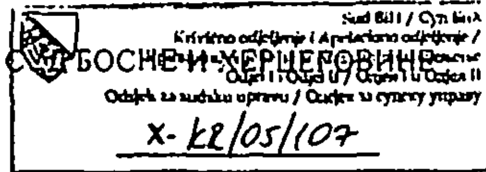
SUD BOSNE I HERCEGOVINE




Number: X-KR/05/107
Sarajevo, 18 June 2007

PREVOD DOK. 776

## IN THE NAME OF BOSNIA AND HERZEGOVINA

Court of Bosnia and Herzegovina, in the Panel composed of Judge Davorin Jukić, as the President of the Panel, Judges Lars Folke Bjur Nystrom and Almiro Rodrigues as the Panel members, in the criminal case against accused Goran Damjanović for the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (the CC BiH) and the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399 (1) and (2), read in conjunction, of the Criminal Code of Republika Srpska, and against Zoran Damjanović, accused of committing the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ 57/05 of 2 June 2006, confirmed on 9 June 2006, following the main trial, parts of which were closed for the public, in the presence of accused Goran Damjanović and his defense counsel, Attorney Senad Kreho from Sarajevo, and accused Zoran Damjanović and his defense counsel, Attorney Fahrija Karkin from Sarajevo, and the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Philip King Alcock, on 15 June 2007 reached and on 18 June 2007 publicly announced the following

## VERDICT

ACCUSED GORAN DAMJANOVIĆ, aka Panija, son of Luka and mother Slavica, née Bajkuša, born on 12 July 1966 in Sarajevo, Municipality of Centar, resident at Istočna Ilidža, 10 Meše Selimovića Street, citizen of BiH, Serb, married, father of one minor child, literate, primary school education, completed the compulsory military service, personal identification number 1207966172182, no prior convictions,

and

ACCUSED ZORAN DAMJANOVIĆ, aka Salama, son of Luka and mother Slavica, née Bajkuša, born on 4 September 1967 in Mihaljevići, Municipality of Novi Grad Sarajevo, resident at Istočna Ilidža, 31 Srpskih izviđača Street, citizen of BiH, Serb, married, father of one minor child, literate, secondary school education, metal worker qualification, worked as a tinsmith, currently unemployed, completed the compulsory military service, no prior convictions,

### ARE FOUND GUILTY

### OF THE FOLLOWING:

1. During the armed conflict in Bosnia and Herzegovina, contrary to the provisions of Article 3(1)(a) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, on 2 June 1992, in front of the supermarket in the settlement of Bojnik, Municipality of Novi Grad Sarajevo, as members of the Army of the Serb Republic of Bosnia and Herzegovina, armed with rifles and in military uniforms, together with many other Serb soldiers and members of paramilitary formations, accused Goran and Zoran Damjan[illegible]

took a prominent part in the beating of a group of about twenty to thirty male prisoners of Bosniak ethnicity, including witness Zaim Rizvanović, witness Elvir Jahić, witness C, witness D, Izet Šehić, Kasim Šehić and Amir Jahić, all of whom had been earlier captured by Serb military forces that day during the over-running of the settlement of Ahatovići, and all of whom were placed *hors the combat* because some of them had been wounded, and because all of them had surrendered and had been captured, when accused Goran Damjanović beat Zaim Rizvanović, Elvir Jahić, witness D, Izet Šehić, Kasim Šehić, Amir Jahić and other unidentified individuals while accused Zoran Damjanović beat Elvir Jahić, witness D and other unidentified individuals, all of which lasted over a period of one to three hours and was performed using rifles, batons, bottles, kicks and punches, which resulted in the intentional infliction of severe physical and mental pain to the victims, for the purpose of punishing them for having offered resistance to the Serb attack on Ahatovići, as well as for the purpose of discriminating them on the ground of their Bosniak ethnicity, and then these persons were placed in a bus and taken to the Rajlovac camp.

**Therefore,**

during the armed conflict, as members of the Army of the Serb Republic of Bosnia and Herzegovina, they acted contrary to the rules of international law by taking part in the beating of captured Bosniak males in the settlement of Bojnik in Sarajevo,

**whereby**

they committed the criminal offense of War Crimes against Civilians under Article 173(1)(c), read in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

2. On 26 April 2006, in a family house at Istočna Ilidža, 10 Meše Selimovića Street, accused Goran Damjanović, contrary to the provisions of Articles 5 and 12 of the Law on the Trade in Explosive Substances and Inflammable Liquids and Gases and Articles 4, 6 and 43 of the Law on Weapons and Ammunition of RS, illegally kept a large quantity of fire arms and ammunition, possession of which is not at all allowed to citizens, namely: two knives, serial numbers 698775 and 738633 for use with an automatic rifle M-70; bayonet, serial number 1214; one ammunition drum, serial number 14364; seven boxes of ammunition, each containing 15 caliber 7.62 bullets; one RAP SMB with three clips and 138 bullets of caliber 7.62; one RAP SMB with one clip and 28 bullets of caliber 7.62, as well as a large quantity of explosive materials of a high destructive force, namely: three 0.5 kg pieces of plastic explosive; two trotyl bullets 500, serial numbers CPB 652 and CPB 653; seven detonators; 7.5 meters of slow-burning fuse.

**Therefore,**

accused Goran Damjanović illegally kept a large quantity of fire arms, ammunition and explosive materials of a high destructive force and extremely dangerous, obtaining and keeping of which is not allowed to citizens,

**whereby**

he committed the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399 (1) and (2), read in conjunction, of the Criminal Code of Republika Srpska.

Therefore, the Court imposes on the first accused Goran Damjanović an 11(eleven)-year prison sentence for the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH and a prison sentence of 1 (one) year and 6 (six) months for the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Substances *under* Article 399 (1) and (2), read in conjunction, of the Criminal Code of Republika Srpska, in conjunction with Articles 5 and 12 of *the Law on the* Trade in Explosive Substances and Inflammable Liquids and Gases and Article 43(1)(1) of the Law on Weapons and Ammunition of RS,

and, based on the application of the foregoing legal regulations and Articles 39, 42, 48 and 53(2)(b) of the CC BiH, hereby

**SENTENCES HIM TO A COMPOUND PUNISHMENT OF IMPRISONMENT FOR A TERM OF 12 (twelve) YEARS**

The Court, applying the provisions of Articles 39, 42 and 48 of the CC BiH,

**SENTENCES**

the second accused Zoran Damjanović

**TO 10 (ten) YEARS AND 6 (six) MONTHS OF IMPRISONMENT**

for the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH.

Based on the application of the legal provision under Article 56 of the CC BiH, the time the accused spent in custody, lasting from 26 April 2006 until 18 January 2007 for accused Goran Damjanović and from 26 April 2006 until 22 June 2006 for accused Zoran Damjanović, shall be credited towards the sentence of imprisonment.

Pursuant to Article 188(4) of the CPC BiH, the accused shall be relieved of the duty to reimburse the costs of the criminal proceedings.

Pursuant to Article 198(2) of the CPC BiH, the injured parties Zaim Rizvanović, protected witnesses C and D, and Elvir Jahić, if he wishes to do so, are hereby referred to take civil action with their claims under property law.

