SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KR-08/502
Sarajevo, 28 November 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA

Court of Bosnia and Herzegovina, Section I for War Crimes, Judge Minka Kreho as the Panel President and Judges Marjan Pogačnik and Tihomir Lukes as the Panel members, with the participation of the intern Jelena Simić as the record-keeper, in the criminal case against the Accused Zrinko Pinčić for the criminal offense of War Crimes against Civilians under Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina, deciding upon the Indictment of the Prosecutor's Office of BiH number KT-RZ-19/06, dated 25 June 2008, which was confirmed on 26 June 2008, following the main trial which was public and attended by the Accused Zrinko Pinčić and his Defense Counsel, attorney Velimir Marić and the Prosecutor of the Prosecutor's Office of BiH, Vesna Budimir, rendered and on 28 November 2008, in the presence of the Accused and his Defense Counsel and the Prosecutor of the Prosecutor's Office of BiH, publicly announced the following

VERDICT

The Accused

ZRINKO PINČIĆ, son of Marin and Ljubica, maiden name Regio, born in Sarajevo on 12 September 1948, permanent residence at Buna bb */no number/*, Mostar municipality, PIN 1209948171511, Croat by ethnicity, metal processing worker by profession, married, father of two adult children, unemployed, received disability pension, served the JNA */Yugoslav National Army/* in 1969/1970 in Senta and Gornji Milanovac, has the rank of a junior lieutenant, registered in the official (military) records of the Military Service Records Group in Mostar, poor financial standing, citizen of Bosnia and Herzegovina and the Republic of Croatia, previously not convicted, currently subject to prohibiting measures imposed under the Decision of the Court, number: X-KR-08/502 dated 26 June 2008,

IS GUILTY

Because:

During the war in Bosnia and Herzegovina, during the armed conflict between the Army of the Republic of Bosnia and Herzegovina and the Croat Defense Council on one side, and the armed forces of the Serb Republic of Bosnia and Herzegovina on the other, in the place of Donje Selo, Konjic municipality, as a member of the Croat Defense Council in the capacity of the secretary of the HVO Hrasnica within the Herceg Stjepan Brigade in Konjic, acted contrary to the regulations of international humanitarian law by violating Article 3(1)(a) and (c) and Article 27(2) of the Geneva Convention relative to the Protection of Civilian Persons, dated 12 August 1949, in the way that:

Over the period starting from November 1992 until March 1993 in the place of Donje Selo, Konjic Municipality, during the night, dressed in military uniform and armed, he used to

come to a house in which civilians were captured – women, two under-age girls, one under-age boy and two girls of the Serb ethnicity, including the person "A" and her bed-ridden mother, and on several occasions he took the person "A" out of the room where the captured civilians were sitting, and forced her into another room where every time he ordered her to undress and forced her to a sexual intercourse with him, all the time holding the rifle by the bed and every time threatening that he would bring 15 soldiers and that she would then see what would happen to all of them;

Therefore, during the war in Bosnia and Herzegovina, during the armed conflict between the Army of the Republic of Bosnia and Herzegovina and Croat Defense Council on one side, and the armed forces of the Serb Republic of Bosnia and Herzegovina on the other, acting contrary to the regulations of international law, he coerced another person to sexual intercourse by threat of immediate direct attack upon her limb,

whereby he committed the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

Therefore, pursuant to the referenced legal provisions, in conjunction with Articles 39, 42, 48, 49 and 50 of the Criminal Code of Bosnia and Herzegovina, the Court

SENTENCES HIM

TO A TERM OF 9 (NINE) YEARS OF IMPRISONMENT

Pursuant to Article 56 of the Criminal Code of Bosnia and Herzegovina, the time the Accused spent in custody from 29 May 2008 to 26 June 2008, shall be credited towards the sentence of imprisonment.

II

Pursuant to Article 188(1) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused is obliged to reimburse the costs of the criminal proceedings, the amount of which shall be decided by the Court, in accordance with Article 186(2) of the BiH CPC, by means of a separate decision.

III

Pursuant to Article 198(2) of the Criminal Procedure Code of Bosnia and Herzegovina, the injured party is hereby referred to take civil action with her claim under property law.

R e a s o n i n g

1. Charges

The Indictment of the Prosecutor's Office of BiH, Special Department for War Crimes, number KT-RZ-19/06, dated 25 June 2008, which was confirmed on 26 June 2008, charged

Zrinko Pinčić with committing the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina (BiH CC) by coercing another person to sexual intercourse by threat of immediate direct attack upon her limb.

On 11 July 2008 the Accused pleaded not guilty, whereupon the case file was forwarded to the trial panel, which held the status conference on 26 August 2008 and opened the main trial on 8 September 2008.

The Prosecution announced, already in their opening statement, that they would prove the allegations stated in the Indictment by the examination of witnesses, particularly that of witness "A" who was a direct victim of the Accused's unlawful actions, and documentary evidence, while the Defense announced that they would prove, by means of the evidence to be adduced at the main trial, that the Accused did not commit the criminal offense as charged, that is, that the Accused and the injured party were in the love relationship and that the sexual intercourse occurred exclusively with the consent of the injured party.

2. Presented evidence

a) Prosecution evidence

The following witnesses for the prosecution were examined in the course of the main trial: witness "A", Gordana Gligorević, Vjekoslav Oroz, Miodrag Mitrović, Zdravko Žilić, Željko Žilić, Radmila Živak, Safet Ratkušić, Amir Sijerčić, Dragan Majstorović, Petko Grubač, as well as the expert witnesses Alma Bravo Mehmedbašić and Alma Pašalić while the witness Danijela Pinčić, daughter of the Accused, exercised the right accorded to her under Article 83(2) of the Criminal Procedure Code of Bosnia and Herzegovina (BiH CPC) and refused to testify in this concrete case.

The following documentary evidence was presented: Records on the examination of witness "A" before the Prosecutor's Office of BiH, number: KT-RZ 19/06 dated 25 August 2006, 30 October 2007 and 26 February 2008; Finding and opinion of the expert witness, Dr. Alma Bravo-Mehmedbašić, dated 10 March 2008; Record on the examination of witness Miodrag Mitrović before the Prosecutor's Office of BiH, number: KT-RZ 19/06 dated 13 June 2008; Record on the examination of witness Željko Žilić before the Prosecutor's Office of BiH, number KT-RZ 19/06 dated 11 March 2008; Record on the examination of witness Zdravko Žilić before the Prosecutor's Office of BiH, number KT-RZ 19/06 dated 3 June 2008; Record on the examination of witness Gordana Gligorević before the Prosecutor's Office of BiH, number KT-RZ 19/06 dated 9 October 2007; Finding and opinion of the expert witness, Dr Alma Pašalić dated 6 February 2008; Record on the examination of witness Vjekoslav Oroz before the Prosecutor's Office of BiH, number KT-RZ 19/06 dated 17 June 2008; Decision of the Presidency of the Republic of Bosnia and Herzegovina Proclaiming the State of War dated 22 June 1992; Decision of the Presidency of the Republic of Bosnia and Herzegovina Terminating the State of War dated 22 December 1995; Decision to establish the Army of Serb Republic of Bosnia and Herzegovina dated 12 May 1992; Decree with the force of law on the Armed Forces of the Republic of Bosnia and Herzegovina dated 20 May 1992; Decision of the President of HVO */Croat Defense Council/* and HZ HB */Croat Community of Herceg Bosna/* Establishing the HVO dated 8 April 1992; Excerpts from the

16 Nov. 1998 final Judgment of the ICTY in the *Zejnil Delalić et al.* case - paragraphs 188, 189, 190, 191 and 192; Personal file and address card of officer Zrinko Pinčić; Military booklet of HR HB */Croat Republic of Herceg Bosna/* issued to Zrinko Pinčić; the Disabled Veteran of the Homeland War Booklet issued to Zrinko Pinčić; Military booklet of the HVO of HZ HB issued to Zrinko Pinčić; Decision to establish the HVO Hrasnica dated 2 September 1992; Certificate issued on 22 March 1996 to Zrinko Pinčić by the HR HB Ministry of Defense – Organization and Personnel Department in Ljubuški; Certificate issued to Zrinko Pinčić by the HR HB-HVO Hrasnica dated 27 July 1994; Certificate issued on 31 October 1994 to Ivica Pinčić by the HR HB Ministry of Defense – Organization and Personnel Department in Ljubuški; Certificate regarding the circumstances of tragic events involving Zrinko Pinčić, number: 2926-4/41-1/12-1501/04, issued on 31 May 2004; Certificate regarding the circumstances of tragic events involving Zrinko Pinčić issued on 24 January 1997; Certificate no. 17-22-01-41-1-234/06-1 issued to Zrinko Pinčić on 20 March 2006; Excerpt from the Decision by the President of the HR HB Presidential Council dated 8 June 1996; Certificate issued to Zrinko Pinčić on 25 February 1997 by the HR HB Ministry of Defense; Certificate number 031/94, dated 3 October 1994, issued to Zrinko Pinčić by the Ministry of Defense HVO Hrasnica; Passenger Vehicle Driver Record for Ivica Pinčić; Witness "A" medical records; Record on the identification of persons by witness "A" dated 29 May 2008; Excerpt from the criminal record, dated 5 November 2007, for Zrinko Pinčić; Record on the examination of witness Radmila Živak on the premises of the Embassy of Bosnia and Herzegovina in Belgrade, number KT-RZ 19/06 dated 9 October 2007; Record on the examination of suspect Zrinko Pinčić before the Prosecutor's Office of BiH, number KT-RZ 19/06 dated 29 May 2008; Record on the examination of suspect Zrinko Pinčić before the Prosecutor's Office of BiH, number KT-RZ 19/06 dated 30 May 2008; Analysis of the obtained information on the suffering of Serbs in Konjic municipality - Banja Luka, February 2001; Publication of the Croat disabled veterans of the homeland war HR HB "Naš glas" */Our Voice/*; Order of 27 May 1992 to establish a mixed check-point in the village of Donje Selo; Authorization of the RBiH - Supreme Command of the Armed Forces Staff, Sarajevo, number: 02/349-86 dated 17 September 1992; Territory assessment for Konjic municipality - Municipal Staff in Konjic, number: 01-235/93 dated 12 March 1993; Zrinko Pinčić's application to the Ministry of Defense - Welfare Department in Mostar, dated 5 July 1999; Zrinko Pinčić's application to the Department for Veterans' Issues of the Herzegovina-Neretva Canton - Sector for Veterans' Issues (HVO and MUP */Ministry of Interior/*) to confirm his status as a disabled veteran of the HVO and MUP; Response by the Ministry for Veterans' Issues of the Herzegovina-Neretva Canton of the FBiH, BiH, number: 12-43-01-1296/08, dated 16 May 2008; Decision by the Service for the Protection of Rights of Veterans and their Families of the City of Mostar, number: UP-I 09-43-1023/06 issued to Zrinko Pinčić on 30 August 2006; Decision by the Department for Veterans' Issues - Mostar, Sector for Veterans' Issues (HVO, MUP) of the Herzegovina-Neretva Canton of the FBiH, BiH, number: 14-43-1-2802/06, dated 5 March 2007, issued to Zrinko Pinčić; Nikola Perić's application to the Office for Defense in Konjic to confirm his status of disabled war veteran of the HVO; Decision by the Service for the Protection of Rights of Veterans and their Families of the City of Mostar, Herzegovina-Neretva Canton, FBiH, BiH, number: UP-I 09-43-228/06 issued to Nikola Perić on 31 October 2006; Certificate of the FBiH Ministry of Defense - Office for Defense in Konjic, number: 22-07-49-586/04-01 issued to Nikola Perić on 5 November 2004; Certificate by the Ministry of Defense - HVO issued to Nikola Perić on 5 March 1997; Official Gazette of the FBiH, number 33, dated 19 June 2004; Record made by SIPA - Regional Office in Mostar, number: 17-13/3-04-02-254-1/08, dated 29 May

2008, on the deprivation of liberty of Zrinko Pinčić; Record made by SIPA, number 17-13/3-04-02-254-1/08, dated 29 May 2008, on the handover of the person deprived of liberty to the responsible prosecutor; Report compiled by SIPA - Regional Office in Mostar, number: 17-13/3-1-04-2-47-13/08, dated 29 May 2008, on the undertaken measures and actions; Report on the search by SIPA - Regional Office in Mostar, number: 17-13/3-1-04-2-47-16/08, dated 29 May 2008; Record made by SIPA - Regional Office in Mostar on the search of the apartment, other premises and movables, number: 17-13/3-04-2-255-1/08, dated 29 May 2008; Order of the Court of BiH, number: X-KR-08/502 dated 11 July 2008; SIPA Report, number 17-13/3-1-04-2-47-19/08, dated 20 October 2008, with a compact disc (CD) on the search of the house owned by Zrinko Pinčić.

b) Defense evidence

The following witnesses for the defense were examined in the course of the main trial: witness "A", Radmila Živak, Accused Zrinko Pinčić, Mila Pinčić, Ljubo Pogarčić, Nikola Perić, Ilija Šagolj, Željko Komšić, Ljubica Rajić and Zdravko Rajić.

