

28. On 11 January 2011, the Prosecution filed a petition with the Court to grant protective measures to Witness S1. However, as the hearing was public and since the witness' name had already been mentioned in the Indictment, the Court decided to assign pseudonym S1 to this witness that will be in use pending his/her decision in terms of other measures. The Court also ordered the Prosecution to redact the witness name in the Indictment.

29. On 1 February 2011, the witness expressed her willingness to testify under full

name and surname, but with the public excluded, and the Prosecution fashioned its motion in line with the witness's request explaining that the public should be excluded in order to protect the personal and intimate life of the injured party and in the furtherance of the witness' interests. The Defense did not object to the motion.

30. Having granted the Prosecution Motion, on the same day, 1 February 2011, pursuant to Article 237(1) and Article 235 of the Criminal Procedure Code, the Court decided that witness Mina Zerem should testify in closed session.

B. DECISION TO EXCLUDE THE PUBLIC

31. The Panel issued decisions to exclude the public from the main trial pursuant to Article 235 of the Criminal Procedure Code of BiH, specifically on 1 February 2011 when it discussed the witness protection measures in relation to witness Mina Zerem.

32. Upon the Prosecution motion the public was also excluded pursuant to the above-mentioned statutory provision on 7 July 2011 when the Prosecution, as part of its closing argument, elaborated on the testimony of the injured party Mina Zerem. Defense Counsel for the Accused Velibor Bogdanović objected to this Motion; however, in order to protect the intimate life of the injured party, the Court granted the Prosecutor's motion and excluded the public during the Prosecutor's presentation of its closing argument.

33. The Panel issued the above-mentioned decisions after a careful examination of the case-law, which had shown that dynamics of presentation of legal and factual issues could not always be predictable and controllable, and therefore decided to exclude the public from the part of the main trial involving a discussion on protective measures pertaining to the witness Mina Zerem and her testimony.

34. Following each of such decisions the Panel informed the Public of the reasons for its exclusion and the decision itself.

C. EXPIRY OF A 30 (THIRTY) DAY DEADLINE

35. Article 251(2) of the CPC of BiH provides that: "The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has

changed or if the adjournment lasted longer than 30 days but with consent of the parties and the defense attorney, the Panel may decide that in such a case the witnesses and experts shall not be examined again and that the new crime scene investigation shall not be conducted but the minutes of the crime scene investigation and testimony of the witnesses and experts given at the prior main trial shall be used."

36. As the adjournment between the resumption of main trial held on **7 July 2011 and 22 August 2011** lasted longer than 30 days, with a prior consent of the parties and Defense Counsel, the Court decided not to recommence the trial from the beginning but to use the evidence adduced up to the referenced point in time.

D. DECISION REFUSING THE MOTION TO ADDUCE EVIDENCE IN REJOINDER TO THE PROSECUTOR'S REBUTTING EVIDENCE

37. For the purpose of Article 261(2), Defense Counsel for the Accused Velibor Bogdanović proposed the examination of Pero Zelenika, who was supposed to confirm Salko Zerem's membership in the HVO.

38. The Panel dismissed this motion because the witness proposed is a witness of fact and not an expert witness who would be in a position to confirm whether Salko Zerem was a member of any HVO unit or not.

E. DECISION REFUSING THE PROSECUTION MOTION FOR A SUPPLEMENT TO THE EVIDENTIARY PROCEDURE

39. Pursuant to Article 276(1), as part of the supplement to the evidentiary procedure, the Prosecution proposed that the following witnesses be heard: Fahira Đozić, Senada Đozić, Lejla Balta, Fatima Katica, Mehmed Katica, Spomenka Drljević and the protected witness. The Prosecution proposed that the above-named witnesses be heard in relation to the fact that the Accused was in Mostar and that they used to see him on a daily basis. The Prosecution stated that these witnesses contacted the Prosecutor's Office themselves after the Indictment was filed.

40. The Defense was against the afore-mentioned proposal because the witnesses

proposed were in no way related to the incidents mentioned in the Indictment and because the Prosecution was in a position to propose them as witnesses at an earlier stage of the proceedings.

41. The Panel refused the Prosecution motion for a supplement of the evidentiary procedure as the Prosecution failed to offer proper arguments and evidence that would attest to the fact that the witnesses proposed had knowledge about the incidents referred to in the Indictment. The fact that the witnesses contacted the Prosecutor's Office themselves after the Indictment was filed is not a reason that would prevent the Prosecution from contacting them, particularly if known that all witnesses reside in BiH.

In the process of issuing this decision, the Panel applied Article 239 of the CPC which provides that it is the duty of the judge or the presiding judge to ensure that the subject matter is fully examined and that everything that prolongs the proceedings rather than clarifies the matter at issue is eliminated.

F. DECISION ON THE MOTION TO ACCEPT AS ESTABLISHED FACTS ADJUDICATED BEFORE THE ICTY

42. On 23 May 2011, the Panel issued a decision dismissing the Prosecutor's Motion No. T20 0 KTRZ 0000003 dated 23 December 2010 to accept as established the following facts:

1. in the final and binding Judgment rendered by the ICTY Trial Chamber in the *Prosecutor Vs. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* Case (*IT-96-21-T dated 16.11.1998)* in the text that follows:

"The preceding background section has discussed in some detail the military and political situation in the States of the former SFRY leading up to 1992. Particular attention was focused upon the State of Bosnia and Herzegovina and there is no need for repetition of the relevant facts. Suffice it to say that in Bosnia and Herzegovina as a whole there was continuing armed violence at least from the date of its declaration of independence – 6 March 1992 – until the signing of the Dayton Peace Agreement in November 1995. Certainly involved in this armed violence, and relevant to the present case, were the JNA, the Bosnian Army (consisting of the TO and MUP), the HVO and the VRS." (para 186).

2. "The JNA was the official army of the SFRY and was, after the creation of the FRY, under that State's authority until its division (the FRY claiming to be the sole legitimate successor State of the SFRY). However, the authorities of the so-called SRBH also announced the existence of their own army in May 1992 – the VSRBH (later the VRS) – which comprised of former JNA units in Bosnia and Herzegovina. The remainder of the JNA became the VJ, the army of the FRY. The VRS was controlled from Pale by the leadership of the Bosnian Serb authorities, headed by Radovan Karadžić, and throughout 1992, and thereafter, it occupied significant amounts of Bosnia and Herzegovina. The HVO was in a position similar to that of the VRS, in that it was established by the self-proclaimed para-State of the Bosnian Croats as its army and operated from territory under its control. The remaining participants, the Bosnian TO and MUP, were clearly acting on behalf of the authorities of Bosnia and Herzegovina. (para 187)

3. in the final and binding Trial Chamber Judgment rendered in *the Prosecutor Vs. Mladen Naletilić and Vinko Naletilić* Case (*IT-98-34-T od 31.03.2003)* in the text that follows:

"The BH Croats participated in the institutions of the newly independent Bosnia and Herzegovina in Sarajevo[1]. Even before the referendum on independence, the "HZ H-B" was founded. The HZ H-B started to play a more prominent role as the actual legislators and administrators of the areas of relevance to this Indictment. There were many differing expectations expressed on the reasons for the establishment of HZ H-B; some saw it as a temporary institution to fill a void after virtual disintegration of the government of Bosnia and Herzegovina. Others saw it as a step towards forming part of the Republic of Croatia or creating an independent state. Regardless of which, many B-H Croats wanted to take the initiative and create a structure for defense against the Serbs" (para 15)

4. "The jurisprudence of the ICTY finds that an armed conflict exists:

[1] Exhibit PP 104, Decision on the establishment of the HZ H-B which states in Article 2 of the Statute that HZ H-B is composed of the following municipalities: Jajce, Kreševo, Busovača, Vitez, Novi Travnik, Travnik, Kiseljak, Fojnica, Skender Vakuf/Dobratic, Kakanj, Varos, Kotor Varoš, Tomislavgrad, Livno, Kupres, Bugojno, Gornji Vakuf, Prozor, Konjic, Jablanica, Posušje, Mostar, Široki Brijeg, Grude, Ljubuški, Čitluk, Čapljina, Neum, Stolac, Trebinje/Ravno).

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State (...) whether or not actual combat takes place there.[2]

International humanitarian law applies from the moment it is established that an armed conflict exists in a particular territory.[3] It is not required that clashes take place in a specific part of the territory.[4] The nexus between the armed conflicts is established if the crimes charged were "closely related to the hostilities."[5] **(**para 177).

5. "The Trial Chamber is satisfied that an armed conflict existed during the time relevant to the Indictment, *i.e.* at least between 17 April 1993 and the end of February 1994." **(**para 179)

6. in the final and binding ICTY Appeals Chamber Judgment in the *Prosecutor Vs. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (Case No. IT-96-21-A dated 20.02. 2001.) in the text that follows:*

"The Trial Chamber's finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in Tadić that it "is indisputable that an armed conflict is international if it takes place between two or more States", which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict was international prior to 19 May 1992" (para 33)

7. in the final and binding ICTY Appeals Chamber Judgment in the *Prosecutor Vs. Mladen Naletilić-Tuta and Vinko Martinović - Štela (IT-98-34-T od 03.05.2006)* in the text as follows:

"The Chamber thus finds that the conflict between the HVO and the ABiH in Bosnia and Herzegovina was internationalized by the intervention of the troops of the Republic of Croatia in the conflict." (para 196)

[2] Decision on Jurisdiction in the *Prosecutor Vs. Tadić* Case, para 70.
[3] Decision on Jurisdiction in the *Prosecutor Vs. Tadić* Case, para 70.
[4] Decision on Jurisdiction in the *Prosecutor Vs. Tadić* Case, para 70.
[5] Decision on Jurisdiction in the *Prosecutor* Vs. *Tadić* Case, para 70.

8. in the final and binding ICTY Appeals Chamber Judgment in the *Prosecutor Vs. Dario Kordić and Mario Čerkez* Case *(IT-95-14/2-A dated 17 December 2004)* in the text that follows:

"This reasoning is supported by the purpose of the Geneva Conventions. Once an armed conflict has become international, the Geneva Conventions apply throughout the respective territories of the warring parties. Accordingly, the Trial Chamber did not err by taking into account the situation in other areas within Bosnia and Herzegovina linked to the armed conflict in Central Bosnia when examining the international character of the armed conflict." (para 321).

