22 -05- 2007
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SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Sud BiH / Суд БиХ
Krivično odjeljenje I Apelaciono odjeljenje/
Кривично одјељење и Апелационо одјељење
Odjel I I Odjel II / Одјел I и Одјел II
Odsjek za sudsku upravu/Одсјек за судску управу
X-KR/06/217
PREVOD OOK. 425

Number: X-KR/06/217
Sarajevo, 16 April 2007

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, sitting as a Panel composed of Judges Davorin Jukic as the presiding Judge, Lars Folke, Bjur Nystrom and Almiro Rodrigues as the Panel Members, with the participation of the legal advisor Zeljka Marenic as a record taker, in the criminal case against the accused Radmilo Vukovic, for the criminal offense of war crimes against civilians under Article 173 (1) (c) and (e) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), upon the indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-131/06 dated 12 October 2006, in the presence of the Accused, his defense attorney Milenko Radovic, lawyer from Foca, and the prosecutor Behaija Krnjic of the Prosecutor's Office of Bosnia and Herzegovina, on 12 April 2007 reached and on 16 April 2007 publicly announced the verdict that follows.

VERDICT

RADMILO VUKOVIĆ, aka Rade, son of Aleksa and mother Stana, nee Skakavac, born on July 28, 1952 in the place of Rataja, Foča Municipality, residing in Foča at 34 Svetosavska St, of Serb ethnicity, citizen of BiH, Personal Identification Number 2807952131530, clerk by occupation, literate, secondary school qualifications, married, indigent, served the army, no prior convictions,

IS FOUND GUILTY

Of what follows.

During the armed conflict between the armed forces of the Republic of Bosnia and Herzegovina and the armed forces of the Serb Republic of Bosnia and Herzegovina, in the territory of the Foča Municipality, as a member of the military forces of the Serb Republic of Bosnia and Herzegovina, he acted contrary to the rules of international humanitarian law violating the provisions of Article 3 (1) (a) and (c), and of Article 27 (2) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, by the acts described below:

On 10 June 1992 in Miljevina, Foca Municipality, the Accused came armed to an apartment in Miljevina from where he took out the injured party A to be allegedly brought in to the military headquarters in Miljevina; thereupon, instead of taking her to the headquarters, he took her to a building located in the newly-built settlement in Miljevina and used force to bring her into an apartment in which he physically abused her by hitting her in various parts of her body, threatening to kill her, placing a pistol against her temple and holding a knife to her throat; at one point, he used force to tear her clothes to pieces while the injured party was screaming and begging him to let her go; thereupon, he used one hand to cover her mouth and the other one to punch her in the head whereupon she lost consciousness and he used the fact that the injured party was unconscious and raped her; when she regained consciousness, he threatened to kill her if she told anyone what he had done to her; he also threatened her to come to the same apartment whenever he called her which she had to do up until 24 or 27 August 1992; during this period, she had to go to that apartment on five or six occasions in which he would force her to have sexual intercourse with him, which directly resulted in the injured party becoming pregnant and, after she was expelled from Miljevina, she gave birth to a male child in the Gorazde Hospital on 20 February 1993.

Consequently, during the armed conflict, as a member of the military forces of the so-called Serb Republic of Bosnia and Herzegovina, he acted contrary to the rules of international humanitarian law violating the provisions of Article 3 (1) (a) and (c), and of Article 27 (2) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, **whereby** he committed the criminal offense of war crimes against civilians in violation of Article 173 (1) (c) and (e) of the Criminal Code of BiH.

Therefore, the Court, in accordance with the above stated provisions and pursuant to Article 42, 48, 49 and 50 of the CC of BiH hereby

SENTENCES HIM

TO 5/FIVE YEARS AND 6/SIX MONTHS OF IMPRISONMENT.

Based on the application of the legal provision under Article 56 of the CC of BiH, the time the Accused spent in custody, commencing on 18 April 2006 and lasting until 14 February 2007, shall be credited towards the sentence of imprisonment.

Pursuant to Article 188, paragraph 4 of the CPC of BiH, the Accused shall be relieved of the obligation to reimburse the costs of the criminal proceedings.

Pursuant to Article 198, paragraph 2 of the CPC of BiH, the injured party, protected witness A, is hereby referred to take civil action with her claim under property law.

Reasoning

By the indictment of the Prosecutor's Office of BiH number KT-RZ-131/06, dated 12 October 2006 and confirmed on 13 October 2006, Radmilo Vuković, aka Rade, was charged with the criminal offense of war crimes against civilians under Article 173 paragraph 1 items c) and e) of the Criminal Code of Bosnia and Herzegovina.

The accused Radmilo Vukovic, at the plea hearing held on 31 November 2006, pleaded not guilty of the criminal offense with which he was charged in the Indictment.

The main trial commenced on 19 January 2007 and, throughout the proceedings, the Court was mindful of protection of identity of witnesses, the protected witnesses in particular, by not mentioning their full names in the Verdict but only their pseudonyms, whereas their complete data are contained in the confidential case file.

1- Presented Evidence

The Prosecutor presented the evidence as follows.

The Prosecutor proposed the protected witnesses A and B who were examined in the main trial. The Court notes that the personal data of the protected witnesses, which are confidential, will not be disclosed in the Verdict.

Furthermore, during the main trial, the Court inspected the following evidence submitted by the Prosecutor: Statement given by the protected witness "A" to the Prosecutor's Office of BiH (hereby: T) on 16 of August 2006, Prosecution evidence 1 (T1); Statement given by the protected witness "B" to PO, on 17 July 2006, (T2); Referral slip to a hospital for the injured party A issued by the Gorazde Health Center, dated 20 February 1993, (T3); Case history for the injured party A made by the Gorazde Health Center, No. 207/93, (T4); Anamnesis and a finding for the injured party A made by Dr. Fadil Jahic on 20 February 1993 and 26 February 1993, (T5); Bodily temperature record for the injured party A, dated 20 February 1993, (T6); Release form for the injured party A issued by the Gorazde Health center, No. 207/93, dated 26 February 1993, (T7); Copy of the Register of Births (T8); Certificate issued by the Gorazde Municipality Registry Office (T9); Procedural decision of the Public institution Social Welfare Center Gorazde (T10); Social anamnesis (T11); New registration (T12); Order of the Prosecutor's Office of BiH ordering performance of a DNA analysis, (T13); DNA expert evaluation finding (T14); Certificate issued by the Bellevue Hospital Center, New York, USA, dated 31 July 2006, (T15); Certificate on deprivation of liberty issued by the RS Ministry of the Interior- Foca Support Unit, Istocno Sarajevo Public Security Center, Ref. number 13-01/2-01/06, dated 18 April 2006, (T16); Official letter of the ICTY on giving the standard marking "A" for Radmilo Vukovic, ref. n. 00-04209/Gb/AmdV/RR516, dated 9 August 2000, (T17); Criminal records certificate for Radmilo Vukovic, issued by the Istocno Sarajevo Public Security Center – Foca Public Security Station, Ref. n. 13- 1- 8/02-248-2-290/06, dated 11 July 2006, (T18).