Pursuant to Article 74(1) of the CC BiH, the following items shall be forfeited from the first accused Goran Damjanović:

- two knives for use with an automatic rifle M-70, serial numbers 698775 and 738633,
- bayonet, serial number 1214,
- one ammunition drum, serial number 14364,
- seven boxes of ammunition, each containing 15 caliber 7.62 bullets,
- one RAP SMB with three clips and 138 bullets of caliber 7.62,
- one RAP SMB with one clip and 28 bullets of caliber 7.62,
- three 0.5 kg pieces of plastic explosive,
- two trotyl bullets 500, serial numbers CPB 652 and CPB 653,

- seven detonators,
- 7.5 meters of slow-burning fuse.

## Reasoning

By the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-57/05 of 2 June 2006, confirmed on 9 June 2006, Goran Damjanović, aka Panija, and Zoran Damjanović, aka Salama, were accused of committing the criminal offense of Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina by the actions described under Count 1 of the Indictment.

Goran Damjanović, aka Panija, was also accused of committing the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Substances under Article 399(1) and (2), read in conjunction, of the Criminal Code of Republika Srpska, in conjunction with Articles 5 and 12 of the Law on the Trade in Explosive Substances and Inflammable Liquids and Gases of RS and Article 43(1)(1) of the Law on Weapons and Ammunition of RS, by the actions described under Count 2 of the Indictment.

Accused Goran and Zoran Damjanović pleaded not guilty of the criminal offense charged under Count 1 of the Indictment, while Goran Damjanović also pleaded not guilty of the criminal offense charged under Count 2 of the Indictment.

During the entire course of the proceedings, the Court was mindful of some witnesses' identity protection measures, so that the full names of the witnesses are not given in the Verdict, but only their pseudonyms, while the complete data about the mentioned witnesses are in the case file, which is also under special protection. In order to provide adequate protection for the witnesses, the Court excluded the public from parts of the main trial sessions held on 12 October 2006 and 14 December 2006.

### A. Presented evidence

The Prosecution examined the following persons as witnesses: Zaim Rizvanović, Elvir Jahić, Bajro Kulovac, Nermina Jerković, Ejub Zukić, Elvedin Karahodžić, Alfredo Strippoli and the witnesses under the pseudonyms of C and D. The Court also examined Alexander Mayes as an expert witness at the main trial. While rebutting evidence, the Prosecutor also presented the following witnesses: Ibrahim Baberović, Abdulah Koldžo, Muhamed Gaćanović, Elza Livančić, Mitar Tešić and Dr. Mirko Šošić.

Furthermore, during the main trial, the Court inspected the following evidence submitted by the Prosecutor's Office of BiH: record of the examination of witness Zaim Rizvanović number KT-RZ-57/05 of 15 March 2006; record of the examination of witness Zaim Rizvanović number Ki 293/98 of 1 December 1998; record of the examination of witness Elvir Jahić number KT-RZ-57/05 of 21 March 2006; record of the examination of witness C number KT-RZ-57/05 of 13 December 2005; record of the examination of witness D number KT-RZ-57/05 of 13 December 2005; record of questioning of suspect Goran Damjanović number KT-RZ-57/05 of 22 May 2006; record of questioning of suspect Zoran Damjanović number KT-RZ-57/05 of 22 May 2006; record of questioning of suspect Goran Damjanović, number KT-RZ-57/05 of 27 April 2006; record of questioning of suspect Zoran Damjanović, number KT-RZ-57/05 of 27 April

2006; SIPA report on search and seizure of items number 17-04/2-04-474-7/06 of 28 April 2006; indexed dossier number 17-13/1-7-15/06 of 16 May 2006, containing photographs of items seized at the house of Goran Damjanović; military booklet of Goran Damjanović, serial number "SA" P-033970; military booklet of Zoran Damjanović, serial number "BČ" 153349; certificate number *05/5-3-113/137 of 21 July 1997; letter from the Ministry of Interior number* 02/PK-1-1-04-8-2/2032 of 24 May 2006, concerning criminal records of the suspects; list of the (Igman) formation for Zoran Damjanović; list of the (Igman) formation for Goran Damjanović; photographs of accused Goran and Zoran Damjanović; photographs of the supermarket in Bojnik (3 photographs); photographs of the place Potkraj (3 photographs); map of the Municipality of Visoko and its surroundings; certificate for Luka Damjanović; referral slip – findings for Luka Damjanović of 30 May 1992; temperature chart for Luka Damjanović from the hospital Koran - Pale; receipt for the medical documentation handed over for temporary use, containing, in addition to the medical documentation for Luka Damjanović, the documentation for Miladin Dutina, Boško Divčić, Nenad Dragičević and Vojna Dragutinović.

The Defense for Goran Damjanović examined the following persons as witnesses: Zdravko Jović, Ljubinka Cvijanović, Boško Tešanović and protected witness E.

The Court also inspected the following documents adduced as evidence during the main trial by the Defense for accused Goran Damjanović: letter of discharge from the hospital for Luka Damjanović, son of Despo, certificate of the SDS Municipal Board Istočna Ilidža of 25 July 2006, decision of the Municipality of Srpska Ilidža number 05-364-338/02 of 11 December 2002, certificate of the Employment Office of Republika Srpska number 1-61-10855-1-2004-215 of 16 May 2007 for Goran Damjanović and certificate number 1-61-10855-1-2003-168 of 16 May 2007 for Janja Andrić.

The Defense for Zoran Damjanović presented the following witnesses: Mirko Avlijaš, Ilija Tolj, Salem Koldžo, Marinko Avlijaš and Dušan Tolj. Accused Zoran Damjanović also testified on his own behalf. Four photographs of Zoran Damjanović were also tendered in the case file as Defense evidence.

## B. Closing arguments

After the completion of the evidentiary procedure, the Prosecutor presented his closing arguments in two parts.

In the first part, he refers to the general arguments under Counts 1 and 2 of the Indictment, and states that the main facts under Count 1 are not disputable, that the beatings and humiliation of the captured Bosniaks over a fairly long period of time indeed took place in Bojnik, in the afternoon hours of 2 June 1992, that accused Goran and Zoran were present at this place and took part in some of these tortures, and that all of these are indisputable facts following from the testimonies of witnesses Zaim Rizvanović, Elvir Jahić, protected witness C and witness D. A mistaken identification of the accused by the mentioned witnesses is an untenable argument because they knew the accused very well and because they successfully identified them in photographs. Furthermore, the Prosecutor points out that all identifications are based on recognition, which constitutes one of the strongest bases for identification, and that the identification of the accused by each single witness re-enforces the identification done by the other witnesses. The Prosecutor also points out that small uncertainties in the testimonies of the Prosecution witnesses are proofs of truthfulness and an obvious lack of interaction among them. To wit, none of the witnesses claims to have seen all three of the other Prosecu

witnesses in the confusion and crowds of Bojnik; hence, it follows that they did not bind their stories together and that they mentioned only the victims whom they had really seen and whom they remembered from that afternoon. Furthermore, the alibi for the accused arose after the testimony of Elvir Jahić. In fact, he stated that Goran Damjanović had been the most dominant in the beatings because of the fact that his father Luka had been wounded. The Prosecutor points out that none of the alibis provided for the accused survived close examination and that, in order for the alibis raised by the Defense for Goran and Zoran Damjanović to be tenable, they must be based on a certain level of probability, and the Prosecutor submits that none of them reached such a level of probability.

In relation to Count 2 of the Indictment, the Prosecutor submits that the Defense version that Luka Damjanović had found and owned the explosive that was found in the Damjanovićs' family house on 26 April 2006 should not be accepted, as that story is illogical and inconsistent with the confession of Goran Damjanović, as well as that no permit was produced to explain ownership of the explosives.