Specifically, the Prosecutor's Office of BiH referred to Article 4 of the Law on Transfer in its Motion No. T20 0 KTRZ 0000003 of 23 December 2010, moving the Court to accept as proven the facts adjudicated in the ICTY Trial Chamber judgments in the following cases: *Prosecutor Vs. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (Case No. IT-96-21-T of 16.11.2008), Prosecutor Vs. Mladen Naletilić- Tuta and Vinko Martinović - Štela (Case No. IT-98-34-T of 31 March 2003),* and Appeals Judgments in the following cases: *Prosecutor Vs. Zejnil Delalić, Zdravko Mucić, Hazim Delić i Esad Landžo (Case No. IT-96-21-A of 20 February 2001), Prosecutor Vs. Mladen Naletilić -Tuta and Vinko Martinović - Štela (Case No. IT-98-34-T of 3 May 2006), Prosecutor vs. Dario Kordić and Mario Čerkez (Case No. IT-95 14/2 – A, of 17 December 2004.* The Prosecution submitted paragraph numbers for each of the ICTY Judgments proposed and the facts contained therein on which they based their motion for acceptance of the facts as proven for the purposes of this trial.

The Court did not receive the Defense's response to the Prosecution Motion, but it did receive a submission by both the Prosecution and the Defense stating that there is no need to hold a separate hearing in relation to the Motion.
Following a detailed examination of the Motion, the Court has decided as stated in the operative part for the following reasons:

Article 4 of the Law on Transfer[6] provides that: "At the request of a party or *proprio motu*, the court, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings."

Having given an opportunity to the parties to have a separate hearing on this matter the Court met the first formal requirement prescribed in the above-cited provision governing the **decision-making process of accepting as proven those facts that are established by legally binding decisions.**

It must be noted that the Law on Transfer is a *lex specialis* and that **it had as such** been applied in the proceedings before the courts in Bosnia and Herzegovina. The essential purpose of Article 4 of the Law on the Transfer of Cases is efficiency and judicial economy. Efficiency of the proceedings implies economy in the sense that it condenses the relevant proceedings to what is essential for the case of each party, without rehearing supplementary allegations already proven in past proceedings.

The legislator entrusted the courts with a discretionary right to accept "as proven" the facts that had already been established for the purpose of judicial economy, also in furtherance of a defendant's right to be tried within a reasonable deadline and to minimize the number of courts in which witnesses have to appear to give their evidence, thus avoiding their further traumatization.

The Court was aware of the danger that the right of the accused to a fair trial and presumption of innocence may be jeopardized in furtherance of the goal of achieving judicial economy and that the above-mentioned goals can only be attained by ensuring that those rights remain intact and the criteria given bellow have been specifically designed to accomplish that end. In the exercise of its discretionary right foreseen under Article 4 of the Law on Transfer, the Panel took into consideration and had due regard for

[6] Article 4 of the Law on Transfer provides that: "At the request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings."

the rights of the accused in terms of Article 6 of the European Convention on Human Rights and Fundamental Freedoms and Articles 3, 13 and Article 15 of the CPC. However, the Court is aware that it must act with due diligence when it comes to the application of this provision in terms of respecting the principle of fairness of a given proceeding, meaning that the Court **shall refuse acceptance** of those facts that would directly or indirectly incriminate the accused.

The Court understands that in terms of Article 15 of the CPC it is not obliged to base its decision on any fact that was accepted as proven, given that all of them will be subject to evaluation individually and in correspondence with other pieces of evidence adduced at the main trial, which will result in a judgment that was made based on the evaluation of the entirety of the evidence presented.

Procedural and legal effect of taking a judicial notice of an established fact is that an onus of proof in terms of contesting the fact concerned is shifted from the prosecutor to the defense[7]. In case the accused, in the course of the trial, wants to challenge an established fact that the court took a judicial notice of, the accused has the right (as a guarantee of the fairness of the proceedings) to present evidence that challenges credibility of the adjudicated facts.[8]

Bearing in mind that neither the Law on Transfer nor the CPC sets forth the criteria that must be met for a certain fact to be accepted as established by the ICTY, driven by its obligation to preserve the right to a fair trial guaranteed under the European Convention and the CPC of BiH, the Court decided to apply the criteria laid down by the ICTY in the *Prosecutor Vs. Momčilo Krajišnik* (Case No. IT-00-39-T). For a fact to be capable of admission under those criteria, it should be truly adjudicated in previous judgments in the sense that: 1) it is distinct, concrete and identifiable; 2) it is restricted to factual findings and does not include legal characterizations; 3) it was contested at trial and forms part of a judgment which has either not been appealed or has been finally settled on appeal; or 4) it

[7] The Court of BiH jurisprudence: Decision in the Prosecutor Vs. Momčilo Mandić Case No. X-KR-05/58 of 5 February 2007; Decision in the Prosecutor Vs. Krešo Lučić Case No. X-KR-06/298 of 27 March 2007.
ICTY Jurisprudence: Decision on adjudicated facts in the Prosecutor Vs. Vujadin Popović et al. No. IT-05-88-T of 26 September 2006 which further develops the criteria laid down in the two ICTY Decisions on adjudicated facts in the Prosecutor Vs. Momčilo Krajišnik Case No. IT-00-39-T of 28 February 2003 and 24 March 2005.
[8] Article 6(2) of the CPC and Article 6(3) subparagraph d) of the European Convention.

was contested at trial and now forms part of a judgment which is under appeal, but falls within issues which are not in dispute during the appeal; 5) it does not attest to criminal responsibility of the Accused; 6) is not the subject of (reasonable) dispute between the Parties in the present case; 7) it is not based on plea agreements in previous cases; and 8) it does not impact on the *right of the Accused to a fair trial*.[9]

The Court decided as stated in the operative part of the Decision with due regard to the above-mentioned criteria.

The fact must be distinct, concrete and identifiable

For a fact to be admissible under this requirement, pursuant to the ICTY Decision in the *Prosecutor Vs. Popović et al.* case, the fact as proposed by the moving party must not be inextricably commingled either with other facts that do not themselves fulfil the requirements for judicial notice or with other facts that serve to obscure the principal fact. The Chamber must examine the purported fact in the context of the original judgment.[10]

The Panel applied the above-mentioned criteria for admissibility to the facts proposed and established that the facts do not meet the necessary requirements. This admissibility requirement has been supplemented through the ICTY and the Court of BiH jurisprudence, so that each and every fact proposed was examined by the Court in the following fashion:

The fact proposed truly must be a "fact" that is:

a) sufficiently specific, concrete and identifiable;
b) not a conclusion, opinion or oral testimony;[11]

The Panel concludes that the facts proposed under Nos. **2, 3, 5, 6, 7** represent conclusions, findings and opinions of the Trial Chamber, and are not clearly identifiable to serve the purposes of this case.

[9] ICTY Decision on adjudicated facts in the Momčilo Krajišnik Case No. IT-00-39-T dated 28 February 2003.
[10] See: ICTY Decision on Prosecution Motion for Judicial Notice of Adjudicated facts in the Prosecutor vs. Vujadin Popović et al Case, ICTY Case No. IT-05-88-T od 26 September 2006, paragraph 6;
[11] *The Court of BiH jurisprudence: Decision by the Court of BiH No X-KR-07/394 of 13 November 2008, Decision by the Court of BiH No. X-KR-06/202 of 3 July 2007, Decision by the Court No. X-KR/06/165 of 26 June 2007;*

The fact must be limited to factual findings and must not contain characterisation of an essentially legal nature.

The Court applied the above-mentioned criteria in the examination of the facts proposed by the Prosecution with the aim of proving the existence of an armed conflict and the international character of the conflict in Bosnia and Herzegovina for the period 1992 – 1995. It is alleged in the Indictment that during the war in Bosnia and Herzegovina and the armed conflict in the Mostar Municipality between the Army of B-H and the HVO, as a member of the HVO in Mostar he acted in contravention of the rules of international humanitarian law and in violation of Articles 3 and 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter: the Fourth Geneva Convention).

The Panel is satisfied that any fact that contains legal conclusion of any kind should be denied acceptance as an adjudicated fact. Accordingly, no fact containing statutory elements of a criminal offence, such as "armed conflict" in this case should not be accepted as adjudicated. A close look at the statutory definition of the criminal offence of War Crimes against the Civilian Population, which reads as follows: "Whoever in violation of rules of international law in time of war, **armed conflict** or occupation, orders or perpetrates any of the following acts..." clearly shows that armed conflict is legal qualification of the criminal offence, and this is the reason why this should not be considered as an adjudicated fact.

Having applied the afore-mentioned principles, the Panel denies acceptance of the facts listed in the Decision under Nos. **1, 4 and 5.**

Common Article 3 provides for "the fundamental humanitarian principles which underlie international humanitarian law as a whole."[12] Common Article 3 is widely recognized as being a foundation of customary international humanitarian law.[13] These fundamental rules

[12] *Prosecutor Vs. Delalić Case*, IT-96-21-A, Judgment of 20 February 2001 (Appeals Judgment), paragraph 143.
[13] *Nicaragua Vs. the United States of America*, International Court of Justice, the Case involves the activities of military and paramilitary forces in Nicaragua and against the state, the Judgment of 27 June 986, Reports by the International Court of Justice, paragraph 218; *Prosecutor Vs. Tadić Case*, IT-94-1, Appeals Chamber Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Tadić, Decision on jurisdiction), paragraphs 98 and 129; *Prosecutor Vs. Akayesu*, ICTR -96-4-T, Judgment of 2 September 1998 (Akayesu), paragraphs 603-605; see the US Decision in the *Kadić Vs. Karadžić Case*, 70 F 3d 232 (2.Cir.1995)

are a minimum which apply to all conflicts, no matter if they are of international or non-international in character constitute the minimum core applicable to conflicts, internal or international.[14]

It clearly follows that for the application of common Article 3 of the Geneva Conventions the issue of the nature of the conflict is not relevant and, consequently, given the nature and type of the criminal offence the accused is charged with, pursuant to the common Article 3, the Court has no obligation to establish that the armed conflict was internationalized.