The following documentary evidence was presented: Application to the Ministry of Defense of BiH, number: OKO-2-110-010908 dated 1 September 2008; Record on the search of the apartment, other premises and movables, number: 17-13/3-04-2-255-1/08, dated 29 May 2008; Record on the search of the apartment, other premises and movables, number: 17-13/3-04-2-255-1/08, dated 29 May 2008; Information by the Federation Ministry of Interior, number: 09-13/5-4-362 dated 23 September 2008; Request made to the Ministry of Security of BiH - State Investigation and Protection Agency to disclose the record on search, dated 17 October 2008; Record on the examination of witness Radmila Živak on the premises of the Embassy of Bosnia and Herzegovina in Belgrade, number KT-RZ 19/06 dated 9 October 2007; CD with photographs of the search of the house, other premises and movables, dated 29 August 2008; Decision by the Department for Veterans' Issues - Mostar, Herzegovina-Neretva Canton, Sector for Veterans' Issues (HVO, MUP), number: 14-43-1-2802/06, dated 5 March 2007, issued to Zrinko Pinčić; Law on the Rights of Veterans and Members of their Families (Official Gazette of FBiH, number 33/2004 dated 19 June 2004); People's Tribune, official publication of the Croat Community of Herceg Bosna; information by the Federation Ministry of Interior, number: 09-13/5-4-362, dated 23 September 2008; Preliminary motions filed by the attorney Velimir Marić, number: X-KR-08/502 dated 7 July 2008: Decision by the Court of BiH, number: X-KR-08/502, dated 11 July 2008; Appeal filed by the attorney Velimir Marić on 29 May 2008.

3. Procedural decisions

a) Exclusion of the Public

Under the Decision, number: X-KR-08/502, rendered on 30 May 2008 by the Preliminary Hearing Judge and pursuant to Articles 4, 12 and 13(1) of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses and Articles 91 and 235 of the BiH CPC, witness "A" was granted protection measures, including that all the personal details of the witness are confidential and shall remain confidential for the period of thirty years following the day the decision became final, and given a pseudonym "A" before the Court of Bosnia

and Herzegovina, with the Prosecutor's Office of BiH having the obligation to disclose to the Defense the name and surname of this witness fifteen days ahead of her examination.
At the time of the examination of this witness at the main trial held on 8 September 2008, pursuant to Articles 235 and 237 of the BiH CPC and with the consent of parties to the proceedings, the Court rendered and publicly announced a Decision to exclude the public for a part of the main trial in order to first hear from witness "A" whether she seeks additional protection measures to be granted to her, in addition to the already existing ones, and if yes, why.
Since witness "A" stated on that occasion that she did not seek any additional protection measures, the Court decided to resume in open session and for the rest of the proceedings the main trial was public.

b) Decision on the Manner of the Examination of Witness "A" by the Defense

On 8 September 2008, the Prosecution conducted the examination-in-chief of witness "A", after which time the Defense was given the opportunity to cross examine this witness. Defense Counsel for the Accused did not use this opportunity and asked for the Court's permission to summon witness "A" as the defense witness in order to be able to directly examine her.

The Prosecution opposed this motion by the Defense arguing that there is no need or purpose for the Defense to directly examine witness "A" since the Defense can also obtain answers to the questions they want to pose to her by conducting the cross examination.

Following its withdrawal, closed deliberation and voting, the Trial Panel rendered and publicly announced a Decision allowing the Defense Counsel for the Accused to directly examine witness "A", but only in relation to the following circumstances:

- manner in which witness "A" met the Accused and the manner in which that relationship was terminated;
- who were all the refugees in Donje Selo in the period covered in the Indictment, and
- manner in which witness "A" left the territory of Donje Selo and arrived in the territory of Borci.

As for other circumstances, pursuant to Article 263(2) of the BiH CPC, the Court dismissed a motion of the Defense because it did not refer to proving the circumstances relevant to the Indictment, and hence they were considered irrelevant to this case.

c) Established Facts

On 22 August 2008, pursuant to Article 4 of the Law on the Transfer of Cases, the Prosecutor's Office of BiH filed a Motion to accept established facts (the Motion) seeking from the Court to take judicial notice of the facts established by a final decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Judgment, number: IT-96-21 of 16 November 1998 in the case *Prosecutor v Zejnil Delalić, Zdravko Mucić a.k.a. "Pavo", Hazim Delić and Esad Landžo a.k.a. "Zenga"*, namely the facts contained in paragraphs 188, 189, 190, 191 and 192 of the referenced judgment.

Given that the Accused Zrinko Pinčić is charged with having committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e), in conjunction with Article 180(1) of the BiH CC, which offense was committed in the territory of Konjic municipality with the armed conflict forming an important element thereof, the Prosecutor's Office of BiH submits that this motion is founded, and with the principle of judicial economy in mind, it moved the Court to accept the existence of armed conflict as an established fact that does not need to be proven in the course of the present proceedings before the Court of BiH because it has already been established by the final Judgment of the ICTY in The Hague, number: IT-96-21 of 16 November 1998.

In his written response submitted to the Court on 25 August 2008, the Defense Counsel for the Accused Zrinko Pinčić, attorney Velimir Marić opposed the motion of the Prosecutor's Office of BiH to accept as established the fact concerning the existence of armed conflict between the Army of BiH and the HVO on one side, and VSRBiH */Army of the Serb Republic of Bosnia and Herzegovina/* on the other, in the period and in the territory relevant to the Indictment against Zrinko Pinčić arguing that there was an armed conflict between the Army of BiH (ABiH) and HVO at the relevant time and in the relevant territory. Furthermore, the Defense noted that the direct armed conflict between the ABiH and HVO took place in June 1992 near Kiseljak, while the armed conflict on a massive scale between the HVO and ABiH in a wider region of Prozor municipality happened in July of the same year.
There was no armed conflict between the HVO and VSRBiH in the territory of Konjic municipality from the end of May 1992 until the end of the war in BiH, nor were the friendly relations that existed between them disrupted in any way.

On 19 September 2008, the Defense Counsel Marić submitted to the Court an addendum to his Response to the Prosecution motion, contesting the veracity of allegations of the Prosecution that there was an armed conflict between the HVO and ABiH on one side, and the VSRBiH on the other, at the relevant period of time. The Defense Counsel noted that the full-scale conflict between the HVO and ABiH took place in April 1993, but that the incidents involving the use of firearms and preparations of the ABiH for a full force attack on the Croat population of Konjic municipality had already started in May or June 1992, which was established in Paragraph 118 of the ICTY Judgment, number IT-96-21 of 16 November 1998 and which also ensues from the book "Ratni zločini Alije Izetbegovića" */"Alija Izetbegović's War Crimes/* and reports entitled "Konjic Trusina", "Progoni Hrvata opštine Konjic" */"Persecution of Croats from the Konjic municipality/* and "Konjic Musala".

In view of all the above, the Defense moved the Court to accept as established the fact that there was an armed conflict between the ABiH and HVO at the time and in the territory covered in the Indictment against Zrinko Pinčić.

On 26 September 2008, the Court partially granted the Motion of the Prosecutor's Office of BiH, number: KT-RZ-19/06 of 22 August 2008 and the Motion of the Defense Counsel for the Accused contained in his Response, dated 19 September 2008, in accordance with Article 4 of the Law on the Transfer of Cases and concerning the acceptance as proven of facts established in the proceedings before the ICTY. For a more detailed explanation, the Court recalls its written Decision of 26 September 2008.

ee) The facts contained in the following paragraphs of the referenced Judgment were accepted as having been established:

Paragraph 188:

As has been discussed at some length in Section II above, the Konjic municipality was indeed itself the site of some significant armed violence in 1992. In April of that year the municipal TO was mobilized and a War Presidency was formed. The JNA, which had occupied various military facilities and other locations throughout the municipality, was involved in the mobilization of Serb volunteers, in co-operation with the local SDS, and had distributed weapons among them. It also appears that the JNA itself participated in some of the military operations, at least until May 1992. [223]

Paragraph 189:

The Trial Chamber has been presented with significant amounts of evidence regarding military attacks on and the shelling of Konjic town itself, as well as many of the villages in the municipality, including Borci, Ljubina, Džajići and Gakići, by these Serb forces. It is further uncontested that military operations were mounted by the forces of the municipal authorities, incorporating the TO, MUP and, within the period of the Joint Command, the HVO, against the villages of, *inter alia*, Donje Selo, Bradina, Bjelovčina, Cerići and Brđani. It was as a result of these operations that persons were detained in the Čelebići prison-camp.

Paragraph 191:

In Konjic, the TO and MUP were joined for a short period by the HVO as part of a Joint Command established and organized to fight the Serb forces. At the very least, these forces representing the "governmental authorities" were engaged against the forces of the Bosnian Serbs – the JNA and VRS joined by local volunteers and militias – who themselves constituted "governmental authorities" or "organized armed groups". This finding is without prejudice to the possibility that the conflict may in fact have been international and the parties involved States and their representatives.

Paragraph 192:

The Trial Chamber must therefore conclude that there was an "armed conflict" in Bosnia and Herzegovina in the period relevant to the Indictment and notes that, regardless of whether or not this conflict is considered internal or international, it incorporated the municipality of Konjic. Thus, the first fundamental precondition is met for the application of international humanitarian law, including those norms of the law incorporated in Articles 2 and 3 of the Statute, to the present case, providing there is shown to be a sufficient nexus between the alleged acts of the accused and this armed conflict.

Paragraph 118:

The Croat Defense Council (hereafter "HVO) was formed on 8 April 1992 as the military force of the Croat Community of Herceg-Bosna (HZH-B), the self-proclaimed para-State of the Bosnian Croats in certain parts of the Herzegovina region. The HVO had been

distributing arms amongst the Bosnian Croats in preparation for conflict and HVO units were formed in many municipalities. The Croatian government and Army (HV) trained and armed many of these troops and some HV officers and soldiers were also integrated into the HVO. Dr. Čalić stated in her report to the Trial Chamber that in 1992 there were approximately 30,000 HVO troops on the ground, who relied heavily on the HV for direction and support. During most of 1992, the HVO and units from the HV sided with the Bosnian TO (later the Bosnian Army) against the JNA and VRS. Towards the end of 1992, however, clashes developed between the HVO and the Bosnian Army and this conflict continued into 1993.

In view of all the above, the Court decided that the facts established in paragraphs 188, 189, 191 and 192 concerning the existence of an armed conflict between the Army of RBiH and HVO on one side, and VRS on the other, in the territory of the Konjic municipality during the period relevant to the Indictment, meet the objective criteria and are not prejudicial to the criminal responsibility of the Accused. The Court was governed by the same rationale in accepting as proven the fact established in paragraph 118 that concerns the existence of an armed conflict between the Army of RBiH and HVO in a specific period relevant to the Indictment.

On the other hand, with respect to the fact contained in paragraph 190 about the level of the fighting in BiH, including the territory of Konjic municipality relevant to the Indictment, that was "clearly intense" and that consequently triggered the reaction by the international community, the Court did not find it indispensible to make an inference about the existence of the armed conflict relevant to the Indictment.

d) Refusal to allow the presentation of some Defense evidence

Following the presentation and admission into the court case-file of evidence, which the parties had already announced at the status conference, a brief status conference was held on 14 October 2008 for the parties to state if they have any additional evidentiary motions.

On this occasion, the Defense Counsel for the Accused moved the Court, among other things, to allow the confrontation between the Accused and witness "A" and that the Accused takes a polygraph test. The Accused himself, at the time of his examination as a witness for the defense, requested from the Court to allow his confrontation with witness "A" and to take a polygraph test. In addition, the Defense moved that an additional neuropsychiatric evaluation of witness "A" be conducted in order to separate the first and second period of her stay in Donje Selo, as well as the psychiatric evaluation of the Accused who, as a result of his illness, is not able to follow further course of the proceedings. As the Defense noted, this evaluation would be conducted by the expert witness, neuropsychiatrist Elena Škrobić from Mostar.

The Court decided, immediately at the main trial, to dismiss the motion of the Accused and his Defense Counsel for confrontation between witness "A" and the Accused on the grounds that the Accused attended the hearing held on 8 September 2008 when witness "A" gave her testimony and was given the opportunity by the Panel President to cross examine the witness in accordance with Article 262 of the BiH CPC. On that occasion, the Accused stated that he had no questions for witness "A". Since the witness was heard on that same day as a defense

witness upon the motion of the Defense Counsel for the Accused, the Accused also had the opportunity to directly examine witness "A", which again he failed to do. To wit, at the time of the examination of witness "A" as a witness for the prosecution and defense, the Accused had the opportunity to confront the witness, to put questions to her in direct and cross-examination, which he failed to do and which is why this motion by the Defense at this stage of the proceedings was obviously aimed at delaying the proceedings and abusing their procedural rights. For these reasons and pursuant to Article 13(2) of the BiH CPC, the Court decided to dismiss this motion.

Also, the Court dismissed the motion of the Defense that a polygraph test be administered to the Accused because the questioning of the Accused in this manner would be contrary to the basic rules on questioning set out in Article 77(2) of the BiH CPC. Under this provision, apart from the use of force, threat, fraud or narcotics, it shall be explicitly forbidden to use other means that may affect the freedom of decision-making and expression of will while giving a statement.

The essence of the functioning of a polygraph, as a technical instrument, is based on the measurement of physiological reactions that occur in the body of the subject independently of his will while he answers certain questions. This means that the results obtained by such form of questioning are not necessarily a result of the free will of the subject, concretely the Accused Zrinko Pinčić, which would be a violation of basic principles stipulated in the law for the questioning of a suspect or accused. Based on the above reasons, the Court holds that if such evidentiary motion were granted, it would constitute an essential violation of the criminal procedure provisions under Article 297(1)(i) of the BiH CPC because Article 77(3) of the same Code prescribes that the court decision may not be based on such evidence as proposed by the Defense in the present case.