In the second part of his closing arguments, the Prosecutor refers to the application of the appropriate law to the facts under Count 1 and Count 2 of the Indictment. As for Count 1 of the Indictment, the Prosecutor states that the two accused have been charged with the criminal offense of Crimes against Civilians under Article 173(1)(c) (torture) of the CC BiH. The Prosecutor states that the essential elements of this criminal offense, which the Prosecution needs to prove, are as follows: that the crime was committed in time of war, armed conflict or occupation, that that crime violates rules of international law and that there was a nexus between the crime and the armed conflict. According to the Prosecutor, all presented evidence suggests that essential elements referred to in Article 173 of the CC BiH have been met. Bearing in mind the power of the Trial Panel to give a different legal qualification of the act pursuant to Article 280(2) of the CPC BiH, the Prosecutor refers to the alternative qualification within Article 179. To wit, Article 179 mirrors Article 3 of the ICTY Statute. The ICTY has developed a test to ascertain whether a violation of humanitarian law falls under Article 3, namely: that it must constitute a serious violation of a customary rule of international humanitarian law entailing the individual criminal responsibility of the person breaching the rule. Applying this test, the ICTY has concluded that violations of Common Article 3 of the Geneva Conventions of 1949 are punishable under Article 3 of the Statute. Finally, the Prosecutor points out that they are responsible as co-perpetrators because of their intent and awareness pursuant to Article 29 of the CC BiH and that the Panel should take this fact into account when deliberating on the verdict and length of the sentence.

As for Count 2 of the Indictment, the Prosecutor states that Goran Damjanović committed the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399(1) and (2) of the Criminal Code of RS and that essential elements of this offense are: that the perpetrator has acquired or possesses firearms, ammunition, explosive substances or any other means of combat and that the law forbids private individuals to possess 'the items' or subjects possession of 'the items' by private individuals to the issuance of an authorization which the perpetrator was not issued with. Furthermore, for the criminal offense to be qualified under Article 399(2) of the CC RS, the Prosecution had to prove one of the following two additional elements, namely: that the items were in a large quantity or of a high value, and that the items were of a high destructive force and dangerous. The Prosecutor submits that Goran Damjanović committed this criminal offense by acquiring and possessing these items and that the Court should convict him and impose a punishment pursuant to Article 399(2) of the CC RS.

In his closing arguments, the Prosecutor did not give any proposal as to the length of the punishment that should be imposed on the accused.

In the closing arguments, the Defense for accused Goran Damjanović points out that the factual description of the criminal offense his client has been charged with is challenged by analyzing the testimonies of the Prosecution witnesses. There are significant differences and contradictions in these testimonies. First of all, the Defense objects to the identification of the accused by witness Zaim Rizvanović for the reason that it was done contrary to Article 85(3) of the CPC BiH. The Defense further states that the recognition is a particular form of testifying that requires a separate record in order to avoid the possibility of witnesses giving false testimony. In this context, the Defense also mentions the prewar jurisprudence of courts in the former Yugoslavia, namely that, when the recognition has not been carried out pursuant to the *legal regulations, the same action cannot be used as evidence in the criminal proceedings*, an example of which is the Verdict of the Supreme Court of Macedonia number KŽ 152/82. Furthermore, the Defense points out that it was established by the analysis of the Defense witnesses' testimonies that Luka Damjanović had been wounded on 30 May 1992 and this was also corroborated by the Prosecution evidence; it was also established that on 1 June 1992 Goran went to Pale, to the military hospital in Koran, and that he returned on 3 June 1992. The fact that the information on a blood transfusion does not exist in the temperature chart for Luka D. does not exclude the possibility that it was entered in the patient's case history, which Dr. Šošić, as a Prosecution witness, did not see in the medical documentation presented for Luka Damjanović. The Defense finds this to be a crucial element that is missing.
As for Count 2 of the Indictment, analyzing the testimonies of the Prosecution witnesses, the Defense states that SIPA employees did not establish on the spot who the owner of the house was, save for the fact that the house was occupied by the Damjanović family. In addition to being occupied by Goran Damjanović, the house is occupied by his family, his mother, and it was also occupied by his late father, Luka, and his brother Vedran. It was Vedran who handed over the items found and therefore signed the certificate on the temporary seizure of items. It follows from this fact that all the mentioned persons, besides Goran Damjanović, could be under suspicion of the criminal offense under Count 2 of the Indictment. Furthermore, the Defense contends that it was indisputably proved that the offense had been committed, but that the Prosecutor did not prove that Goran Damjanović is the perpetrator of this offense. The only evidence is the Prosecution exhibit number 10 – the statement of Goran Damjanović given in the investigative phase. However, pursuant to Article 273 of the CPC, his statement cannot be used as evidence. The right to present or not to present his defense is the most important right of the accused, and he cannot be deprived of this right in any phase of the proceedings. Concluding the closing arguments, the Defense contends that, by the application of the valid principle *in dubio pro reo*, the Prosecution did not prove that Goran Damjanović committed this criminal offense in the manner presented in the factual description. Therefore, the Defense proposes that Goran Damjanović be acquitted of the charge.

The Defense for accused Zoran Damjanović presented its closing arguments in several parts: it first referred to the Prosecutor's closing arguments, then to the Defense and Prosecution evidence and the legal qualification, and presented its conclusion in the end.

In the introduction, the Defense notes that no one challenges the event implied in the factual description of the Indictment and specified in the factual substratum. However, it is challenged that Zoran Damjanović was present as an active co-perpetrator or accomplice to the perpetration of the criminal offense of a war crime referred to in Count 1 of the Indictment. There is no logic whatsoever in the assertion that Zoran Damjanović obtained criminal status as a result of the events which occurred in front of the supermarket in Bojnik. This event lasted only two hours and Zoran was not classified as a criminal before or after this event. The only logical thing explaining this all is that accused Zoran Damjanović was not present there. Furthermore, the defense counsel notes that the Court is to evaluate whose pieces of evidence are stronger in these criminal proceedings, those of the Prosecution or the Defense, in partic

which pieces of evidence are such that suggest beyond any doubt that the facts have been proven. The Defense for Zoran Damjanović claims that the Prosecutor failed to prove the thesis of the Indictment, while the Defense proved that the accused had not taken part in this criminal offense. Furthermore, the Defense states that the analysis of the Prosecution witnesses' statements suggests large contradictions in their direct and cross examinations and that their testimonies differ in decisive matters relating to the event that occurred in Bojnik. The Defense had to prove the innocence of Zoran Damjanović and it was being proven by a truthful alibi. The Defense noted that it was difficult to prove the alibi as it dates 15 years back. However, certain events happened that are in favor of the memory of the relevant time, more precisely the death of Drago Tolj and wounding of Luka Damjanović. These events cannot be challenged.

Finally, the Defense for Zoran Damjanović referred to the legal qualification of the criminal offense. It claims that the legal qualification remained the same until the last hearing, and that the closing arguments of the Prosecutor revealed uncertainty about such legal qualification because an alternative legal qualification was offered. The Defense presented two arguments to oppose the mentioned alternative legal qualification: the general principle is that a criminal offense does not exist unless prescribed by the law and a more lenient law must be applied to the accused.

In the conclusion, the Defense proposed that accused Zoran Damjanović be acquitted of the charge because of the lack of evidence beyond any doubt.

After the closing arguments of their respective defense counsel, accused Goran Damjanović and Zoran Damjanović stated they entirely supported the closing arguments of their respective defense counsel.