Furthermore, with respect to Article 27[15] of the Geneva Convention relative to the Protection of Civilian Persons at the Time of War (the Fourth Geneva Convention), which applies to the international armed conflicts, this Panel will not accept the facts which may be relevant but are in fact of legal nature.

Article 27 of the Fourth Geneva Convention sets forth a legal framework that forbids endangerment of civilians, and/or provides for the obligations that the parties to the armed conflict have to adhere to, which, logically, make an integral part of the international customary law that applies to non-international conflicts as well. This clearly follows from the 2005 ICRC Study and Rules on Customary International Humanitarian Law wherein it is stated that rules set forth in Article 27 represent the standards of customary international law that apply to internal armed conflicts. This is why Article 27 of the Fourth Geneva Convention makes an integral part of the international customary law principles, and is, as such, applicable to both international and non-international conflicts, and accordingly the Panel is not obliged to establish the type of conflict for the application of this article.

Pursuant to the afore-mentioned, the Panel denied acceptance of the facts proposed under Nos. **6, 7, 8** under this criteria too, as the facts proposed do not meet the necessary requirements.

[14] *Prosecutor Vs. Delalić Case*, IT-96-21-A, Appeals Judgment, paragraph 143.
[15] Article 27(1) of the Fourth Geneva Convention provides that: „Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."

On the other hand, a decision to accept as proven the facts proposed under the above-mentioned numbers at the stage of the proceeding when the Prosecution witnesses have already been examined and the Defense is about to conclude examination of its witnesses would contravene the interests of judicial economy and efficiency provided for under Article 4 of the Law on Transfer. This even more so if known that almost all of the witnesses have testified about the same circumstances in relation to which the Prosecution proposed adjudicated facts for acceptance, which means that the Panel already disposes with sufficient amount of evidence to establish the circumstances of the case.

In view of the legal test for the acceptance of facts that is binding on the Court, the Court must deny the taking of judicial notice of the facts if such facts do not meet the relevant criteria.

Finally, this is a procedural decision of the Panel, which pursuant to Article 239(4) of the CPC of BiH "shall always be published and entered into the main trial record supported by a short explanation of the relevant facts," and can only be challenged when appealing the Judgment. The Court has, however, decided to render this decision in writing, so that the accused and the public are better informed about the course of the criminal proceedings.

III. APPLICABLE LAW

A. STATUTORY PROVISIONS

43. At the time of perpetration of the criminal offence the Criminal Code of the Socialist Federal Republic of Yugoslavia was applicable (the CC of SFRY). The CC of SFRY was adopted at the session of the SFRY Assembly of the Federal Council held on 28 September 1976 and published in the SFRY Official Gazette No. 44 of 8 October 1976. Following the Declaration of Independence, the Criminal Code of SFRY was taken over based on a Decree issued on 22 May 1992 as the law of the Republic of Bosnia and Herzegovina (with minor changes), and it came into force on the day of its publishing. The CC of SFRY was in effect until 20 November 1998 in the Federation of BiH, until 31 July

2000 in the Republika Srpska and until 2001 in the Brčko District. The new Criminal Code of BiH (the CC of BiH) came into force on 1 March 2003, whilst the new Criminal Code of the Federation of BiH came into force on 1 August 2003, and the new Criminal Code of the Republika Srpska on 1 July 2001.

44. The criminal offence of War Crimes against Civilian Persons was specifically prescribed by Article 142 of the CC of SFRY, and it was punishable by imprisonment sentence ranging from at least five (5) years to the death penalty. The same criminal offence is prescribed in Article 173 of the Criminal Code of Bosnia and Herzegovina and the prescribed sentencing range is the minimum of 10 years or a long-term imprisonment.

45. A comparison of these statutory provisions clearly shows that the criminal offence of War Crimes against Civilian Persons was defined by both the SFRY Code and the CC of BiH, the CC of BiH, being, however, more lenient to the accused in terms of the severity of sentence.

46. Given the time of perpetration of the criminal offence (1993) and the substantive law in force at the time, the Panel finds that it is necessary to give consideration to the principle of legality (in both ways: ***nullum crimen sine lege and nulla poena sine lege***) and the principle of temporal application of the Criminal Code:

B. THE PRINCIPLE OF LEGALITY

47. The Principle of legality is prescribed under Article 3 of the CC BiH and foresees that no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment was has not been prescribed by law.

48. Article 4 of the Criminal Code of BiH (temporal application of the law) stipulates that the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

49. The principle of legality is also prescribed in Article 7(1) of the European Convention

on Human Rights and Fundamental Freedoms (the ECHR), which has priority over all other laws in BiH.[16] The aforementioned provision of the ECHR provides that: “No one shall be found guilty of any criminal offence on account of any act or omission which was not prescribed as criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

50. Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates the following: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

51. Accordingly, the afore-mentioned provisions prohibit imposition of a penalty that is heavier than the penalty applicable at the time of perpetration of the criminal offence. This is the principle of legality; however, there is one exception to this rule. Article 4a) of the CC of BiH adopted the provisions set forth in Article 7(2) of the ECHR and Article 15(2) of the ICCPR thereby providing for an exceptional derogation from the principle enshrined in Article 4 of the CC BiH and derogation from the mandatory application of the more lenient law in the proceedings involving criminal offences punishable under international law in relation to the charges involving violations of international law. This position is consistent with the Court of BiH jurisprudence which is reflective of international jurisprudence.[17]

52. As mentioned above, the criminal offence of War Crimes against Civilian Persons was prescribed under Article 142 of the SFRY Criminal Code which was in force in Bosnia and Herzegovina at the time. Article 173 of the CC of BiH also prescribes the criminal offence of War Crimes against Civilian Persons; accordingly, the criminal offence of War Crimes against Civilian Persons was prescribed as a criminal offence by the law, which means that the principle of *nullum crimen sine lege* has been upheld.

[16] Article 2.2. of the BiH Constitution.
[17] See the Decision of the Court of BiH on Admissibility and Merits in the *Abduladhim Maktouf* Case No. AP1785/06 of 30 March 2007 and also the Decision of the ECHR on Admissibility in the *Karmo Vs. Bulgaria* of 9 February 2006.

C. THE CASE–LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

53. Article 7(1) of the ECHR and Article 4 of the CC of BiH provide that the law which was in effect at the time of perpetration of the criminal offence shall apply if more lenient to the perpetrator. It follows from the jurisprudence of the European Court that a violation of Article 7 exists in cases where, due to retroactive application of a new law that directly or indirectly (e.g. the provisions pertaining to recidivism) affects the sentencing, a penalty heavier than the penalty that the applicant would face at the time of perpetration of the criminal offence was imposed.[18]

54. Abolition of the death penalty in BiH[19] gave rise to new developments, specifically in those cases where the domestic law replaced the death penalty (Article 142 of the CC of SFRY) with the long-term imprisonment (Article 173 of the CC of BiH). The European Court understands that the principle of legality and the exception to this rule are an integral part of the principle and values them as equally important. The European Court discussed this issue in two cases at least.[20]

55. In the *Karmo vs. Bulgaria* case, the applicant was charged with Aggravated Murder committed in 1993. The sentencing range prescribed by the Bulgarian Criminal Code that was in effect at the time of perpetration was the prison sentence of fifteen to twenty years (maximum) or the death penalty. The amendments to the Code were made in 1995, as part of which sentence of life imprisonment was introduced and the death penalty was abolished in 1998. The Applicant was found guilty of the charges in 1996 and sentenced to death. The Bulgarian Supreme Court rendered the Judgment on appeal on 17 April 1998 by which the trial judgment was revoked and the death penalty replaced with the life imprisonment sentence.

56. The Applicant filed an appeal pursuant to Article 7 of the Convention because he received the sentence of life imprisonment, which was not prescribed under the national law in force at the time of the perpetration of the criminal offence. The applicant contended

[18] See for instance the ECHR, *Jamil Vs. France*, the Judgment of 8 June 1995; ECHR, *Achour Vs. France*, the Judgment of 10 November 2004; ECHR *Achour Vs. France*, Grand Chamber, the Judgment of 29 March 2006.
[19] Pursuant to Protocols No. 6 and No. 13 of the European Convention.
[20] *Karmo vs. Bulgaria*, Decision on Admissibility of 9 February 2006. See also *Ivanov Vs. Bulgaria*, Decision on Admissibility of 5 January 2006.

that he should have received the prison sentence of twenty years at most. The European Court dismissed the appeal as "manifestly ill-founded."[21]

57. Pursuant to the case-law of the European Court, no application can be filed alleging a violation of Article 7 of the Convention if the applicant received the sentence of life imprisonment, and/or the long-term imprisonment sentence for the criminal offence for which the death penalty was prescribed at the time of commission, notwithstanding the fact that the sentences of life imprisonment or long-term imprisonment were not prescribed by the law in effect at the time, because the life sentence is manifestly more lenient to the offender than the death penalty.

58. Therefore, as it has already been pointed out, application of Article 173(1)(e) of the CC of BiH constitutes neither an essential violation of the *nulla poena sine lege* principle nor a violation of the right of the Accused to receive a sentence that is more lenient to him. On the contrary, it is absolutely consistent with the "statute and international law" and/or "universal principles of international law", and/or Article 3 and 4a) of the CC of BiH.

IV. GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

59. In this proceeding the Panel evaluated the evidence pursuant to the BiH Criminal Procedure Code, having primarily applied the presumption of innocence as prescribed by Article 3 of the CPC BiH, which embodies the general principle of law according to which the onus of proof rests on the Prosecution, and the standard of proof is beyond reasonable doubt.