On the other side, the Defense presented, during the main trial, the protected Defense witnesses C and D who were examined. The Court, at the motion of the Defense, also examined Dr. Senadin Ljubovic, a neuropsychiatrist, as a forensic expert witness.

Furthermore, during the main trial, the Court inspected the following evidence submitted by the Defense: Forensic Expert Evaluation, Dr. Senadin Ljubovic, Chief Physician, Clinical Centre of the Sarajevo University, Defense evidence 1 (O1); Statement of the protected witness under pseudonym A given to the authorized official of the Public Security Centre Sarajevo on 13 April 1994, (O2); Statements of the protected witness under pseudonym B given to Investigative Judge Cantonal Court Sarajevo on 4 April 2001 and 30 November 2001, (O3); and 3 photos of the settlement where protected witness A and the Accused used to live, (O4 a, b and c).

Following the presentation of material evidence, the Defense proposed that a neuropsychiatric expert evaluation be carried out. The Defense proposed that the forensic neuropsychiatrist analyzes the personality structure of the accused (the emotional and intellectual qualities of his personality); whether there exists a symptomatic, genetic inclination on the part of the accused toward instinctive sexual perversities; whether the accused displays any signs of temporary or permanent mental illness, temporary mental derangements or mental underdevelopment; whether the accused was able to understand the importance of his actions and to manage his actions, or to understand the actions he is charged with; and, finally, the Defense requested that the forensic expert neuropsychiatrist review all the statements of the protected witness A, the injured party, and in particular the testimony given by that witness on 6 February and thereafter give an expert opinion about the meaning of the term "retrograde amnesia" and whether witness A could have developed a retrograde amnesia. The Defense proposed this evaluation be carried out by Dr. Senadin Ljubovic, Psychiatrist and Chief Physician of the Clinical Center of the Sarajevo University. After deliberation, the Court accepted this proposal and issued an order for expert evaluation of the Accused, number X-KR- 06/217, dated 26 February 2007.

2- Closing arguments

The main trial was completed on 11 April 2007 with the closing arguments of the Prosecution and Defense.

The Prosecutor, during the presentation of closing arguments, argued that based on the evidence presented at the main trial the trial panel could conclude that it is established beyond a reasonable doubt that the accused knowingly undertook all actions in a manner and circumstances as under the factual description of the operative part of the Indictment, thereby committing the criminal offence of war crime against civilians in violation of Article 173, paragraph 1, items c) and e) of the CC BiH. Namely, the Prosecutor stated that it ensues from Article 173 of the CC BiH that significant elements of the criminal offence of war crimes against civilians encompass undertaking of acts contrary to international law, the existence of armed conflict or war at the time when the actions were undertaken, undertaking actions against a civilian, or in fact a person awarded a protected status, and the actual perpetration of these acts by the accused. According to the Prosecutor, the evidence presented and the facts mutually accepted by the parties clearly lead to the conclusion that all significant elements of the crime as charged under the Indictment were met in the acts undertaken by the accused.

The Prosecution and the Defence agreed on the fact that there was an armed conflict in the Foča Municipality region between armed forces of at first the so-called Serb Republic of BiH, and then of Republika Srpska, and the-then forces of the BiH Territorial Defence, or later the Army of BiH, in the period from early April 1992 to at least February 1993. The Prosecutor argued that it is evident from all prosecution evidence presented at the main trial, and particularly from the testimonies of the injured protected witness A, and the testimony of the protected witness B, that the accused undertook actions as charged in the operative part of the Indictment during the armed conflict in the Foča Municipality area. The Prosecutor indicated that it was confirmed by the statement of witness B, claiming that the testimonies of witnesses A and B "are completely reliable and not a single fact puts their trustworthiness under suspicion and that it is also confirmed by the physical evidence, which was accepted by the Court as relevant". The Prosecutor also stressed that the credibility of the accounts of both witnesses is clear and undisputable, since they were corroborated in their entirety by the material evidence, meaning the medical and administrative documentation regarding both the child the injured party gave birth to and the injured party herself. Furthermore, the Prosecutor stressed in particular that the actions of the accused in their entirety constitute the *actus reus* of the criminal offence of rape committed upon the injured given that he enforced upon her the whole sexual intercourse or sexual penetration and given the fact that he came to penetration without the consent of the victim, accompanied by threats against her life and the life of her family members. Accordingly, the Prosecutor expressed the opinion that all this clearly suggests the full intent of the accused (*mens rea*) to commit by his actions the offence as charged with under the Indictment. The Prosecutor also argued that the testimonies given by the Defence witnesses "did not deal with the key facts of the act under the indictment", since they mostly concern the character of the accused. Finally, the Prosecutor deemed that considering all the above mentioned statements as well as material evidence, the trial panel can, beyond any reasonable doubt, conclude that Radmilo Vukovic is entirely criminally responsible for the perpetration of the criminal offence charged in the indictment. Thus, the Prosecutor moved the Court to find the Accused guilty and to accordingly pronounce against him a sentence, taking into account the aggravating circumstances reflected in the persistence of the accused in continuously undertaking unlawful acts against the injured party as well as his recklessness towards her, being an unprotected woman.

The Defense, in its closing arguments, stressed that in making its decision the Court should have in mind that the statements in the indictment are based solely on the testimonies of the perpetrator and the victim, which are diametrically opposed in terms of duress. The Defense objected to the validity and credibility of the accounts of protected witnesses A and B, arguing that there are important discrepancies between the two accounts in terms of the crucial facts. Accordingly, the Defense is of the opinion that the criminal liability of the defendant cannot be based on the accounts of witnesses A and B, because the alleged discrepancies raise important doubts as to the allegations of these witnesses. Furthermore, the Defense pointed out that the DNA test result is not proof of the violent nature of the intercourse between the injured party and the defendant, but establishes only the existence of a sexual relation between the defendant and the injured party A, which is not contested by the defendant. The Defense further alleged that based on the statements of the Defense witnesses C and D, it can be concluded that injured party A and the accused were in a relationship. Therefore, the Defense argued, the accused would have had no need to use force during sexual relations. The Defense further objected that this specific case does not qualify as a war crime, arguing that the Prosecutor failed to prove that the actions of the defendant towards the injured party were undertaken by him within the existing armed conflict. The Defense