Deciding on the motion of the Defense Counsel for the Accused for the supplementary neuropsychiatric evaluation of witness "A" and the Accused, the Court decided to allow the Defense to present this additional evidence at the hearing held on 14 October 2008 when the Defense announced its additional evidentiary motions. The Court, however, advised the Defense Counsel for the Accused that the evaluation to be conducted was not additional expert evaluation, but rather additional evidence in the form of a neuropsychiatric evaluation solicited by the Defense, and that accordingly it was entirely upon the Defense to engage the services of a neuropsychiatrist expert witness and inform the Court thereof, so that the summons can be sent to the selected expert witness in time, and to secure the presence of witness "A" at the hearing with the assistance of SIPA. The Defense Counsel took it upon himself that he would urgently act in accordance with the instructions of the Court, establish contact with the expert witness and furnish the Court with the requested information. In the next few hearings and the ones that followed, the Court cautioned the Defense Counsel on several occasions because of his failure to inform the Court of the name and address of the expert witness and each time he promised he would send it to the Court the same day or the next day upon his return to the office. On 7 November 2008, the Defense Counsel furnished the Court with the telephone number of the court expert Elena Škrobo who informed the Court over the phone that due to an extremely heavy workload, she is unable to conduct the referenced evaluation. The Court promptly informed the Defense Counsel Marić thereof and advised him to furnish the Court with a name of another court expert who would conduct the evaluation. A letter was then sent to the Defense Counsel in which the Court asked him to

state his position regarding the court expert Fahro Puzić, so that the latter could complete the evaluation, or if he is unable to do so, to find another court expert to do it. The Defense Counsel Marić failed to inform the Court of his position, while the court expert Puzić informed the Court that he was unable to conduct the evaluation in November and that he did not find another court expert as a replacement. After that, the Defense Counsel was advised to inform the Court at the hearing to be held on 10 November 2008 about the name of the expert witness who would carry out the evaluation of both witness "A" and the Accused, which he failed to do.

Since the Defense Counsel failed to follow the instructions and engage the services of an expert witness in spite of the Court's insistence upon it and although he has been involved in preparing the defense case already from the investigative stage of the proceedings, during which time he should have at least arranged for a neuropsychiatric evaluation of his client, the Court decided to dismiss the Defense motion to conduct an evaluation because it is obvious that the intention behind this motion is only to delay the proceedings, especially bearing in mind that the Defense sought the assessment of the Accused's current mental condition that is not relevant to the Indictment, as well as the evaluation of witness "A" for a period that is also not relevant to the charges against his client, which altogether does not serve to clarify the matter, as set out in Article 13 (2), Article 239(2) and Article 263(2) of the BiH CPC.

At the hearing held on 3 November 2008, the Defense Counsel for the Accused moved the Court to allow expert witness testimony by a document examiner in relation to the lawfulness, that is, unlawfulness of the Record on the search of the apartment and other premises owned by the Accused, dated 29 May 2008, and the text added in handwriting on the Order of the Court of BiH, number: X-KRN-08/502 of 20 May 2008.

The Prosecution instantly opposed this Defense motion arguing that it was aimed at delaying the proceedings, at which time the Panel withdrew in order to decide on the motion.

Following the closed deliberation and voting, the Panel rendered and publicly announced at the main trial its decision to dismiss this Defense motion on the grounds that, in the view of the Panel, it was aimed only at delaying the proceedings, which is why the Court had no other recourse but to refuse it in accordance with Article 13(2) of the BiH CPC which stipulates that *"[t]he Court shall also be bound to conduct the proceedings without delay and to prevent any abuse of the rights of any participant in the criminal proceedings."* It follows from the article cited above that the Court is bound to conduct the proceedings in a rational and efficient manner and to prevent any type of conduct that is obviously aimed at delaying the proceedings and that may lead to the abuse of procedural rights. Mindful of Article 263(2) of the BiH CPC that reads *"[i]f the judge or the presiding judge finds that the circumstances that a party tries to prove are irrelevant to the case or that the presented evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence"*, the Court found that the presentation of this evidence was unnecessary on the grounds that it thought that sufficient evidence in relation to these circumstances had already been presented both by the Prosecution and Defense and that this evidence would not serve to clarify the matter. The Court holds that even if the presentation of this evidence were allowed, it would have neither the probative value nor the required relevance to lead to the rendering of a different verdict in the present case.

However, on 4 November 2008, the Defense Counsel for the Accused submitted to the Court a motion of the same content, in which it moved the Court once again to issue an order for the analysis by a document examiner although the Court had already decided and publicly announced its decision upon this motion at the hearing held the day before. This only confirms what has already been stated above, namely that by acting in this way the Defense Counsel for the Accused sought to obstruct and delay the proceedings, which the Court must not allow under any circumstances.

e) Decision on the Method of Examination of Witnesses

At the hearing held on 26 August 2008, the Prosecutor's Office of BiH informed the Court that it contacted witness Radmila Živak, who informed them that, for reasons of private nature, she is not willing to come to the Court of BiH and testify, and that she agrees to testify only via video-link. On this occasion, the Prosecution announced that it would file a written submission to establish a video-link with the court in Belgrade, which it did on 12 September 2008. Since this witness was proposed by the Defense Counsel for the Accused as witness for the defense too, he agreed with the Prosecution motion to examine this witness via a video conference link with the court in Belgrade.

Pursuant to Article 86(6) of the BiH CPC which stipulates that *"[g]iven age, physical and mental condition, or other justified reasons the witness may be examined using technical means for transferring image and sound in such manner as to permit the parties and the defense attorney to ask questions although not in the same room as the witness"*, in view of the consent of parties to the proceedings and the fact that apart from witness "A", witness Radmila Živak is the only eyewitness of the critical events and consequently one of the key witnesses in the present proceedings who may give relevant and valuable information in her testimony before the Court that would significantly contribute to clarifying the matter, as well as the fact that the witness currently lives in Sremska Mitrovica - the Republic of Serbia, the Court decided to grant the Prosecution motion to examine this witness via a video conference link with the court in Belgrade.

f) Principle for the Evaluation of Evidence - Admission of the Record on search and part of the text on the Search Order, CD with photographs of the search and other documentary evidence

Among other evidence it presented at the main trial, the Prosecution moved for the admission into evidence of the Record on the search of the apartment, the Search Order, as well as the CD with photographs of the search. The Defense contested this evidence arguing that it is unlawful since it was obtained unlawfully as, in the view of the Defense, the search was conducted in violation of the law, that is, it was carried out outside of the timeframe specified by the Court for the search.

In response to the Defense allegations concerning the above evidence proposed by the Prosecution, the Prosecution stated that such allegations were unfounded, that the Prosecution evidence was obtained in a lawful manner and that it can be admitted as evidence from the point of view of legal admissibility. To this end, the Prosecutor examined two SIPA officials who participated in the search, while the Defense, in the context of the

defense case, examined two persons who witnessed the search, with the daughter of the Accused Zrinko Pinčić, whom the Prosecution wanted to examine in relation to the same circumstances since she herself was present at the time of the search and personally signed both the receipt of the Search Order and the Record, refusing to testify on the basis of the rights accorded to her, as the daughter of the Accused, by law.

Having evaluated all the evidence noted above, the Court found that the Defense allegations were unfounded and resultantly the Prosecution evidence, namely the Record on the search of the apartment, the Search Order and the CD with photographs of the search, was deemed to have been obtained lawfully and was evaluated as such in the context of the evidentiary proceedings. The following, however, should be added.

Article 15 of the BiH CPC establishes the principle of free evaluation of evidence, which gives the right to the Court to evaluate the existence or non-existence of facts freely, that is, the right of the Court to evaluate whether a certain fact exists or not shall not be related or limited to special formal evidentiary rules. The probative value of the evidence is not set in advance, neither in the qualitative nor quantitative terms. In the process of free evaluation of evidence, the Court is obliged to evaluate each piece of evidence individually and in correlation with other evidence, and then based on such evaluation make an inference as to whether a certain fact has been proven or not. Such evaluation of evidence entails their logical and psychological assessment. Free evaluation of evidence is limited by the principle of legality of evidence.

Article 10 of the BiH CPC defines the notion of legally invalid evidence as the information that has been obtained or presented in the manner proscribed by law. The evidence obtained through violation of fundamental human rights and freedoms, as well as through essential violation of the procedural code constitutes legally invalid evidence that, together with the evidence obtained in an unlawful manner, is considered as legally unsound evidence which may not serve as the basis for a court's decision.

The legally invalid evidence may be grouped in three categories:

1. Evidence obtained through violation of certain fundamental rights and freedoms,
2. Evidence that is explicitly specified in the law as the evidence not to be used in rendering a court's decision in the criminal proceedings,
3. Evidence that would not have been obtained by the prosecution authorities had it not been for the information derived from the invalid evidence (the so called fruit of a poisonous tree).

Article 274(2) of the BiH CPC deals with the authenticity of the evidence that must be original writings, recordings, photographs or the equivalent. Article 20(p) of the BiH CPC defines the term "original" as referring to an actual writing, recording or similar equivalent intended to have the same effect by a person writing, recording or issuing it. Under this subparagraph, an "original" of a photograph includes the negative or any copy thereof. For the purpose of criminal procedure, Article 20(r) of the BiH CPC defines the term "duplicate" as referring to a copy generated by copying the original or matrix by using different techniques (scanning, enlargements, miniatures, re-recording, reproduction) that accurately reproduce the original. Various technical recordings may be used as evidence in the criminal

proceedings provided that they have been obtained under the conditions and in a way set out in the BiH CPC. The judgment, however, may not be based exclusively on recordings as the only evidence because this brings into question Article 6(2) (Presumption of innocence) and Article 8 of the ECHR (Right to respect for private and family life) – See Schenk v Switzerland, Judgment of 12 July 1998, Series A, number 140.

The issue of whether a document, the contents of which is important for the process of proving one's criminal responsibility, is an original or duplicate is often subject of much discussion. In principle, the position is that there is a need for the documents submitted to the Court to be original, but this position in itself does not exclude the possibility of the use of a copy of a certain document as legally valid evidence. In its Decision, number I Kž-645/01, the Supreme Court of the Republic of Croatia stated as follows:

> *"The accused are right when they say that all documents which have probative value should be submitted in original, which in the present case was not done with the record of the questioning of the suspect N.Š, dated 8 May 1999 (sheet 72-74 of the case file), nor did the first instance court, despite its efforts, succeed in obtaining the original during the proceedings. However, contrary to the arguments stated in the appeal, it cannot be accepted that this is unlawful evidence in terms of Article 9(2) of the CPC only because of this formal omission, given that the accused Š. does not challenge the authenticity of that record, and that it was not obtained by breaching the defense rights guaranteed by the Constitution, the law or international law, while, also during the main trial when he presented his defense, the Accused himself stated that he maintained that defense, which was then read out and for which he said that what was read out was exactly what he had stated to the law enforcement authorities. In addition, given that the accused Š. completely denies the commission of the offense, it is inadmissible that the contested judgment be based on that evidence, and therefore, even if it were accepted that this is evidence referred to in Article 9(2) of the CPC, the ground for appeal for the unlawful violation referred to in Article 367(2) of the CPC would not be satisfied."*

The European Court of Human Rights (hereinafter: ECtHR) established a general rule that the evaluation of evidence is a matter to be dealt with by the national courts. As for the decisions of the ECtHR, it was established as a general rule that the evaluation of evidence is a matter to be dealt with by the national courts. Since there is no explicit provision on it in the Convention, the ECtHR stopped short of setting the rules on evidence and firmly maintained that it is not upon this court to adjudicate on whether the evidence was properly admitted at the trial, which in principle is the issue regulated under the national law, but to determine whether the trial as a whole was fair. Whilst analyzing whether the trial was fair or not, the Court looks into the manner in which the evidence was obtained and if evidence was obtained through violation of one of the rights from the Convention, as well as the nature of such violation. The ECtHR took a following position:

Although Article 6 [...] of the Convention guarantees the right to a fair trial, it does not set any rules on the admissibility of evidence as such, and as a result of that it is primarily an issue regulated under the national law. The Court, therefore, may not exclude in principle or in general terms the possibility that unlawfully obtained evidence of this type may be admissible.

In the *Khan v The United Kingdom* case, the ECtHR took a position that the use of evidence obtained in the manner that violates the rights from the Convention is not necessarily a violation of the right to a fair trial. In this particular case, it was not suggested that the right to a fair trial necessarily entails the exclusion of evidence obtained in the manner that violates Article 8, but that a convicting verdict based *only* on the evidence obtained through unlawful acts by the prosecution authorities is in contravention of the legal provisions and Article 6. In dismissing the appeal filed by the appellant, the Court noted that he had ample opportunity to contest the authenticity of the recording and that the national courts have a discretionary right to exclude evidence if they believe that admitting them would render the trial unfair.

Since it is necessary to strike a right balance between fundamental rights of the Accused and essential interests of the criminal prosecution of persons charged with grave violations of the international humanitarian law, the Court found, in the present case, that the Defense allegations contesting the validity of this evidence are unfounded. This is so because the Court did not find a single reason why the SIPA officers would conduct the search of the apartment owned by the Accused prior to the time specified in the Order. To wit, the SIPA personnel themselves, as experienced officers, could not have possibly completed their part of the action, the aim of which was to arrest a person suspected of having committed a war crime and whose arrest had been planned in detail at the meeting held that very same morning, prior to the time specified in the Court's Order for a number of reasons that the Court will explain in detail below.