60. Article 15 of the CPC provides for a principle of free evaluation of evidence as one of the fundamental principles. This Article provides that the Court shall not be bound or limited to "special formal evidentiary rules," which is why the probative value of evidence is not determined in advance, either in quality or quantity. The Court shall evaluate each and

[21] For the following reasons: "The Court reiterates that that according to its case-law, Article 7(1) of the Convention generally enshrines the principle that the crime and punishment can only be prescribed by the law, and in particular forbid retroactive application of the Criminal Code that goes to the detriment of the accused. The Court observes that in the pertinent case, domestic courts have pronounced a single sentence of "life imprisonment", which they found to be more lenient to the accused because he should have been sentenced to death. Accordingly, the applicant benefited from the modification of the punishment prescribed by the Criminal Code for the most severe criminal offence that the applicant was charged with, so that he received the punishment that is more lenient to him than the punishment prescribed for the same criminal offence at the time of its perpetration." (ECHR, *Karmo Vs. Bulgaria*, Decision of 9 February 2006)

every piece of evidence individually and in correspondence with the rest of evidence, and based on the results of such a decision conclude whether a fact was proven or not. A free evaluation of evidence includes their logic and psychological evaluation. However, free evaluation of evidence is limited by the principle of legality (Article 10 of the CPC of BiH). Having established this principle, the legislator gave the judiciary the independence it should enjoy and demonstrated trust in the ability of judges to adjudicate.

61. In the course of the main trial, the Court ruled on the objections raised on the grounds of relevancy, legality and authenticity of evidence. The decision pertaining to the probative value of evidence was made at the end of the proceedings.

62. The Panel held that it must be satisfied that the evidence is reliable in the sense that it was given voluntarily, that it is truthful and credible. The Panel inspected each and every document in this case in order to test its reliability and probative value.

63. Article 10 of the CPC of BiH (legality of evidence) provides that “The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.”

64. The Court examined and considered all of the evidence presented, but for the purpose of this Judgment it will only address those pieces of evidence relevant to the ruling on this case, as well as present and explain the findings pertaining to those facts only that are crucial for the ruling on the case.

65. Pursuant to Article 281 of the CPC of BiH the Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, conclude whether the fact(s) have been proved. Evaluation of evidence includes both logic and psychological evaluation. However, free evaluation of evidence is limited by the principle of legality of evidence (Article 10 of the CPC of BiH).

66. The Court is not statutory bound to refer in the Judgment to all of the evidence adduced. The duty of the Court is to examine all of the evidence adduced when deciding on the case. It would be useless to impose a duty on any trial panel to separately address and reason in the judgment every single piece of documentary evidence and every

testimony given during the trial.

67. This position was also taken and explained in detail in the case-law of the ICTY Appeals Chamber: “The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98ter(C) of the Rules. However, this requirement relates to the Trial Chamber’s Judgment; **the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial.**

68. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count.

69. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[22]

70. The same position was taken by the ICTY Appeals Chamber in the *Mucic et al.* case: “The Trial Chamber is not obliged in its Judgment to recount and justify its findings in relation to every submission made during trial.”[23]

71. Article 281 of the CPC of BiH provides that the Court shall reach a verdict solely based on the facts and evidence presented at the main trial.

72. At the hearing held on 12 April 2011 the Prosecution adduced documentary evidence pursuant to Article 274(4) of the CPC of BiH, starting from T1 through T24, and at the hearing held on 7 June 2011 also documentary evidence marked with the numbers T25 through T29. The Defense raised the issue of legality (T1), relevancy (T9) and pointed out that the exhibits marked as T2 and T4 were issued only after the Indictment was filed.

73. The Defense for the Accused presented its documentary evidence before the Court pursuant to Article 274(4) of the BiH CPC and the Court marked them as Exhibits No. O1 through O4. The Prosecution also objected to some of the Defense evidence on the basis of relevancy (O2, O3, O4), and legality (O4).

[22] The ICTY Appeals Chamber Judgment in the *Kvočka et al. case*, paras 23-25.
[23] *Mucić et al*, The ICTY Appeals Chamber Judgment, 20 February 2001, para 498.

74. The Court considered the objections individually and in correspondence with the other evidence adduced before it and explained its position regarding the issue of admissibility and probative value of these pieces of evidence in the reasoning of this Judgment (Chapter VII - Factual findings).

A. CREDIBILITY OF THE WITNESSES

75. The Panel had the first-hand opportunity to observe witnesses, their posture, voice, attitude, body language and emotional reactions to the questions put to them, non-verbal conduct towards parties and attorneys and the environment in which they testified. The Panel paid special attention to their attitude, conduct and character.

76. The Panel heard 8 witnesses proposed by the Prosecution and 3 witnesses proposed by the Defense. The Panel evaluated witness credibility starting from a presumption that every witness wanted to tell the truth. Where possible, the Panel tried to harmonize the witness testimonies and, in cases where this was not possible, the Panel evaluated individual pieces of evidence, primarily from the point of view that these differences resulted from non-intentional memory or perceptive mistakes, and then also from the point of view that the witness tried to mislead the Panel.

77. As for individual witnesses, the Panel established that the testimonies of specific witnesses were sincere and reliable, while the parts of testimonies of other witnesses were not completely sincere, either due to some private interests, friendship or loyalty towards the Accused or because their intention was to produce an effect on the result of the proceeding. In any event, the Panel evaluated the reliability and accuracy of each and every fact a witness has testified about and provided reasoning behind its decision to give or deny credence to a particular testimony or parts thereof.

78. In relation to each witness testimony, the Panel considered other evidence and circumstances in relation to this case.

79. On the occasion of examining the Indictment, the Panel took into consideration that it was only the injured party who recounted the incident, which is often the situation in rape cases, because the injured party was the only person present in the room beside the accused when the incident took place. Having paid due regard to this fact, the

Panel examined her testimony with due diligence and in correspondence with the rest of the evidence. Non-existence of expert medical findings about the crime in the course of the armed conflict, the attitude of the injured party towards what had happened to her, as well as the lapse of time between the incident in question and her testimony added to the difficulty of establishing credibility of the injured party testimony.

B. INDIRECT EVIDENCE

80. As for indirect evidence, the Court underlines that it is well-established in the case-law of this Court that indirect evidence is admissible. The Court evaluated such evidence in each and every case.

81. The Constitutional Court of Bosnia and Herzegovina took a position that the establishment of facts based on indirect evidence is not in contravention of the principles of a fair trial guaranteed under Article 6(1) of the European Convention. With respect to the use of evidence by the Panel, it is stated that it has been established in the actions undertaken before this Panel as well as in the Court's case-law that the use of indirect evidence is acceptable.

V. APPLICABLE LAW

82. The Prosecution charged Velibor Bogdanović with the criminal offence of War Crimes against Civilian Persons in violation of Article 173(1)e) of the Criminal Code of BiH.

83. The definition of War Crimes Against Civilian Persons under Article 173 contains several general requirements that will be meticulously explained bellow. In addition, the definition of the criminal offence in question is given in Article 173(e). A detailed description of elements of this criminal offence will also be given bellow.

A. WAR CRIMES AGAINST CIVILIANS IN VIOLATION OF ARTICLE 173 OF THE CC OF BIH

84. Article 173(1)e) provides: Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

.....

e) Coercing another by force or by threat of immediate attack upon his/her life or limb, or the life or limb of a person close to him/her, to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution, application of measures of intimidation and terror, taking of hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial, forcible service in the armed forces of enemy's army or in its intelligence service or administration;

85. The Prosecution maintained that the Accused committed the criminal offence of War Crimes Against Civilian Persons in violation of Article 173 because he acted contrary to Article 3(1), Subparagraphs (a) and (c), Article 27(1)[24] and Article 147[25] of the Geneva Convention (IV) Relative to the Protection Civilian Persons in Time of War of 12 August 1949 (The Fourth Geneva Convention).

86. Violations of Article 173 are based on Common Article 3 which prescribes that the victims of the alleged violation of the rules of the international law must not take an active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* due to illness, injury, arrest or any other reason. In addition, "in terms of Article 3, the perpetrator knew or should have known that the victim did not take a direct part in the hostilities at the time of perpetration of the criminal offence."[26]

87. The Panel examined the Indictment in its entirety, in particular the averments pertaining to violations of Article 173 of the CC of BiH. After a thorough analysis, the Panel holds that paragraph 1 subparagraphs (a) and (c) of common Article 3 shall be given priority in this case.

[24] The first paragraph of Article 27 of the Fourth Geneva Convention provides as follows: Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
[25] Article 147 of the Fourth Geneva Convention provides that: Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.
[26] *Boškovski and Tarčulovski*, Appeals Judgment, paragraph 66.

88. When it comes to Articles 27 and 147 of the Fourth Geneva Convention, a question poses itself as to whether this Article applies to the internal armed conflict or not. In the Third Geneva Convention relative to the treatment of the Prisoners of War, excluding Article 3 that is common to all four conventions, it is explicitly stated that these provisions apply to the international armed conflict. The ICTY Appeals Chamber concluded as follows in its Judgment handed down in the Prosecutor Vs.Tadić Case:

The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[27]

89. The 2005 ICRC (International Committee of the Red Cross) Customary International Humanitarian Law Rules and Study states that some articles of this Convention, additional to Common Article 3, have attained customary law status and are now applicable in both internal and international armed conflict. Article 27 of the Fourth Geneva Convention provides a general legal framework prohibiting the harming of a civilian population. In the 2005 ICRC Study on Customary International Humanitarian Law it is stated that the rules laid down in Article 27 constitute standards of customary international law applicable to internal armed conflicts.[28] In addition, parts of Protocol II additional to the Geneva Conventions that pertain to the protection of victims of non-international armed conflicts contain provisions that are similar to the provisions of Article 27.[29] The ICRC Commentary also explains that Article 27 "... proclaims the principle of respect for the man and unalienable character of the fundamental rights of both men and women."[30] That Article 27 is a customary international law standard applicable to the internal armed conflict was further confirmed by the Special Treaty of 22 May 1992, that was signed in Geneva with the help of the ICRC as a mediator by the belligerents in Bosnia and Herzegovina.

[27] *Tadić*, Decision on Jurisdiction, subparagraph 126.
[28] The ICRC Study on Customary International Humanitarian Law of 2005, Volume 1: The Rules, Rule No.93. Rape and other types of sexual violence shall be forbidden, Rule 90, Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected, p. 375 – 376; Rule 105 Family life must be respected as far as possible, p. 379; Rule 134 The specific protection, health and assistance needs of women affected by armed conflict must be respected, p. 475.
[29] See Article 4 of the Protocol additional to the Geneva Conventions of 12 August 1949 that is relative to the protection of victims of non-international armed conflicts (Protocol II) of 8 June 1977.
[30] ICRC Commentary on the Fourth Geneva Convention, Article 27 – General remarks – Historical Overview.

