SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

No: X-KR-08/489
Sarajevo, July 10, 2009

The Court of Bosnia and Herzegovina, in the Panel consisting of Judge Šaban Maksumić as the presiding judge, and judges Snezhana Botusharova and Ljubomir Kitić as the panel members, with the participation of legal officer Lejla Konjić as the record-taker, in the criminal case against the accused Anto Kovać, for the criminal offense of War Crimes against Civilians under Article 173(1) c), e) and f) as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), regarding the Indictment of the Prosecutor's Office of Bosnia and Herzegovina no. KT-RZ-106/06 of March 24, 2008, after the public main trial, during which the public was partially excluded, in the presence of the prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Mirko Lečić, the accused Ante Kovać and defense counsel for the accused, attorney Dušan Tomić, on July 10, 2009 rendered and publicly announced the following:

VERDICT

The accused: ANTE KOVAĆ aka "Žabac", son of Milko and Antunija nee Vidović, born on 5 January 1957 in Vitez where he has his permanent residence at 202 Kralja Tvrtka Street, ID Number 0501957193616, citizen of BiH and the Republic of Croatia, Croat, married, father of three children, locksmith, secondary education, completed Secondary Business School, employed by the HPT Vitez, served the army, KM 1,200.00 salary, in possession of his own house and passenger's car Mercedes, currently in custody under the Decision by the Court of BiH, Number: X-KRN-08/489 of March 26, 2008.

I

HAS BEEN FOUND GUILTY

Because during the state of war in Bosnia and Herzegovina and the armed conflict between the Army of the RBiH and the HVO, violating Article 3 of the Geneva Convention on the Protection of Civilian Persons in Time of War of 12 August 1949, in as much as he:

1. During the time period between April and May 1993, in the area of the Vitez Municipality, as the commander of the Brigade Military Police of the HVO Vitez Brigade, he issued orders to his subordinate military police officers and approved of those orders and, together with his subordinate military police officers, unlawfully deprived of liberty the Bosniak civilian population, unlawfully detaining them on the premises of the Radnički univerzitet, Movie Theatre and SDK in Vitez. Thus, they unlawfully deprived of liberty and detained Enes Šurković, Salih Cicvara, Edin Bešo, Edib Zlotrg, Ermedin Gerin, Muhamed Šehaganović, Samet Sadibašić, Derviš Subašić, Bahtija Sivro, Alija Bašić, Suad Salkić, Čazim Ahmić, Mirsad Ahmić, Ahmet Kalčo, Sulejman Kavazović, Senad Hidić and persons under the pseudonyms "B"

and “D“, as well as more than 250 civilians of Bosniak ethnicity. By his order and approval, the military police officers to whom he was superior kept them there under guard in inhumane conditions, of which he was well aware. A large number of persons were placed on the premises of those facilities; they slept there on the floor and in a sitting posture. During their incarceration they received one meager meal a day consisting of one fourth of a loaf of bread and a fish can. At his order, approval or consent, military police officers would take a certain number of detainees in groups by a van for the forced labour at the places called Kratine, Krčevine and Pirići to dig up trenches and perform other physical works at dangerous places where there were lines of separation between units of the HVO and the Army of BiH, although he knew that, while digging up the trenches, the detainees Almir Gadžun, Redžep Zahirović, Adis Tuco and Jusuf Ibraković were killed performing such works. However, military police officers would take some detainees from the Radnički univerzitet to other detention facilities located in the Chess Club and in the Kaonik Camp in Busovača,

2. About April 18, 1993, in Vitez, in the same capacity as under Section 1, armed with a rifle and a pistol, he took during the night a civilian under the pseudonym “B“ out of the premises of the SDK detention facility in which she was unlawfully detained and brought her into an apartment in the so-called *Crnogorka* building near the SDK building. While he was taking her there he cursed her “Balija's mother”. When they entered the apartment, he pushed her violently on a bed saying to her, “You will see now who Žabac is”, and ordered her to undress. When she refused to do so, he came up to the bed, punched her in her head, and using the force, he pulled her trousers and underwear down, and while she was crying telling him not to do that, he had sexual intercourse with her without her consent, that is, he raped her. Afterwards, he took her back and took her to the SDK premises,

3. On August 21, 1993, in Vitez, in the same capacity as under Section 1 of the operative part of the Verdict, he ordered military police officers to stop and bring in front of the Military Police Command a motor vehicle Jeep, with the insignia of the International Committee of the Red Cross, which was heading towards Zenica from Stari Vitez, and in which there were sick civilians of Bosniak ethnicity - the person under the pseudonym “A“, Nadžija Pekmić and Mirsad Grabus - who were referred to hospital in Zenica for medical treatment. He unlawfully deprived those persons of liberty and unlawfully detained them on the premises of the Radnički univerzitet – the Culture Home where he searched them together with other military police officers and took away and appropriated all valuable objects from them - golden jewellery, money, watch, etc. Afterwards they examined them in respect of the military situation in the place of Mahala which was under the control of BiH Army units. Several days after being detained, when the person under the pseudonym “A“ was alone in an office of the Culture Centre, Ante Kovać threatened her saying that she would never see her children again, questioning her about the location of her husband and about weapons in the place of Mahala. On that occasion, he punched her in her face and, holding the pistol

pointed at her chest, ordered her to undress. When she refused to do so begging him not to do that, he pushed her violently on a bed, tore her clothes, and without her consent, he had sexual intercourse with her, that is, he raped her. Afterwards he threatened that he would kill her if she told anyone about the rape.

Therefore, by violating the rules of international law during the war and armed conflict, he unlawfully incarcerated people, took them to concentration camps, coerced another person into sexual intercourse – rape by using force and threats, took people to forced labor and plundered property,

whereby he committed the criminal offence of War Crimes against Civilians in violation of Article 173(1) of the BiH CC of BiH:

- Items e) and f) in conjunction with Section 1 of the operative part of the Verdict
- Items e) in conjunction with Section 2 of the operative part of the Verdict
- Items e) and f) in conjunction with Section 3 of the operative part of the Verdict

all as read with Article 180(1) of the CC of BiH.

Therefore, this Court Panel, based on Article 285 of the CPC of BiH, applying Articles 39, 42 and 48 of the CC of BiH

SENTENCES HIM

to a 13-year imprisonment

II

Under Article 56 of the CC of BiH, the time spent in custody under Court Decision shall be credited towards the imposed sentence for the accused, starting as of January 30, 2008, onwards.

III

Based on Article 188(1) of the CPC of BiH, the accused shall reimburse the costs of the criminal proceedings, the amount of which shall be determined by the Court in a separate Decision, upon obtaining required information.

IV

Under Article 198(2) of the CPC of BiH, the injured parties are referred to civil action with the claim under property law.

R e a s o n i n g

In the Indictment number KT-RZ-106/06 of March 24, 2008, the Prosecutor's Office charged Ante Kovać of committing the criminal offense of War Crimes against Civilians under Article 173(1) c), e) and f) of the CC of BiH in conjunction with Article 180(1) of the Criminal Code of BiH.

At the plea hearing, the accused Ante Kovać pleaded not guilty of the offense as charged.

During the proceedings, as proposed by the Prosecutor's Office, the following persons were examined as witnesses: Enes Šurković, Salih Cicvara, Edin Bešo, Edib Zlotrg, Ermedin Gerina, Muhamed Šehaganović, Samet Sadibašić, Derviš Subašić, Bahtija Sivro, Suad Salkić, Mirsad Ahmić, Sulejman Kavazović, Senad Hidić, Nadžija Pekmić, Kadrija Šabić – Haračić, Alija Bašić, Ćazim Ahmić, Enver Karajko, protected witnesses A, B, C, D, and expert witnesses Abdulah Kučukalić and Alma Bravo-Mehmedbašić.