## C. Procedural decisions of the Court

*Witness protection decisions*

*By the Decision number X-KRN-05/107 of 27 April 2006,* the Court ordered protection measures for four witnesses in total in these proceedings. All personal details of the protected witnesses, their real names and surnames and other personal data, were declared confidential by this Decision.

On 17 October 2006, the Court considered the Motions of the Prosecution and the Defense for additional protection measures for the witnesses under the pseudonyms of C and D. It was decided that the protection measures for the mentioned witnesses be expanded and that they be enabled to testify from another room with image and voice distortion.

On 12 October 2006, witness Zaim Rizvanović, formerly protected under the pseudonym A, gave up his protection measures and agreed to testify without protection measures.

At the hearing held on 26 October 2006, witness Elvir Jahić, whose identity was protected under the pseudonym B, also gave up the protection measures and accepted that his personal details be disclosed, while keeping protected only his address. The Court made such a decision with the agreement of the parties to the proceedings and the defense counsel for the accused.

On 14 December 2006, the Defense for accused Goran Damjanović, in a closed session, requested identity protection measures or the exclusion of the public for a witness who is a returnee living in the area where he lived before the war. The Court decided to protect the witness by giving the pseudonym E to the witness.

## D. Charges under Count 1 (War Crimes against Civilians)

Assessing all the presented items of evidence individually and in their correspondence with the rest of the evidence, the Court has established that accused Goran Damjanović and Zoran Damjanović, during the armed conflict in Bosnia and Herzegovina, as members of the Army of the Serb Republic of Bosnia and Herzegovina, armed with rifles and in military uniforms, on 2 June 1992 in front of the supermarket in the settlement of Bojnik, Municipality of Novi Grad Sarajevo, committed the criminal offenses described in detail under Section 1 of the Verdict.

### 1. Evidence pertaining to Count 1 (the beating and humiliation of the captured Bosniaks over a fairly long period of time in Bojnik, in the afternoon hours of 2 June 1992)

Witnesses Zaim Rizvanović, Elvir Jahić, witnesses C and D testified about the circumstances related to the capturing and beating of Bosniaks and the presence and role of the accused in front of the supermarket in Bojnik.

Witness Zaim Rizvanović says that he was captured in Ahatovići in late May or early June 1992, and that, prior to being taken to the Rajlovac camp with a group of 20 to 30 persons, he was taken in front of the supermarket in Bojnik, where there were drunken armed Serb soldiers who forced them to place their raised hands against the wall of the supermarket. At these moments, the first accused Goran Damjanović approached witness Rizvanović from behind, tapped his shoulder and told him "turn around". He was in a JNA uniform, with a helmet on his head and armed. Then he beat Rizvanović by kicking him with his military boots. The witness lost his breath as a result of the beating and fell in front of the supermarket. Goran Damjanović started yelling and cursing and Rizvanović found strength to stand up again and place his raised hands against the wall. After that, Goran Damjanović continued beating Rizvanović with a police baton he had in his hands in the back of Rizvanović's head and chest. Rizvanović says that he still has scars caused by these blows. After he stopped beating Rizvanović, Goran Damjanović started beating Kasim Šehić from Bioča, who was standing next to Rizvanović. Goran Damjanović asked Kasim Šehić: "How come that you came here from Bioča, from Hijaš? Have you come to defend Ahatovići?" Kasim Šehić fell as a result of the beating and, while he was lying the ground, accused Goran Damjanović was jumping on his body and saying: "See how heavy a Serb is!" Goran Damjanović also beat witness Elvir Jahić, who was 18 years old when he was captured and was wounded by shrapnel in his right thigh muscle. Because he was wearing a helmet, Elvir Jahić received blows in his head and his legs and was ordered to take off Serb boots; he was beaten with batons over his feet, which was extremely painful because that pain spread along the spine throughout his body. According to Elvir Jahić, the mentioned actions were done by a group of Serb army members that included both of the accused and others. Elvir Jahić testified that Goran Damjanović had been the most dominant person in the abuse, probably because his father Luka had been wounded. While they were entering a bus trough a gauntlet of soldiers, Goran Damjanović grabbed the witness's brother Amir Jahić by his hair, telling him to go and kill Omer Gačanović and set his house on fire. According to Elvir Jahić's testimony, Zoran Damjanović also took part in the beatings of Amir Jahić and witness C. Witness C was also wounded at the time of capturing and he is sure that he saw Zoran Damjanović in the group beating Amir Jahić, who begged Goran Damjanović and Zoran Damjanović not to beat him because they were schoolmates. Witness D describes his acquaintanceship with accused Goran Damjanović as especially close: "We were like brothers". Therefore, his testimony is particularly distinctive and convincing in relation to the identification of the accused. Accused Goran Damjanović, confronting witness D face to f

said ""Why did you need this?" and then thrust a rifle barrel in his mouth, breaking several of his teeth and hurting his palate. After that, accused Zoran Damjanović kicked him with a military boot in his chest. As a result of this kick, witness D hit the shop glass window with his back. The glass window fell on him and he lost consciousness. After they poured water on witness D, accused Zoran Damjanović forced him to crawl like a dog and pick up items of clothing with his teeth and throw them in a container. While doing this, Zoran Damjanović forced him to sing the song "Who says Serbia is small...", and, when he sang in a lower voice, he would beat him over his back. All these actions lasted for 3 to 4 hours.

Therefore, in relation to Section 1 of the Verdict, the Court gave full credibility to the examined witnesses, as the witnesses' statements given before the Prosecutor's Office of BiH and at the main trial were clear and convincing, as well as consistent and in concord. It was established that witnesses Zaim Rizvanović, Elvir Jahić, and protected witnesses C and D had been captured on 2 June 1992 by Serb military forces during the attack on the settlement of Ahatovići. They were placed *hors the combat* because they had surrendered and had been captured. Some of them were wounded, as was the case with witness Elvir Jahić and witnesses C and D. Of course, it should be borne in mind that the testimonies of the mentioned witness cannot completely correspond, which is completely normal and acceptable from the human perception point of view of psychological mechanisms. Therefore, the Court used its discretion in assessing evidence and considered some inconsistencies or differences in the testimonies in their substantial and meaningful entirety. The total credibility of the witnesses is also assessed comprehensively and systematically. Some testimonies of the witnesses are not identical, but they are consistent and correspond in their basic and important elements, that is, in respect of the essence of this criminal offense. The Court finds that the testimonies were reliable, evidence credible, and that small differences cannot be sufficient to assess the whole testimony as unreliable. Actually, the mentioned differences are not decisive, since some discrepancies in their testimonies are completely expected and normal differences in observations of persons with different ability to notice, memorize and remember information, particularly taking into account the fact that all of them experienced very stressful and traumatic events during which they could not unanimously observe all important and consistent details and it would not be reasonable to expect such precision from the witnesses.

Furthermore, it is also important to state that accused Goran and Zoran Damjanović are very well known to their victims, in other words the mentioned witnesses. Zaim Rizvanović did not only know the two accused, but he also knew the third brother, Vedran; they were neighbors, Rizvanović attended the same school in Dobroševići as accused Goran and Zoran Damjanović did, and they were in the same class with his brother; Elvir Jahić knew them and visited their house several times, and his brother Amir Jahić attended school together with both of the accused; witness C had known Zoran Damjanović for some ten years before the event in Bojnik took place; witness D was a very good and close friend of Goran Damjanović before the war, and he also knew Zoran Damjanović. The Court draws the conclusion from all the foregoing that the witnesses are reliable and that they speak the truth when they say that Goran Damjanović and Zoran Damjanović were at the crime scene and that they committed the criminal offenses related to the critical event.