suggested that, on the contrary, the acts undertaken by the defendant towards the injured party in the specific situation were undertaken regardless of the ongoing conflict. his actions thus not being part of any systematic and widespread rapes of Bosniak Muslim women, nor as a part of the policy of ethnic cleansing of the non-Serb population from the territory of the local community of Miljevina and Foca municipality. The Defense further argued that the necessary specific intent is missing. The Defense was thus of the view that, even if it were established that forced sexual relations took place in this case, it cannot be qualified as a war crime against the civilian population since the acts allegedly committed by the accused were independent from the armed conflict. Furthermore, the Defense stated that applying Article 173, Paragraph 1, Items c) and e) of the CC of the BiH would constitute a direct violation of the defendant's right to have a more lenient law applied. Finally, the Defense denied any responsibility for the acts the accused is charged with. Due to all the above mentioned, the Defense moved the Court to acquit the accused Radmilo Vukovic and if not acquitting him, to take as mitigating circumstances the earlier life of the defendant, his personal circumstances and his conduct during the armed conflict.

Following the closing argument of his defense attorney, the accused stated the following: "neither as a human being nor as a man, would I ever be able to commit such a crime as I am charged with. I did not commit this criminal offense and for that reason, I am not guilty. I share the entire closing arguments of my defense attorney".

3- Procedural decisions of the Court

The Court rendered several procedural decisions in this criminal case as follows.

A) Decision on continuation of the trial without the presence of the accused

The Accused was duly informed of the hearings scheduled in the criminal proceedings against him. The opening of the main trial was scheduled for 10 January 2007. However, the Accused failed to appear on that day. In accordance with the Official Note sent on the same date by the Penal and Correctional Institution Kula-Istočno Sarajevo, the accused Radmilo Vuković did not want to come to the Court of BiH due to his being on a hunger strike with other detainees. The defence counsel stated in the hearing that the Accused told him that he decided to join a group of detainees on the hunger strike; he expressly stated that he would not appear for trial and his own decision would follow the decision of the group of detainees. The Court also received a written statement of the Accused where he declared: "I am unable to attend the trial scheduled for 10 January 2007 at 10.00 because of illness." The opening of the main trial, starting with reading the indictment and opening statements was thus postponed until 19 January 2007. On 19 January 2007, the Court was informed by an official note that the Accused was not able to appear due to his "mental and physical exhaustion resulting from the hunger strike that has been ongoing since 8 January 2007". At the hearing held on 19 January 2007, the Court orally decided that the main trial against the accused Radmilo Vukovic should be held even without his presence as he was duly summoned and aware of the trial, while emphasizing that the Accused would have the right to appear before the Court at any time during the course of the main trial, while his defense attorney would attend the sessions held without the presence of the Accused, and that he would also be informed without delay about the course of the proceedings by being served with recordings of the entire trial hearings.

written Decision No. X-KR-06/217, dated of 19 January 2007, specifies the reasons for such oral decision.

B) Decision on undisputed facts

On 19 January 2007, the Prosecutor and the Defense filed the motion number KT-RZ-131/06, pertaining to the agreement upon undisputed facts. In fact, the Prosecutor and the Defense agreed upon the following facts to be accepted as proven: in the period from early April 1992 at least until February 1993, in the territory of Foca Municipality, there was an armed conflict between the armed forces of the Serb Republic of BiH, afterwards the Republika Srpska, and the then forces of the Territorial Defence of BiH, afterwards the Army of BiH; and that, in the period of the mentioned armed conflict as well as in the period in which the accused Radmilo Vukovic allegedly undertook the acts with which he has been charged, he was a member of military forces of the Serb Republic of BiH. On 22 February 2007, the Court delivered the Decision X- KR/06/217, granting the Motion of the parties and accepting as proven the agreed facts. That decision specifies the reasons for accepting as proven the agreed facts.

C) Decisions on the protection of the witnesses

On 6 February 2007, the Court granted protective measures to Prosecution witnesses A and B. By this decision, the injured party's personal data were declared confidential and she testified under the pseudonym A. Furthermore, witness A was enabled to testify from another room, with voice and face distortion. The Court took particularly into consideration the psychological condition of the injured party, based on a medical report from her treating doctor about her chronic psychological state, which could be aggravated by any stress of high intensity.

On the same date of 6 February 2007, the Court also decided that witness B would testify in open session under pseudonym B, while video streaming would be available only inside the courtroom.

On 09 March 2007, the Court granted the protective measures requested by the Defense counsel to his two witnesses. The protected witness C testified from another room with voice and face distortion, while the protected witness D enjoyed protection of his personal details, while he testified in the courtroom in an open session, but the media was barred from publishing his photo and his image not even in the video streaming from the Courtroom.

D) Oral decision on the Defense Motion for a neuropsychiatrist expertise

On 22 February 2007, the Court accepted the proposal of the Defense to order the conduct of a neuropsychiatric examination of the accused Radmilo Vukovic by one of the Court's forensic experts.

4- Evidence Evaluation

By evaluation of all the presented evidence individually and in their correlation, the Court established beyond any reasonable doubt that the Accused committed the criminal acts described in detail in the operative part of this verdict.

As it arises from the Indictment, the accused Radmilo Vukovic is charged with the criminal offense of war crimes against civilians under Article 173 (1) (c) and (e) of the CC of BiH. The essential elements of the legal definition of that criminal offense are the *actus reus*, the *mens rea* and the *nexus* between the act of the Accused and the armed conflict. The burden of proof of all these essential elements lies with the Prosecutor.