Subparagraph 2.3 provides that: “Civilians and civilian population are protected under Articles 13 – 34 of the Fourth Geneva Convention of 12 August 1949.“

90. Article 147, although applicable to the international armed conflict only, the Treaty of 1 October 1992 signed by the parties to the conflict in Bosnia and Herzegovina, Article 3 of this Treaty implicitly provides for criminal prosecution and sanctioning in cases of a violation of Article 147.[31]

B. GENERAL REQUIREMENTS

91. Article 173 of the CC of BiH requires that certain elements be met for the conduct of the Accused to constitute a war crime against civilians. The Panel recalls that the Trial Panel in the Novak Đukić case No. X-KR-07/394 of 12 June 2009 took the position that all War Crimes have to meet the following criteria. Those elements are as follows:

- The conduct must be in violation of rules of international law in time of war, armed conflict or occupation;
- The violation must take place in time of war, armed conflict or occupation;
- The act must be related to the state of war, armed conflict or occupation;
- The accused must order or perpetrate the act.

1. The conduct must be in violation of rules of international law in time of war, armed conflict or occupation

92. The source of law of the Court of BiH is domestic law, and the Panel is rendering its verdict based on Article 173 of the CC of BiH. However, Article 173(1) states that the Accused must act in violation of “the rules of international law”. Article 2(b) of Protocol I defines the rules of international law as “the rules applicable in armed conflicts set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law.”

93. Therefore, the Panel must also base its decision on specific rules of international law, whether conventional or customary in nature that were applicable during the period defined in the Indictment. Article 173(1) of the CC of BiH criminalizes the violation of these

[31] See *Tadić Case*, Decision on jurisdiction, paragraphs 83 and 136.

rules by anyone who orders or perpetrates these acts. Therefore, violation of the rule need not per se have been criminalized under international law during the period defined in the Indictment. The prescribed conduct must have been applicable under domestic and/or international law at the time the act was committed. Referring to the Indictment, the Panel concludes the violation of the rules of international humanitarian law contained in Common Article 3 of the Fourth Geneva Convention and Article 27 of the Fourth Geneva Convention, and therefore that these provisions of international humanitarian law are applicable to this case insofar as they satisfy the requirements of Article 173(1) of the CC of BiH and its reference to rules of international law.

94. According to the ICTY Appeals Chamber, "international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities (..)"[32] As will be explained in the section below, the Panel finds that there existed an armed conflict in the territory of Mostar during the period considered in the Indictment. The Panel also recalls that the rules of the international humanitarian law, specifically Common Article 3 and Article 27 of the Fourth Geneva Convention, were applicable in the territory of Bosnia and Herzegovina in 1993. The State of Bosnia and Herzegovina, as a successor of the Socialist Federal Republic of Yugoslavia, had ratified the Geneva Conventions and their additional Protocols.[33] The Accused is charged with rape and taking away of civilians, which is prohibited conduct under humanitarian law, as it is codified in the relevant Geneva Conventions and their Additional Protocols. Both these offenses are also generally recognized as being part of customary international law and apply to conflict both of internal and international nature. These rules of customary international law were applicable at the time of the offense in the territory of Bosnia and Herzegovina, and the Accused was therefore bound to obey them.

95. Finally, regarding the required mental state, the Panel emphasizes that one need not have had specific knowledge of the existence of these international norms. It is sufficient that one acted contrary to these norms. It is never necessary that one have the ability to define the legal qualifications of his crime, only that he have notice that his actions and intentions are criminal. It is for the Panel to determine the crime then committed. One must

[32] *Tadić*, Decision on jurisdiction, subparagraph 70.
[33] Ratified by the SFRY on 11 June 1979. See Bosnia and Herzegovina's Declaration of Succession of 31 December 1992, where it declared that it had become party to the Geneva Conventions and the Additional Protocols as of the date of its independence, 6 March 1992.

however have the specific *mens rea* applicable to the underlying offence he is charged with to be found guilty, whether he is found guilty as a perpetrator or as one ordering.

96. In order to establish that the rules of international law have been violated in the specific case, it is necessary to establish that the action was aimed against a protected category of civilians, protected by all mentioned articles of the Geneva Convention and its Additional Protocols.

97. The Panel recall that in cases where the crimes are punishable under Article 173 on the basis of common Article 3 the victims of the alleged violation of the international law did not take an active part in the hostilities and were not members of armed forces, including members of armed forces who have laid down their arms and those placed *hors de combat* due to illness, injury, arrest or any other reason. The victims of alleged violation must also satisfy the definition of a protected person under the Fourth Geneva Convention relative to the Protection of Civilian Persons. This element requires a specific analysis as it has been elaborated in the text that follows (VI – Findings relative to the status of civilians).

2. The violation must take place in time of war, armed conflict or occupation

98. The Panel is satisfied that: "*armed conflict is said to exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*[34]

99. The Panel finds that based on the evidence placed before it that there was an armed conflict between the ABiH and the HVO in May 1993 in Mostar, and that its onset was on 9 May 1993. This element is not contentious in this case because both the Defense and the Prosecution agree that the armed conflict existed at the relevant time.

100. In the course of the evidentiary proceedings, it has been proven beyond a reasonable doubt that there was an armed conflict in Bosnia and Herzegovina between the Army of BiH and the Croat Defense Council.

[34] *Tadić Case*, Decision on jurisdiction, subparagraph 70. See also *Prosecutor Vs. Kordić and Čerkez*, IT-95-14/2-A, the Judgment of 17 December 2004, subparagraph 341. This element was not contested in this case because both the Prosecution and the Defense agreed that there existed the armed conflict at the relevant time.

101. The Presidency of the RBiH issued the Decision to Declare a State of War on 20 June 1992. In the course of the evidentiary proceedings, it has been established beyond a reasonable doubt that there existed an armed conflict in Bosnia and Herzegovina between the Army of BiH and the Croat Defense Council that commenced on 9 May 1993, which was confirmed both by the Prosecution and the Defense witnesses.

102. The Panel has concluded that this element has been proven beyond any reasonable doubt.

3. The perpetrator's act must be related to the state of war, armed conflict or occupation

103. The third condition of Article 173(1) of the CC of BiH is that there must be a nexus between the act of the Accused and the armed conflict. Indeed, "[t]he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit the crime, the manner in which it was committed or the purpose for which it was committed."[35] This requirement has been met if the alleged crime was committed in the furtherance or under the guise of the armed conflict."[36] The ICTY Trial Chamber in the *Prosecutor Vs. Dragoljub Kunarac et al.* states: " ... Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes were committed in the aftermath of the fighting, and before the cessation of combat activities in a certain region, and were committed in furtherance of a goal or under the guise of the fighting."[37]

[35] *Prosecutor vs. Kunarac, Kovač and Vuković*, IT-96-23 and IT-96-23/1-A, Appeals Judgment of 12 June 2002 (*Kunarac et al*, Appeals Judgment), paragraph 58.
[36] *Kunarac et al, Appeals Judgment*, paragraphs 58 – 59.
[37] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* Case No. IT-96-23-T/IT of 22 February 2001, para 568.

104. The nexus between the accused and the armed conflict can be established based on several factors including the position of the accused, the nature of the victim, the ultimate goal of a military campaign or that the crime is committed as part of or in the context of the perpetrator's official duties.[38]

105. Based on the evidence presented in this case, the Panel finds that the criminal offences from the Indictment are closely related to the armed conflict.

4. The accused must order or perpetrate the act

106. Finally, Article 173(1) of the CC of BiH requires that the Accused either directly perpetrate the illegal act or order the said act. The Panel emphasizes that this relates to the mode of liability of the Accused and does not constitute an element of the crime as such. The Prosecution alleged that the Accused perpetrated the criminal offence in violation of Article 180(1) of the CC of BiH and Article 29 of the CC of BiH. This will be elaborated in detail in the section of the Judgment titled as Individual Criminal Liability.

VI. FINDINGS RELATIVE TO THE STATUS OF CIVILIANS

107. The Panel took into account Article 3(1) of the 1949 IV Geneva Convention Relative to the Protection of Civilian Persons, which provides for the definition of the term 'civilian persons':

> *"Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat (...)"*

108. Article 4 of the IV Geneva Convention states as follows:

> "...*Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals..."*

[38] *Kunarac et al*, Appeals Judgment, para 59.

109. Furthermore, it is necessary to note that not everyone is covered by the Geneva Conventions. That is why there are specific categories and exemptions from categories. For example:

> *"… Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are…"*

110. The Panel agrees with the finding in the *Prosecutor vs. Galić* case: "It is a matter of evidence in each particular case to determine whether an individual has the status of civilian."[39] In every single case the Panel took into account as evidence the statements of victims themselves, witnesses and documentary evidence tendered into the case file.

111. The Panel established that witnesses Mina Zerem and Salko Zerem had the status of civilian persons. In the course of the evidentiary proceedings, the Defense did not challenge the civilian status of Mina Zerem so that no evidence was placed on the record to prove the opposite.

112. In the course of the evidentiary proceedings the Defense challenged the civilian status of Salko Zerem, maintaining that he first was member of the Army of BiH and then joined the HVO. The Panel has established that Salko Zerem was a member of the Army of BiH, which is evident from Exhibit T 26[40]. Specifically, it follows from the Exhibit that Salko Zerem was Commander of the Jablanica Municipal Staff, and that he was removed from that position on 25 October 1992.

113. The Defense for the Accused Bogdanović placed on the record a Croat Defense Council ID card (T27)[41] to show that Salko Zerem was a member of the HVO and consequently not a civilian person at the time relevant to the Indictment.

114. In his statement given before the Court of BiH, Salko Zerem stated that he was not engaged in combat activities.

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[39] *Prosecutor Vs. Stanislav Galić*, Case No. IT-98-29-T of 5 December 2003, para 47.
[40] T26 – Order issued by the Main Staff VK OS R BiH of 25 October 1992.
[41] T27 –HVO ID Card – of 6 January 1993.