During the evidentiary proceedings, the Prosecutor's Office tendered the following documentary evidence, under the following ordinal numbers: (T-1) Witness Examination Record for Enes Šurković, of July 10, 2006, number: KT-RZ-106/06, (T-2) Witness Examination Record for Salih Cicvara, July 11, 2006, number: KT-RZ-106/06, (T-3) Witness Examination Record for Edin Bešo of October 16, 2007, number: KT-RZ-106/06, (T-4) Witness Examination Record for Edib Zlotrg, October 16, 2007, Number: KT-RZ-106/06, (T-5) Witness Examination Record for Ermedin Gerin of October 17, 2007, number: KT-RZ-106/06, (T-6) Witness Examination Record for Muhamed Šehaganović of October 18, 2007, number: KT-RZ-106/06, (T-7) Witness Examination Record for Samet Sadibašić of October 23, 2007, Number: KT-RZ-106/06, (T-8) Witness Examination Record for Derviš Subašić of February 5, 2008, number: KT-RZ-106/06, (T-9) Witness Examination Record for Bahtija Sivro of February 7, 2008, number: KT-RZ-106/06, (T-10) Witness Examination Record for Suad Salkić of February 14, 2008, number: KT-RZ-106/06, (T-12) Witness Examination Record for Sulejman Kavazović of March 5, 2008, number: KT-RZ-106/06 (T-13) Witness Examination Record for Ahmet Kalčo of March 4, 2008, number: KT-RZ-106/06, (T-14) Record of the examination of the Protected Witness under the pseudonym "B", (T-15) Record of the examination of the Protected Witness under the pseudonym "C",(T-16) Record of the examination of the Protected Witness under the pseudonym "D", (T-17) Witness Examination Record for Senad Hidić of February 19, 2008, number: KT-RZ-106/06, (T-18) Witness Examination Record for Nadžija Pekmić of 10 July 2006, number: KT-RZ-106/06 (T-19) Record of the examination of the Protected Witness under the pseudonym "A", (T-20) Witness Examination Record for Kadrija Šabić-Haračić of October 17, 2007, number: KT-RZ-106/06, (T-21) Medical records of the Association of Citizens (UG) Medica Zenica, which refers to the witness "A" of March 30, 1006 [sic]; (T-22) The decision declaring the state of war, Official Gazette of R BiH June 20, 1992; (T-23) Combat Command - The command to prevent enemy attack/ actions of extreme Muslim forces/and blockade of Kruščica area, Vranjska, and D. Večeriska of April 19, 1993; (T-24) Undertaking of further combat activities of April 16, 1993; (T-25) Report to Colonel Tihomir Blaškić of April 16, 1993; (T-26) The withdrawal of troops of MP company from Travnik to Vitez of April 16, 1993; (T-27) The command to commanders of Vitez Brigade, and Zrinski Brigade of April 17, 1993. years; (T-28) Instructions on military police conduct when ordinance on CPC provisions is applied in case of a war or imminent threat to the Croat Community of Herceg-Bosna; (T-29) Instructions for the Military Police troops of the Croat Defense Council of the HZHB of November 30, 1992; (T-30) List of

employees and military police officers of the IV Military Police Battalion Vitez, in the municipality of Vitez of March 27, 1993; (T-31) The minutes of the Brigade Military Police of August 23, 1993; (T-32) Minutes on the golden jewelry found on the people who have tried flee to Zenica through the Red Cross on August 21, 1993, of August 23, 1993; (T-33) Bulletin of daily events of August 23 and 24, 1993; (T-34) Requisition of food of April 23, 1993; (T-35) Command based on findings and reports from the citizens of Vitez of May 1, 1993; (T-36) List of 13 Muslim leaders who were arrested in Vitez of May 15, 1993; (T-37) Command based on Article 34 of the Book of Rules on Military Discipline, and on the grounds provided for in Article 3 (1) 6) and 8) of the Rules of June 1, 1993. years; (T-38) List of persons interesting for security reasons for whom there is grounded suspicion of being responsible and directly linked to the perpetration of crimes and genocide against Muslims in the Vitez municipality of June 2, 1993; (T-39) Decision based on the findings by the Commander of the Brigade Police, officers Anto Kovać, concerning military police officer Dragan Križnac who was not fulfilling his obligations for a longer period of June 25, 1993; (T-40) Excerpt from the Death Registry for Jusuf Ibrakovic of December 5, 2007; (T-41) Excerpt from the Death Registry for Adis Tuco of May 5, 2007; (T-42) Excerpt from the Death Registry Redžep Zahirović of May 5, 2007; (T-43) Excerpt from the Death Registry for Almir Gađun of December 5, 2007; (T-44) Witnesses Examination Record for Basić Alija of February 13, 2008; (T-45) Witnesses Examination Record for Ćazim Ahmić of February 14, 2008. (T-46) Forensic psychiatric examination in team for the witness "A", number KT-RZ 106/06 of October 30, 2007, (T-47) Forensic psychiatric examination in team for the protected witness "B" of October 22, 2008, (T-48) The psychological findings for witness A number 01-0124-2006 of February 3, 2006; (T-49), Witnesses Examination Record for Enver Karajko of September 25, 2008; (T-50), Report to the Commander of the Vitez Brigade of May 4, 1993; (T-51) List of arrested persons, number 0420-0471; (T-52) List of arrested persons who were released from custody of May 16, 1993; (T-53) Personnel file for the officer Ante Kovać.

The following witnesses were examined at the proposal of the Defense: Ankica Pranjković, Željko Sajević, Mijo Đotlo, Mahmut Tuco, Abdulah Tuco, Dragan Križanac, Goran Kovač, Ilija Križanac, Dragan Toljušić, Slavko Vidović, Stipo Čeko, Nedim Bećirbašić, Ivica Rajić, Dejan Kovać, Vladimir Šantić, Zlatko Krišto, Paško Ljubičić, Mario Raić, Ivica Jukić, Boško Pavlić, and protected witnesses 001, 002 and 003.

The Defense for the accused Ante Kovać tendered the following documentary evidence: (O-1) Witnesses Examination Record for Samet Sadibašić of October 23, 2007, number KT-RZ-106/06 (prosecution exhibit T-7), (D 1) Summons for the witness Mario Rajić of May 12, 2009; (D 2) Summons for witness Ivica Rajić of May 13, 2009; (D 3) Summons for witness Paško Ljubičić of May 19, 2009, (D 4) Summons for witness Vladimir Šantić of May 20, 2009, (D 5) Command of Brigade Commander, number 01-39.-1/93 of March 22, 1993, (D 6) Command of Brigade Commander, number 01-27.-1/93 of March 20, 1993; (D 7) Submission of medical documentation from Dr. Fra Mato Nikolić Hospital, No. 02-1315/09 of June 23, 2009; (D 8) Summons for witness Dr. Boško Pavlić of June 23, 2009; (D 9/15-1) Report of the Brigade Commander and Brigade MP, number 01504075-01504076; (D 9/15-2) Command to the commanders of the defense sector of Vitez Brigade, No. 01-178/93 of April 24, 1993; (D 9/15-3) Telegram, note, number 01-8-240/93; (D 9/15-4) A memo of the brigade commander, number of 010011462 of April 22, 1993 and the list of released persons who were detained, number 01-157893 of April 22, 1993; (D 9/15-5) Request of the Commander, number 01-4-560/93 of April 24, 1993; (D 9/15-6) Amendment to the Command, number 01-4-666/93 of April 27, 1993; (D 9/15-7) The list of detained persons which should not be exposed to serious physical effort of April 27, 1993 No. 200-

1/93; (D 9/15-8) The command of Colonel Tihomir Blaškić, (D 9/15-9) Command of the Brigade Commander, number 01-211-2/93 of April 30, 1993; (D 9/15-10) Report on the bringing in of the soldiers, number 01504033 of May 14, 1993; (D 9/15-11) Report on the work of the Commission so far, number 364-1/93 of May 24, 1993; (D 9/15-12) Report of the Commander M.P. of May 28, 1993, number 01504052, (D 9/15-13) Report of the Commander of MP of May 29, 1993, number 01504051, (D 9/15-14) Report of the Commander of MP of June 8, 1993, number 01504047, (D 9/15-15) Report of an attempt at organizing an illegal exchange of August 21, 1993, number 01504041.

Prosecutor's Office Closing Argument

The Prosecution presented its closing argument on July 1, 2009. The Prosecution argues that from the testimonies of the witnesses examined (both of the prosecution and of the defense) it stems that all persons who were detained in the Workers' University, Cinema hall and SDK were protected persons, unarmed Bosnian civilians from Vitez, who were not involved in military activities, whereby Article 3 of the IV Geneva Convention was violated. Furthermore, the Prosecution pointed out that during the critical period the state of war had already been declared in BiH. In the opinion of the Prosecutor's Office, during the proceedings it was established that the accused Ante Kovać treated civilians inhumanely, because he unlawfully deprived them of liberty, unlawfully detained them, ordered and approved such actions, kept civilians under guard in inhumane conditions in the facilities where they were imprisoned, without sufficient food, civilians were taken to perform forced labor, to dig trenches in places dangerous for their lives. The Prosecution submits that it has been proven that the accused, coercing two females with the use of force and threats, performed sexual intercourse/rape on them, and appropriated their property. All these actions of the accused, the Prosecution points out, constitute serious violations of personal dignity and they are insulting and humiliating acts.