First of all, witness A testified that, in the beginning of 1992, she lived with her parents in the area of Foca Municipality. Her Father was taken away on 9 June 1992. The following day, on 10 June 1992, around 10.00 in the morning, a neighbor of the family came to their flat having received a phone call for witness A. Their own phone had been taken away previously. Witness A did not know who was on the phone. She says: "it was a man, who said I had to be ready in ten minutes to give a statement to the headquarters". Around thirty minutes later, the Accused was at the door of witness A's flat. She knew him by sight, because they used to work at the same place. Witness A had to follow him. However, instead of going to the headquarters, he took her into an apartment, which belonged to the Accused although witness A did not know it at that time, even though his building was in the neighborhood. On the way to the flat, witness A asked why and where he was taking her since the direction was not to the headquarters. The Accused answered "nothing bad will happen, come on" and pushed her each time she stopped. Once in front of the apartment, he pushed her inside and locked the door, putting the key in his pocket. Upon his invitation, she refused to sit. Then he pushed her onto the couch. The Accused then showed her a table where a knife, a pistol and bullets were placed and told her "if you don't agree with what I demand, you can choose with what I will kill you". Then, he offered her drinks and cigarettes but she refused everything. He came near and put his hand on her. She tried to move away, but he caught her by her hair and brought her back to the couch, where he punched her and hit her, slapped her face with one hand, and held her arms with the other one. He asked her to stop defending herself and to get her clothes off. She did it. While she was resisting, the Accused "just came on her, pressing her legs with his own legs", trying to unbutton her dress and starting to hit her more strongly, using his fists in the area of her temple. She lost consciousness for between 30 and 60 minutes. When she regained consciousness, she realized that she was undressed and the Accused was sitting next to her on the couch. She was in pain below her stomach, in her back and in her face. She was "all broken down". She tried to get up, crying and asking the Accused what he did to her. He answered "nothing special". She managed to stand up, pick up her dress, put it on and then she noticed that "blood was running out". At this moment, noticing she was bleeding and feeling pain below, witness A realized that she had been raped. As he instructed her, she went to the bathroom, washed herself, found her underwear and put it on. She tried to button her dress but there were no buttons left. The Accused let her go home as she wanted, but said "in the future, when you have to come back here, you'll have to come on your own, I won't pick you up. I will wait next to the building". He told her she would have to come back in two days at a specific time and that he would be waiting for her behind the building. The Accused threatened witness A that he would kill her and her family members if she spoke to anyone

[redacted]

about what happened. After this, witness A went home, with neither her mother nor her sister asking what happened.

Two days later, witness A went under threat to the same flat with the Accused, where "the same thing happened, but I was conscious that time". She said in her testimony: "Whenever I would come, he would come on me, like a maniac, would attack me, doing his job (...) under the threat I shouldn't tell anyone. Each time, he would use force, force me to sexual intercourses and threaten me". "He told me if I would say one word, he would cut my head like a rabbit"

Witness A went to the apartment at issue 5 or 6 times in total. On the latest occasion, which took place on the 26 or 27 August 1992, the Accused informed her that he had to go to Montenegro to visit his wife and child. He told her that nobody would attack her while he would be away and that they would continue when he would return.

After the Accused left for Montenegro, witness A and her family were transported to Gorazde on 3 September 1992 together with other remaining Bosniaks. Witness A did not notice any change in her; she "felt nothing special, but started to have doubt" about pregnancy. She saw a doctor when arriving in Gorazde and he told her after examination that she was in high pregnancy. Witness A kept the information to herself, and in February 1993 she gave birth to a child in the Gorazde hospital, whom she never saw and never wanted to see. She got information at the hospital regarding the fate of the child and learned only later on that a family adopted that baby. After all these events, due to trauma, she had to undergo treatment and is still under constant medical treatment.

The Court notes that the account of the witness A is in many aspects confirmed by the account of the witness B. Witness B was not an eyewitness to the events in the apartment of the Accused. Nevertheless witness B confirmed essentially the whole range of facts stated by witness A's account, namely the facts which confirm that the Accused undertook all actions as charged and as described by witness A. Witness B confirmed that, on 10 June 1992, witness A received a phone call from a man who threatened witness A that he would kill her if she did not follow him and, after some time, that man came to in front of their apartment and again threatened witness A that she must follow him. Witness B then saw that this man was the accused Radmilo Vuković whom she knew very well since before the war. In her testimony she said that two or three hours had passed after the Accused took witness A before she returned to the apartment all in tears, with a ripped dress on and visible injuries. Witness A immediately went to the bathroom, and only after a while the witness B did manage to talk to witness A, witness A told witness B that instead of going to the headquarters, the Accused took her to an apartment, where he first threatened her and then physically abused her by hitting her all over her body due to which she lost consciousness, and was then raped by the Accused. Witness B clearly confirmed that, after the witness A returned from the apartment to which witness A had been taken by the Accused, there were visible injuries on the body of witness A, namely a haematoma on her back, arms and neck. Witness B further confirmed that witness A, after this incident, went on several other occasions to the same apartment, although witness A kept it as a secret, witness B nevertheless knew where to and why witness A was going. Witness B also confirmed that witness A got pregnant, and, in February 1993, before they left her place of residence, she gave birth to a baby in the Goražde hospital.

The Court gave full credit to the said witnesses A and B. Witness A unequivocally described the act of being raped by the accused Radmilo Vuković, while the testimony of witness B was clear, logical and complementary in a manner that leaves no space for any doubts as to its accuracy. In fact, the testimonies are utterly consistent and correspondent in their essential and important elements, and the few varying interpretations of certain facts do not raise suspicion in relation to the authenticity and credibility of the accounts, given that these discrepancies are normal in the witnesses' psychological processes and do not refer to any of the crucial facts. Therefore, the Court considers that full credibility should be given to the substance of these accounts.

Furthermore, the Court notes that the accounts of both witnesses are entirely corroborated by the material evidence presented by the Prosecution and admitted by the Trial Panel as relevant and legally acceptable. The Court on the basis of that material evidence concluded with certainty that the injured party witness A gave birth to a baby on 20 February 1993 whom she abandoned immediately after giving birth. The DNA findings show that the accused Radmilo Vuković is the child's biological father. The Accused himself does not deny his paternity.

Following the accounts of both witnesses and taking into consideration the Prosecutor and the Defense agreed facts, which were accepted by this Panel[1]; it is beyond dispute that the charge of war crimes against civilians is appropriate in this specific case.
Firstly, an armed conflict existed between Bosnian Serbs and Bosnian Muslims in the territory of Foca municipality from April 1992 to February 1993, as required by the ICTY Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on jurisdiction, on 2 October 1995, in the *Tadic* case paragraph 137. The Prosecutor and the Defense agreed upon this fact in their common Motion upon undisputable facts from 19 January 2007.
Secondly, there must be a nexus between the armed conflict and the alleged offense (see ICTY *Halilovic* case, Trial Chamber, 16 November 2005, paragraph 28). The Court notes that the Accused used his military position to bring witness A to his apartment. Indeed, witness A testified that, when calling her on the 10 of June, the Accused told her that she would have to go to the Headquarters to give a statement, which was, as a matter of fact, just a way to get her out of her apartment. By doing so, the Accused acted as a member of the military forces of the then Serb Republic of BiH, when (from April 1992 to February 1993) there was an armed conflict in the Foca Municipality. Furthermore, witness A clearly stated that the Accused was wearing a military uniform, while witness B claims he also had a rifle. The ICTY Appeals Chamber Decision, in the *Kunarac, Kovac and Vokovic* case, 12 June 2002, paragraph 59, when listing the factors for assessing the existence of a nexus, stated that "In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of the military