4. Closing arguments

a) Prosecution

In its closing arguments, the Prosecution stated that it is of the view that through the examination of witnesses and the documentary evidence presented and admitted into the court case-file, it proved beyond any reasonable doubt the existence of an armed conflict as the primary and general element of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the BiH CC, as well as the fact that at the time of the commission of the criminal offense, witness "A" was a civilian, that is, a person protected under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 29 August 1949, more specifically Article 3 of the Convention, which, among other things, prohibits torture, outrages upon personal dignity, in particular humiliating and degrading treatment, including rape which surely is a form of torture, outrage upon personal dignity and a particularly humiliating and degrading treatment. Article 27 of the Convention strictly prohibits rape or any form of indecent assault. The Prosecution further pointed out that through the evidence adduced at the main trial, it proved beyond a reasonable doubt that the Accused Zrinko Pinčić was a member of HVO as a military conscript mobilized into the unit of HVO Hrasnica and assigned to the position of a secretary within the unit. To wit, the Accused was a person with a military uniform and weapons issued to him, that is, a soldier, which was corroborated by the expert witness Dragan Majstorović and the Prosecution documentary evidence, while witness "A" was a person who suffered a trauma, who, not of her own accord but by the will of others, came to live in Donje Selo, which was a camp for all Serb refugees because they could not move freely in it without permits and frequent

check-ups, that is, they were detained and their lives were in the hands of others.
Finally, the Prosecution pointed out that it proved beyond a reasonable doubt that the Accused committed the criminal offense at the time of the armed conflict between the HVO and Army of BiH on one side, and the VSRBiH on the other, as a member of one belligerent party at the time and in the manner described in the Indictment, that the criminal act committed by the Accused constitutes a grave violation of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, that at the time of the commission of the criminal offense, witness "A" was a civilian, that is, a person protected under this Convention and that the criminal offense committed by the Accused was not justified by military necessity since witness "A" did not pose any military threat.

b) Defense

In his closing arguments, Defense Counsel for the Accused primarily objected to the application of the BiH CC to the present case, pointing out that under Article 6 of the ECHR, which foresees the right of everyone to a fair trial, the CC SFRY as a more lenient law to the perpetrator should have been applied in the present case.
The Defense further noted that it does not contest the existence of an armed conflict at the time and in the territory covered in the Indictment, but not between the HVO and Army of BiH on one side and VSRBiH on the other as argued by the Prosecution, but between the HVO and Army of BiH, which the Defense proved beyond a reasonable doubt in the course of the proceedings through the examination of defense witnesses.
The Defense is also of the view that through the evidence it adduced during the main trial, in particular the examination of witnesses, some of whom were superior to the Accused at the relevant time, it proved that the Accused was a civilian person at the critical time, who discharged his duties within the HVO unit as a secretary, which by nature is a civilian rather than military position, as the Prosecution tried to prove during the proceedings.
The Defense also challenged the Prosecution's claim that Donje Selo was a camp for the Serb refugees at the relevant time, arguing that Serbs and Croats in Donje Selo had the same treatment, protected and assisted each other, enjoyed a full freedom of movement without any limitations, which is why these persons cannot under any circumstances be referred to as detainees.
During the proceedings, the Defense succeeded in proving that the Accused and the injured party were in the love relationship and that sexual intercourse occurred exclusively with the consent of the injured party. This was corroborated by the defense witnesses, some of whom testified that they saw them in Konjic walking hand in hand and that on several occasions, the injured party came to the office looking for the Accused.
Reacting to the testimonies given by the prosecution witnesses and expert witnesses, the Defense pointed out that the Court should not give credence to them because they lack the required probative value, noting in particular that the search of the Pinčić family house was conducted in an unlawful manner, and hence all the evidence obtained in the search was unlawful. The expert witness finding should not be trusted either because it is too broad and does not refer to the period relevant to the Indictment.
Finally, the Defense moved the Court that following the evaluation of all the presented evidence, it renders a verdict acquitting the Accused of the charges.

5. Applicable law

Article 3 of the BiH CC stipulates the principle of legality, that is, 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. Furthermore, Article 4 of the BiH CC stipulates 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; 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 is also stipulated under Article 7(1) of the ECHR. The European Convention for the Protection of Human Rights supersedes all legislation of BiH pursuant to Article 2(2) of the BiH Constitution. Furthermore, this provision of the ECHR stipulates the general principle prohibiting a heavier penalty than the one that was stipulated at the time when the criminal offense was committed, but does not stipulate the application of the most lenient law.

Article 4a of the BiH CC stipulates that Articles 3 and 4 of the BiH CC 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."*
Article 7(2) of the ECHR stipulates the same exemption, providing that paragraph 1 of the same 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."* (See also Article 15(1) and (2) of the International Covenant on Civil and Political Rights, which contains similar provisions. The State of Bosnia and Herzegovina, as a successor of Yugoslavia, ratified this Covenant).

This provides for the possibility to depart, under the described circumstances, from the principles laid down in Articles 3 and 4 of the BiH CC (and Article 7(1) of the ECHR) and from the application of the criminal code applicable at the time of the commission of the criminal offense and the application of a more lenient law in proceedings constituting criminal offenses under international law.

The Court points out that the crime for which the Accused has been found guilty constitutes crime under international customary law and thus falls under *"general principles of international law"* stipulated under Article 4a of the Law on Amendments to the BiH CC and *"general principles of law recognized by civilized nations"* stipulated under Article 7(2) of the ECHR, and thus the BiH CC can be applied in this case on the basis of these provisions.

Furthermore, the fact that the criminal acts listed in Article 173 of the BiH CC can also be found in the law which was in effect at the relevant time period – at the time of the perpetration of the offense, specifically under Article 142 of the SFRY CC, means that these criminal offenses were also punishable under the then applicable criminal code, which additionally supports the conclusion of the Court regarding the principle of legality.

Finally, the application of the BiH CC is further justified by the fact that prescribed punishment is surely more lenient than death sentence that was in force at the time of the commission of the criminal offense, which is in line with the principle concerning the temporal application of the criminal code, that is, the application of the law that is more lenient to the perpetrator.

The foregoing is in line with the position of the Appellate Division of Section I of the Court of BiH taken in its Verdict against Abduladhim Maktouf number KPŽ 32/05, dated 4 April 2006, and the Verdict against Dragoje Paunović number KPŽ 05/16, dated 27 October 2006. The Constitutional Court of Bosnia and Herzegovina deliberated on this issue in the A. Maktouf Appeal (AP 1785/06) and stated in its Decision dated 30 March 2007: "68. In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long term imprisonment, as often done by the International Criminal Tribunal for crimes committed in the territory of the former Yugoslavia (the cases of Krstić, Galić, etc.). At the same time, the concept of the SFRY CC was such that it did not stipulate either long term imprisonment or life sentence but death penalty for the gravest crimes and maximum 15 year imprisonment for less serious crimes. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law." "69. In this context, the Constitutional Court holds that it is not possible to simply 'eliminate' the sanction and apply other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."

In the opinion of the Panel, the principle of mandatory application of a more lenient law is ruled out in the trial of criminal offenses for which at the time of the commission it was absolutely predictable and commonly known that they were contrary to the general rules of international law. In the specific case, it is taken as established that the Accused had to know that in the state of war application of international rules has priority and that a violation of internationally protected values carries heavy consequences. If the provision of Article 173 of the BiH CC is analyzed, it is obvious that it has been clearly stated that the body of this criminal offense includes, inter alia, elements of violation of international rules. This makes this group of offenses special, because it is not sufficient only to commit such criminal offenses through certain physical activity, but what is necessary is the awareness that the international rules are being violated by the commission and the assumption that the accused must know that the period of war or conflict or hostilities is especially sensitive and especially protected by the commonly accepted principles of international law and, as such, the offense gains an even greater significance and its commission carries even more serious consequences than an offense committed in another period.

Also, at the time when the criminal offenses were committed, Bosnia and Herzegovina, as a successor state of SFRY, was a signatory party to all relevant international conventions on human rights and international humanitarian and/or criminal law.[1]

[1] *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 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*

Also, customary status of criminal responsibility for War Crimes against Civilians and individual responsibility for war crimes committed in 1992 was recognized by the UN Secretary-General[2], the International Law Commission[3], as well as jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)[4]. These institutions have established that criminal responsibility for War Crimes against Civilians constitutes a peremptory norm of international law or *jus cogens*.[5] That is why it appears undisputable that War crimes against Civilians constituted part of customary international law in 1992. This conclusion was confirmed by the Study on Customary International Humanitarian Law[6] conducted by the International Committee of the 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 in 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 the 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 by the International Law Commission (1950) refer to "the Nurnberg Charter and the Judgment of the Tribunal", hence to war crimes in general. "Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal", which were adopted by the International Law Commission in 1950 and submitted to the General Assembly, prescribe in Principle I that "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 under "general principles of international law" referred to in Article 3 and Article 4(a) of the BiH CC. That is why, regardless of whether viewed from the aspect of customary

---

Convention on Apartheid (1973); The Convention on the Elimination of All Forms of Discrimination against Women (1979); The UN Convention against Torture (1984).

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

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

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

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

[6] *Jean-Marie Henchaerts and Louise Doswald-Beck, Customary International Humanitarian Law, ICRC, Cambridge University Press, 2005, pages 568 et seq.*

international law, international treaty law or "the principles of international law", it is indisputable that War Crimes against Civilians constituted criminal offenses at the critical time; in other words, the principle of legality was complied with in the sense of both *nullum crimen sine lege* and *nulla poena sine lege.*

6. Findings of the Court

a) General considerations regarding the evaluation of evidence

The documentary evidence adduced during the main trial was not too voluminous, and in light of it being circumstantial or supporting evidence, that is, given the fact that it is mainly objective evidence confirming certain circumstances or conditions, for instance psycho-trauma suffered by the injured party, the existence of an armed conflict, the Accused's status of a disabled war veteran, membership of the Accused in an army or unit, his position within that unit, which are public documents, the Court will not explain in detail here the manner of evaluation and use of this evidence because there will be an explicit mention of its application in the context of the final evaluation of decisive evidence concerning the charges against the Accused.

b) General characteristics of the criminal offense of War Crimes against Civilians

Under the Indictment of the Prosecutor's Office, the Accused has been charged with the commission of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e) of the BiH CC, which reads:

"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)...

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

The general elements of the criminal offense of Crimes against Civilians, which need to be proven by the Prosecution, follow from the legal definition thereof:

i. The act of the perpetrator must be committed in violation of the rules of international law;
ii. The violation must take place in time of war, armed conflict or occupation;
iii. The act of the perpetrator must be related to war, armed conflict or occupation;
iv. The perpetrator must order or perpetrate the act.

i. The act of the perpetrator must be committed in violation of international law

The indictment charges the Accused Zrinko Pinčić with Crimes against Civilians in violation of Article 173(1)e) of the BiH CC, namely, that in the relevant period he acted contrary to Article 3(1)(a) and (c) of the Geneva Convention relative to the Protection of Civilian

Persons in Time of War from 1949 (hereinafter: the Geneva Convention).

Article 3(1)(a) and (c) of the Geneva Convention reads:
"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, among others, 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) outrages upon personal dignity, in particular, humiliating and degrading treatment.

Article 27(2) of the Convention prescribes as follows: *"Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."*

Article 2(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) provides:
"'Rules on international law applicable in armed conflict' means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law".

Common Article 3 of the 1949 Geneva Convention is generally considered a provision of customary law and it is binding on all parties to a conflict, either internal or international, and therefore this provision was in effect at the time and in the place of the incidents charged against the Accused.
In order to establish a violation of the rules of international law, it is necessary to establish against whom the commission was directed, that is, whether the act was directed against the special category of population protected by Article 3(1) of the Geneva Convention.
According to the definition of the term protected categories contained in Article 3(1) of the Geneva Convention, civilians are persons not taking part in hostilities, including members of armed forces who have laid down their arms and/or those placed hors de combat.[7]

Moreover, Protocol I Additional to the Geneva Conventions defines civilians in the negative by stating that civilians are "those persons who are not members of the armed forces".[8]

[7] *Prosecutor v Blagojević and Jokić*, Case no. IT-02-60-T, Judgment, 17 January 2005, paragraph 544.
[8] J. Pictet et al, Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, p. 610.

Article 43(1) of the Protocol prescribes that:[9]

"[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."

Thus, apart from members of the armed forces, every person present in a territory is a civilian.[10] Article 50 of Protocol I further considers that the civilian population is made up of all persons who are civilians and that the presence within that civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. Article 50 also states that in case of doubt, a person should be considered to be a civilian.

Therefore, considering the definition of the term "civilian", explicitly stating that civilians are all persons who are not taking part in hostilities and who are not members of the armed forces, it is clear that witness "A", who has been injured by the criminal conduct of the Accused as described in the operative part of the Verdict, was a civilian, a person who in no way participated in the armed forces and who was protected by international law. Neither witness "A" nor other civilians who were detained together with her in Donje Selo had weapons, nor were they in a position to fight. Injuries to life, bodily integrity and personal dignity, as well as humiliating and degrading treatment inflicted upon this category of persons are especially forbidden by the rules of international law. Therefore, it is obvious that the criminal acts referred to in the Indictment, which, as it will be explained in the text below, the Accused committed, were contrary to the rules of international law, namely Article 3(1)(a) and (c) of the Geneva Convention.

ii. The violation must be committed in time of war, armed conflict or occupation

Article 173 of the CC BiH foresees that a criminal offence must be connected with violations of international law rules in time of, among others, armed conflict. Since the Panel has found that the actions of the Accused fulfill the elements of the violations of international law rules, namely of Article 3(1)a) and c) of the Geneva Convention, which foresees that the Article shall be applied to armed conflict that is not of an international character, therefore the Panel concludes that many courts have found that this Article applies not only to internal conflicts, but also to international conflicts.[11] However, the Court did not deal with determining the character of the armed conflict, for which it was established in the case at

[9] Besides pointing to Article 43 of Additional Protocol I, Article 50 („Definitions of civilians and civilian population") of the same protocol also makes explicit reference to Article 4(A) of the Third Geneva Convention concerning those included in the definition of armed forces. The Commentary to Article 50 of Additional Protocol I, however, suggests that Article 43 of Additional Protocol I contains a new definition that includes the provisions of Article 4(A) of the Third Geneva Convention; see *supra* note 4, p. 611.
[10] See *supra* note 4, p. 611.
[11] *Prosecutor versus Delalić and others*, case number IT-96-21-A, Verdict, 20 February 2001, paragraphs 140-152, especially paragraph 147. See also *Prosecutor versus Hadžihasanović and others*, case number IT-01-47-AR72, *Decision on the interlocutory appeal which denies the competence with regard to command responsibility*, 16 July 2003, paragraph 13.

hand that it took place in BiH during the time relevant for the Indictment, since Article 173 of the CC BiH does not require that the character of armed conflict, either internal or international, must be determined.