*2. Alibis for the Accused in relation to Count 1*

The Defense for accused Goran and Zoran Damjanović relied on alibis, stating that the accused were not present at the relevant time and place.

Assessing the Defense witnesses' testimonies, individually and in their interrelatedness, the Court did not give credibility to the Defense witnesses in relation to the alibis presented by both of the accused. The testimonies of the Defense witnesses are confusing, contradictory, inconsistent and unconvincing.

### *2.1. Accused Goran Damjanović's alibi*

Goran Damjanović's alibi is unconvincing in respect of the explanation of his presence in the hospital in Pale on 1 and 2 June 1992, first of all because it is not possible that a person who was fit for military service and was a member of the Army of Republika Srpska be absent at the time of a military operation and the most critical attacks on Ahatovići that lasted from 28 May 1992 all until 2 June 1992. In addition, the witnesses' testimonies in relation to the fact regarding giving a blood transfusion to Luka Damjanović are very contradictory and inconsistent. Witness Zdravko Jović testifies in the direct examination that he gave blood for a transfusion to Luka Damjanović and then in the cross-examination he states that he donated blood to the hospital in Koran. Witness Ljubinka Cvijanović also categorically states in her testimony that Goran Damjanović and Zdravko Jović went to Pale first of all because they knew that Luka required blood. In relation to this, the Court gives full credibility to the Prosecution witness (rebutting evidence of the Prosecution), Dr. Mirko Šošić, who, based on the examination of the presented medical documentation for Luka Damjanović, states that it was a medium *injury which was not life-threatening and that there is no indication in the* documentation that a blood transfusion was given. This information, according to the practice and doctor's experience, should be written in the so-called patient's temperature chart, which is an important document for a patient's treatment. Furthermore, contradictions in the testimonies of the mentioned Defense witnesses are also visible from the information as to when Zdravko Jović and Goran Damjanović returned from Pale. Witness Zdravko Jović states that they returned on 3 June 1992, before dark, around 6:00 - 6:30 p.m., while witness Ljubinka Cvijanović states that they arrived during the night and that she did not see them because she was sleeping. She excludes every possibility that they returned in the late afternoon. Furthermore, witness Zdravko Jović's testimony is also inconsistent and unconvincing in relation to the fact when he went to collect Luka Damjanović from Pale: in the direct examination he states that he went to collect Luka from the Koran hospital 10-15 days after having returned from Pale, and then in the cross-examination he changes his testimony and states that he went to collect him from the weekend house where his family was accommodated in Pale.

### *2.2. Accused Zoran Damjanović's alibi*

Zoran could not have been encircled in Potkraj, as he said in his defense, since there is no evidence that Bosnian Serbs had to leave their homes or be in hiding. The evidence given by witness Zoran clearly indicates that Serbs controlled Rakovica and the greater area of Rakovica in April, May and June 1992. This fact also derives from the statements of Prosecution witnesses Ibrahim Baberović, Abdulah Koldžo and Elza Livančić. All these witnesses stated that it was not possible that a single Serb family from the area of the entire local community of Rakovica could be captured or blocked in the period from 6 April until July 1992 and that Serbs could freely move around at that time. Also, the fact about the injury of Luka Damjanović does not support the alibi of Zoran Damjanović, because based on the statements of the Defense witnesses, stories as to how Zoran had learned about the wounding of his fa

and when he actually left Potkraj to visit him in Bojnik are very unclear, confused and inconsistent. According to the testimony of accused Zoran Damjanović, he learned about the wounding of his father via military phone on 30 May 1992 and went to Bojnik within the time period between 10 June and 15 June 1992. Witness Ilija Tolj (Zoran's father-in-law, with whom Zoran was living) asserts that he learned about the wounding of Luka Damjanović via military phone, while Zoran learned it from some person from Potkraj, because he personally could not tell him that, as well as that Zoran went to Bojnik two or three days after this wounding had taken place. Witness Dušan Tolj stated that Zoran had learned about the wounding on the radio station of the Republika Srpska and that Zoran went to Bojnik one month after he had learned about the wounding. Finally, a fact that did not speak in favor of the alibi of accused Zoran Damjanović is also the fact regarding the stay of Salem Koldžo in the house of Ilija Tolj. During the cross examination, Defense witness Salem Koldžo said that he had not seen accused Zoran Damjanović in the house during his stay with his father-in-law, and he was there in late May, early June 1992, which indicates that Zoran Damjanović was not at home in Potkraj at the time when the crime under Count 1 of the Indictment was committed.

Based on the foregoing, and through assessing the testimonies of the Defense witnesses individually and collectively, the Court did not give credence to the Defense witnesses in relation to the alibis presented by both of the accused. The Court found the testimonies inconsistent to such a degree that they could not be considered reliable and their contradiction affected the quality and credibility of these witnesses. A detailed analysis of these testimonies in view of the above contradictions clearly indicated that the testimonies of the Defense witnesses were adjusted to the timing of the incriminating event described in Count 1 of the Indictment in order to provide the false alibis for accused Goran and Zoran Damjanović.

### 3. Legal findings pertaining to the war crimes Count

#### 3.1. The legal provisions

As it follows from Count 1 of the Indictment, accused Goran Damjanović and Zoran Damjanović have been charged with committing the criminal offense of War Crimes against Civilians under Article 173(1) c) (torture), read in conjunction with Article 180 (1) of the CC BiH. Article 173 c) establishes that "(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts: c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture). (...)". The Prosecution also submitted, in its closing arguments, that "the conduct of both the Accused breached Article 3 (1) a) common to the four 1949 Geneva Conventions ".

Common Article 3 of the Geneva Convention foresees that "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronou

by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

Common Article 3 of the 1949 Geneva Convention is *universally considered* a rule of customary law, binding all parties in any kind of conflict, whether internal or international, and therefore the rule was in force at the time and in the place of the event with which the accused have been charged.

3.2. The legal definition

Therefore, for a crime to be adjudicated under common Article 3 of the Geneva Convention, three preliminary requirements must be satisfied.

First, there must have been an armed conflict, whether internal or international in character, at the time the offenses were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offense, meaning that the acts of the accused must be 'closely related' to the hostilities." Thirdly, the alleged offense must be committed against civilians or civilian property.

(1) There must have been armed conflict, whether internal or international

It is well established that for international humanitarian law to apply there must first be an armed conflict. An 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. . . . For the purposes of common Article 3, the nature of this armed conflict is irrelevant. It does not matter whether the serious violation occurred in the context of an international or internal armed conflict, provided the following requirements are met: the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; the violation must be 'serious,' that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim and the violation of the rule must entail the individual responsibility of the person breaching the rule.

(2) There *must* be a close nexus between the armed conflict and alleged offense

In order for a particular crime to qualify as a violation of international humanitarian law under common Article 3 of the Geneva Convention, the Prosecution must . . . establish a sufficient link between that crime and the armed conflict.