The Prosecution submits as undisputed the fact that Bosniak civilians detained in the rooms at the Workers' University were brought and guarded there by the members of the Brigade Military Police of the Vitez Brigade, whose commander was the accused, and an undisputed fact is also that they were taken there from their apartments or houses, companies and workplaces.

The defense witnesses who were members of the Brigade Military Police, as the Prosecution argues, were inconsistent in their statements, contradictory and confused, trying to help the accused, stating that the accused was not their commander from April 1993, and stating that the Military Police did not arrest and detain civilians, but that they only guarded them in these facilities. The Prosecution noted that all the examined witnesses who were detained in these detention facilities said that nobody ever told them, or gave any written document as to why they were arrested and detained in these rooms.

Finally, the Prosecution argues that a large number of evidence presented during the main trial confirms the above, i.e. that the Brigade Military Police, whose commander was Ante Kovać, together with him carried out the illegal arrests and detentions the Bosniak civilian population, they were kept under guard in the detention facilities, in inhumane conditions where they were treated inhumanely, as well as the fact that the accused ordered, approved, controlled, made lists, reported undisciplined members of the military police, i.e. that he had all the powers as the commander. The Prosecution believes that the Court, in meting out the sentence, should bear in mind the severity of the perpetrated criminal offense, and the

resulting consequences, then the fact that it was the attack on personal dignity, reflected in the rape of two females, one of which was of minor age at the time of the rape.

Defense Closing Argument

Defense counsel for the accused, the attorney Tomić, on July 6, 2009 presented his closing argument, stating that the Prosecution failed to prove beyond a reasonable doubt that Anto Kovać committed the crime as charged.

Primarily, as regards the general elements of the criminal offense in this case, the defense counsel asserts that not all the preconditions – necessary to regard the acts of the accused as war crimes in accordance with the 1949 Geneva Convention – have been fulfilled. The counsel does not dispute that there was an armed conflict between the HVO and the Army of Bosnia and Herzegovina at the relevant time, but in his opinion, it has not been proven that this conflict, in its nature, was an international conflict. Furthermore, he said that no nexus between the perpetrated crime and the accused has been established, and that the victims of these crimes did not belong to the category of protected persons, i.e. civilians. The defense counsel also challenges the command responsibility of the accused, claiming that his orders were of "technical nature."

Furthermore, the defense counsel argues that the crimes alleged under Counts 2 and 3 of the Indictment are not war crimes and therefore challenges the jurisdiction of the Court of BiH (the defense counsel believes that the subject matter jurisdiction to try these offenses rests with the Cantonal Court in Novi Travnik). The counsel, in addition, claims that the victims of the alleged rapes are "two setup witnesses" under protection of person C, and based on the alleged rape both of them received a pension.

The counsel argues that the accused until June 2, 1993, was a member of the Brigade Military Police, and only after that date was he appointed commander. According to the defense counsel, the name of the accused was abused in the signing of the documents pertaining to the punishment of soldiers and searches of apartments. He claims that on most of these documents the signature of the accused is falsified even before he formally became a commander. Also, the defense counsel referred to the military hierarchy and the structure of the HVO, claiming that the accused was at the very bottom of the chain of command.

1. Procedural Decisions of the Court

1. 1. Public Exclusion Decisions

Under the Law on Protection of Witnesses under Threat and Vulnerable Witnesses (Law on Witness Protection), specific protection measures were granted to four prosecution witnesses during the preliminary proceedings, in a way that they were assigned pseudonyms A, B, C and D. At the main trial the Prosecution proposed to exclude the public during the testimony of these witnesses in accordance with Article 235 of the CPC of BiH, with their consent. The reason that the Prosecutor's Office stated to support its Motion was the protection of life of these witnesses. The Prosecution explained its Motion by stating that witnesses A, B and D are the victims of criminal acts and that nobody knows what happened to them except members of their close families. Witness C is closely associated with one of the protected witnesses, and his interest would be called into question if he testified in public.

Defense for the accused did not oppose these proposals of the Prosecutor's Office so the Panel accepted the agreed proposal of both parties and decided that the public shall be excluded when hearing these witnesses in accordance with Article 235 of the CPC BiH. The Panel, in making the decision, considered the mutual consent of the parties, and the relationship between the right of witnesses to protection of their private life and the right of the public to proper and timely information. It is clear that the exclusion of the public is an exception to the rule that the trials are public. However, in this case, the Panel found that the exclusion of the public achieves the desired purpose of preventing harmful consequences to witnesses, while providing information to the public will be made in some other, more acceptable manner. In making decisions on the exclusion of the public, the Panel took into account the specificity of the protected witnesses testimony content that could easily uncover their identity.

Therefore, the Panel, in addition to protective measures granting a pseudonym, during the examination of these witnesses, in accordance with legal provisions, entirely excluded the public, finding it necessary to reinforce the measure of pseudonym, which is the basic measure to protect the identity of these witnesses.

The Panel notes that the accused and his attorneys in the above-mentioned situation were informed with the identity of protected witnesses and the entire content of their testimony.

In addition to witnesses for the Prosecution, on November 17, 2008 the Defense submitted to the Court a proposal seeking protection measures for three defense witnesses, under Article 3 of the Witness Protection Law and Article 235 of the CPC of BiH. The proposed measures included granting of a pseudonym and the exclusion of the public during their testimony. The defense counsel, while explaining this proposal, said that these are Bosniaks who feel that their testimony could endanger their and the safety of their families.

During the main trial held on February 3, 2009, the defense counsel verbally explained the above proposal. The Prosecution did not object to the proposal of the defense, so the Panel, in accordance with Article 3 of the Law on Witness Protection, granted pseudonyms 001, 002 and 003 to the witnesses whose personal data were specified in the defense proposal on November 17, 2008, and also declared confidential all their personal details. In addition, the public was excluded during their testimony. Based on the information that the Defense presented, the Panel found that these are the witnesses who believe that there are reasonable grounds to fear that their personal safety or the safety of their families would be threatened due to their participation in this case, and that such risk would arise as a result of their testimony in this proceeding. Detailed reasons why the Panel opted for protective measures for these witnesses (related to the personality of the witnesses) will not be presented here in order to achieve adequate protection of these witnesses.

1.2. Court (in)admissibility of specific evidence

1.2.1. Prosecution evidence (in)admissibility

During the evidentiary proceedings of the Prosecutor's Office, during the introduction of documentary evidence, the defense objected to the relevance of some of the proposed pieces of evidence, while with respect to some of the evidence used before the International Criminal Tribunal for the Former Yugoslavia (ICTY), it pointed out that those were documents that do not have the date and signature and as such they are not authentic.

With respect to objections related to relevance, the Panel admitted the proposed prosecution evidence because it considered them relevant to the case (opposite to the opinion argued by the Defense). This conclusion of the Panel particularly applies to the evidence that had already been the subject of the evidentiary proceedings in other cases before the ICTY.

The next objection of the defense, which refers to the authenticity of the evidence obtained from the ICTY, the Panel also considered as unfounded. Namely, Article 3 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office and the use of evidence obtained from the ICTY in proceedings before courts in BiH (the Transfer Law) prescribed that the evidence obtained in accordance with the Statute and Rules of Procedure and Evidence of the ICTY can be used in proceedings before the courts in BiH. Furthermore, Article 8 the same Law allows the use of documentation and certified copies (ICTY evidence) and prescribes that copies can be certified, inter alia, jointly for multiple documents (one or more pages of one document) in an electronic manner by the ICTY. The evidence, the tendering of which was objected by the defense, were obtained exactly from the ICTY and they are electronically certified copies. Accordingly, the Panel admitted the evidence, finding that their authenticity was confirmed precisely in the manner as prescribed in Article 8(2) of the Transfer Law.

1.2.2. Defense evidence (in)admissibility

Defense tendered into the case file proposal of defense evidence of November 16, 2007, which included, inter alia, a proposal to examine 41 witnesses. The Panel considered this proposal and granted the summoning of 24 witnesses. At the hearing held on December 16, 2008, the Defense of the accused waived the examination of witness Zvonko Čilić, stating that his testimony would just be the repetition of the information already presented.

When deciding on the above defense proposal, the Panel considered the following.

Article 241(1) of the CPC BiH reads: "It is the duty of the judge or the presiding judge to ensure that the subject matter is fully examined and that everything is eliminated that prolongs the proceedings but does not serve to clarify the matter."