115. The Panel concluded that Salko Zerem had the status of civilian at the relevant time. Specifically, the injured party was taken away from his apartment into the prison camp during the night in question, and was kept in the prison camp for about a month. In addition, Exhibit T27 does not clearly show to which unit Salko Zerem belonged to, and cannot serve as proof that Salko Zerem was engaged in combat activities. The fact that Salko Zerem enjoyed the status of civilian, that is, that he was in the prison camp at the relevant time, follows from the certificate of the Camp Inmates Association dated 16 June 2010, which was placed on the record as Exhibit T4.

116. Finally, the Panel concluded that the Prosecution has proven beyond a reasonable doubt that the injured parties Salko Zerem and Mina Zerem had the status of civilian persons at the relevant time.

VII. FACTUAL FINDINGS

A. INTRODUCTION

117. The Court is satisfied that, by evaluation of the adduced evidence individually and collectively, the Prosecution has succeeded to prove beyond a reasonable doubt that the accused committed the criminal acts described in the Indictment during the armed conflict between the Army of BiH and HVO.

118. The criminal offense charged against the Accused is War Crimes against Civilian Persons in violation of Article 173(1)(e).

119. Throughout the evidentiary proceedings, the Court assessed the existence of the essential elements of the referenced criminal offense, while the onus of proof was on the Prosecution.

120. The Court established beyond doubt that that at the relevant time an armed conflict existed between the Army of BiH and the HVO, which ensues from the witness' testimonies and the existence of which was not contested by the Defense for the Accused Velibor Bogdanović.

121. The Court established beyond a doubt that the Accused Velibor Bogdanović raped

Mina Zerem on the night between 25/26 May 1993 and took away Salko Zerem to the *Heliodrom* prison camp. As far as the act of perpetration is concerned, the Panel gave credence to the evidence given by the injured parties before the Court by witnesses Fatima Pehlić, Blaž Šimunović, Anica Pudar, Junuz Vajzović, Jusuf Numanović and Senad Velić.

122. The Panel in particular evaluated the manner in which the Defense witnesses answered the questions they were asked by the parties to the proceedings, and found testimonies of the majority of those witnesses to be unconvincing. In other words, the Defense witnesses have failed to convince the Panel beyond a reasonable doubt that the Accused was not in Mostar at the time relevant to the Indictment, and thus did not commit the criminal offence charged against him.

123. The Panel concludes that all the elements have been met to establish beyond a reasonable doubt that the Accused perpetrated the criminal offence he is charged with.

B. SPECIFIC CRIMES

1. Rape

124. In order to prove the commission of the criminal offence of rape the following elements need to be proven:

(a) Sexual intercourse or an equivalent sexual act
(b) Coercing another by force or by threat of immediate attack upon his/her life or limb, or the life or limb of a person close to him/her.

125. As it is clearly stated in Article 173(1)(e) “Sexual intercourse or an equivalent sexual act” represents a more detailed description of criminal acts that are usually termed as “rape”.

126. Sexual intercourse or an equivalent sexual act implies an assault by the perpetrator against the limb of a person which as a consequence had the sexual penetration, however slight, of any part of the victim’s body, by the penis of the perpetrator or any other object

used by the perpetrator.[42]

127. Coercion as the other element of the criminal offence of rape includes the absence of voluntary consent.[43] "Coercion" shall be considered proven if shown that "assault was committed by force or threat of force or coercion, like the one caused by fear of violence, coercion, psychological oppression or abuse of power against the person or some other person or by using violent environment or the assault was committed against a person that could not give a voluntary consent."[44]

128. The required *mens rea* for the criminal offence of sexual violence is the intent to commit an act of sexual violence with the awareness that the act is taking place without the victim's consent.

129. The Panel concludes that the Prosecution has proven beyond a reasonable doubt that, as the Indictment alleges, the Accused Velibor Bogdanović forced the injured party Mina Zerem to sexual intercourse and thus committed the criminal offence of War Crimes against Civilian Persons in violation of Article 173(1)(e) of the CC of BiH.

130. The Panel has established that the Accused had sexual intercourse with the victim and penetrated the victim's body by his penis. The Panel has also established that the Accused used physical force, threat of force, psychological oppression and violent environment so as to force the victim to sexual intercourse and that the victim did not freely and voluntarily consented to sexual intercourse. The Panel finally concludes that the accused acted with intention to have sexual intercourse with the victim and that he was fully aware that the victim did not give her free and voluntary consent to it.

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[42] The elements of the criminal offence according to the Roma Statute, Article 7(1)(g)-I(1). Definition of "rape" established in *ad hoc* courts case-law includes a more restrictive and less precise description of the *actus reus* of the criminal offence of rape. See for instance, *Prosecutor Vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T and IT-96-23/1-A, the Judgment of 22 February 2001; *Prosecutor Vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T and IT-96-23/1-A, the Judgment of 22.2.2001, the Judgment of 12 June 2002, para 127-128.

[43] See *Kunarac* Case, the Trial Panel Judgment, para 40 (which defines that such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.) See also the Appeals Chamber Judgment in the *Kunarac Case*, para 127-133 (which confirms the finding that coercion is equivalent to the absence of voluntary consent and wherein it is stated as follows: "A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force..")

[44] The elements of criminal offences according to the Rome Statute, Article 7(1)(g)-I(1); Commentary on the Criminal Codes in Bosnia and Herzegovina, page 555.

131. In the process of reaching these findings the Panel relied on the credible testimony of the injured party, which was supported by other evidence. Specifically, the witness described the rape in detail, and provided a detailed and trustworthy description of each of her encounters with the Accused, both before and after the rape.

132. In her testimony, the injured party stated that the conflict in Mostar started on 9 May 1993 and that they lived in an apartment at the time. She also testified that she worked for the company called *Borba*, which was part of the work detail she was assigned to, and that she ceased going to work after she was told by her superior Blaž Šimunović not to come to work any longer because he was worried for her safety.

133. The witness gave a detailed recount of the moment when the Accused first came to their apartment, which took place between 9 May and 14 May 1993, adding that on the occasion their neighbor Fatima Pehlić was with her and her husband in the apartment, but was told to leave the apartment by the Accused. The injured party Mina Zerem stated that the Accused introduced himself on that occasion, telling them his full name and that he was from Jesenice.

134. The witness also gave a detailed description of his second visit, when the pertinent incident took place. She stated that he was wearing a uniform and was accompanied by four or five armed soldiers in uniforms and that the Accused himself confirmed his identity when he saw that she recognized him as a person from the previous visit. She further testified that the Accused and the soldiers ransacked the apartment and stole household items and valuables and that they took her husband out of the apartment.

135. The injured party then testified that the Accused then took her to the upper floor of her split-level apartment and raped her. The witness gave a very detailed description of the act of rape itself, which corresponds to the description of the incident given in the Indictment. She spoke about all of the circumstances related to the rape, starting from the use of force by the Accused to the penetration of the victim's body. The injured party repeatedly mentioned that she felt humiliated using the following words "being naked as I was, in my bedroom, and he was as young as my children were," and "I remained lying on my bed, humiliated and miserable."

136. After the incident, the witness left the apartment and went to her neighbor Anica

Pudar's place, where she stayed till the next morning, from where she went to her neighbor Fatima Pehlić's place. Fatima Pehlić's spouse asked Mina Zerem's superior to take care of her, explaining to him that her husband had been taken away, and he did so, which means that Mina Zerem stayed at Blaž Šimunović's place over a certain period of time and then returned to her apartment.

137. The witness testified that she did not share with anyone the fact that she was raped by the Accused and that she only said that she was mistreated. When she was asked why she did not tell anyone about the rape, she said that she "belonged to the generation of women who used to keep to themselves anything related to things of intimate nature."

138. The Defense challenged the fact that the witness was raped, raising the issue of her failure to provide the Court with any medical documents in that regard, and due to the fact that she first spoke about the rape 16 years after it was committed.

139. When asked in the course of her testimony whether she went to any medical practitioner after the incident in question, the witness answered: "Which doctor could I go to back in 1993, whom could I go to back then?", and by that she meant that during that time there was a conflict in Mostar and she could not go to see a medical doctor.

140. The Panel concluded that the injured party told Dr. Omanović for the first time in 2006 that she had been raped during the war, which follows from Exhibit T11, wherein it is stated that during the war the victim suffered severe mental and physical trauma that was underneath human dignity. The injured party also testified before the Court that it was precisely Doctor Omanović whom she told that she had been raped because he was a professional. It follows from the medical findings that she was prescribed a therapy and advised to have regular check-ups. Although there is no explicit mentioning of the word rape in the medical findings, the Panel has no dilemma as to what the word trauma stands for.

141. Accordingly, the Court did not accept the Defense averments that the witness first spoke about the rape as late as in 2009 and that no medical findings were placed on the record to that end. Further on, the moment when the woman chooses to report that she was raped or share that fact with someone is irrelevant when establishing whether the crime was committed or not. This element, as is the case with other evidence, must be

viewed in the context of the war and the aftermaths of the war in BiH. Expert witnesses have testified before the Court that it is not unusual for the women who were raped to report to the medical personnel only in 2006 and that their practice shows that a large number of witnesses did not tell their spouses or children that they had been raped. The fact that they work and apparently function normally is again something that is often seen with this category of victims. Specifically, expert witnesses said that those persons "suffer quietly", while their functioning is impaired.

142. In the process of issuing of this Judgment, the Court evaluated the Report of expert witness Dr. Alma Bravo Mehmedbašić and Dr. Senadin Fadilpašić of 17 September 2010. The Report states that ...

143. The Defense objected to the evidence marked as Exhibit T1[45], on the basis of its legality, maintaining that identification was carried out contrary to Article 85(3) of the CPC, and that the Accused was available to the prosecution bodies throughout the time. The Panel dismissed this objection as unfounded because the injured party had no hesitations when she finger-pointed on the accused identifying him as the perpetrator of the criminal offence in question.

144. The Defense for the Accused also objected to the evidence marked as Exhibit T2[46] on the basis of its legality, maintaining that it was issued in 2010, that is, 17 years after the incident in question. The Defense did not provide any tangible evidence in support of this averment, aside from raising a doubt in relation to the findings. The Panel dismissed this objection, particularly bearing in mind the fact that every institution or a body has to comply with a particular document-issuing procedure, which in this case was also the situation with the Association Women Victims of War (*Udruzenje Žene-Žrtve Rata*).