Armed conflict exists whenever states resort to armed force or in case of continuous armed violence between state authorities and organized armed groups or between such groups within a state. In view of common Article 3, the nature of armed conflict is irrelevant. Namely, it does not matter if serious violation took place within the context of international or internal armed conflict, providing that the following requirements are met: violation must represent breaches of international humanitarian law provisions; the provision must be of customary nature or, if it belongs to treaty law, the required conditions must be fulfilled; violation must be serious, that is, it must represent breaches of the provision that protects important values, while violation must have serious consequences for the victim, and the violation of the provision must include individual responsibility of the person who violates the provision.

During the proceedings, the fact was indisputably proven that armed conflict existed during the relevant period and in the relevant region, which undoubtedly stems from the Decision of the Presidency on proclamation of state of war ("Official Gazette of RBiH" number 7/92) dated 20 June 1992, as well as from consistent statements of the heard Prosecution and Defense witnesses. However, it was disputable whether the parties involved in the armed conflict during the time referred to in the Indictment were the Army of BiH and the HVO on one side and the VSRBiH on the other side. Contrary to the thesis of the Prosecutor's Office that the warring sides in the territory of the Municipality of Konjic during the critical period were the Army of BiH and the HVO on one side and the VSRBiH on the other side, the Defense of the Accused claimed that the VRSBiH and the HVO were allies in the armed conflict against the Army of BiH. Having assessed all pieces of evidence presented, the Court has determined beyond reasonable doubt that during the relevant period the armed conflict existed between the HVO and the Army of BiH on one side and the VSRBiH on the other side, which was undoubtedly confirmed by the statements of Prosecution witnesses, as well as by the statements of Defense witnesses. These facts were also established by the final verdict of the Hague Tribunal number: IT-96-21 dated 16 November 1998 in the Prosecutor versus Zejnil Delalić, Zdravko Mucić a.k.a. Pavo, Hazim Delić and Esad Landžo a.k.a. Zenga case, namely the facts contained in the paragraphs 188, 189, 191 and 192, which were also accepted by this Panel in its Decision dated 26 September 2008.

The following witnesses testified about these circumstances:

In her statement witness "A" noted among others that in March 1993 disagreements and a conflict occurred between the HVO and the Army of BiH, at which point she left Donje Selo.

In his statement, Prosecution witness Željko Žilić confirmed that the relations between the HVO and the Army of BiH were good and fair and that the conflict between these two armies broke out in April 1993 with the attack of the Army of BiH on Croat villages.

Witness Vjekoslav Oroz, who was a member of the same unit as the Accused, also stated that the conflict broke out and that the alliance between the Army of BiH and the HVO was

terminated in April, more precisely on 18 April 1993, when the Army attacked the HVO, which left the territory after that.

In her statement witness Radmila Živak also noted that the conflict between the Army of BiH and the HVO broke out in mid April 1993, which was confirmed by witness Gordana Gligorević in her statements as well.

Defense witness Ljubo Pogarčić also confirmed that the conflict between the Army of BiH and the HVO took place during 1993 and that after the conflict the HVO Hrasnica left the territory of Donje Selo.

Defense witness Nikola Perić also stated that the Army of BiH and the HVO were allies during the relevant period and that the alliance was terminated only on 14 April 1993, which was confirmed by witnesses Željko Komšić and Ilija Šagolj too.

Having assessed the consistent statements of Prosecution witnesses, as well as the statements of Defense witnesses, the Court has determined beyond reasonable doubt that during the relevant period the armed conflict existed between the Army of BiH and the HVO on one side and the VSRBiH on the other side, whereby the Court does not deny the fact that during the alliance between these two armies there were certain conflicts and incidents between them, however the real termination of the alliance and the breakout of the armed conflict took place only in April 1993.

It is also important to note that during the proceedings before the ICTY several defense teams have (unsuccessfully) denied the existence of the armed conflict regarding the specific crime charged against the Accused as well, claiming that the crime was committed in time other than the time of the armed conflict (the cases *Kunarac, Blaškić, Tadić*…). However, "it is (not) necessary to prove that the conflict took place on every single meter of the surface area included in the framework of the conflict". Crimes must be linked with the armed conflict, with their nature or their consequences, so that they could be treated as war crimes". However, in order to be treated as a war crime, an individual act does not have to coincide in time and space with the effective conflict and it can be committed away from the direct combat (the *Vasiljević* and *Rutaganda* cases). The crime itself does not necessarily have to be of "military" nature and it does not necessarily have to be a part of politics or an officially encouraged practice, a plan and so on.
It is considered that armed conflict exists "wherever states resort to armed force or in case of extended armed violence between state authorities and organized armed groups or between such groups within a state."

The area in which the combats are concretely taking place does not necessarily correspond with the geographic zone to which law of war applies. It is applied to the entire territory of the warring states, that is, in case of internal armed conflicts to the entire territory under the control of one side, regardless of whether combats are really taking place in that place, until a peace agreement is signed or, in case of internal conflicts, until a peace solution is found. Therefore, violations of the laws and customs of war can be committed at time and in place where no combats are taking place. Namely, a close nexus between the acts of the Accused and the armed conflict can exist even if the crimes were not committed at the time the actual combats took place or in the very place they were taking place. In order for this condition to

be fulfilled, it would be sufficient if, for example, the crimes were closely linked with the hostilities which were taking place in other parts of the territory under the control of the sides involved in the conflict.

The ultimate difference between a war crime and a common criminal offence which is under the jurisdiction of national legislature is the fact that war crimes are determined by the context in which they were committed – armed conflict – or they depend on it. A war crime is not necessarily a planned action or a result of politics. The casual connection between armed conflict and the commission of a crime is not required, however it is at least required that the existence of armed conflict significantly influenced the ability of the perpetrator to perpetrate the crime, his decision to perpetrate it, the manner in which the crime was perpetrated or the aim with which it was perpetrated. Therefore, it is sufficient to determine, as in the case at hand, whether the perpetrator acted in service of armed conflict or under auspices of armed conflict so that it could be concluded that the criminal offences are closely linked with armed conflict. The Court's conclusion on this issue is indisputable.

In order to determine whether a certain action is connected with the armed conflict to a significant extent, the Court has, among others, considered the following factors: the fact that the perpetrator of the crime was a soldier, the victim was not a soldier and the victim belonged to the opposite side. It is indisputable that law of war can often refer to the actions which, to be fair, were not committed in the place where operations were conducted, but which were crucially connected with the conflict. Law of war can be applied to two types of criminal offences. Law of war does not necessarily substitute the laws that were effective in time of peace: it can add to them necessary elements of protection which must be offered to victims in time of war.

iii. An action of the perpetrator must be connected with war, armed conflict or occupation

The third requirement allows a distinction to be made so that not all crimes committed during armed conflict can be automatically marked as war crime. International jurisprudence has decidedly determined that, in order to mark an act as a war crime, sufficient nexus with armed conflict must exist; that is, actions of the Accused must be "closely connected with armed conflict".[12]

This close connection does not necessarily mean that combats must indeed take place in the territory where the actions were perpetrated. Appellate Chamber of the ICTY in the *Tadić* case found that: "international humanitarian law is applied to the entire territory of the warring states or, in case of internal conflicts, to the entire territory under the control of a side involved in the conflict, regardless of whether combats are taking place there or not, and it continues to be applied until a peace agreement is signed or, in case of internal armed conflicts, until a peace solution is found."[13]

[12] See, *inter alia*, *Prosecutor versus Kunarac*, case number IT-96-23 & IT-96-23/1-A, verdict, 12 June 2002. paragraph 55; *Prosecutor versus Vasiljević*, case number IT-98-32-T, verdict, 29 November 2002, paragraph 24; Decision on jurisdiction of the Court in the Tadić case, paragraph 70.
[13] Decision on jurisdiction of the Court in the Tadić case, paragraph 70.

Furthermore, "a casual connection between armed conflict and commission of crime is not actually required. However, it is at least required that the existence of armed conflict significantly influenced the ability of the perpetrator to perpetrate the crime, his decision to perpetrate it, the manner in which the crime is perpetrated or the aim with which it was perpetrated."[14]

Bearing in mind the evidence presented, the Court finds that the actions of the Accused were sufficiently connected with the armed conflict. The Court particularly bore in mind the position of the Accused within the military structure – that is, his capacity of the Secretary of the HVO Hrasnica unit within the "Herceg Stjepan" Brigade Konjic, his presence in the place where the crime was committed, as well as the length of the time period during which he acted towards the injured party in a prohibited manner. In addition, considering his work and duties, there can be no doubt as to the knowledge of the Accused about the armed conflict and the fact that he participated in it to a large extent.
During the proceedings it was disputable whether the Accused as the Secretary of the HVO Hrasnica within the "Herceg Stjepan" Konjic Brigade was a civilian or a soldier. During the entire course of the proceedings the Prosecutor's Office represented the thesis that during the time of the perpetration of the criminal offence the Accused was a member of the military structure within the HVO and it presented a large number of pieces of documentary evidence and heard a large number of witnesses about these circumstances. As opposed to the Prosecution, during the proceedings the Defense tried to prove that during the relevant period the Accused performed a civilian post and that the Accused was not militarily engaged during the critical period.

Having assessed the evidence presented during the main trial, the Court removed every doubt as to whether the Accused performed a military or a civilian post during the critical period, that is, whether he was a soldier or a civilian. The Court has determined in a reliable and indisputable manner that the Accused was a soldier and this fact undoubtedly stems from the documentary evidence of the Prosecution, particularly from: the military booklet, the disabled veteran booklet and the personal file issued for Zrinko Pinčić, the Certificate issued for Zrinko Pinčić by the MO HR HB */the Ministry of Defense of the Croat Republic of Herceg Bosna/* dated 25 February 1997, the Certificate of the MO HR-HB issued for Zrinko Pinčić, the Certificate of the HR-HB-HVO Hrasnica dated 27 July 1994, the Certificate of the MO HR-HB dated 22 March 1996. This fact is also corroborated with consistent statements of witness "A", Radmila Živak and Gordana Gligorević, who often used to see the Accused during the relevant period and they remember him as a person who was always dressed in military uniform and who was armed. In his statement the Defense witness Ljubo Pogarčić noted during the main trial that "…the Accused was a soldier, but he performed civilian work". However, contrary to the Prosecution evidence and the statement of this Defense witness, the Court could not believe the statement of certain Defense witnesses who claimed that the Accused was a civilian within the HVO and that he had a rifle for the sake of his personal safety and that he wore uniform because he did not have any civilian clothes. Namely, these statements are completely contradictory to the above-mentioned pieces of documentary evidence which were issued by relevant organs and which, as such, represent public documents, as well as to the heard witnesses, as it was noted above.

[14] *Prosecutor versus Kunarac and others*, case number IT-96-23 & IT-96-23/1-A, verdict, 12 June 2002. paragraph 58;

With regard to these circumstances, the Prosecutor's Office examined, as additional evidence, the expert witness Dragan Majstorović, who clarified in his statement that the person who was described in the certificates of the relevant authorities as a member of the HVO Hrasnica within the "Herceg-Stjepan" Brigade was a soldier and that only soldiers and not civilians could be recognized as homeland war veterans, which is also the case with the Accused. The witness also clarified that, during the war in BiH, only persons who were military engaged – soldiers were issued with military uniforms and weapons, whereas civilians had neither.

The Court considered the allegations of the Defense regarding the armed conflict, namely that along with the conflict between the Army of Republika Srpska and the Army of BiH there was also armed defense of the HVO from the assaults of the Army of BiH, whereby in addition to the evaluation of evidence presented during the main trial, the Court has found it determined that during the relevant period the conflict existed between the Army of BiH and the HVO on one side and the VSRBiH on the other side, while the Court did not deny the fact that during the alliance between these two armies there were certain conflicts and incidents among them, however the real termination of the alliance and the armed conflict between them took place only in April 1993. Furthermore, the Court has reliably determined that the victim of the events charged against the Accused is strictly a civilian and not a member of such armed groups. In view of this, the Court bore in mind that Article 51(3) of the Additional Protocol I stipulates that civilians shall enjoy protection unless they take a direct part in hostilities, that is, for as long as they do not directly participate in hostilities. The Court has concluded that members of the armed forces, namely the Army of BiH, the HVO and even the members of the TO, have the status of soldiers all the time, even while they rest at home, or while they carry weapons.[15]

iv. The perpetrator must order or commit a crime

Based on the statements of the witnesses and the analysis of the documentary evidence, either individually or jointly, the Court has established that during the war in Bosnia and Herzegovina, at the time of the armed conflict between the Army of the Republic of Bosnia and Herzegovina and the Croat Defense Counsel on one side and the armed forces of the Serb Republic of Bosnia and Herzegovina on the other, starting from November 1992 until March 1993, the Accused, being a member of the Croat Defense Council, in the capacity of the Hrasnica HVO Secretary within the "Herceg-Stjepan" Brigade Konjic, in Donje Selo, on

[15] *Prosecutor versus Kordić and Čekez*, case number IT-95-14/2-A, verdict, 17 December 2004, paragraph 51.
As the Trial Chamber I of the ICTY concluded in the *Akayes* case, the definition of rape in international law should be approached based on the premise that „the key-elements of the crime of rape cannot be presented through mechanical description of an object or a body part". In the opinion of that Trial Chamber it would be more useful to focus in international law „on the conceptual framework of violence along with state... */transl. note: unfinished sentence/*
The International Military Court in Tokyo sentenced generals Toyoda and Matsui based on their command responsibility for violations of the laws and customs of war which were committed by their soldiers in Nanking and which included large-scale rape and sexual assaults. Former Japanese Minister of Foreign Affairs, Hirota, was also sentenced for these atrocities. This Decision, as well as the Decision of the United States Military Commission in the *Yamashita* case (195), along with the fact that the fundamental ban of "ravishment of personal dignity" as set forth in common Article 3 has developed into international customary law, have contributed to the development of the universally accepted international law norms which ban rape and serious sexual assault. These norms are applied to every armed conflict.

several occasions used to come to the house in which civilians of Serb ethnicity – women and children were captured. All the witnesses stated that the security circumstances were not satisfactory, while some witnesses stated that road blocks and check-points were set in certain places on the crossings between the territories under the control of different military formations. Witnesses also stated that when the unusual events commenced all able-bodied men in the territory of the municipality were included in certain units whose primary task was to guard their homes and settlements.