There must be a nexus between the armed conflict and the alleged criminal offense[1]. Also the decision of the ICTY Appeals Chamber in the Kunarac case[2], listing the factors for the assessment of the existence of *nexus*, states 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 a military campaign: and the fact that the crime is committed as part of or in the context of the perpetrator's official duties." The armed conflict must have played a substantial part in the perpetrator's ability to commit the crime, his decision

[1] *Halilović*, Trial Chamber, 16 November 2005, paragraph 28.
[2] *Kunarac, Kovač and Vuković*, 12 June 2002, paragraph 59

to commit it, the manner in which it was committed or the purpose for which it was committed.[3]

In this regard, the ICTY jurisprudence developed the notion of "close nexus". The Appeals Chamber held in the Blaškić case that: 'Even if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed . . . international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.' Also in relation to the armed conflict being linked to the crimes, the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.

Furthermore, there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time and in a place where no fighting is actually taking place. The requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.

(3) Crimes must be committed against persons 'taking no active part in the hostilities'

Finally, the ICTY jurisprudence added another element to be taken in relation to Common Article 3. The additional requirement for Common Article 3 is that the violations must be committed against persons 'taking no active part in the hostilities'. In fact, Common Article 3 protects 'persons taking no active part in the hostilities' including persons 'placed *hors de combat* by sickness, wounds, detention, or any other cause'. The ICTY jurisprudence, in Tadić case also stated that the legal approach for defining protected persons, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterizations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.

The Prosecution bore the burden to prove all essential elements of this criminal offense, namely that the crime was committed during an armed conflict (a), that the crime violated rules of international law (b) and that the crime was committed against persons 'taking no active part in the hostilities' and that there was a nexus between the crime and the armed conflict (c).

(1). The Court finds it indisputable that an armed conflict existed in the territory of Bosnia and Herzegovina at the time of critical events. A number of ICTY judgments, namely Galić

[3] *Kunarac, Kovač and Vuković*, Appeals Chamber, 12 June 2002, paragraph 58.

judgment, and Court of BiH verdicts confirm this fact. The Defense also accepted the existence of the armed conflict.

(2). It is also indisputable that the actions of Goran and Zoran were committed in the critical period of time and were contrary to the provisions of Common Article 3(1)(a) of the Geneva Convention.

From the testimonies of Zaim Rizvanović; Elvir Jahić and witnesses C and D follows that the victims in this case surrendered, they were deprived of all weapons they possessed after having been captured, and many of them were wounded, as was the case of witness Elvir Jahić and witnesses C and D. Based on the foregoing, the Court concludes that the mentioned persons were not taking active part in the hostilities when the criminal actions were committed and that the victims fall within the category of persons protected by Common Article 3.

Furthermore, in order to conclude that a violation of Common Article 3(1) of the Geneva Convention occurred, it is necessary to prove that the protected persons were subjected to one of the prohibited acts, *"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"*. In the present case, torture is alleged in the Indictment. Torture is prohibited by both treaty and customary international law, and it is prohibited at the time of peace and the time of armed conflicts. The prohibition of torture is a *ius cogens* norm.

When defining a criminal offense in accordance with international humanitarian law, it is necessary to be mindful of specific qualities of that corpus of law, particularly in relation to the definition of the term "torture" that exists in the context of the human rights protection. The ICTY Trial Chamber in the Kunarac case, analyzing in detail provisions of the Universal Declaration of Human Rights from 1948, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment from 1984, European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950, concluded that the act of torture within international humanitarian law included the following elements: (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; (iii) the act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[4]

It seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and - if the requisite conditions are met - qua treaty law, the content of the prohibition being the same. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

The Panel, in relation to the first element of the definition of torture, finds that it is proved that Goran and Zoran and their accomplices caused severe physical and mental pain and suffering to the victims by their actions. This pain and suffering is inferred from the nature of the beatings, namely the blows directed at their wounds, genitals and soles of their feet, as well as the

[4] ICTY, Prosecutor v. Kunarac et al. paragraph 142.

duration of the beatings and the implements used. The circumstances of the beatings reasonably suggest that the required level of severe pain and suffering is attained.

It is also clear that the second element is met. Goran and Zoran were aware of their actions and wanted the offense to take place. They were aware of the factual circumstances that established the existence of an armed conflict or the status of a victim as a *person placed hors de combat*. Under the circumstances of the case, they meant to engage in the unlawful conduct and also meant to cause the consequence of their acts and were aware that it would occur in the ordinary course of events.

Furthermore. in relation to the third element, it is evident from the testimonies of all the witnesses who were brought in front of the supermarket in Bojnik that all the prisoners were Bosniaks and that it was because of their ethnicity and nationality that they suffered beatings, and degrading treatment. They were called "Alija's army" and "balijas" and forced to sing Serb nationalistic songs. It clearly follows from the evidence that the beatings were a discriminatory measure administered against captured Bosniaks, who were not members of the Serb ethnic group under whose control they were. Based on the testimonies of the witnesses, which the Panel assesses as credible and consistent, it is clear that the Bosniaks were the victims to the actions of the accused. Therefore. the Panel is convinced that the beatings, insults and humiliation were committed by accused Goran and Zoran with a discriminating intent against the captured Bosniak men and with the intent of obtaining information and punishing them. In addition, accused Goran and Zoran knew the victims from before. They knew that the Bosniak prisoners were members of an ethnic group they considered obviously less worthy. Accused Goran and Zoran treated them in this way. Therefore, the discriminatory intent of the accused in relation to the prisoners against whom they committed these acts is clear.

(3). There was a nexus between the criminal offenses and the armed conflict.

*It is well established in this case that there is a nexus between the crime and the armed conflict*, given that Goran and Zoran were members of the RS Army when the offense was committed, that the offense was committed immediately after the takeover of Ahatovići, that their actions assumed the connotation of a discrimination and punishment to those who resisted, and that these actions took place just before the detention of the victims in the camp in Rajlovac.

In conclusion. it has been unequivocally established that accused Goran and Zoran *Damjanović* in time of armed conflict and as members of the Army of RS, acting in the manner described in Count I of the Indictment, violated the rules of international law in time of armed conflict, namely Common Article 3 of the Geneva Conventions.
Therefore, they indisputably committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH.

## 3.3. The application of substantive criminal law to war crimes

The Court accepted the legal qualification of the Prosecution and convicted accused Goran and Zoran Damjanović of the criminal offense (Count 1) of War Crimes against Civilians referred to in Article 173 (1) (c) of the Criminal Code of Bosnia and Herzegovina.

The Court finds relevant the principle of legality and the principle of time constraints regarding applicability. given the time of the commission of the criminal offense to determine the *substantive law applicable at the time*.

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

On the other hand, Article 4 of the CC BiH (Time Constraints Regarding Applicability) prescribes that "The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense" and that "If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied".

The principle of legality has also been prescribed by the European Convention on Human Rights (ECHR) which, pursuant to Article 2 (2) of the BiH Constitution shall have priority over all other BiH laws. 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 offense. 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."

In addition, Article 15 (1) of the International Covenant on Civil and Political Rights (ICCPR) prescribes that "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 when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby". Article 15 (2) of the ICCPR, however, 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 BiH prescribes 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".

Generally speaking, Article 4 (a) of the CC BiH refers to "the general principles of international law". Article 7 (2) of the ECHR refers to "the general principles of law recognized by the community of nations", and Article 15 (2) of the ICCPR to "the general principles of law recognized by the community of nations". International law, the ECHR or the ICCPR do not recognize the term identical to the term used in Article 4 (a) of the CC BiH and, therefore, the used phrase is the combination of "principles of international law" recognized by the UN General Assembly and the International Law Commission, on the one hand, and "general principles of law recognized by the community of nations" 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.