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[1] *See this Panel's Decision dated 22 February 2007, to grant the Motion of the Prosecutor's Office of BiH and the defense counsel for the accused Radmilo Vukovic, informing the court that they have agreed upon the following facts: the fact that first there was an armed conflict in the territory of Foca Municipality between the armed forces of the Serb Republic of BiH, afterwards the Republika Srpska, and the then forces of the territorial Defence of BiH, afterwards the Army of BiH, in the period from early April 1992 at least until February 1993 and secondly, the fact that in the period the mentioned armed conflict commenced, as well as in the period when the accused Radmilo Vukovic undertook the acts with which he has been charged by the Indictment, he was a member of military forces of the Serb Republic of BiH, or of the Republika Srpska, as a private.*

campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties".
Thirdly, the armed conflict must have played a substantial role in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which he committed it. *See Kunarac, Kovac, Vokovic*, Appeals Chamber, 12 June 2002, paragraph 58. The Accused was a member of the then SR of BiH Army when, during the above mentioned period, he came to the flat of a Bosniak family, where the father had already been arrested and the phone taken away. Also, he allegedly took the victim away to bring her to the HQ to give a statement, as was common practice. The Court, following the case law of the ICTY, also stresses that a single act may constitute a violation if the required nexus is established. In fact, in the *Halilovic* case, the Trial Chamber expressively stated that "There is no reason why a single, isolated act, could not constitute a violation of the law and customs of war, when the required nexus has been established"[2].
Finally, the criminal offense must be committed against persons taking no active part in the hostilities (*see. e.g., Krocka et al.* Trial Chamber, November 2, 2001, paragraph 124), which was the case of witness A.

Concerning the *actus reus,* the Court took into account that "The *actus reus* of the crime of rape in international law is constituted by the sexual penetration." The Court notes that the *actus reus* element of the rape is here clearly established. Indeed, the Court notes that account of both witnesses is entirely corroborated by the material evidence presented by the Prosecution.

"The mens *rea* regarding rape is the intention to effect sexual penetration and the knowledge that it occurs without the consent of the victim. Such state of mind may be inferred from all the circumstances surrounding the events, including the coercive environment in which the act took place. Resistance is not a requirement. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. Force and threat are merely an *indictum*" (see ICTY Appeals Chamber judgment in Kunarac, Kovac and Vokovic, June 12 2002, paragraphs 127-132).
Concerning the capacity of the Accused to comment on the circumstances in which the victim found herself at the time of giving or not giving her consent, in particular the existence of circumstances so coercive that she is not in a position to give a true consent, the Court considers that the pre-war intimate relationship between the Accused and the injured party had influence on the perception of the Accused regarding the current circumstances of war. Still, the Court finds that the use of coercion, physical force and threats by the Accused clearly established that he was aware of the absence of consent of the injured party, meaning that it was so explicit that he had to use coercion to have a sexual intercourse with the injured party; by essence consisting in a rape. This is in accordance with the *Akayesu* Trial Chamber judgment, paragraph 688, where it says that "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion".

The Court notes that the Accused's capability to comprehend the significance of the act and to govern his actions, *tempore criminis*, was entirely preserved. Indeed, the expert witness Dr. Senadin Ljubovic examined the accused Radmilo Vukovic and, on 14 March 2007, he submitted his findings and opinion. A psychological examination of the Accused was first

[2] *Judgement of November 16, 2005, paragraph 724.*

conducted on that day by the graduate psychologist Elvedina Dervovic. Dr. Dervovic concluded that the test results and behavioral indicators suggest that the Accused is of above-average intellectual potential with no signs of cognitive dysfunctions. Dr. Dervovic also concluded that a tendency of presenting himself in the most favorable light was dominant and hence limited the possibility of an in-depth exploration of his personality. At the hearing held on 27 March 2007, Dr. Senadin Ljubovic presented the following conclusions he reached: in the course of the detailed psychiatric analysis and the review of obtained examination results of the Accused, no signs of temporary or permanent mental illness or temporary mental disorder on the part of Radmilo Vukovic were detected; the Accused's intellectual potential is above average and the Accused does not exhibit any signs of cognitive malfunctions. The expert also emphasized that the constant tendency of the Accused to present himself in the most positive light constituted resistance throughout the examination and did not allow him to penetrate deeper into the very structure of the accused person's personality. Therefore, it was not possible to offer a precise and complete answer as to whether there are any significant deformations in the structure of his personality. The expert witness also considered that it is undoubtedly possible for a person with perfectly preserved outer appearance and correct social functioning to display, under certain circumstances, particularly deviant behavior on the emotional, instinctive and sexual level, which includes the possibility of sexual violence wherefore, according to the expert witness, it cannot be concluded as to whether the Accused is prone to actions described in the indictment, as asked by the Defense. The expert witness clearly stated that the accused Radmilo Vukovic's capability to comprehend the significance of the act and to govern his actions, *tempore criminis*, was entirely preserved. Then, the expert witness stated that the damaged party did not provide information in her statements that could indicate the existence of retrograde amnesia. According to Dr. Ljubovic, there is the possibility that the mentioned loss of consciousness was a result of the combination of two factors: physical trauma (described injuries to the head) and psychological trauma (the damaged party's inability to confront willingly the psycho-traumatic situation in which she was, meaning the threat of rape). Therefore, the Court has accepted in its entirety the finding of the expert witness as objective, professional and science-based.

Thus, it is unequivocally concluded that in the course of the armed conflict in the territory of the Foča municipality between the armed forces of the then Serb Republic of BiH, and the then forces of the Territorial Defence, the accused Radmilo Vuković as a member of the forces of the then Srpska Republika of BiH acted in violation of the rules of international law at the time of an armed conflict in the manner described in the operative part of the indictment. Therefore, he indisputably committed the criminal offence of war crimes against civilians charged against him.

The Court also gave full credit to the witnesses C and D, who unequivocally confirmed the fact that the Accused and witness A were having an extra-marital relationship before the war. Witness C stated that, after the Accused had told him about this relationship with his working colleague and after the rumor started to be spread, he advised the Accused to stop this secret extra-conjugal relationship with a Bosniak woman in such a small place as they used to live. Witness D testified that he had indirect information that before 4th April 1992, the Accused had an intimate relationship with a woman of Bosniak ethnicity. The Accused gave him the name of that woman, whom witness D knew since before, to whom witness D had spoken several times and with whom witness D saw the Accused on several occasions in the street. Witness D also stated that he had several discussions with this woman, who had also told him that she had a relationship with a non-Bosniak man from the area. Witness D stated that the

relationship between the Accused and this woman existed already in 1991. Both witnesses, emphasizing their Bosniak ethnicity, also pointed out that the Accused, as well as his family, were well known for helping Bosniak refugees from the Foca territory and for having helped them to move.