Having analyzed the statements of the heard Prosecution witnesses, the Court finds it proven that the accused Zrinko Pinčić with his actions caused severe physical and mental pain to his victim – the witness "A". The conclusion on this pain and suffering is based on the nature of coercion used by the Accused so that he could have sexual intercourse with witness "A", as well as based on the length of the period during which this relation lasted. The circumstances under which such relation between the Accused and the victim, witness "A" lasted justifiably suggest that the injured party went through the required level of serious pain and suffering. Therefore the Court is satisfied that *coercing another by force or by threat of immediate attack upon her life or limb, or the life or limb of a person close to her, to sexual intercourse* was committed precisely by Zrinko Pinčić with the intent of *violating personal dignity, with particularly insulting and humiliating actions*. He knew that the witness "A" was of Serb ethnicity, with no male protection, alone with her bed-ridden mother, and he treated her accordingly. Therefore, the discriminatory intent of the Accused is clearly visible with regard to the injured party against whom he committed these atrocities.

Therefore, the Panel finds that the Accused committed the criminal offence of War Crimes against Civilians with premeditated intent, that he was aware of the action he committed and that he wanted to commit it.

The action committed by the Accused himself was targeted at severe deprivation of the fundamental rights, such as right to life, freedom and safety, which is in contrast with international law and which, pursuant to the above-quoted provision of Article 3(1) of the Fourth Geneva Convention, cannot be tolerated against unarmed civilians or the persons who are not members of armed forces, in which manner he undoubtedly violated the rules of international law. The actions were committed during the armed conflict about which the Accused knew and in which he undoubtedly participated.

Based on all the above-mentioned and having considered all the statements of the witnesses of the Prosecutor's Office who testified about the events, the Court finds that the statements are reliable, convincing and that they corroborate each other. Therefore, the Panel concludes beyond reasonable doubt that the action of the Accused fulfills the elements of the criminal offence of Crime against Civilians as set forth in Article 173(1)a), e) and c) of the CC BiH and that he is individually responsible for the commission of the offence, as noted in Article 180(1) of the CC BiH.

Based on the statement of the witness "A" who is the direct victim of the criminal conduct of the Accused it undoubtedly stems that the Accused committed the action which represents the criminal offence of War Crimes against Civilians, which action resulted in the violation of her bodily and mental integrity, her personal dignity, due to which she has suffered and is still suffering huge mental traumas and pain. These actions of the Accused, pursuant to the

above-quoted provision of Article 3(1) of the Fourth Geneva Convention */transl. note: sentenced as rendered in the original text/*.

The reasoning of this conclusion of the Court is given in the following text:

iu. Rape and other serious sexual offences in international law

1. International humanitarian law

Rape in time of war is banned explicitly by treaty law: the Geneva Conventions of 1949, the Additional Protocol I of 1977 and the Additional Protocol II of 1977. Other serious sexual offences are banned either explicitly or implicitly by other different provisions of these conventions.

At least the common Article 3 of the Geneva Conventions of 1949, which implicitly includes rape, and the common Article 4 of the Additional Protocol II, which explicitly mentions rape, are applied to this case as treaty law, since Bosnia and Herzegovina ratified the Geneva Conventions and both Protocols on 31 December 1992. Furthermore, on 22 May 1992 the sides involved in the conflict committed themselves to respect the most important provisions of the Geneva Conventions and to ensure the protections guaranteed by them. The ban on rape and serious sexual offences during the armed conflict developed into international customary law. It gradually took a more definite shape based on the explicit ban of rape set forth in Article 44 of the Lieber's Codex and the general provisions included in Article 46 of the Regulations in the Annex IV of the Hague Convention, which should be interpreted along with the "Martens Clause" which is noted in the preamble of this Convention. Although the Nuremberg Court did not specifically charge anyone with rape and sexual assault, rape was qualified as Crime against Humanity as set forth in Article II (1)(c) of the Control Council Law number 10. (10) It cannot be denied that rape and other serious sexual offences during armed conflict imply criminal liability of the perpetrator.

2. International law on human rights

No international instrument on human rights has explicitly banned rape or other serious sexual offences. However, such criminal offences are implicitly banned by the provisions which protect bodily integrity and which are included in all relevant international agreements. The right to bodily integrity is the fundamental right that is reflected in national legislation and therefore it is undoubtedly a part of international customary law. However, in certain circumstances rape can be qualified as torture and, in the opinion of international judicial authorities, it can represent the violations of the norm that prohibits torture. The prosecution of rape as Crime against Humanity is explicitly foreseen in Article 5 of the International Court Statute. If the necessary elements are fulfilled, rape can also represent severe violation of the Geneva Conventions, the violation of the law on war or customs or an act of genocide and it can be prosecuted as such.

3. The definition of rape

The Court holds that the argument of the Prosecutor's Office is indisputable, namely that rape represents a forced act: this means that this act is "accompanied with force or threats that force would be used against a victim or a third party, while such threats are explicit or implicit and must cause grounded fear with the victim that he, she or the third party would be subject to violence, captivity, coercion or psychological oppression". This act is defined as penetration of vagina, anus or mouth by penis, or penetration of vagina or anus by another object. Within this context, penetration of vulva, anus or oral cavity by penis, regardless of how insignificant it may be, is included, whereby sexual penetration of vulva or anus is not limited to penis.
International law does not offer any definition of rape. However, based on the provisions of international agreements, certain general indications can be discerned. Particular attention should be paid to the fact that Article 27 of the 4th Geneva Convention, Article 76(1) of the Additional Protocol I and Article 4(2)(e) of the Additional Protocol II ban rape and "any form of indecent assault" on women. It is justified to conclude that international law, by explicitly banning rape as well as, in general, other forms of sexual abuse, considers rape as the most serious form of sexual offence. This is among others confirmed in Article 5 of the International Court Statute, which explicitly refers to rape, while other less serious forms of sexual offences are implicitly included in the term of "other inhumane actions" set forth in Article 5(i).

Like torture, rape is also used with the aim of intimidation, degradation, humiliation, discrimination, punishment, control over or destruction of a person. Like torture, rape represents ravishment of personal dignity and rape actually represents torture when it is carried out by or on the incentive or with approval or with consent of a state official or other persons in official capacity. The Panel defines rape as physical invasion of a sexual nature committed against a person under circumstances which are coercive". (11)

The Court holds that no other elements besides the above-mentioned ones can be derived from international conventional or customary law, whereby resorting to the general principles of international criminal law or the general principles of international law was neither of any use. Therefore, the Trial Panel finds that, in order to formulate a correct definition of rape based on the criminal-legal principle of specificity (*Bestimmtheitgrundsatz, nullum crimen sine lege stricta*), the principles of the criminal law which are common to all major legal systems in the world should be referred to. These principles can be, with the necessary precaution, derived from national laws.

Whenever a term from criminal law is not defined in international criminal regulations it is justified to rely on national legislature, providing that the following requirements have been met: (i) unless noted otherwise in international rule, it is not good to refer to only one national-legal system, e.g. only to the common law or to civil law. On the contrary, international courts must derive from the general terms and legal institutes which are common to all major legal systems of the world. This implies the process of the identification of the common denominator in these legal systems so that their common terms could be determined; (ii) since "international trials show many characteristics by which they differ from national criminal proceedings", while using terms from national law, the

specifics of international criminal proceedings should be considered. In this manner, mechanical transplantation or transposition from national law to international criminal proceedings is neglected.

At the very beginning the Court would like to note that the tendency of widening the definition of rape can be noticed in national legislature of many states, in the manner that it now includes the actions that have so far been qualified as relatively less serious crimes, that is, crimes of sexual or indecent assault. This trend suggests that on the national level states tend to take a more strict position towards serious forms of sexual offence: more and more numerous category of sexual offences is now branded with the same disgrace as rape, providing of course that certain criteria have been met, primarily the criterion of forced bodily penetration.

Laws of several jurisdictions say that the *actus reus* of rape consists of penetration of female sexual organ by male sexual organ regardless of how insignificant it may be. However, there are jurisdictions which interpret the *actus reus* of rape in a broader manner. Provisions of civil law jurisdictions often contain formulations which can be *proprio motu* interpreted by courts. Furthermore, in all jurisdictions the element of force is necessary, as well as coercion, threat or acting without the victim's consent: the use of force can be widely interpreted and it includes bringing the victim in a helpless position. Some jurisdictions note that force or intimidation can be focused on a third person. Aggravating circumstances usually include death of the victim, participation of several perpetrators, age of the victim, as well as the fact that the victim suffers from a state that makes him/her particularly vulnerable, for example from a mental illness. Rape is almost always punished with imprisonment, even with life-time imprisonment, however the length of sentences that can be pronounced differs significantly in different jurisdictions.

Based on this overview of national legislature it is obvious that, regardless of unavoidable differences, the majority of legal systems in common law and civil law define rape as forced sexual penetration of a human body with penis or forced insertion of any other object into vagina or anus. (10) However, it can be noticed that there are important differences in terms of the criminalization of forced oral penetration: some states treat this act as a sexual assault, while others qualify it as rape. Faced with such differences, the Court had to determine whether a suitable solution can be found by resorting to the general principles of international criminal law or, in case these principles cannot be applied, to the general principles of international law. The essence of the entire corpus of international humanitarian law, as well as international law that regulates the area of human rights, is the protection of human dignity of each and every person, regardless of that person's sex. The general principle of respecting human dignity represents the main foundation, in fact it also represents the *raison d'etre*, of international humanitarian law and international law on human rights; indeed, in modern time it acquired such exceeding importance that it imbues the entire corpus of international law. The purpose of this principle is to protect human beings from ravishment of their personal dignity, regardless of whether this ravishment was caused by an unlawful assault on body or by humiliation, dishonoring or an attack on self-respect or mental welfare of a person.

Therefore, the Court holds that the following elements can be accepted as objective elements of rape:

(i) sexual penetration, regardless of how insignificant it may be, of

(a) vagina or anus of the victim by penis of the perpetrator or by any other object used by the perpetrator;

(b) mouth of the victim by penis of the perpetrator;

(ii) with use of coercion or force or with threat of force against the victim or a third person. (11)

As it has been already noted, international criminal regulations punish not only rape but also any serious sexual assault which does not include real penetration. It can be said that the ban includes all serious abuses of sexual nature carried out against bodily or moral integrity of a person by using coercion, threat or intimidation in the manner that is degrading and humiliating for the victim's dignity. Since both actions are qualified as crimes pursuant to international law, the difference between them is significant primarily for the pronunciation of sentence.

Based on the testimonies of all the witnesses who testified about the events referred to in this Verdict it is clear that the victim of the critical events is a woman of Serb ethnicity and that due to her ethnicity and nationality she was exposed, namely by the use of threat of attack on her body and the bodies of other women and children who were captured in that house together with her, coercing her on several occasions to sexual intercourse while he was holding his rifle by the bed on each occasion. Based on the evidence presented, it clearly stems that taking the injured party, the witness "A", into another room in the house, while other captured women and children remained in the room, represented a discriminatory measure that was applied to the person of Serb ethnicity who was not a member of Croat ethnic group which had control over the captured women and children. Based on the statements of these Prosecution witnesses, which the Court assessed as credible and consistent, it is clear that the injured party, the witness "A", who was of Serb ethnicity, was the victim of the actions of the Accused.

c) Charges against the Accused

With regard to the operative part of the Verdict, this Court has established that the accused Zrinko Pinčić during the time period starting from November 1992 until March 1993 in the place of Donje Selo, Konjic Municipality, on several occasions, during the night, dressed in military uniform and armed, used to come to the house in which civilians of Serb ethnicity were captured, women and children – two under-age girls, one under-age boy and two girls of the Serb ethnicity, including the person "A" and her bed-ridden mother, and he took the person "A" out of the room where the captured civilians were sitting, and forced her

into another room where he ordered her to undress, threatening her every time that he would bring 15 soldiers and that she would then see what would happen to all of them, in which manner he forced her to sexual intercourse with him while he was holding a rifle by the bed all the time.

Therefore, during the war in Bosnia and Herzegovina, during the armed conflict between the Army of Bosnia and Herzegovina and the Croat Defense Council on one side, and the Army of the Serb Republic of Bosnia and Herzegovina on the other, acting contrary to the regulations of international humanitarian law, he coerced another person to sexual intercourse by threat of immediate direct attack upon her limb, by which he committed the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e) of the CC BiH, in conjunction with Article 180(1) of the CC BiH.

During the entire evidentiary proceedings the Court assessed the main characteristics of the criminal offence of War Crimes against Civilians, which reflect in the existence of war and violations of the international law regulations and, within such conduct, in specific actions of the Accused, and therefore the Court notes that the existence of the state of war indisputably stems not only from the Decision of the Presidency on the proclamation of state of war ("Official Gazette of the RBiH" number 7/92) dated 20 June 1992, but also from the statements of the heard witnesses, both Prosecution witnesses and Defense witnesses, which was elaborated in detail under count 6.b. of the reasoning part.

It is indisputable that the Accused and the injured party had sexual intercourse on several occasions during the period from November 1992 until March 1993, which was not denied either by the injured party or by the Accused.

However, it was disputable whether the sexual intercourse took place under coercion, with the use of force by the Accused, or whether the Accused and the injured party were romantically involved and whether she consented to that act.

The following Prosecution witnesses testified about these circumstances: witness "A", Radmila Živak, Gordana Gligorević, expert witnesses Alma Bravo-Mehmedbašić and Alma Pašalić, whereas the following Defense witnesses were heard about these circumstances: the accused Zrinko Pinčić, his spouse Mila Pinčić, Ljubo Pogarčić, Nikola Perić and Željko Komšić.