## 3.4. Applicability of the law to war crimes

*In fact*, Article 4 (a) of the CC BiH explicitly adopts the provision of Article 7 (2) of the ECHR, which enables considerable departure from the principle of Article 3 and Article 4 of the CC BiH, as well as the departure from the mandatory application of a more lenient law in the proceedings pending for the criminal offenses according to international law. This is the case in the proceedings against the accused because that is a criminal offense which includes the violation of *international* law. This is *jurisprudence* of the Court of BiH so far.[5]

The State of Bosnia and Herzegovina, as a successor of the former Yugoslavia, ratified the ECHR and the ICCPR. Thus, the treaties are binding for the State of Bosnia and Herzegovina, and BiH authorities must apply them. Article 4 (a) of the CC BiH is but a national legal *reminder because it is not necessary for the application of international treaties. For the same* reason, all courts in Bosnia and Herzegovina are bound by the above-mentioned treaties and a provision such as Article 4 (a) should not be necessary for the application of international law.

Article 173 of the CC BiH prescribes War Crimes against Civilians (grave breaches of the Geneva Convention of 1949), as it is done by Article 2 of the *ICTY* Statute. At the critical time, war crimes against civilians were also strictly prescribed by the Criminal Code of SFRY which was then applicable in Bosnia and Herzegovina. The fact that the criminal offenses prescribed by Article 173 of the CC BiH can also be found in Article 142 (1) of the CC SFRY provides for the conclusion that the criminal offense of war crimes against civilians was prescribed by the law.

However, as the provisions suggest, the pronounced punishment prescribed by Article 173 of the CC BiH is surely more lenient than the death penalty stipulated by Article 142 of the CC SFRY which was applicable when the criminal offense was committed. As for the application of Article 7 (1) of the ECHR, the Court concludes that the application of Article 4 (a) CC BiH continues to be justified and meets the principle of time constraints regarding applicability, in other words the application of "a more lenient law for the perpetrator".

## 3.5. International law and war crimes

At the time the criminal offenses were committed, Bosnia and Herzegovina as a successor state of SFRY was a signatory to all relevant international conventions on human rights and international humanitarian and criminal law.[6]

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[5] Verdict of Section I of the Appellate Division of the Court of BiH pronounced against Abduladhim Maktouf No. KPZ 32/05 *dated 4 April 2006, appeal filed against this Verdict was refused* by the Constitutional Court of BiH on 30 March 2007; Verdict of Section I of the Court of BiH pronounced against Dragoje Paunović, No. X-KR-05/16; Verdict of Section I of the Court of BiH pronounced against Radovan Stanković No. X-KR-05/70; Verdict of Section I of the Court of BiH pronounced against Nikola Andrun, No. X-KR-05/42; Radmilo Vuković, No. X-KR-06/217; Nikola Kovačević, No X-KR-05/40

[6] This particularly includes: The Convention on Genocide (1948); The Geneva Conventions (1949) and their additional Protocols (1977); The Convention on Slavery amended in 1956; The *International Convention on the* Elimination of All Forms of 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 International Convention on the Suppression and Punishment of Apartheid (1973); The Convention on the Elimination of All Forms of Discrimination against Women (1979); The UN Conve[illegible] against Torture (1984)

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Moreover, customary status of criminal responsibility for a war crime against civilians and individual responsibility for war crimes committed in 1992 was recognized by the UN Secretary-General[7], the International Law Commission[8], as well as jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)[9]. These institutions have established that criminal responsibility for war crimes against civilians constitutes a peremptory norm of international law or *jus cogens*[10]. That is why it appears undisputable that war crimes against civilians in 1992 constituted part of international customary law. This conclusion was confirmed by the Study on Customary International Humanitarian Law[11] conducted by the International Committee of the Red Cross. The Study clearly says that "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 universal jurisdiction principle, customary international humanitarian law is obligatory for each state throughout the world, regardless of whether it has ratified appropriate international legal instruments. Therefore, each state is bound to prosecute or extradite (*aut dedere aut judicare*) all persons suspected of having violated customary international humanitarian law.

Principles of international law recognized in the UN General Assembly Resolution 95 (I) (1946) as well as in the International Law Commission (1950) refer to "the Charter of the Nurnberg Tribunal and the Judgment of the Tribunal", hence war crimes in general. "Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal" adopted by the International Law Commission in 1950 and delivered to the General Assembly, in Principle I prescribe: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". Principle II also prescribes: "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 offense of War Crimes against Civilians should in any case be placed in "general principles of international law" referred to in Article 3 and Article 4 (a) of the CC BiH. That is why, regardless of whether viewed from the aspect of international customary law, international treaty law or "the principles of international law" it is indisputable that war crimes against civilians constituted a criminal offense at the critical time, in other words that the principle of legality was complied with in the sense of both *nullum crimen sine lege* and *nulla poena sine lege*.

Therefore, pursuant to the provisions of Common Article 3 (1) (a) and (c) of the Geneva Conventions and Article 27 (2) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the criminal offense of War Crimes against

[7] Report of the UN Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 of 3 May 1993, paragraphs 34-35 and 47-48

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

[9] ICTY, Appeals Chamber, Tadić case, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 151; ICTY, Trial Chamber, Tadić case, Judgment of 7 May 1997, paragraphs 618-623;

[10] International Law Commission, Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 26;

[11] Jean-Marie Henchaerts and Louise Doswald-Beck: Customary International Humanitarian Law; ICRC, Cambridge University Press, 2005; page 568 et seq.

Civilians should in any case be subsumed under "international law", or "general principles of international law" referred to in Article 3 and Article 4 (a) of the CC BiH. It is therefore indisputable that a war crime against civilians constituted a criminal offense in the incriminating time and is punishable under Article 173 of the CC BiH.

E. Charges under Count 2 *(illegal keeping of a large quantity of fire arms, ammunition and explosive materials of a high destructive force and extremely dangerous, obtaining and keeping of which is not allowed to citizens)*

The criminal activities charged under Count 2 of the Indictment relate only to the first accused Goran Damjanović.
As it derives from this count of the Indictment, accused Goran Damjanović is charged with committing the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399 (1) and (2), read in conjunction, of the Criminal Code of RS. The Prosecution had the burden to prove the key elements of this offense as follows: the perpetrator obtained or is in possession of fire arms, ammunition, explosive materials or any other combat equipment, the law prohibits private individuals to be in possession of those "items" or that possessing of the "items" by private individuals is conditioned by issuance of an authorization, there was a large quantity or high value of these "items" and the "items" were of a high destructive force and extremely dangerous.

The Court has established beyond reasonable doubt that the accused committed the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399 (1) and (2), read in conjunction, of the Criminal Code of the Republika Srpska.

First and foremost, it was established that the accused possessed ammunition and explosive materials, the possession of which is forbidden to private individuals or they are restricted from its possession or keeping. Pursuant to the Search Warrant issued by the Court of BiH Ref No. X-KRN-05/107 dated 26 April 2006, SIPA officials carried out the search of the family house of the Damjanović family at Meše Selimovića St. 10 in Istočno Sarajevo. During the search they found the following "items": two knives, serial nos. 698775 and 738633 for use with automatic rifle M-70; one bayonet, serial no. 1214; one ammunition drum, serial no. 14364; seven boxes of ammunition each containing 15 caliber 7.62 bullets; one RAP SMB with three clips and 138 bullets of caliber 7.62; one RAP SMB with one clip and 28 bullets of caliber 7.62; three 0.5 kg pieces of plastic explosive; three trotyl bullets 500, serial nos. CPB 652 and CPB 653; seven detonators and 7.5 meters of slow-burning fuse. On 25 October 2006, the SIPA officials Bajro Kulovac, Nermina Jerković, Ejub Zukić and Elvedin Karahodžić gave evidence about the circumstances of the search of the family house of the Damjanovićs and the items that were found. On that occasion the officials analyzed 33 photographs depicting the search of the house. Based on these testimonies and the presented photographs the Panel inferred that the search had been carried out pursuant to the Warrant issued by the Court of BiH Ref. No. X-KRN-05/107, dated 26 April 2006, as well as that during the search of the accused's house they had found the ammunition and the explosive materials the possession of which by private individuals is prohibited by law.