Furthermore, Article 262(3) of the CPC of BiH states: "The judge or the presiding judge shall exercise an appropriate control over the manner and order of the examination of witnesses and the presentation of evidence so that the examination of and presentation of evidence is effective to ascertain the truth, to avoid loss of time and to protect the witnesses from harassment and confusion."

In this specific case, the Panel, minding its obligations in terms of "clarifying the matter," disallowing unnecessary repetitions and ensuring a fair trial within a reasonable time, at various stages of the proceedings determined the length of time to examine the proposed witnesses, or refused to examine a witness whose testimony would have been irrelevant. In this manner, the repetition in evidentiary proceedings was avoided as well as unnecessary procrastination in the case, but at the same time enough room was left to the parties to present all relevant evidence before the Court.

Namely, the defense suggested examining a number witnesses on the same circumstances, in relation to Count 1 of the Indictment (about 17 witnesses). The Panel reviewed in detail the proposal of the defense in light of its obligations and concluded that the examination of

the proposed persons would lead to delays in the proceedings in a sense that the same circumstances would be repeated by a larger number of persons, which in no way contributes to the effectiveness of establishing the truth. The examination of a number of persons in relation to the same circumstances would lead to the unnecessary loss of time. With this in mind, as well as the right of the accused to examine his witnesses, the Panel gave the defense the right to choose which witnesses to summons within a specified number of days or hours that the Panel provided for the examination of the proposed witnesses.

Furthermore, in addition to the witnesses who would testify on the same circumstances, the Defense proposed a number of persons who would testify about the character of the accused. However, the Panel found that the testimony about the character of the accused and about individual isolated cases where the accused helped some of them, is irrelevant in determining the responsibility of the accused for the acts described in the operative part of the Indictment. At the same time, the Panel evaluated such claims contained in a number of testimonies that the panel allowed – and the extent to which the testimony of the character of the accused was relevant in meting out the sentence.

Since the beginning of the main trial, the accused was represented by selected defense counsels, attorneys Dragan Barbarić and Branka Praljak. On January 5, 2009, the wife of the accused cancelled the power of attorney to defense counsel Praljak, so attorney Barbarić remained as the only (chosen) defense counsel of the accused. After the attorney Dragan Barbarić on February 23, 2009 canceled the power of attorney for the accused, an ex officio attorney Dušan Tomić was appointed to defend him. The Panel allowed attorney Tomić to get informed with the case, granting him the time that he requested. After the expiration of that period, attorney Tomić filed a new proposal of evidence for the defense. In this proposal, inter alia, attorney Tomić:

- Requested to re-examine all the protected witnesses examined by then, both for the Prosecution and the Defense. This includes witnesses with the pseudonyms A, B, C and D (for the prosecution) and witnesses 001, 002 and 003 (for the defense). Attorney Tomić said that the chosen defense attorneys for the accused had not sufficiently examined these witnesses, and argued that they did not conduct the defense of the accused in a proper manner;
- Adhered to the proposal to examine Mario Čerkez (who was suggested as a witness for the defense by the attorney Barbarić), and further proposed to examine Paško Ljubičić, Vladimir Šantić and Tihomir Blaškić on the circumstances of the role of the accused during the relevant time. Namely, the defense counsel believes that thus far only "ordinary police officers" were examined and that the people proposed to testify, who during the relevant time had a command role, could provide valuable and useful information for the defense;
- proposed that the accused present his defense again.

The Prosecution expressed opposition to the motion to examine protected Prosecution witnesses, noting that all these witnesses have been directly examined at the hearings when they were summoned, as well as cross-examined by the defense. The Prosecution is of the opinion that the defense had an opportunity to ask questions that even moved beyond the scope of cross-examination, to which neither the Court nor the Prosecutor's Office objected. Furthermore, the Prosecution noted that persons A and B are victims of rape, and that reexamination would cause trauma among these witnesses and deteriorate their health. In connection with the proposal for the re-examination of protected defense witnesses, the

Prosecution also voiced opposition, believing that it was unnecessary, especially when it comes to witness 002 who was already a prosecution witness.

The Prosecution also opposed the Defense proposal to examine Mario Čerkez, Tihomir Blaškić, Paško Ljubičić and Vladimir Šantić as defense witnesses. The Prosecution believed that these persons could not present any new and relevant information related to the accused.

The Prosecution did not oppose the proposal that the accused presents his defense again.

After detailed consideration of defense arguments, and the opposition of the Prosecutor's Office, the Panel refused the proposal to re-examine the already examined protected witnesses (for both the Defense and the Prosecution).

The Panel, bearing in mind the nature of mandatory provisions under Article 241(1) as well as Article 262(3) of the CPC of BiH, evaluated all the circumstances in this case, and in particular the following.

First of all, when it comes to the prosecution witnesses, whose re-examination was proposed by the defense, the Panel noted that at the time when these protected witnesses testified before the Court, the accused had two defense counsels, attorneys Dragan Barbarić and Branka Praljak. In this, the Panel draws particular attention to the fact that they were chosen counsels. Both chosen counsels were present at the main trial hearings when the protected prosecution witnesses were examined and they conducted the cross-examination of these witnesses. Some of the witnesses were cross-examined by the accused himself. All four protected witnesses were extensively examined, and the Panel, for the purpose of establishing comprehensive facts during the cross-examination of witnesses by the defense allowed to some extent the issues that went beyond the scope of earlier direct examination.

After the evidentiary proceedings of the Prosecutor's Office, attorney Barbarić submitted to the Court the defense evidence, in which no protected prosecution witnesses were proposed for examination as a witness for the defense. Therefore, it is apparent that the counsels, who represented the accused at the time, and the accused himself, thought that these witnesses were sufficiently examined. It is necessary to bear in mind that these are protected witnesses, some of whom are traumatized, especially witnesses who are the victims of rape. The Panel found that the re-summoning of these witnesses would expose them to further trauma, unjustified amid the existing circumstances.

With respect to protected defense witnesses, the Panel found that they were extensively examined in detail with respect to the entire factual description in the Indictment. In addition, the witnesses were extensively examined on the circumstances set forth in the written proposal of the defense. The witnesses presented a detailed knowledge of the actions of the accused.

The Panel believes that during the examination of the protected witnesses, the accused had an adequate defense, and that he himself actively participated in the trial, in accordance with his rights. The fact that the accused did not recall the power of attorney to these defense counsels leads to a conclusion that there was no situation in which the accused was possibly dissatisfied by the defense of the then defense counsels. When asked by the Court why the attorney Dragan Barbarić cancelled his power of attorney, the accused, among other things,

stated that there was no disruption in cooperation, and that there were no "particular" misunderstandings between him and the defense counsel.

In connection with the above, the Panel points at the practice in the Court of Human Rights in the *Kamasinski vs. Austria* case[1], which, inter alia, stated that the conduct of the defense is primarily a matter of agreement between the accused and his defense counsel, regardless of whether the counsel was chosen or appointed *ex officio*. The competent authority is required, in accordance with Article 6 of the Convention, to intervene only when there has been a failure by the defense counsel to effectively represent the accused, and when the Court is in some manner informed about the existence of such a failure. In this case, as highlighted above, the Panel concluded that the accused in the relevant part of the trial had the adequate defense.

The Panel, with respect to the refusal of the evidence proposed by attorney Tomić, also had in mind the conclusions of the Court of Human Rights in the *Perna vs. Italy* case[2]. Specifically, a position was presented in this case that the admissibility of evidence primarily falls under the purview of domestic law in a certain country and the general rule is that domestic courts decide on this issue. Furthermore, the position of the Court of Human Rights is that a local court is competent to decide on the admissibility or inadmissibility of evidence proposed by the accused[3]. Therefore, the accused must corroborate his request for examination of a certain witness with an explanation of reasons as to why the testimony of that person is relevant and important in the case[4].

Furthermore, the Panel draws attention to the duty of every counsel, including those who have just been included in an ongoing case, to thoroughly familiarize themselves with the case and perform their duties well and with a high degree of promptness. In doing so, the Panel does not exclude a possibility that in certain instances when there is a change of defense counsel, it is necessary to present certain evidence again, and when the opposite decision would put the defense at a disadvantage and throw into doubt the fairness of the proceedings against the accused. It was not so in this case. The Panel found that in this case both the previously chosen defenders and the defense counsel Tomić fulfilled their duties and competently represented the interests and the defense of the accused at various stages of the proceedings. Carefully following the course of the entire proceedings, the Panel did not find that the request to re-examine the witnesses was objectively justified after the defense counsels changed.