In her statement the witness "A" first of all recalled how shortly after the killing of nine persons on the road section Repovci-Bradina on 12 July 1992 she left her native settlement Bradina against her will. She was brought to Donje Selo where she was placed in one of abandoned Serb houses together with her bed-ridden mother, her aunt, her sister, her cousin Radmila Živak and their three under-age children. Shortly after their arrival a unit of the HVO Hrasnica, including the Accused, came to Donje Selo. Life of Serb civilians in this village was horrible. For them Donje Selo was a detention camp. They were detained. They could not move freely, they moved only if the HVO and the Army of BiH, from whom they had to get a permission to leave, allowed them to do so, but they were allowed only to go as far as the Musala and Čelebići detention camps to visit their close family members who were detained in those camps. Their names were often registered. There was a check-point at the entrance point to Donje Selo. On the occasion of each leaving and entering the village they

had to report at the check-point and to show their permissions. They could not leave Donje Selo and cross over to the territory that was controlled by the VRSBiH during that period.
The witness, as she stated, went through many traumas and troubles in Bradina too, but the biggest and the most painful trauma of all was rape committed against her on several occasions in Donje Selo by the accused Zrinko Pinčić.
She said that she met the Accused when, together with his brother, wearing a uniform and armed, he came to the house in which she was detained together with her mother, her aunt, her sister and cousin and their three under-age children. They were alone with the children, unprotected, they were afraid of every soldier who would come to the house armed, but they were too afraid to confront him and not to let him inside and even to refuse to make him coffee. On the occasion of their first visits, the Pinčić brothers, Zrinko and Ivica, were nice to them, they introduced themselves telling them who they were and where they were from, they talked and they were even kind. They used to come often. They would all sit together in the living room. On one evening, while they were sitting there, the Accused grabbed her hand and took her out of the living room, he forced her into another room and ordered her to undress threatening that he would bring 15 soldiers and that she would then see what would happen to them all. She had no choice, she had to do whatever he ordered her to do, even to pretend that she enjoyed it, but, as the witness stated, she would have rather died than go through such things. The same happened on several occasions, always against her will. He threatened her, she was afraid, not for herself, but for the little children who were together with them in that house. She was afraid that something bad would happen to them, so, in order to protect them, she decided to sacrifice herself. The witness could not precisely say how many times the Accused raped her, but it is certain that he raped her on several occasions. She was lost, as she remembered, she did not know what day and what date it was. The Accused used to come whenever he wanted to, he would force her into the room and rape her, on which occasions he always kept his rifle by the bed. She was afraid that he would come back again. She would often hide with her mother and aunt on the ground floor, so that he would not find her, but every time he would send her sister or her cousin to get her and she had to go. She never reported what happened to her to the relevant authorities because she did not trust anyone, nobody protected them, they were left to themselves and even if she had reported it, the witness believes that they would not have done anything to protect her and to punish the perpetrator. She did not tell anyone anything, not even to her sister or her cousin. And they did not ask her. Why should have they? They knew the answer themselves. The Accused never promised her to leave his family because of her.
Simply, she decided to be silent, she tried to forget, but with no success. It was harder and harder every day and since she could not bear it any longer she decided to talk and to tell the whole truth, and she did in 2006, when she gave her statement to the relevant authorities at the Public Security Centre in Trebinje.
The psychological consequences she is suffering from are immeasurable. She has never married. After what happened to her, towards men she feels nothing but disgust.

Witness Radmila Živak also remembers how, after she was released from the Musala camp together with the sister of witness “A”, she went to Donje Selo, where civilians from Bradina were brought and held, including the witness “A”, her bed-ridden mother and her aunt. For them Donje Selo was a detention camp. There was a check-point at the entrance point, they were not allowed to move around freely, they could not leave the village whenever they would want to, their names were often registered. During that period there were many soldiers of the HVO and the Army of BiH in Donje Selo. They used to come to the houses in

which Serb civilians were located. She remembers that the accused Zrinko Pinčić and his brother often used to come to the house where they stayed. They were dressed in military uniforms, they had the HVO insignia and rifles. They had to let them inside, they were alone with small children, unprotected. They were afraid of every soldier who would come to the house where the children were and who would be armed and the Pinčić brothers always had rifles. She has known the witness "A" all her life, they grew up together. She knows her to be a very honest person of strong character, raised in a tradition-dominated manner. She remembers that, while they were together in Donje Selo, the Accused often took her out of the living room and forced into the next room. When she would get out of that room she looked miserable, scared and she often cried. She did not say anything. They did not ask her anything. Based on the expression of her face they realized what was going on. She remembers that during that period the witness "A" often repeated to her that it would have been better if she had been killed in Bradina than to go through that all. On one occasion, long time after all these events took place, the witness "A" told her that she was raped by Zrinko Pinčić in Donje Selo on several occasions and that she can no longer be silent about it and that she would report it all to the relevant authorities.

Witness Gordana Gligorević remembers that while they were in Donje Selo she very often used to see how the Accused, together with his brother, went to the house in which the witness "A" stayed. She has known the witness "A" for a long time, all her life. She knows her to be a wonderful, moral person raised in a tradition-dominated manner. She said that she used to see her in Donje Selo too and she remembers that, when she used to see her, the witness "A" looked terrible and terrified. The witness remembers that the spouse of the Accused and his two daughters were also in Donje Selo during that period. The spouse of the Accused used to come to her to drink coffee on several occasions.

Following the order of the Prosecutor's Office of BiH, the court expert neuropsychologist Alma Bravo-Mehmedbašić and the court expert psychologist Alma Pašalić carried out court-psychiatric examination of the protected witness "A" and made written findings and opinion about the circumstances of the consequences of the psychological trauma this witness is suffering from.

In the conclusion of her findings and opinion, under item 3, the expert witness Alma Bravo-Mehmedbašić noted that the witness "A" showed symptoms of chronic posttraumatic stress disorder and permanent personality change after the catastrophic experience of torture, which results in clinical symptoms of depression, anxiety, hyper-arousal, revival of traumatic events through intrusion of thoughts, memories and dreams about traumatic experiences. The witness suffers from the feeling of inferiority, loss of self-esteem and self-confidence. Low self-esteem and self-confidence are evident, as well as loss of trust in other people, dulling and narrowing of the scope of emotional experience and withdrawal from society.

Under item 4, the expert witness noted that during the period from 1992 until April 1993 the witness stayed in Donje Selo, where she went through psychological torture, including the combination of torture through multiple sexual torture, feeling completely helpless, with no protection whatsoever and no possibility of resistance, in the situation that was threatening for her life and the life of her family members in case she offered any resistance, which led to the feeling of complete dependence on the will of the rapist and permanent personality changes after the torture, on the emotional level, as well as on the social level.

In the conclusion of her findings and opinion, expert witness psychologist Alma Pašalić noted that permanent personality changes are noticeable in the witness "A" as a result of the catastrophic experience. The witness shows symptoms of increased psychological vulnerability and hyper-arousal. Difficulties in falling asleep, irritation, difficulties in concentrating and hyper-vigilance are a part of the posttraumatic reactions to stress. She shows a series of complicated posttraumatic reactions to traumatic memories and a changed pattern of experience and behavior which is long-lasting and pervasive with regard to important domains of emotional and social functioning of the personality and has the characteristics of an emotional disorder in the form of avoidance and emotional dulling and suspiciousness linked with fear, as well as endangered state and alienation from others. She also reacts in a mildly depressive manner through narrowed scope of uncontrolled emotion and feeling of shortened future.

While she was explaining her findings and opinion at the main trial, expert witness Alma Bravo Mehmedbašić stressed that there absolutely exists a casual connection between the rape of the witness "A" by the Accused and the consequences she shows on the psychological level. The violent sexual relation, which went on during a long period of time, has far-reaching effects on the victim, especially when the victim is captured, since the captivity damages her identity to an even greater extent. During a violent sexual intercourse victims behave differently, some of them are completely passive, some of them are lost, while others offer physical resistance. After the rape, the victims express loss of self-esteem, self-confidence, feeling of inferiority, feeling of shame, disgrace and there are often memory gaps. The victims are often silent, the so called "silence conspiracy", they avoid verbalization and when they cannot take it any more – they talk.

While she was explaining her findings and opinion, expert witness Alma Pašalić stressed that she carried out the psychiatric evaluation of the witness "A" through the application of the standard methods, the batteries of instruments, the structured interview, the index of reactions and examination of the witness. The expert witness stressed that during the process of making findings and opinion the primary importance is not in what the examinee is saying about herself, adding that there are numerous methods by which it can be easily determined if the examinee is not telling the truth. The expert witness established that the witness shows a series of psycho-social consequences, permanent personality changes, after the catastrophic rape experience. The witness expresses emotional dulling, spiritual killing, strong reactions to sudden stimuli, feeling of shame.

In his statement the accused Zrinko Pinčić stated that he came to Donje Selo together with the unit of the HVO Hrasnica in November 1992. Within this unit he performed strictly civil affairs. He had an office in Konjic, where he issued freedom of movement permits to civilians. The relations between the HVO Hrasnica and Serb civilians in Donje Selo soon became friendly. They helped each other and spent time together as friends. After their arrival they felt safe and protected. He met the witness "A" when, together with his brother Ivica and Goran Kuljanin, he went to sit and drink coffee with her, her sister and cousin. After that he often went to their place together with his brother. They would drink coffee, talk, spend time together as friends. After some twenty days, he started dating the witness "A". They would sit in the living room holding their hands and then they would hug and go to the room where they would make love. They often stayed in the room the whole night and

then he would leave the room in the morning and go to work, only stopping in the living room to take the rifle which he used to leave behind the door. He said that he loved the witness "A". She was his big love. He was ready to leave his spouse and his two daughters for her. Everybody in the command and in Donje Selo knew about their love. His commander often used to tell him that the witness "A" and her cousin came to the command looking for him. They stopped seeing each other in March 1993 when his spouse found out about their affair. Even then he begged the witness "A" not to break up their relationship because he loved her and he promised her to leave his spouse and children, but she did not agree to that. She told him not to come anymore, and that is how it all ended. If she had told him earlier that she did not want him to come anymore, he would have done that. When asked by the Prosecutor how come that during the examination he could not remember the name of that big love of his, he answered that many years have passed since then.

Witness Ljubo Pogarčić remembers that, after the arrival of the HVO Hrasnica to which unit he belonged too, they stayed in abandoned houses in Donje Selo. There they found Serb refugees from Bradina and there were also Croats, citizens of Donje Selo. At the beginning the relations between them were cold, but they grew better each day. In time they even became friends. They helped them, while they trusted them. He remembers that the Accused often went to the house in which the witness "A" stayed, whom he knows only by the physical appearance, since he never had any contacts with her. He does not know what happened between her and the Accused, but he thinks that it was a relationship like any other, a love relationship. There was nothing "not normal" in it, otherwise, if it had been, somebody would report it to the command and they would have undertaken all the necessary measures. Discipline within the HVO was on a highly satisfactory level, such things must not have happened. When asked by the Prosecutor whether Serb refugees considered Donje Selo as a detention camp, the witness answered that he did not know that, that the army did not consider it as such, but that he cannot know what those people thought and how they felt in Donje Selo.

Witness Mila Pinčić, the spouse of the Accused, stated that she found out about the "relationship" between her husband and the witness "A" only at the beginning of March 1993, although she arrived in Donje Selo long before that. The house in which she stayed with her husband and their daughters was not far away from the house in which the witness "A" stayed. Zrinko used to leave the house and go to work in the morning and he often did not come back in the evening. She assumed that he had many obligations at work. However, in time, the neighbors told her that they could often see his car parked in front of the house in which the witness "A" lived. She started having doubts, soon she found out about their relationship. She wanted to leave him. She asked him about it and he admitted that they were involved and that he loved the witness "A", but he begged her not to leave him and he promised her that he would break up the relationship. That is what happened. The relationship was broken. Zrinko was not a violent person and that relationship was certainly founded on a voluntary basis and it lasted for 2 or 3 months. Zrinko was a nice man, he was fair to everyone in Donje Selo. He was certainly like that towards the witness "A" as well. He loved her.

In his statement, Nikola Perić, who performed the post of the President of the HVO Hrasnica during the critical period, stated that he heard that the Accused fell in love with the witness "A" after he arrived in Donje Selo, which the Accused himself told him. He often stayed in

her house. They used to see them together around the town too. They were holding hands. This relationship went on for 2 or 3 months for sure. The witness "A" often used to come to the command to look for the Accused. The reason why they broke up is the conflict between the Accused and his wife after she found out about the relationship. There was a strict discipline within the HVO, it was impossible for a crime to be committed while the leading men within the HVO were unaware of it and did not punish the perpetrator. Nobody ever reported rape.

Witness Željko Komšić, the Commander of the HVO Command during the relevant period, remembers that he did not know about the relationship between the Accused and the witness "A" at the beginning. He found out about it later on when two or three female persons came to the command looking for the Accused. He thought that they were looking for him so that he would issue them with permits, but he was then told that the Accused is involved with a girl from Bradina, that he even lived with her. Once they saw them in the town holding hands. The witness does not know how long this relationship lasted or when and in what manner it was broken.

a) General considerations about the evaluation of evidence

The Court assessed the evidence in this case pursuant to the valid procedural law, that is, the Criminal Procedure Code of Bosnia and Herzegovina. The Court has applied the presumption of innocence to the Accused as set forth in Article 3 of the CPC BiH, which embodies the basic legal principle, so that the Prosecutor's Office carries the burden of proof of guilt of the Accused, whereby it has to be proven beyond reasonable doubt.
Having analyzed the statements of the witnesses who testified before the Court, the Court bore in mind their behavior, their conduct and character as much as possible. In view of these witnesses, the Court also considered the probability, consistency and other evidence, as well as the circumstances of the case. Furthermore, during the entire course of the proceedings the Court was aware of the fact that the credibility of the witnesses depends on their familiarity with the facts about which they testified, their integrity, honesty and the fact that they obliged themselves to tell the truth through the oath they took.