As already stated above, the Court considers that the Accused, before the war, was involved in an intimate relationship with witness A. That consideration is beyond any doubt corroborated by the aforementioned witnesses and by the Accused himself. On the other side, the Prosecutor estimates that witnesses C and D "did not deal with the key facts of the act under the indictment", since they mostly concern the character of the Accused. It is true that witness A denies that relationship. However, the Court could not accept that segment of her testimony, because the testimonies of witnesses C and D were specific, consistent and convincing.

In general, the Court concludes that the evidence is factually sufficient to sustain the conviction of guilt beyond reasonable doubt. The Court, within its discretion to evaluate the evidence, assessed as a whole some inconsistencies or discrepancies of the testimonies. Also the overall credibility of the witnesses was assessed in a global and systematic manner. Some witness's testimonies are not identical but they are consistent in respect to the substance of the concerned criminal offense. The Court considers that the testimonies were reliable and the evidence was credible and small inconsistencies cannot suffice to render the whole testimony unreliable. In fact, the said differences are irrelevant, as some variations in their statements entirely represent expected and normal differences in observations of persons of different ability to perceive, memorize and retrieve information, in particular given the fact that all of them survived a very stressful and traumatic events during which they could not observe precisely all the relevant and consistent details, nor could such a precision be reasonably expected from the witnesses.

5- Application of Substantive Law

Regarding the issue of the substantive law to be applied, the Court accepted the legal qualification of the prosecution and convicted the Accused of the criminal offence of war crimes against civilians in violation of Article 173 (1) (c) and (e) of the Criminal Code of Bosnia and Herzegovina. However, as already mentioned above, the Defense argued that applying article 173, (1), c) and e) of the CC of the BiH would constitute a direct violation of the defendant's right to have a more lenient law applied.

A) Law under consideration

At the time of the commission of the criminal offense, the CC SFRY was in force. In fact, that CC was originally adopted by the SFRY Assembly at the session of the Federal Council held on 28 September 1976 and published in the Official Gazette SFRJ No. 44, of 8 October 1976. After independence, a Decree of 22 May 1992, with the force of law adopted the SFRY Criminal Code as the Code of the Republic of BiH (with a few minor amendments) and entered into force on the date of its publication. The CC SFRY was in force until 20 November 1998 in the territory of the Federation of BiH, until 31 July 2000 in the territory of Serb Republic and until 2001 in the Brcko District. Let us say that new Criminal Codes

entered into force on 1 March 2003 for BiH, on 1 August 2003 for the Federation and on 1 July 2003 for the Serb Republic.

The CC of the SFRY contemplated war crimes against civilians. Article 142 (1) provided that "whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders (...) forcible prostitution or rape (...), or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty". On the other side, the CC of BiH, when dealing with war crimes against civilians provides in Article 173 (1) that 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 life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution, (...) shall be punished by imprisonment for a term not less than ten years or long-term imprisonment".

Given the time of the perpetration of the offence (June-August 1992) and the substantive law in effect at that time, the court finds it appropriate to pay attention to the principle of legality and the principle of time constraints regarding the applicability of the criminal code:

Article 3 of the CC of BiH (principle of legality: *nullum crimen et nulla poena sine lege*) stipulates that "criminal offences and criminal sanctions shall be prescribed only by law" and "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 offense by law or international law, and for which a punishment has not been prescribed by law."

On the other side, Article 4 of the CC of BiH (Time Constraints Regarding Applicability) 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".

The principle of legality is also stipulated by the ECHR which, pursuant to Article 2 (2) of the BiH Constitution, supersedes all national legislation of BiH. Article 7 (1) of the ECHR reads: "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense 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 offense was committed." This provision bars the imposition of a heavier penalty without prescribing mandatory application of the law that is more lenient to the Accused in comparison with the penalty applicable at the time of the perpetration of criminal offence. However, Article 7 (2) of the ECHR stipulates that "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

Additionally, Article 15 (1) of the International Covenant on Civil and Political Rights (hereinafter: ICCPR) stipulates that "No one shall be held guilty of any criminal offense 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 a lighter penalty, the offender shall benefit thereby". However again, Article 15 (2) of the ICCPR prescribes that "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

Finally, Article 4 (a) of the CC of BiH sets forth that "Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law."

In sum, Article 4 (a) of the BiH CC is about "general principles of international law". Article 7 (2) of the ECHR is about "general principles of law recognized by civilized nations" and Article 15 (2) of the ICCPR is about "general principles of law recognized by the community of nations". As neither international law nor ECHR or ICCPR recognize a term identical to that one used by Article 4a of the CC of BiH, the used phrase is then a combination of the "principles of international law", as recognized by the UN General Assembly and International Law Commission on the one hand, and the "general principles of the rights recognized by a community of nations" as recognized by the Statute of the International Court of Justice and Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR on the other hand.

B) Applicability of the Law

By Article 4 (a) of the CC of BiH, the provision of Article 7 (2) of the ECHR has been expressly adopted enabling a significant departure from the principles of Article 3 and 4 of the CC of BiH, as well as a departure from the mandatory application of a more lenient law in proceedings conducted for acts which are criminal according to international law, which is exactly the case in the proceedings against the Accused, because this is exactly an incrimination which includes a violation of international law. This is the position so far taken in the Court of BiH case law[3].

The State of Bosnia and Herzegovina, as a successor to the former Yugoslavia, ratified the ECHR and the ICCPR. Therefore, these treaties are binding on the State of Bosnia and Herzegovina and they must be applied by the authorities of BiH. Therefore, Article 4 (a) of the CC of BiH is only a domestic legal reminder, as it would not be necessary for the application of the treaties. For the same reason, all the courts in Bosnia and Herzegovina are bound by the mentioned treaties and a provision like Article 4 (a) of the CC of BiH is not needed for its application.

Article 173 of the CC of BiH prescribes war crimes against civilians (grave breaches of the 1949 Geneva Convention) like Article 2 of the ICTY Statute. At the critical period, war crimes against civilians were also explicitly prescribed by the applicable CC of SFRY which

[3] *See as an example of the constant case law of the Court on that issue: the Verdict of Section I of the Appellate Division of the Court of BiH pronounced against Abduladhim Maktouf, No. KPZ 32/05 on 4 April 2006, whose Appeal to the Constitutional Court against this Verdict has been dismissed on 30 March 2007; As far as the Court is informed, in that decision the Constitutional Court recommended to all Courts of BiH to apply the BiH Criminal Code as the common criminal norm; Verdict of Section I of the Court of BiH pronounced against Dragoje Paunovic case, No. X-KR-05/16; Verdict of Section I of the Court of BiH pronounced against in the Radovan Stankovic case, No. X-KR-05/70; Verdict of Section I of the Court of BiH pronounced against Nikola Andrun, No. X-KR-05/42 ....*

was in force in Bosnia and Herzegovina. The fact that the criminal acts set forth in Article 173 of the CC of BiH can also be found in Articles 142 (1) of the CC of SFRY allows the conclusion that the criminal offense of war crimes against civilians, namely rape, was prescribed by law.