145. It is true the injured party was the only one who gave evidence in relation to the act of rape because she was the only one left in the apartment with the Accused when the incident in question took place. That being said, the Panel underlines that the victim's testimony was clear, specific and very convincing even more so if known that her testimony was not brought into question at any point. The Panel examined the testimony of the Prosecution witnesses, particularly in the context of documentary evidence placed

[45] T1 – Photo-album used by Mina Zerem in the process of identification.
[46] T2 – Certificate issued by the Women Victims of War Association of 16 December 2010.

before it, and decided to take the injured party's testimony as a basis for reaching the final decision on the guilt of the Accused. The Panel also took into consideration the ICTY case-law which complies with Article 96 of the Statute, which provides that no additional corroboration of the rape victim's testimony shall be sought.

2. Taking away Salko Zerem

146. In relation to the act of taking a person to a prison camp, the Accused is charged that in violation of the rules of international law, in time of war, he unlawfully took away Salko Zerem to the Heliodrom prison camp, in the manner as described in the facts substratum of the Indictment.

147. The Court finds that this particular charge has been proven through the testimony of witness Salko Zerem, and witnesses Junuz Vajzović, Jusuf Numanović and Senad Velić.

148. Specifically, witness Salko Zerem testified that the first time the Accused came to the apartment, he told him to turn in weapons and the car. He gave him his driver's license with KM 300 inside. The Accused also took the car keys and ordered him to follow him. They got into the car and drove around for about 4 or 5 rounds, and then the Accused returned the witness home and ordered him not to tell anyone about what happened. The witness also said that their neighbor Fatima Pehlić had been in the apartment with him and his wife on that occasion, before the Accused ordered her to leave once he got there. Witness Salko Zerem also testified that he and his wife did not talk to anyone about the incident.

149. The second arrival took place on the night between 25 and 26 May 1993 around 2:30 when the Accused came to the apartment together with four or five soldiers in uniforms and armed. On that occasion, the Accused requested money from the witness and his wife and they took out the electronics from the apartment. Then the Accused threw him out of the apartment into the hallway, wherefrom he was taken downstairs in front of the building by two armed soldiers. The Accused ordered him to sit shotgun in the Golf 2 vehicle and told him not to be afraid because they were only going to ask him some questions.

150. They came to the *Heliodrom,* where he was handed over to two soldiers who then

took him to a prison cell, which, in fact, was an office where he had worked for 20 years while he was in the JNA. *Heliodrom* served as a prison camp during the war and the prison cells were packed with prisoners.

151. The witness was held in the Heliodrom building for four or five days and during that time he was transferred from one cell to another. He testified that he did see Accused Velibor Bogdanović while he was there, and that Doctor Ivan Pinj confirmed to him that it was Velibor Bogdanović and said to him "you don't mean to tell me it was him who was in your apartment." The witness said that it was not him because he was concerned about his and his wife's life. The witness was then taken from the Heliodrom prison camp to the Široki Brijeg Police Station where he was held for 10 to 12 days, wherefrom he was taken to the *Široki Brijeg* Hotel that served as the HVO barracks, where he was held for five or six days. He then returned to the *Heliodrom* where he was again held for four or five days, after which he was released. The witness stated that he spent around 25 days in captivity. The fact that Salko Zerem was held in the prison camp is corroborated by the Exhibit T4.[47]

152. Witnesses Junuz Vajzović, Jusuf Numanović and Senad Velić confirmed that they were taken away during the night of 25 May 1993, and brought to the *Heliodrom* prison camp and that Salko Zerem was held there together with them. All the witnesses confirmed that they were not physically mistreated.

153. The witness was not informed of the reasons for his arrest; he was only told by the Accused that he was being taken for interrogation.

154. The witness stated that he was not mistreated physically, but that he was mistreated psychologically.

155. The Panel concluded that violations of the rights to a fair trial guaranteed under international law and non-existence of procedural protective measures make convincing evidence that Salko Zerem's arrest was arbitrary. These breaches of procedural rights guaranteed under international law were grave because the inmates were extensively deprived of all of their rights, in view of the fact that all non-Croat men who were held there as civilians were deprived of their procedural rights in the same fashion.

[47] T4 – Certificate by the BiH Prison Camp Inmates Association of 16 June 2010.

156. More specifically, the absence of any kind of court proceedings in the *Heliodrom* prison camp, Široki Brijeg Police station, HVO barracks, shows that there was no interest to establish whether those non-Croats who were held there were imprisoned lawfully or not. The fact that no court proceedings were in place for those persons is of vital importance in the determination of whether deprivation of liberty was legitimate or not given that the initial lawful arrest may turn into an unlawful arrest if the initial grounds for arrest cease to exist.[48]

157. If procedural guarantees and a judicial review existed it would mean that the intention was to make lawful arrests and that this was the case in practice, because it would serve as a proof that only those persons were arrested who posed concrete and specific threat to legitimate security interests.

158. On the other hand, absence of procedural guarantees and judicial review in this case builds strong evidence that Salko Zerem was not lawfully deprived of liberty, but instead solely on the grounds of his ethnicity.

159. In the course of evidentiary proceedings, and in their closing argument, the Defense for the Accused Velibor Bogdanović challenged the credibility of Salko Zerem's testimony, maintaining that it was given with the intention to harm the Accused.

160. The Defense primarily challenged the fact that Salko Zerem had the status of a civilian. The findings of the Panel in relation to this objection are given in Section VI (The findings relative to the status of civilian persons).

161. The Defense for the Accused focused on the information that the witness harassed the Accused during the criminal proceedings, adding that the Accused filed reports about the incidents to the Mostar Police Station that were duly placed on the record.[49] However, the Panel examined this submission and the supporting evidence in correspondence with the rest of the evidence adduced, and found it to be irrelevant to the outcome of this specific case.

162. Further on, the Defense also contested the legality of Exhibit T4 without offering a single evidence in support, but simply expressing doubt as to the lawfulness of this

[48] Trial Chamber Judgment in *the Krnojelac Case,* para 114.
[49] O3 – Letter by the Mostar Police Department of 9 May 2011 with attachments.

document on the basis of time lapse. The Panel dismissed this objection as unfounded because the procedure for obtaining a certificate from the Camp Inmates Association is a very formal one, while on the other hand, accuracy and legality of the certificate was not brought into question at any point.

163. The Court decided to dismiss the Defense averments that witnesses Junuz Vajzović, Jusuf Numanović and Senad Velić testified only about the circumstances related to their capture and interrogation during the war. In fact, these witnesses clearly stated that Salko Zerem was with them in the *Heliodrom* prison camp as well as on other locations.

3. Conclusion

164. Finally, the Panel concluded that the actions of the Accused include all important elements of the criminal offence of War Crimes against Civilians, in violation of Article 173(1)e) of the CC of BiH.

165. When evaluating the evidence, the Court also took into account other evidence placed before it in the course of the trial. However, the Court has found that such evidence is of no particular importance and accordingly requires no in-depth analysis, as it did not considerably affect the state of facts and findings the Court reached based on the evidence whose evaluation was presented in the Judgment.

166. It is clear from these findings that the Accused possessed the required *mens rea* in relation to the criminal offence he is charged with. These were direct actions meant to cause suffering to the injured parties.

VIII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED VELIBOR BOGDANOVIĆ

167. It was stated in the Indictment that the Accused is responsible for the crimes charged against him pursuant to Article 180(1), in conjunction with Article 29 of the CC of BiH.

168. Article 180(1) of the CC of BiH prescribes that: “A person who planned, instigated,

ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be personally responsible for the criminal offence."

169. It is clear from the foregoing statutory definition that individual criminal responsibility exists for planning, instigation, ordering, perpetration or incitement to the commission of a criminal offense, or for aiding and abetting in the preparation or execution of a criminal offence.

170. The rape of Mina Zerem and the taking away of Salko Zerem constitute the *actus reus* of the crime that the Accused is charged with.

171. The criminal offence of War Crimes against Civilians in violation of Article 173(1)(e) of the CC of BiH was committed with direct intent because it follows from the evidence adduced during the proceedings that the Accused was aware of the criminal offence he was perpetrating and he evidently wanted to cause forbidden consequence.

172. Accordingly, the Accused possessed the required *mens rea* and *actus reus* required to establish his criminal responsibility as a direct perpetrator of the act of sexual violence and unlawful taking into the camp.

IX. PUNISHMENT

A. PUNISHMENT THAT IS NECESSARY AND COMMENSURATE WITH THE GRAVITY OF THE CRIMINAL OFFENSE

173. In terms of the criminal offence itself, the crime of rape and taking away and commission of the War Crime against Civilians, the Panel considered the sanction which is necessary and compliant with the aim of punishment and the relevant statutory elements. The rape and taking away of a person to a prison camp has been the focus of this trial.

1. The sentence prescribed shall be necessary and commensurate with the level of the threat against persons and values protected (Article 2 of the CC of BiH)

174. In this regard, the Panel shall also be mindful of the statutory elements pertaining to this specific purpose, that is, the sufferings of victims.[50] Here the suffering of victims was heard by direct victims of the crime, and the victims are Mina Zerem and Salko Zerem. The suffering inflicted upon these victims has also projected onto their families.

2. Criminal sanction shall be commensurate with the extent of suffering, and be sufficient to deter others from similar criminal offenses in the future (Article 6 and 39 of the CC of BiH)

175. Deterrence is an important consideration as the crime is so great that every tool available to the rule of law must and should be utilized to ensure these acts are never repeated. These acts must never be repeated again in potential future conflicts. In order to deter others a sentence must be effective to sufficiently convey the enormity of the offence. These crimes are the crimes of a soldier out of control who was not supervised or sanctioned by his superiors. While others have responsibility here it is important that these offenses are treated as the serious violations they represent so that others take note.

3. The criminal sanction shall reflect the community's condemnation of the conduct of the accused (Article 39 of the CC of BiH)

176. In the relevant case, the community, international law as well as the law of BiH describes the conduct of the Accused as criminal under national and international regulations. Both communities have clearly voiced their positions that crimes of this nature are to be condemned notwithstanding the affiliation of the perpetrator or the site of the commission, and that they must not go unpunished. The sanction must be of sufficient weight to ensure this crime is not condoned with impunity.