It is not enough for the statement of a witness to be just honest. The real question regarding the statement in which identification is carried out is not whether the statement is given honestly, but also whether it is reliable. During the entire course of the proceedings, the Trial Panel was aware of the fact that there is insecurity in the statements about the fact which sometimes took place (many) years before the giving of the statement, due to the inconsistency of human perception of traumatic events and their memories of them.

In view of the hearsay evidence, the Court would like to note that the position according to which the hearsay evidence is acceptable has become rather established in the practice of the Court. In addition, pursuant to Article 15 of the CPC BiH the Court is free to evaluate evidence. The Court has taken the position that that the Court must be convinced that such statements are reliable in the manner that they are given voluntarily, that they are true and reliable. Furthermore, the probative value of hearsay statements would depend on the context and the character of the referenced statement and/or of whether the statement was also corroborated with other evidence.

The Court finds that the circumstantial evidence represents the evidence about facts of an event or a criminal offence from which the referenced fact logically stems. Since the criminal offence was by all indications committed at time when there were not many witnesses on the scene and since the possibility of determining the issues which are incriminated by direct and explicit statements of eye-witnesses or irrefutable documents is problematic or impossible, the circumstantial evidence can become the crucial element not only for the Prosecutor's Office, but for the Accused as well. Such pieces of evidence, if taken individually, can be by itself insufficient for establishment of a fact, but if considered in its entirety, their collective and cumulative character can be revealing and sometimes even decisive.

In the case at hand the documentary evidence was especially important. During the trial, a certain number of documents, which were challenged by the Defense, were proposed as evidence. With the aim of deciding on their reliability and probative value, the Court reviewed all the documents which the Defense opposed.

The Defense believed that certain documents "with regard to which there is no proof of authorship and reliability" are unreliable and that they can have no significance.

However, the fact that a document is not signed or sealed does not necessarily mean that that document is unreliable. The Court did not consider documents without signature and seal as *a priori* unreliable. Bearing in mind the whole time the principle according to which the burden of proof remains on the Prosecutor's Office, the Court reviewed all presented documents, one by one, and the Court holds that the Prosecutor's Office proved their credibility beyond reasonable doubt. In order to evaluate the credibility of the documents, the Court considered them in the light of evidence, such as other documentary evidence and statements of witnesses. Along with this, even when the Court was convinced that the documents are reliable, the Court did not automatically accept the statements contained in these documents as correct statement of facts. Indeed, the Court has evaluated these statements in the light of all pieces of evidence lying before the Court.

Since the Defense of the Accused challenged the legality of the manner in which the evidence on the search of the family house of the Accused was presented, in the context of the presentation of additional evidence, by noting that the SIPA officials, following the order of the Court, carried out the search before the time written in the order itself, having evaluated in detail the evidence presented by both the Prosecutor's Office and the Defense, the Court accepted the evidence of the Prosecutor's Office in its entirety. At wit, the Court has assessed as clear and convincing the statements given by witnesses Safet Ratkušić and Amir Sijerčić, who were on the critical occasion the main executors of the Court's order for the search of the family house of the Accused as the SIPA officials, especially since these statements were also corroborated by the documentary evidence, more precisely by the Record on the conducted search and by the CD. Based on these statements and the documentary evidence, the Court has undoubtedly determined that the search of the family house of the Accused was carried out at 6:05, therefore, at the time allowed in the Order on search. Therefore, the statements of the Defense witnesses Ljubica Rajić and Zdravko Rajić who during the main trial stressed that they were called by the spouse of the Accused to be present during the search, namely at 5:45, although they were witnesses of the very search

and although they signed the Record on the search and with their signatures confirmed that everything regarding the search of the family house of the Accused, including the time of the search, was, as they themselves noted, "done in a fair manner", were assessed as statements given only with the intention to reduce the responsibility of the Accused or to free him from any responsibility. The Court rendered such decision particularly bearing in mind the fact that was indisputable during the course of the testimonies of all witnesses, Prosecution witnesses as well as Defense witnesses, namely the fact that the Accused was deprived of liberty on the same morning at 5:50 and therefore the search of the apartment could not have possibly be carried out before that, so that the Defense witnesses, the neighbors of the Accused could not be called by the spouse of the Accused before the Accused was taken outside the house and before the SIPA officials, who were in charge of the search, entered the house. This fact by itself says enough about the intention of the Defense witnesses when they claimed at the main hearing that the search of the family house commenced before 6:00 a.m. Furthermore, during the evaluation of this evidence the Court also bore in mind the fact that there is not a single logical reason why should the SIPA officials, who are persons with, as they noted, enough experience in conducting the similar cases, with no reason whatsoever enter the house and commence the search before the time noted in the Court's order, although they were coming from a joint meeting with the officials who had the task to deprive the Accused of liberty. Therefore, even the CD which the Defense of the Accused presented at the main trail as a proof that the search of the house of the Accused was carried out even before the Accused was deprived of liberty, since the footage showed the time of 5:19 a.m.; 5:20 a.m. … represents the evidence which was obviously modified, thanks to technical options, with one aim only, to free the Accused from his responsibility. Bearing in mind all the above-mentioned, the Court had dismissed the evidence of the Defense in its entirety and had reliably and undoubtedly found it determined that the search of the family house of the Accused was carried out in accordance with legal regulations.

b) Evaluation of evidence

Having considered all the pieces of evidence presented, individually as well as jointly connected, the Court determined beyond reasonable doubt that the Accused committed the criminal offence of War Crimes against Civilians in violation of Article 173(1)e), in conjunction with Article 180(1) of the CC BiH.

Having evaluated the evidence, the Court completely believed the statement of the injured party witness "A", considering this statement as absolutely credible and reliable. In view of the decisive facts this statement was also corroborated by the statements of witnesses Radmila Živak and Gordana Gligorević. Witness Radmila Živak, who lived in the same house as the injured party during the critical period and who eye-witnessed the critical events, confirmed the allegations of the injured party that the Accused often, against her will, took her out of the living room and forced her into the room and that after she would come out of the room the injured party looked miserable and frightened and that she would just cry for days. They did not ask her why. It was obvious. They knew the answer. This witness also confirmed that the injured party told her, long time after they left Donje Selo, that she was repeatedly raped by the Accused, that she can no longer be silent about it and that she would report it all to the relevant authorities. Witness Gordana Gligorević, who lived in a house that was located near the house in which the injured party stayed, confirmed that the

Accused often used to come to visit the injured party. During that period she often used to see the injured party too. She looked miserable and beside herself.
Within the context of the relevant facts the Court especially considered the findings and the opinion of the expert witnesses neuropsychiatrist and psychologist, who after the conducted court-psychiatric evaluation of the injured party, found that she suffers from chronic Post-Traumatic Stress Disorder and permanent personality change which were the result of the catastrophic torture experience, including the psychological and combined torture through multiple sexual torture. It was also concluded that the injured party suffers from many other mental consequences, such as loss of self-esteem, self-confidence, the feeling of inferiority, emotional dulling and suspiciousness, state of threat and alienation from others, which are all symptomatic and characteristic precisely for rape victims. Expert witness Alma Bravo-Mehmedbašić also explained that in majority of cases rape victims decide to be silent because of fear, shame and even the feeling of guilt, which can sometimes last for years, and that they talk only when they cannot mentally bear the silence any longer, which is precisely the case with the witness "A" who told the relevant authorities about it only in 2006.

The Court has accepted as indisputable the fact that the injured party could not offer any resistance to the Accused in fear for her own life, as well as for the lives of her family members. She was captured, together with her mother, her sister, her aunt and three under-age children. They were alone, unprotected and afraid. On the other hand, the Accused was a soldier with a rifle.

Contrary to the Prosecution witnesses, the Court could not believe the Defense witnesses, who during the entire course of the proceedings tried to convince the Court that the Accused and the inured party were romantically involved and that, therefore, the sexual intercourse between the Accused and the injured party was explicitly consensual. Having carefully considered these statements, the Court has found that they were completely consistent and that all the witnesses, although they were not eye-witnesses of the critical events, remember all the details of that "relationship" in a completely identical way, which appears to be realistically impossible. Defense witnesses claim that the Accused loved the witness "A", that she came to the command looking for him, that they often saw them together walking in Donje Selo hugged, while some of them heard that they were living together. They claim that everyone in Donje Selo and the Command knew about their relationship. They did not hide from anyone. However, how can the allegation be explained that the spouse of the Accused, who lived in Donje Selo in a house that was only some 500 or 600 meters away from the house in which the injured party stayed, did not know anything? She did not even suspect anything. She did not ask her husband why he was not coming home at night. When she found out about it, she said, she wanted to leave him, but he promised to break up the relationship with the injured party. Contrary to this, the Accused said that he was ready to leave his wife and children because of the love he felt towards the injured party and that he did not want to break up with her.
The Court could not accept the conclusion of the Defense that the superiors of the Accused during the critical period would certainly have found out that he committed the criminal offence of rape and that the fact that the crime was not reported leads to the conclusion that it did not take place, for the simple reason that the injured party herself confirmed that she did not report the criminal offence and the perpetrator until 2006 for the reason that she did not believe that anyone would protect her and punish the perpetrator during the critical period, and later on she tried to forget it all.

7. Sentencing considerations

While deciding on the length of the sentence, the Court considered all the circumstances which could affect it and which are prescribed by Article 48 of the CC BiH and took into account other circumstances bearing on the magnitude of punishment, and in particular the degree of criminal liability, the motives for perpetrating the offence, the degree of danger or injury to the protected object and the circumstances in which the offence was perpetrated. In addition, while deciding on the length of the sentence, the Court also considered the past conduct of the Accused, his personal situation and his conduct during these proceedings, that is, the Court assessed both the aggravating and extenuating circumstances related to the Accused.

While ruling on the punishment for the accused Zrinko Pinčić, the Court primarily considered the gravity of the criminal offence and the degree of his criminal liability.

The gravity of a criminal offence charged against an accused is always determined based on his actions towards the victim or the persons connected with the criminal offence and the close family members. The gravity is determined *in personam* and not through universal consequences.

The Court has determined beyond reasonable doubt that in this specific case there is a high level of responsibility of the Accused for the committed criminal offence for the reason that the Accused acted with premeditated intent, that is, the Accused was aware of the fact that with his actions he committed a criminal offence and he wanted to commit it.

Although the criminal offence against the values protected by international law carries the sentence of long-term imprisonment, the Court did not pronounce it in the case at hand, bearing in mind the gravity of the consequences.

In this specific case the Court bore in mind the following elements, which are assessed in the process of deciding on the length of sentence:

While deciding on the length of sentence the Court primarily considered the manner in which a decision could have affected the protection of society from accused persons who were found guilty, which represents an important factor in the process of determining appropriate punishment. Protection policy depends on the nature of the criminal offence and the conduct of the Accused. Protection of society often implies punishments of long imprisonments, so that the society could be protected from hostile and criminal conduct of an accused person who was found guilty. This factor is important and relevant in case if an accused person who was found guilty is considered dangerous for society.

In addition to the fact that the Accused should be, through appropriate punishment, deterred from even thinking to participate in such crimes ever again, while rendering the decision the Court also bore in mind persons who could find themselves in similar situations in future and who should also be deterred from taking part in such criminal offences.

Although the consequences of these criminal offences are immeasurable and permanent, the Court finds that this punishment will contribute to rising consciousness of consequences and culpability of such crimes, that is, the justice of punishing the perpetrator.

Aggravating circumstances

Therefore, although the criminal offence against the values protected by international law carries the punishment of at least 10 years of imprisonment or long-term imprisonment, the Court did not pronounce it in this specific case, bearing in mind the gravity of the consequences and his fair conduct before the Court, so that the Court has found that there are no aggravating circumstances related to the Accused.

Extenuating circumstances

The Court has assessed the previous circumstances related to the Accused as extenuating circumstances, as well as the fact that he is a family man, a father of two children of age and that during the entire course of the proceedings his behavior and conduct before the Court were fair.

Highly extenuating circumstances

Article 49 of the CC BiH prescribes the following:

"The court may set the punishment below the limit prescribed by the law, or impose a milder type of punishment:
a) When law provides the possibility of reducing the punishment; and
b) When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment."

The Court has assessed the current life age of the Accused as highly extenuating circumstances, as well as the fact that the Accused is an 80 percent disabled veteran.

Bearing in mind the above-mentioned aggravating, extenuating and highly extenuating circumstances, the Court finds that the pronounced punishment is proportional to the gravity of the committed criminal offence, the degree of the criminal liability of the Accused, the circumstances and motives of the Accused to perpetrate the criminal offence, as well as that the pronounced sentence would fulfill the purpose of punishment in terms of special and general prevention, that is, that it would rise the awareness of prohibition, culpability and the society's condemnation of the crime in the Accused and all other individuals and deter the above-mentioned persons from committing crimes in future.

8. Decision on costs of the proceedings and property claims of the injured parties

Pursuant to Article 188(1) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused is obliged to reimburse the costs of the criminal proceedings, the amount of which the Court shall determine in an especially rendered decision pursuant to Article 186(2) of the CPC BiH.

Having decided on the undetermined and imprecisely set property claim of the injured party, pursuant to Article 198(2) of the Criminal Procedure Code of Bosnia and Herzegovina, the Court rendered a decision to refer the injured party with the submitted property claim to a civil suit.

RECORD-TAKER

JELENA SIMIĆ
/signed/

PRESIDENT OF THE PANEL
JUDGE
MINKA KREHO
/signed/

LEGAL REMEDY NOTE: An appeal from this Decision may be filed within 15 days after the service of this Verdict.