However, as we can see from these provisions, the imposed punishment foreseen by Article 173 of the CC of BiH is definitively more lenient than the death penalty foreseen by Article 142 of the CC of SFRY and applicable at the time of the perpetration of the criminal offense. As regards Article 7 (1) of the ECHR, the Court notes that the application of Article 4 (a) is further justified and satisfies the principle of time constraints regarding applicability, or, in other words, the application of a "law more lenient to the perpetrator".

C) The prohibition of a heavier penalty in the context of the abolition of the death penalty

When the Defense stated that applying Article 173 (1), c) and e) of the CC of the BiH would constitute a violation of the defendant's right to have a more lenient penalty, he was assuming that with the abolition of the dead penalty and in accordance with Article 38 of the SFRY CC, the maximum penalty should be 20 years imprisonment.

Article 7 (1) of the ECHR and Article 4 of the CC of BiH establish that the law that was in effect at the time, if more lenient to the perpetrator, shall be applied. In practice, the European Court finds a violation of Article 7 whenever a convicted person is subjected to a heavier penalty than he would have faced at the time he or she committed the offence through the retroactive application of new legislation which directly or indirectly (for instance, through the application of new provisions on recidivism) affect the determination of a sentence[4].

However, the abolition of the death penalty in BiH (in accordance with Protocols 6 and 13 to the European Convention) raised new issues in this respect, where the domestic law replaced the death penalty (Article 142 of the CC of SFRY) with long term imprisonment sentence (Article 173 of the CC of BiH). The European Court was faced with this issue in two most recent cases[5].

In the *Karmo* case, the applicant was found to have committed an aggravated murder in 1993. The types of criminal sanctions envisaged by the Bulgarian Criminal Code in force at the time were fifteen to twenty years' imprisonment or the death penalty. By an amendment of 1995, the penalty of life imprisonment was introduced and in 1998 the death penalty was abolished. In 1996, the applicant was found guilty and sentenced to the death penalty. Upon appeal, the Supreme Court of Bulgaria, by judgment of 17 April 1998, upheld the first instance judgment and reduced the sentence to life imprisonment.

The applicant complained under Article 7 of the Convention that a sentence of life imprisonment was imposed on him, which was not provided for under national law at the time the offences were committed. He considered that he should have been sentenced to no

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4 See e.g. ECHR, Jamil v. France, judgment of 8 June 1995; ECHR, Achour v. France, judgment of 10 November 2004; ECHR, Achour v. France, Grand Chamber, judgment of 29 March 2006.

5 Karmo v. Bulgaria, decision on admissibility, 9 February 2006. See also Ivanov v. Bulgaria, admissibility, 5 January 2006, and Streletz, Kessler and Krenz v. Germany, Judgement of 22 March

more than twenty years' imprisonment. The European Court rejected the complaint as "manifestly ill-founded".[6].

In accordance with the European Court's jurisprudence, it does not violate Article 7 of the Convention to impose a life or long-term imprisonment sentence on an applicant for an offence which at the time of its commission was punished by the death penalty, even though life or long-term imprisonment was not provided for under the law applicable at that time, because life imprisonment is manifestly a more lenient penalty than the death penalty.

Therefore, applying Article 173 (1), c) and e) of the CC of the BiH does not constitute a violation of the defendant's right to have a more lenient penalty. On the contrary, it is in total conformity with the "law and international law" or the "general principles of international law" (respectively, Article 3 and Article 4a of the CC of BiH).

D) International law

Furthermore, at the time when the crimes were committed, Bosnia and Herzegovina was, as a successor state of the SFRY, party to all relevant international conventions on human rights and international humanitarian and/or criminal law[7].

Also, the customary status of criminal liability of war crimes against civilians and individual responsibility for the commission of war crimes in 1992 has been confirmed by the UN Secretary General[8], International Law Commission[9], and the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)[10]. These institutions found that criminal liability for war crimes against civilians represents an imperative standard of international law or *jus cogens*[11]. Therefore, it appears to be beyond dispute that in 1992 war crimes against civilians was part of International Customary Law. That conclusion was

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[6] *On the following grounds: "The Court recalls that according to the Court's case-law, Article 7 § 1 of the Convention embodies generally the principle that only the law can define a crime and prescribe a penalty and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage. The Court notes that in the present case the domestic courts, arguing that the applicant should have been sentenced to death, imposed a joint sentence of "life imprisonment", which they found to be more lenient that the death penalty. Accordingly, the amendment of the forms of penalties envisaged in the Criminal Code for the most severe offence for which the applicant was found guilty operated in the applicant's favour and he received a more lenient penalty than was envisaged for that offence at the time it was committed" (ECHR, Karmo v. Bulgaria, decision of 9 February 2006).*

[7] *These include, in particular: the Genocide Convention (1948); the Geneva Conventions (1949) and their additional protocols (1977); the Slavery Convention as amended in 1956; the Convention on racial discrimination (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the non-applicability of Statutory Limitations to war crimes and Crimes against Humanity (1968); the Apartheid Convention (1973); the Convention on the Elimination of all forms of Discrimination against Women (1979); the UN Torture Convention (1984).*

[8] *Report of the UN Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, Sections 34-35 and 47-48.*

[9] *International Law Commission, Commentary on the Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 8.*

[10] *ICTY, Appellate Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Paragraph 141; ICTY, Trial Chamber Tadic Judgement of 7 May 1997, Paragraphs 618-623; ICTR, Trial Chamber, Akayesu, 2 September 1998, Paragraph 563-577.*

[11] *International Law Commission, Commentary on Draft Articles on State Responsibility for Internationally Wrongful Acts (2001), Article 26.*

confirmed by the Study on Customary International Humanitarian Law[12] of the International Committee of Red Cross. According to that Study "serious violations of international humanitarian law constitute war crimes" (Rule 156), "individuals are criminally responsible for war crimes they commit" (Rule 151) and "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects" (Rule 158).