Therefore, based on these circumstances, the Panel considers that the accused had an adequate defense, that his right to a fair trial was fully honored, and that presenting the evidence again would result in unnecessary delay of proceedings, without any probative value for the proceedings.

Regarding the earlier proposal of the counsel Tomić to examine Mario Čerkez, Tihomir Blaškić, Vladimir Šantić and Paško Ljubičić regarding the role of the accused during the relevant period, the Panel allowed the Defense to summons two of these persons at its own choice. Specifically, according to the Defense, all four proposed witnesses would testify

[1] European Court of Human Rights *Kamasinski vs. Austria* paragraph 65.
[2] European Court of Human Rights *Perna vs. Italy*, July 25, 2001, Application No. 48898/99, paragraph 26. , also the case *Van Mechelen and Others vs. the Netherlands*, April 23, 1997
[3] European Court of Human Rights *Vidal vs. Belgium*, April 22, 1992. No 235-B, paragraph 33.
[4] European Court of Human Rights *Engel and Others vs. the Netherlands*, June 8, 1976., No. 22, paragraph 91., also the case *Bricmont vs. Belgium*, July 7, 1989, No. 158, paragraph 89.

cumulatively, on the same circumstances (the role of the accused at the relevant time). The Panel has already examined a number of defense witnesses on these circumstances during the earlier course of proceedings, so the examination of four more persons would lead to unnecessary delays in the proceedings.

The Panel allowed the defense proposal that the accused presents his defense again and ordered that the accused testify at the end of evidentiary proceedings. Such order of testimony certainly puts the accused in a better position, in the sense that his attorney was able to examine him again directly at the end of the proceedings in connection with all the facts presented at earlier stages of the trial.

1.2.3. 30-day adjournment expiry

Article 250(2) of the CPC of BiH prescribes: "The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has changed or if the adjournment lasted longer than 30 days. However, with the consent of the parties and the defence attorney, the Panel may decide that in such a case the witnesses and experts not be examined again and that no new crime scene investigation be conducted, but that the minutes of the crime scene investigation and the testimony of the witnesses and experts given at the prior main trial be used instead."

In this case, between the main trial hearing held on March 30, 2009 and the main trial hearing held on May 5, 2009 the adjourned time period was longer than 30 days. However, although between these two dates a hearing was scheduled for April 23, 2009, neither the accused nor his defense counsel appeared at the hearing and for that reason the hearing was adjourned. Namely, the defense counsel Tomić did not appear at the aforementioned main trial hearing because of illness, while the accused also did not appear for health reasons, of which there is medical documentation in the record (the diagnosis of the health of the accused on this day was presented by the prison doctor and a specialist doctor/expert witness). In addition, the Panel was not able to schedule a hearing before May 5, 2009 because the defense counsel submitted a letter to the Court from which it was obvious that he could not, due to health reasons, appear before the Court before that date.

At the following main trial hearing (on May 5, 2009) none of the parties in the proceedings, including the defense counsel for the accused, objected to the resumption of proceedings, i.e. they did not demand that the trial starts anew. Subsequently, the main trial hearing held on May 14, 2009, the defense counsel filed an objection regarding the continuity of the main trial (in relation to the previous period), while failing to give any reasonable explanation as to why this objection was not filed at the hearing on May 5, 2009.

The Panel considered the above objection of the Defense, and, bearing in mind the above, found that there was no application of Article 250(2) of the CPC of BiH (in terms of adjourning the trial for more than 30 days). Specifically, the Panel finds that the trial in this case was scheduled within the legal deadline, which did not exceed 30 days. The Panel, bearing in mind obligations under the foregoing Article, was mindful of the fact that the trial be scheduled within the regular legislative deadlines. The failure to hold the main trial on the foregoing date (April 23, 2009) occurred solely because the accused and his counsel failed to appear. While the Panel, on the basis of the submitted documentation, can accept as justified the absence of the accused and his counsel at a trial day as scheduled, it would

be totally illogical if in such circumstances the Panel would be forced to repeat the entire proceedings.

The Panel finds that there is a fundamental difference between the adjournment and failure to hold the trial within 30 days. In the opinion of the Panel, the purpose of the cited provisions is to protect the rights of the accused to a trial within a reasonable time to prevent the neglect of the Trial Panel in scheduling and holding orderly trial hearings. This provision certainly could not have intended to force the Trial Panel (together with other participants, including the witnesses) to repeat the whole evidentiary proceedings in circumstances where the trial was properly scheduled within legal limits, and its continuity at one point slowed down for the reasons completely beyond the control of Panel. Such an outcome would run contrary to the core of this provision aimed at the orderly and timely course of proceedings.

As already stated, the Panel scheduled main trial hearings in accordance with the deadlines stated by the law, paying particular attention to the rights of the accused as well as his ability to attend trials. Main trial hearings in this case were mostly scheduled one to two months in advance so that all participants in the proceedings were informed in time about the scheduled hearings. Therefore, the Panel by its actions did not cause any failure to hold the trial within the specified period, and the resumption of the trial, after the accused and his defense counsel were unable to attend, has not in any way violated the rights of the accused, and it was in the interest of timely completion of the trial.

1.2.4. Hunger strike

On May 20, 2009, the accused went on a hunger strike, claiming that allegedly he was deceived by the former defense counsel and the prosecutor because they persuaded him to defend himself by remaining silent, and because of his health and the decision of the Court (shortening the list of witnesses) which the accused characterized as a denial of the right to a defense. On June 4, 2009, the accused stopped the hunger strike. During the period of the strike the Panel did not hold hearings in this case.

2. Application of the CC of BiH

The accused is charged with committing the criminal offense under the Criminal Code of BiH, which was adopted in 2003, therefore after the period of relevant events in the Indictment. The incriminating actions of the accused, at the time when committed, represented a criminal offense according to the general principles of international law and the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY Criminal Code), which was in force at the relevant period. When deciding on the verdict, the Panel, therefore, primarily focused on the application of the law, bearing in mind the provisions of Articles 3, 4 and 4 a) of the Criminal Code of BiH and Article 7 of the Convention.

The Panel considered as directly relevant to this issue the approach adopted by the Appellate Panel of the Court in case of Ivica Vrdoljak, as follows.

> "Article 3 of the CC BiH (Principle of Legality) provides that, 'the criminal offences 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 offence by law or international

law, and for which a punishment has not been prescribed by law. Also, Article 4 of the CC BiH prescribes that, 'the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence' and that, 'if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law which is more lenient to the perpetrator shall be applied'.

The principle of legality is incorporated also in Article 7(1) of the ECHR. In this matter it should be noted that in terms of the application the ECHR has priority over all the other BiH Laws (in accordance with Article 2(2) of the BiH Constitution). The referenced Article of ECHR prohibits that a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed, but it does not provide for the application of the most lenient law.

In particular the Court had in mind the Decision taken by the BiH Constitutional Court in the Abduladhim Maktouf case (No. AP-1785-06) wherefrom it follows that the application of the CC BiH in the cases of criminal offences against humanity and values protected by international law (the offences which were committed before this Code entered into force) is in accordance with the ECHR as well as with the BiH Constitution. However, the above mentioned Constitutional Court's Decision does not assert that the CC BiH is always more lenient and that as such it may always (and should) be applied. Also, the said Decision cannot serve as a basis for general references thereto. Quite the opposite; each individual case must be given special consideration in the light of the application of the respective law. The Constitutional Court's Decision concludes that in the present case the CC BiH is not more stringent than the Criminal Code which was in effect at the time of the crime perpetration. The ECHR does not prescribe the term 'more lenient law' either; it only provides that 'a heavier penalty cannot be imposed' (Article 7(1) of the ECHR).[5]

The Appellate Panel further said:

> "Only where the CC BiH is found not to be more stringent than the law which was in force at the time of the perpetration, only then the CC BiH can be applied to the specific case."[6]

Thus, concluding that the application of the Criminal Code of BiH is not in contradiction with the Constitution of BiH and the Convention, the Panel has to analyze whether the Criminal Code of BiH is more stringent than the Criminal Code of the SFRY.

Although the Constitutional Court did not reach a final conclusion on this issue (and the Appellate Panel notes that this has to be analyzed in particular circumstances relating to each case), the Panel finds the following interpretation directly applicable in the Maktouf case:

> "68 .... [C]oncept of the CC in Yugoslavia was such that it did not envision the existence of long-term or life imprisonment but prescribed the death penalty for the most serious crimes, and the sentence of up to 15 years in prison for less severe forms of crime. Therefore, it is clear that one sanction cannot be separated from the

[5] Appellate Panel Verdict, Ivica Vrdoljak, X-KRŽ-08/488, of January 29, 2009, page 11
[6] Appellate Panel Verdict, Ivica Vrdoljak, X-KRŽ-08/488, January 29, 2009, page 12

totality of the purpose that was to be achieved in the penal policy while the law was applicable.