The possession of the said "items" is prohibited pursuant to the Law on Weapons and Ammunition of the RS and the Law on the Trade in Explosive Substances and Inflammable Liquids and Gases of the RS. Thus the possession of 7.62 mm caliber bullets (271 in total), pursuant to Article 6 of the Law on Weapons and Ammunition of the RS, requires an authorization that the accused did not have, and this offense is punishable by a fine pursuant to Article 43(2)(1); obtaining of detonators (7 in total) is not allowed pursuant to Article 6 of

same Law and a fine is prescribed pursuant to Article 43(2)(1); explosive (1.5 kg of plastic explosive, two trotyl bullets 500 and 7.5 meters of slow-burning fuse) falls within "explosive substances" pursuant to Article 3 of the Law on the Trade in Explosive Substances and Inflammable Liquids and Gases of the RS. Article 12 of the said Law prohibits private individuals from procuring, selling or using of the explosive substances in any manner.

Furthermore, it has been found that a large quantity of ammunition and explosive substances was in question. The Court gave credence to expert witness Captain Mayes who testified that the quantity of the explosive was sufficient to cause a significant damage to the house in which the items were found, and that it would have lethal effect in the perimeter of approximately 300 meters. Based on this estimate, the Panel established beyond reasonable doubt that these were very dangerous ammunition and explosive materials of a high destructive force in a large quantity.

The Court did not give credence to the Defense witness Boško Tešanović whose testimony regarding these circumstances was not reasonable. The description of the box that Boško Tešanović asserted to be found by Luka Damjanović where the two of them had worked, does not correspond to the boxes found by the SIPA officials at the time of search of the Damjanovićs' house. Hence, it was not one box with explosive but several of them. The witness testimony was not based on firm evidence and, consequently, it was not considered as clear and logical.

When evaluating the evidence the Court also considered other evidence presented at the main trial. Nevertheless, it did not assign any particular significance to this evidence, nor did it consider necessary to analyze it in detail, since it did not have a substantive effect on the ultimately established state of facts and conclusions that the Court reached based on the evidence whose assessment is given in the Verdict.

## F. Conclusion on Count 1 and Count 2

### 6.1. Count 1 (Goran Damjanović and Zoran Damjanović)

Accused Goran and Zoran Damjanović committed the criminal offense of War Crimes against Civilians knowing that they were violating the rules of international law by their acts during and because of an armed conflict and wanted to cause the prohibited consequence.

### 6.2. Count 2 (Goran Damjanović)

Accused Goran Damjanović committed the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399 (1) and (2), read in conjunction, of the Criminal Code of the Republika Srpska, because he kept a large quantity of fire arms, ammunition and explosives that were dangerous and of a high destructive force, the keeping of which is not allowed to private individuals.

## 7. Sentencing of the Accused

7.1. Sentence for Goran Damjanović

Given the established state of facts and the resulting consequence, as well as causal connection between them, the Court found accused Goran Damjanović guilty primarily of the criminal offense (Count 1) of War Crimes against Civilians in violation of Article 173 (1) (c) of the CC BiH and meted out the punishment of 11 (eleven) years of imprisonment, and then found him guilty of the criminal offense (Count 2) of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399 (1) and (2), read in conjunction, of the Criminal Code of the Republika Srpska, in conjunction with Article 5 and Article 12 of the Law on the Trade in Explosive Materials and Inflammable Liquids and Gases, and Article 43 (1) (1) of the Law on Weapons and Ammunition of the RS, and meted out the punishment of 1 (one) year and 6 (six) months of imprisonment. Applying the statutory rules referred to in Article 53 (2) (b) of the CC BiH, the Court sentenced accused Goran Damjanović to the compound punishment of 12 (twelve) years of imprisonment. It was determined that this punishment is proportional to the gravity of the offense, the participation and the role of the accused, and that it will meet the purpose of punishment prescribed by the provisions of Article 39 of the CC BiH.

In meting out the punishment for accused Goran Damjanović the Court assessed as extenuating circumstance the facts that Goran Damjanović acted in a fair manner before the Court, behaved properly and was cooperative throughout the proceedings, as well as that he properly adhered to the measures replacing custody, which were ordered by the Trial Panel, he had no criminal record to date, and that he is a family man and the father of a minor child. The Court did not find highly extenuating circumstances which, for the purpose of Article 49 (1) (b), would indicate that the purpose of punishment could be attained by a lesser punishment than the one prescribed for the criminal offense of War Crimes against Civilians, or more precisely the sentence of imprisonment of at least ten years or a long-term imprisonment.

7.2. Sentence for Zoran Damjanović

The Court also found accused Zoran Damjanović guilty of the criminal offense (Count 1) of War Crimes against Civilians in violation of Article 173 (1) (c) of the CC BiH and sentenced him to 10 (ten) years and 6 (six) months of imprisonment being satisfied that the general purpose of punishment, as well as the purpose of punishment in terms of the provisions of Article 39 of the CC BiH will be attained.
With regard to accused Zoran Damjanović, the Court found as extenuating circumstances the facts that he acted in a fair manner before the Court and behaved properly, responded duly to all summons of the Court while at liberty, that he is a family man with no criminal record to date, and he is the father of a minor child. In meting out the punishment the Court did not find highly extenuating circumstances on the part of accused Zoran Damjanović.

7.3. The Court found no aggravating circumstances on the part of the accused persons.

7.4. Pursuant to Article 56 of the CC BiH, the time the accused spent in custody shall be credited towards the pronounced prison sentence: as for accused Goran Damjanović from 26 April 2006 through 18 January 2007 and as for accused Zoran Damjanović from 26 April 2006 through 22 June 2006.

7.5. Pursuant to Article 188 (4) of the CPC BiH, the accused persons shall be relieved of the duty to reimburse the costs of criminal proceedings because they are unemployed and indig

and in the assessment of the Court the accused persons have no resources to reimburse the costs of the proceedings.

7.6. Pursuant to Article 198 (2) of the CPC BiH, the injured parties Zaim Rizvanović, witnesses C and D, and Elvir Jahić, if he wishes to do so, are hereby referred to take civil action with their claims under property law, since the establishment of the facts with regard to the amount of the claim under property law would take a rather long period of time, which would unreasonably extend the duration of the proceedings.

**RECORD-TAKER**
**Melika Bušatlić**

**PRESIDING JUDGE**
**JUDGE**
**Davorin Jukić**
*(Signature and stamp affixed)*

**INSTRUCTION ON LEGAL REMEDY:** An appeal may be filed against this Verdict with the Appellate Panel of the Court of BiH within 15 (fifteen) days after the day of receiving the Verdict in writing.

*We hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.*

*Sarajevo, 09.07.2007*

*Certified Court Interpreters for English*