According to the principle of universal jurisdiction, Customary International Humanitarian Law is binding on any State of the world, regardless of whether it has ratified the correspondent international legal instruments. Thus, any state is obligated to prosecute or to extradite (aut dedere aut judicare) all those suspected of having committed a violation of the Customary International Humanitarian Law.

Principles of international law as recognized by the General Assembly Resolution 95 (I) (1946) and the International Law Commission (1950) are related to the "Nuremberg Charter and Judgment of the Tribunal", and therefore to war crimes in general as well. "Principles of the International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", adopted by the International Law Commission in 1950 and submitted to the General Assembly, stipulates in its Principle I that: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment". Additionally, Principle II stipulates that: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."

Therefore, the criminal offence of war crimes against civilians should in any case be classified under "general principles of international law" under Article 3 and 4 (a) of the BiH CC. Thus, regardless of whether it is seen from the aspect of international customary law, treaty law or the "principles of international law", it is beyond dispute that war crimes against civilians represented a criminal offence in the critical period i.e. that the principle of legality has been satisfied both in regard to *nullum crimen sine lege* and *nulla poena sine lege*.

Accordingly, the criminal offence of war crimes against civilians, under the provisions of common Article 3 (1) (a) and (c) of the Geneva Conventions and of Article 27 (2) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, should be subsumed within "international law" and the "general principles of international law" referred to in Article 3 and 4 (a) of the CC of BiH. Consequently, it is beyond dispute that the commission of war crimes against civilians constituted a criminal offense in the incriminating period and is punishable under Article 173 of the CC of BiH.

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[12] *Jean-Marie Henchaerts and Louise Doswald-Beck: Customary International Humanitarian Law. ICRC, Cambridge University Press, 2005, pg 568 and following.*

6. Conclusion

The accused Radmilo Vukovic committed the aforementioned criminal offence of war crimes against civilians with direct intent, because the evidence presented in the course of the proceedings shows that, at the moment of the perpetration of the criminal offence, the Accused knew that, by his acts, he was violating the rules of international law and by his acts, he wanted to cause a prohibited consequence. Therefore, the Court finds that in this particular case the fact that the Accused has committed several different offences (causing immense suffering or violation of bodily integrity or health and rape) represents only one criminal offence, war crimes against civilians under Article 173 (1) (c) and (e) of the CC of BiH, because this is a single criminal offence regardless of the number of committed acts, or, in other words, in this particular case, different criminal acts that have been committed (immense suffering or violation of bodily integrity or health and rape) contain elements of criminal acts under Article 173 (1) (c) and (e) of the CC of BiH.

Bearing in mind the established state of the facts and the resulting consequence, as well as the causal connection between those two, the Court has found the Accused guilty of the criminal offence of war crimes against civilians in violation of Article 173 (1) (c) and (e) of the CC of BiH and sentenced him to 5/five/ and a half years of imprisonment, finding that this criminal sanction was proportionate to the gravity of the offence and the involvement and role of the Accused, and also that it will serve the purpose of sanctioning set forth in provisions of Article 39 of the CC of BiH.

The Court finds no aggravating circumstance on the part of the Accused.

In meting out the sentence for the criminal actions of which the Accused is found guilty, with regard to extenuating circumstances, the Panel took into account the appropriate conduct and cooperation of the Accused during the proceedings, the fact that he has no previous convictions and that he is a family man, both father and grand-father of one child. The Panel, based on the testimony of the witnesses C and D, also considered as a particularly extenuating circumstance the existence of the pre-war extra marital relationship between the Accused and the injured party. These witnesses were both of Bosniak ethnicity and the Court gave both full credit with regard to this fact.

As mentioned above, the Court finds that this pre-war extra-marital relationship led the Accused to commit the actions at issue, in very specific circumstances. In fact, the mutual sexual attraction which had existed between the Accused and the injured party before the war was a result of the will of the Accused and the injured party. Meanwhile, the state of war changed the nature of the previously mutually accepted existing relationship. The war brought its own violence into this relationship, changing its nature into a not accepted one, especially on the part of the injured party. The change surely had an impact on the relationship perception by the Accused. However, in no case being an excuse, it is definitely a reason to consider those circumstances in particularly mitigating terms.
In support of such a conclusion is the fact that, throughout the war in Foca, massive and generalized rapes occurred. The Accused is not included in these massive and generalized criminal actions. The Accused, although in a war time context and connection, took the actions at issue "only" against witness A, as he could have done outside Foca or in peace time. Furthermore, the Accused said he was willing to take future care of the child whose

biological father he is, which in a way confirms the acceptance of the general frame of the circumstances.
The Court assumes, for the purpose of Article 49 (1) (b) of the CC BiH, that the extra-marital relationship constitutes a highly extenuating circumstance which indicates that the purpose of punishment can be obtained by a lesser punishment.

Based on the application of the legal provision under Article 56 of the CC of BiH, the time the Accused spent in custody, commencing on 18 April 2006 until 14 February 2007, shall be credited towards the sentence of imprisonment.

Pursuant to Article 188, paragraph 4 of the CPC of BiH, the Accused shall be relieved of the duty to reimburse the costs of criminal proceedings, since it ensues from the evidence in the casefile that he is indigent, so having to pay the costs of these criminal proceedings would apparently jeopardize his own and his family existence.

Pursuant to Article 198, paragraph 2 of the CPC of BiH, the injured party, protected witness A, is hereby referred to take civil action with her claim under property law, as the finding of facts with regard to the amount of the property claim would require a length of time which in turn would unduly lengthen these proceedings.

Finally, the Court, in accordance with Article 3 of the Convention on the Rights of the Child, also takes into consideration the fact that any sentence in this case will undoubtedly reflect as a consequence on the child who was born then. During the trial, the accused Radmilo Vukovic declared that, when all of this would be over, he would contact the child. Willing to preserve the superior interest of the child and also according to the basic case law of the ECHR[13], the Court, as an *obiter dictum*, believes that, although it is important that the Accused accepts his paternity, it is equally important that he respects the destiny of that child, who was adopted and he should respect the adoption relationship. In view of all this, the Court considers that the Accused should not go after the child but would be available to him should the child wish to look for him in the psychological process of development of his identity.

RECORD-TAKER
Željka Marenić

PRESIDING JUDGE
Davorin Jukić

LEGAL REMEDY: This verdict may be appealed with the Appellate Panel of the Court of BiH within 15/ fifteen/ days of the receipt of a written copy.

I hereby confirm that this document is a true translation of the original written in Bosnian/Serb/Croat.
Sarajevo, 18.05.2007
[redacted]
Certified Court Interpreter for English

[redacted]

[13] *See, for example, the ECHR case Pini and Bertani against Romania, Judgment of 22 June 2004.*