69. In this respect, the Constitutional Court considers that it is not possible to simply "remove" one sanction and implement another, less severe sanction and thus practically leave the worst crimes inadequately sanctioned."

Therefore, the Constitutional Court makes clear that, if the SFRY Criminal Code prescribed the death penalty for a specific criminal offense, it is certainly relevant in the context of deciding whether the Criminal Code of BiH is more stringent than that Code. In other words, the existence of death penalty in the Criminal Code of Yugoslavia cannot simply be ignored and the Code interpreted as less stringent because it prescribed, leaving aside the death sentence, a lower maximum sentence compared to the CC of BiH regarding the most severe prison sentence.

Starting from these principles, the Panel conducted an analysis of relevant legal provisions of the earlier codes (Criminal Code of the SFRY) and the Criminal Code of BiH, and came up with the following conclusions.

In its provisions relevant to this case the SFRY Criminal Code allowed the imposition of death penalty,[7] while the highest punishment that can be imposed under the CC of BiH is long-term imprisonment (up to 45 years). At the same time, the minimum prison sentence that may be imposed for a crime the accused was charged with in the Criminal Code of the SFRY is five (5) years, while under the Criminal Code of BiH, the minimum is 10 years. The Appellate Panel in similar circumstances concluded that regarding the sentencing, the application of the Criminal Code of the SFRY is more favorable when it comes to the minimum sentence that may be imposed for the relevant criminal offense, while on the other hand, the CC of BiH is more favorable in terms of maximum penalties for a specific criminal offense.[8]

However, in one aspect of the interpretation of the Appellate Panel, this Panel finds that consideration of the weight (or application) of the code cannot be "deferred" until the end of the process of deliberations, i.e. after the Panel reviewed the evidence, concluded on culpability, took into account the aggravating and mitigating circumstances and passed the conclusion on the sentence. This would mean that the panel should first convict the accused (if there is enough evidence of guilt) and only then decide on the application of the code. Such an approach in the opinion of this Panel is not possible because the adjudication process must start from the point of determining the applicable law, and consequently the elements of the crime, before the Panel can decide on culpability and determine the appropriate sentence.

The Panel believes that in this respect its position is in accordance with the already cited position of the Constitutional Court, which noted that it is not possible to simply "remove" one sanction and apply other, less severe sanctions. Thus, the code must be viewed in its entirety when deliberating on the issue of its stringency. Furthermore, this issue must be considered at the start of deliberations, before the Panel concludes whether the accused is proven guilty (and before the deliberation on criminal sanctions in relation to specific arguments of the Indictment).

[7] The SFRY Criminal Code, 1976, Article 34
[8] Appellate Panel Verdict, Ivica Vrdoljak, X-KRŽ-08/488, January 29, 2009, page 12

In other words, this Panel believes that it is not possible to evaluate the same legal provision in the Criminal Code of the SFRY as more lenient in one case just because a sentence closer to the minimum will likely be imposed on the convicted person, and consider it more stringent in another case just because it is possible to impose the maximum sentence on the accused. If the death penalty is prescribed for a specific criminal offense, the weight of this provision cannot be determined by removing the maximum sentence but the maximum possible sentence must be taken into account. As already explained, at that moment, the Panel cannot know whether the guilt of the accused will be proven and what sentence will be imposed, if there is a conviction.

For the specific situation in this case, the Panel found the Criminal Code of BiH as a more lenient code, because it prescribes a long-term imprisonment as the maximum sentence, while in the case of the SFRY Criminal Code application, the accused, if convicted, could be sentenced to death penalty.

3. Evidence evaluation

3.1. General considerations in evidence evaluation

During the proceedings, the Panel evaluated the evidence in accordance with the applicable procedural code, applying to the accused the presumption of innocence as prescribed in Article 3 of the CPC of BiH, which embodies the general principle of the law according to which the obligation of the Prosecutor's Office is to determine the guilt of the accused beyond a reasonable doubt.

In addition to the obligation that the testimony of witnesses must be given honestly, it is necessary that the testimony is also reliable. With this in mind, throughout the proceedings the Panel was aware that the testimony was given about the facts that occurred many years before the testimony, and that some uncertainty was present due to the instability of human perception in relation to traumatic events and memories of these events. When evaluating the testimony of the witnesses who testified in the proceedings, the Panel particularly valued their demeanor, behavior and character, considering in relation to them the other evidence and circumstances in connection with this case. In addition, the Panel had in mind the lapse of time since the critical events took place, and in line with that, the memories of witnesses, which have certainly underwent some changes, or lack of memory of all the details and circumstances that existed at the time when criminal offenses were perpetrated.

With respect to indirect evidence (second-hand evidence), the Panel pointed out that the case law of this Court is that such evidence is admissible. Of course, the probative value of such evidence depends on the context and character of the evidence at hand and whether that statement is substantiated by other evidence. In addition, the Panel notes that the Court is free in evaluating the evidence (in accordance with Article 15 of the CPC BiH).

The Panel had in mind the case law of the Court of Human Rights[9] according to which the Court, although required to give reasons for its decision, may not deal in detail with every argument that has been put forward by a party in the proceedings.

Bearing this in mind, in a detailed assessment of all presented evidence, individually and in their interconnectedness, the Panel established the following.

[9] European Court of Human Rights *Garcia Ruiz vs. Spain*, No. 30544/96, January 21, 1999

3.2. Role of the accused

Before considering specific elements of the crime and the factual allegations and evidence related to specific counts of the Indictment, the Panel will first address the question of the capacity in which the accused committed the crimes described below. The Indictment charges him with having committed specific criminal acts in the capacity of Commander of the Vitez Brigade Military Police, during the period from the middle of April until the end of August 1993.

From the testimony of all witnesses examined, especially the defense witnesses, it stems that the seat of the Vitez Brigade, and the Brigade Military Police, was on the premises of the Workers' University, known as the Culture Home in Vitez. The largest number of detained civilians were located in the hall of the cinema, in the same building. The witnesses named the building as Cinema or as Culture Home or as Worker's University. Since all three terms denote the same building, the panel will henceforth use the term Culture Home.

In addition to the Culture Home, the premises of the SDK (Public Accounting Service) and the Chess Club were also used to hold detainees in Vitez.

Prosecution witnesses testified about the commanding relationship of the accused toward the military police officers who guarded the Culture Home (and within it, the cinema hall), and the SDK and guarded the persons who were detained in these facilities. Most witnesses knew the accused before the war. Some of them, such as Enes Šurković, Alija Bašić and Ćazim Ahmić, knew the accused from the job (from the Slobodan Princip Seljo factory), while the others mostly came in contact with him through a common interest in football. The accused bears the nickname Žabac, confirmed by a number of prosecution and defense witnesses.

The witness Mirsad Ahmić was detained in the SDK and there he occasionally saw the accused. He remembers that the accused was in the Military Police uniform, and added: "I did not know at first why he would come, but later, while we were staying there, one could conclude while talking with other people there that he was a kind of, well let’s say, a commander. Now, what level he actually was, I do not know. But I saw the guards sometimes asking him for something... These guards from the Military Police, I think that Kovać had some kind of command over them." This witness states that among the military police officers who guarded them he knew Srećko Petrović. He testifies that once his father pleaded Srećko to let them go home and take a bath. Subsequently while talking to his father, he learned that Srećko had asked Žabac to let them take a bath.

Witness Edib Zlotrg during the relevant period was held in a cinema hall of the Culture Home, where he saw the accused several times in a camouflage uniform with a white belt and badge of the Military Police. The witness said that that at the critical time he knew that the accused was "one of the commanders."

Witness Bahtija Sivro saw the accused twice in the lobby of the Culture Home, wearing a camouflaged Military Police uniform with a white belt. He said that on the bulletin board in the lobby of the building he read that Ante Kovać is the military police commander, and that his deputy is Zlatko Nakić, and also said that he heard the same thing in conversations with other prisoners. Specifically, the witness stated that the bulletin board located on the

wall in the lobby of the building where he was imprisoned read the following: "There stood the name of Anto Kovać, the brigade military police commander and then deputy commander Zlatan Nakić, and so on." The witness further stated that once or twice he saw that list (that was typed on an A4 page, which can hold a maximum of perhaps 15 to 20 people), and that afterwards he did not read it any more because it was no longer interesting. Answering a question by the prosecutor whether he was aware as to why the accused came to the Culture Home, the witness Sivro said: "Well, it was the brigade command for him, and he came there to report and possibly to receive new orders."