[50] Article 48 of the CC of BiH.

4. Criminal sanction shall be necessary and commensurate with the educational purposes of the Code, meaning that persons should be made aware of the danger of the crime as well as the justice inherent in punishing criminals (Article 39 of the CC of BiH)

177. Trials and sanctioning of these crimes must demonstrate zero tolerance for the crimes committed at the time of war, but also show that criminal procedure is an appropriate way to unmask the crimes and end the circle of personal retaliation. The Panel or its judgment cannot order or mandate reconciliation. However, a sanction that fully recognizes the gravity of the offence may contribute to reconciliation by offering a legal and non-violent response, and promote the commitment to serve justice instead of a drive for a personal or community retaliation.

178. Taking into account all of these elements that are relevant to the criminal offence that the Accused committed, the Panel is satisfied that the imposed prison sentence in the duration of at least 10 years is a sentence that is necessary and commensurate with the gravity of the criminal offence.

B. THE SENTENCE OR CRIMINAL SANCTION MUST BE NECESSARY AND COMMENSURATE WITH THE INDIVIDUAL PERPETRATOR

179. Fairness as a legal requirement shall also be taken into consideration in calculating a sanction[51], aside from the specific circumstances of not only the criminal offence, but of its perpetrator as well. The Code foresees the two aims relevant for the person convicted of the criminal offence: (1) to deter the perpetrator from perpetrating criminal offences in the future[52]; and (2) rehabilitation[53]. Rehabilitation is a purpose not only foreseen under the Criminal Code as one of the duties of the Court, but it is moreover the only purpose of sanctioning exclusively demanded by international human rights law that the Panel is to adhere to in accordance with the Constitution. Article 10(2) of the International Covenant on Civil and Political Rights stipulates that: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

[51] Article 39 of the CC of BiH.
[52] Article 6 and 39 of the CC of BiH.
[53] Article 6 of the CC of BiH.

180. There are a number of rules relevant to these purposes for they affect the sanction an individual convicted person receives.[54] The rules, among others, include the degree of criminal liability, the conduct of the perpetrator before, during and after the commission of the criminal offence, motives for perpetrating the offence, and personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts dictate. The aim behind consideration of all these elements is to assist the Court in determining a sanction that is necessary and commensurate in terms of the purpose of sanctioning and elements that had already been taken into consideration in relation to the crime itself and its consequences upon the community, provided that the sanction corresponds to the preventive and reformative demands upon the specific perpetrator.

C. DEFENDANT

1. The degree of liability

181. The Accused, Velibor Bogdanović, is directly responsible for the crimes he committed.

2. The conduct and personal situation of the Accused

182. Conduct and the personal situation of the Accused Velibor Bogdanović before, during and after the commission of the crime contain both aggravating and mitigating facts, and are relevant in view of prevention and rehabilitation.

(a) Prior to the commission of the criminal offense

183. Prior to the commission of the criminal offence the Accused Bogdanović Velibor was a member of the HVO starting from 20 September 1991. He had no previous convictions.

(b) The circumstances of the criminal offence

184. The conflict in Mostar in 1993 was fought between the Muslims and the Croats. The conflict was exceptionally painful and the majority was of the opinion that coexistence shall

[54] Article 48 of the CC of BiH.

no longer be possible in Mostar. It is clear that the Accused regarded the Muslims as his enemies and that he despised them. The Accused abused the fact of being a member of the HVO, that the Muslim civilians feared from, and he committed crimes, which is an aggravating factor.

(c) The circumstances after the relevant time

185. After the war, the Accused got married and supports three minor children. He is unemployed. According to the information that the Panel has, he did not commit any criminal offence since the end of the war.

186. According to the injured party, the Accused approached her on the street after the war, apologized for what he did and offered assistance. The Panel regarded this as a mitigating circumstance.

(d) Conduct during the proceedings

187. In the course of the proceedings, the conduct of the Accused was appropriate. He was respectful of the Court and his behavior was proper. His conduct during the trial was appropriate and met the Panel's expectations, and is therefore neither an aggravating nor a mitigating factor.

188. The existence of a motive does not constitute an essential element of the criminal offence in the relevant case nor is it linked with the intent. Accused had the necessary intent to commit the crimes prescribed under the Code and described in the reasoning to the Verdict. Therefore, the Panel will make no findings on this issue and motive is neither an aggravating nor a mitigating factor.

3. The personality of the Accused

189. The Court does not have sufficient evidence to make findings in this regard except for what the Accused showed by his acts in the course of perpetration of the criminal offence and his conduct in the courtroom, both of which has been considered at an earlier point.

4. Reduction of punishment according to the Code

190. Article 49 of the CC of BiH cites the following in terms of the reduction of punishment:

a. When law provides the possibility of reducing the punishment; and

b. When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment.

191. The Panel took into account that the Accused was 22 at the time of the commission of the criminal offence and that he currently has three minor children. The Panel placed special importance on the fact that the Accused apologized to the injured party in 1995 and thus showed responsibility for his actions.

192. The Panel took all of the above into account when deciding whether the Accused should receive a long-term imprisonment or a sentence that goes above the prescribed 10-year minimum. The decision was made to the benefit of the Accused so that the Panel decided to impose a 10-year sentence on the Accused. The Panel then addressed the issue of particularly mitigating circumstances pertaining to the defendant's age, his evident immaturity and thoughtlessness in the war-time circumstances and again made a decision to the benefit of the Accused and reduced the minimum sentence for additional four years.

193. The Panel concluded that the purpose of criminal sanctioning can be achieved through imposition of a sentence below the statutory prescribed minimum provided for in Article 173(1) of the CC of BiH.

5. Deterrence and social rehabilitation

194. The length of the prison sentence and the type of punishment for the crime committed are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes and to make amends for his criminal actions.

D. CONCLUSION

195. The Court finds that this type of criminal sanction is proportionate to the gravity of the

criminal offence, in view of aggravating and mitigating circumstances, and particularly mitigating circumstances, as well as participation and role of the accused in commission of the criminal offences, while the sentence imposed will achieve the ultimate goal of sanctioning in terms of Article 39 of the CC of BiH.

X. DECISION PERTAINING TO THE COSTS AND PROPERTY CLAIMS

196. Pursuant to Article 188(2) and (4) of the CPC of BiH, the Accused is relieved of the obligation to reimburse the costs of the proceedings, which shall be borne by the Court.

197. Property claims – Pursuant to Article 198(2) of the CPC of BiH the Court instructed the injured parties Mina Zerem and Salko Zerem to pursue their potential claims under property law in a civil action, in view of the fact that the process of fact-finding relative to the amount of property claim would take quite some time, thus affecting the length of these proceedings as well.

RECORD-TAKER **PRESIDING JUDGE**

Azra Bijedić **Darko Samardžić**

LEGAL REMEDY NOTE: This Judgment may be appealed with the Appellate Panel of the Court of BiH within 15 days as of the receipt of the written copy thereof.

XI. ATTACHMENT I – THE LIST OF DOCUMENTARY EVIDENCE PLACED ON THE RECORD BY THE PROSECUTION

Exhibit No.	Exhibit Description
1	Photo-album used by witness Mina Zerem in the process of identification of the accused and her signature
2	Certificate issued by the "Association Women – Victims of War", No. BiH-Mostar -1299/2011 of 16 December 2010.
3	Photo-album in which the witness Salko Zerem identified the accused.
4	Certificate issued by the Association of Inmates in BiH No. 13431/2010 of 16 June 2010.
5	Witness Examination Record for witness Salko Zerem No. T20 0 KTRZ 0000003 08 composed by the BiH Prosecutor's Office of 16 September 2010.
6	Interview Record for witness Salko Zerem composed by the State Investigation and Protection Agency of B-H No. 17-13/3-1-04-2-126/08 of 19 June 2008.
7	Interview Record for witness Fatima Pehlić composed by the State Investigation and Protection Agency of B-H No. 17-13/3-2-04-2-29-155/10 of 5 October 2010.
8	A Report pertaining to Psychiatric and Psychological Examination by a team of medical experts of 15 September 2010.
9	Letter of discharge issued by the Mostar Clinical Hospital of 1 December 2006.
10	Findings and opinion of a medical specialist of 4 December 2006.
11	Findings and opinion of a medical specialist of 6 May 2006. Findings and opinion of a medical specialist of 15 March 2006.
12	Findings and opinion of a medical specialist of 29 March 2006.

13	Opinion of a psychologist of 4 May 2006.
14	Vehicle hand-over document of 10 June 1994.
15	Order on proclamation of the all-out public mobilization in the territory of RBiH.
16a	Unit file issued to the name of Velibor Bogdanović.
16b	Personal record card issued to the name of Velibor Bogdanović.
17	Certificate issued by the Mostar Defense Department of 22 March 2006 issued to the name of Velibor Bogdanović.
18	The list of members of ATU Baja Kraljević professional unit, of 4 January 1994.
19	The List of members of 22nd Sabotage Detachment.
20	TXT Schedule
21	The list of guard members, non-commissioned officers and officers of the 22nd Sabotage Detachment
22	The list of members (over 25) of ATU Baja Kraljević professional unit
23	Criminal records excerpt issued by the Mostar Police Station of 27 September 2010
24	The list of costs incurred by the Prosecutor's Office of BiH of 1 January 2010
25	Decision on the right to early retirement of 17 April 1995
26	Order issued by the Main Staff of the Military Command of the Armed Forces of RBiH of 25 October 1992

27	HVO ID card issued to the name of Salko Zerem, No. 29206
28	Certified copy of the Employment Booklet issued to the name of Mina Zerem
29	Decision issued to the name of Mina Zerem of 9 August 2007

XII. ATTACHMENT 2 – THE LIST OF DOCUMENTARY EVIDENCE PLACED ON THE RECORD BY THE DEFENCE

Exhibit No.	**Exhibit Description**
1	Findings by medical doctor Divanović for Emil Ćorić of 18 May 1993.
2	Letter by the Federation Institute for Pension and Disability Insurance of 15 April 2011
3	Letter by the Mostar Police Department with attachments of 9 May 2011
4	A book titled “War crimes committed by the Muslim military units against Croats of Bosnia and Herzegovina” CPD 1997