Witness Suad Salkić said that the accused was said to have a commanding function, and also said it was seen that he had a certain "rating" and influence, i.e. some order-issuing function with regard to the people within that security circle. The witness Salkić said that he saw accused with several members of the military police, that he had a commanding attitude towards him and that the military police officers behaved towards him and accepted him as someone who is their superior. The witness said that the accused had a prominent position within that structure.

The Panel considered the fact that Suad Salkić and Bahtija Sivro at the time in question performed official functions (they were members of the War Presidency of the municipality of Vitez), and as such they had the necessary knowledge and relevant experience that helped them understand the circumstances in which they were and the role of persons surrounding them.

Witness Sulejman Kavazović was held in the SDK, and he testified that military police officers guarded the prisoners in that facility. From among the police officers he knew Dragan Čalić who once took him home for a bath. On that occasion, Dragan Čalić gave him half an hour to bathe and told him that he must hurry, because he did this on his own, because he did not have the approval to let him take a bath. The witness stated that Žabac was a superior (as noted, the nickname used by the accused). The witness did not know Žabac at the time, but he heard that military police officers said "not without the approval of Žabac."

Witnesses Enver Karajko was detained on the premises of the SDK. He said that Dragan Čalić said that Žabac is in charge of the prisoners, and that he was his boss.

Witness Edin Bešo during detention in the Culture Home recognized Ante Kovać. During the presentation of records from the investigation (exhibit T3)[10] the witness confirmed the statements: "I cannot remember exactly which function Ante Kovać had, but he ordered military police officers to deploy this group where I was into the premises of the Workers' University."

Witness Ermedin Gerina was also detained on the premises of the Culture Home and stated that he saw the accused once in the Home, in civilian clothes, when the accused told him that he had an ulcer surgery. After he was shown evidence from the investigation in which he stated that he saw the accused in a uniform, the witness explained that it was probably at one occasion when the accused let him home for a bath and gave him cigarettes. The Panel noted that the testimony of this witnesses at the trial compared to the testimony he gave during the investigation was changed and adjusted in a way that could serve the evasion of the criminal responsibility of the accused. As already stated, the witness said to having seen the accused in civilian clothes during his detention and that the accused told him at that time

[10] Witness examination record of Edin Bešo, no KT-RZ-106/06 of October 16, 2007 (exhibit T3)

to have had ulcer surgery. However, the witness was released from detention in late April or early May 1993 and the accused had surgery on May 14, which is indisputable from the testimony of the accused himself and from the documentary evidence from the hospital in Nova Bila.

The Panel could not give full faith to the testimony of this witness given at the main trial, bearing in mind the contradictions between his statements in the investigation and his testimony at the main trial. The Panel found that this witness showed an interest to help the accused who at the critical time rescued him and his family by providing transportation out of the town (he helped the witness during his detention in the Culture Home). Nevertheless, from the testimony of Gerina, it can be concluded that Ante Kovać had an opportunity and a way to help the witness, to let him go home for a bath and later on to rescue him and his family from Vitez. It is clear that the accused must have been in the position of issuing orders, or at a higher position within the military structure to be able to behave as described above. Thus, even the testimony of this witness confirms that the accused had a commanding position during the incriminating period.

Witnesses Alija Bašić, Samet Sadibašić, Edin Bešo and Salih Cicvara knew the accused since before the war and said that they saw him in the Culture Home in the uniform of the Military Police, as he stood with other uniformed persons at this facility.

During the incriminating period, the accused helped the witness Senad Hidić. The witness Hidić said that in the SDK, where he was detained, he saw Ante Kovać in a camouflage uniform with a white belt, and he also said: "He is, I mean he was, by his conduct, I think he was some kind of a boss, police commander or something." Furthermore, he said that the accused let him go home for a bath and after that helped him and his family to go to Novi Travnik.

The witness for the defense 001, who knew the accused since childhood, testified that he helped him during the critical period. Specifically, in May 1993, the witness, with several Bosniak men (including the brother of the witness) was transported to the Culture Home, however, the accused saw him in front of the Home, returned him and his brother to their home. Thus, the witness 001 was not detained in the Culture Home with other Bosniak residents of Vitez, because the accused voluntarily decided to take him back home. Other persons who were brought with the witness and his brother remained detained in the Home. The fact that the accused could act in this way ("by his choosing") confirms the conclusion that he had the highest position in the hierarchy of the military police.

The Defense does not dispute that the accused was a member and the commander of the brigade military police, but asserts that this was the case only since July 1993 i.e. after the events described under Counts 1 and 2 of the Indictment. Defense witnesses Ivica Jukić, Dragan Križanac, Goran Kovač, Dragan Toljušić, Ilija Križanac, Slavko Vidović and Ivica Rajić (former military police officers) said that it was Ivo Petrović who was the commander during the earlier period.

Defense witness Željko Sajević was the chief of the Operative-Teaching Department during the relevant period, and served as Deputy Commander of the Vitez Brigade. He said that the immediate commander of the Military Police Platoon in the initial period was Ivo Petrović and that only in June or July was Ante Kovać installed as the commander. Witness Sajević explained that the Platoon Commander and commander of the Military Police is in fact one and the same person, because in this case it was the Platoon of Military Police as a

formation. The commander of this platoon, as Sajević said, issues orders to his subordinates i.e. conveys the orders he receives from the Brigade Commander Mario Čerkez.

The accused chose to present his defense and testified on two occasions (on November 26, 2008 and June 11, 2009), during which he was directly and cross examined. He testified that his military involvement began in 1992, and that in April 1993 he had the rank of lance corporal under the command of Mario Čerkez ("... I was a commander in my platoon there was… in that department, seven military police officers)[11]. The defense witnesses Goran Kovač and Stipo Čeko described his position within the military structure in a similar manner.

The defense, moreover, tendered the documentary evidence, inter alia, D5[12] and D6[13], which stated that the Military Police Platoon Commander in March 1993 was Ivo Petrović. The Panel noted that these documents are not included in the time-frame of the Indictment.

The accused, in addition to the above, defended himself with an alibi, claiming that in mid-May 1993, he had an ulcer surgery and that a longer period of time after that he was on sick leave. However, from the defense exhibit D7[14] it arises that the accused was in the hospital between May 13 and May 22, 1993, which the defense witness, Dr. Boško Pavlić, confirmed. From this evidence it is clear that the accused's time in hospital does not cover the entire period he is charged with for committing criminal offenses. Therefore, it is possible that the accused had his surgery in the period while he served as the commander, especially bearing in mind that he was hospitalized for only a short period. However, this circumstance, the Panel finds, does not influence the conclusion that during the relevant time (the time of bringing of civilians and their confinement in detention facilities) he was the commander, which is in accordance with the statements of witnesses who saw him several times in the commanding role during the critical period.

The Panel considered the Prosecution documentary evidence, including T 35[15] and T 50[16], from which it stems that the accused already on May 1, 1993, was the Commander of the Brigade Military Police and he is referred to as such in the aforementioned evidence. Namely, evidence T 35 is the order of Mario Čerkez (Commander of the Vitez Brigade) to conduct an inspection of flats, and in the order, under item 4, it is stated that the person responsible for carrying out the orders is the Brigade Police Commander, Mr. Anto Kovać. The specific Order was issued on May 1, 1993, which means during the period immediately after the Bosniak men were confined in detention facilities. Although the accused said that he saw the evidence T 35[17] for the first time in his life at the main trial, the defense did not seriously challenge the authenticity of these pieces of evidence obtained from the ICTY.

Furthermore, in an official document of the Military Police - Report on the Control of Apartments of May 4, 1993[18] (which was made after the search of apartments of Bosniaks in Vitez), it was stated that the control of apartments was made by Ivica Jukić and the commander of Military Police Ante Kovać, who also signed this document.

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[11] Testimony of the accused at the main trial on November 26, 2008
[12] Order of the Vitez Brigade, no. 01-39-1/93 of March 22, 1993
[13] Order of the Vitez Brigade, no. 01-27-1/93 of March 20, 1993
[14] Letter to Dr. Fra Mato Nikolić Hospital in Nova Bila, of June 24, 2009
[15] Order of May 1, 1993, where, inter alia, item 4 reads: "The Commander of the Brigade Police Mr. Ante Kovać is personally responsible to me for the implementation of this order."
[16] Report of brigade Military Police of May 4, 1993 on the control of apartments
[17] Order based on the knowledge and reports of citizens from Vitez of May 1, 1993;
[18] Report on the control of apartments of May 4, 1993 (T 50)

The accused was referred to as the commander also in the Order of Mario Čerkez, the Commander of the Vitez Brigade of June 1, 1993[19].

The role of the accused as a military police commander is visible in the Minutes of August 23, 1993,[20] as well as the letter from the Brigade Police of August 23, 1993,[21] where the name of the accused is referred to as the Military Police Commander.

Considering all the foregoing evidence, including the evidence of the defense and the prosecution, the Panel concluded that during the relevant period the accused had the authority of the Military Police Commander and directly supervised military policemen who brought and guarded Bosniak men in detention facilities. Even if the Panel accepted the assertion of the accused that during the relevant period he had the role of lance corporal (and not the role of military police commander), such position would not lead to a different conclusion with respect to his criminal responsibility, because the accused, in any case, had both *de facto* and *de jure* control over the military police officers who brought, detained and secured the arrested, and over the fate of detainees themselves.

3.3. General elements of the criminal offence of War Crimes against Civilians

The accused is charged with having committed the criminal offence of War Crimes against Civilians under Article 173/1/c/e/ and f/ of the CC of BiH, in conjunction with Article 180/1/ of the CC of BiH, specifically with the following offences:

c) […] Inhuman treatment […].
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) […], unlawful bringing in concentration camps and other illegal arrests and detention, […].
f) Forced labour, […], pillaging […].

Article 173 contains the following general elements that have to be satisfied to amount to the criminal offence of War Crimes against Civilians:

- the existence of a state of war, armed conflict or occupation;
- the connection between the actions taken by a physical perpetrator and the war, armed conflict or occupation; and
- the actions taken by a physical perpetrator have to be in violation of international law during the war, armed conflict or occupation.

3.3.1. State of war, armed conflict or occupation

The requirement that the actions taken by the accused have to be perpetrated during an armed conflict, occupation or state of war is consistent with the fact that the principles of international law be applied from the very beginning, throughout the end of hostilities. The ICTY Appellate Chamber in the Tadić case state in their Decision: "international

[19] Order of Mario Čerkez no. 01-415-1/93 of June 1, 1993 (exhibit T 37)
[20] Record on the found golden jewelry, Brigade Police, of August 23, 1993 (exhibit T 32)
[21] Letter of Brigade Police no. 13-943-1/93 of August 23, 1993 (exhibit T 31)

humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities …"[22].

The Panel adopts the definition of "armed conflict" developed in the ICTY jurisprudence, since that definition precisely reflects the meaning of the term "armed conflict", both under conventional and customary law in the relevant period. Consequently, the Panel concludes that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[23]

The Panel is satisfied that it has been proved beyond any reasonable doubt that the armed conflict was ongoing between the Army of BiH and the HVO in the period relevant to the Indictment.

To that end, it should be noted that pursuant to Article 8 of the Decree Law on Defence (*Official Gazette of RBiH*, No. 4/92), in the session held on 20 June 1992, the Presidency of the Republic of Bosnia and Herzegovina rendered the Decision on Declaring the State of War in the Territory of RBiH. By this Decision the state of war was declared in the territory of the Republic of Bosnia and Herzegovina. The Decision was published in the *Official Gazette of RBiH*, No. 7/92 and it became effective on the date of its publishing.[24] The Panel specifically finds that it follows from the prosecution witnesses' testimonies, predominantly direct victims of the crimes charged in the Indictment, that the armed conflict in the area of Vitez Municipality began not later than 16 April 1993. In addition, the defence witnesses also confirmed that the conflict existed in this period and the Defence Counsel did not refute this fact.

The witnesses both for the Prosecution and for the Defence were clear and consistent when they testified about the armed conflict between the Army of BiH and the HVO units that started on the mentioned date and was underway in the territory of Vitez Municipality in the relevant period.

The existence of the armed conflict in the relevant area was confirmed also on the grounds of physical evidence – Orders issued by the HVO on 16 April 1993[25] and 17 April 1993[26]. The Order of 17 April 1993 states *inter alia* that: "due to the intensified activities by Muslim forces in the area of Kuber…with the objective of gaining control over the mentioned road, I hereby order the forces of the Viteška Brigade, Zrinski Brigade and 4th Military Police Battalion to establish the defence line in the broader area of Kuber and to link up from the direction of Vidovići …, the forces are tasked to organise critical defence at this line and at any cost prevent the enemy from breaking through towards Kaonik and Nadioci…". There is another Order issued by the HVO on 16 April 1993[27] that states "….

[22] See *Tadić* case, No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paragraphs 67 and 70.
[23] See *Duško Tadić* case, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paragraph 70. See also *Nikola Andrun* case X-KRŽ-05/42 (Court of BiH, Second instance Verdict, 19 August 2008, page 17; *Ivica Vrdoljak*, X-KR-04/488 (Court of BiH), First instance Verdict, 10 July 2008, page 16; *Goran Damjanović and Zoran Damjanović*, X-KR-05/107 (Court of BiH), First instance Verdict, 18 June 2007, page 13.
[24] Decision on Declaring the State of War in the Territory of RBiH, Official Gazette of RBiH of 20 June 1992 (T 22)
[25] Re-assignment of the MP company from Travnik to Vitez, dated 16 April 1993 (T 26)
[26] Order to Commanders of the Viteška Brigade and Zrinski Brigade of 17 April 1993 (T 27)
[27] Combat Order – order to prevent attacks by enemy/extremist Muslim forces and to block the broader area of Kruščica, Vranjska and D. Verčerska, 16 April 1993 (T 23)

your forces are tasked to get control over the area of defence, block the villages and prevent any entry-exit from the villages. Should Muslims openly attack by firing from their infantry weapons on precise targets, destroy the weapons and prevent its movement …".

These physical pieces of evidence adduced by the Prosecution round up a clear picture of the existence and development of the conflict between the Army of RBiH and the HVO in the area of Vitez Municipality.

The Defence Counsel agrees with the Prosecution averment about the existence of the armed conflict, however, the Defence refutes the nature of the conflict by submitting that it was an internal, not international conflict. According to the Defence, that is precisely why the Court cannot establish that international law was violated in this case. The Panel will elaborate on this in more detail further in the text.

3.3.2. Nexus between the offence and the armed conflict

Notwithstanding that Article 173 of the CC of BiH contains no express proviso that there has to be a nexus between the physical perpetrator and the war, armed conflict or occupation, it is clear that such a nexus has to exist to allow the offences by a direct perpetrator to amount to violation of international law rules.[28]

Within the meaning of Article 3 common to the Geneva Conventions, the Panel has concluded that the required nexus exists when it is proved that the actions by a direct perpetrator were closely linked to the armed conflict. When examining if such a nexus exists, the Panel has found that these factors are also relevant to the analysis:

- the fact that the victim is a non-combatant;
- the fact that the victim is a member of the opposing party;
- the fact that the act may be said to serve the ultimate goal of a military campaign; and
- the fact that the crime is committed as part of or in the context of the perpetrator's official duties.[29]

The minimum nexus that has to be established is that the existence of an armed conflict must have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit the crime, the manner in which it was committed or the purpose for which it was committed.[30] Therefore, the state of war need not have been causal to the commission of the crime. Instead, the only requirement is that the armed conflict must have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit the crime, the manner in which it was committed or the purpose for which it was committed.[31] Also, it can be established that the necessary nexus exists even when direct actions by a perpetrator were provisionally and geographically remote from the area of the conflict itself, given that Common Article 3 will apply in the whole territory of the party to

[28] See *Andrun,* Second Instance Verdict, *Mirko Pekez et al,* X-KR-05/96-1 (Court of BiH), First Instance Verdict 15/04/2008; *Niset Ramić,* X-KR-06/197 (Court of BiH), First Instance Verdict, 17/07/2007; *Damjanović* First Instance Verdict

[29] *Prosecutor vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT.96-23-A and IT-96-23/1-A, Judgment, 12/06/2002, paragraph 60. See also *Vrdoljak* (Court of BiH) First-instance Verdict, page 19; *Damjanović* (Court of BiH) First-instance Verdict, page 13.

[30] See *Vasiljević* case, Trial Judgment, paragraph 25.

[31] *Kunarac* Appeal challenging the Verdict, paragraph 58.

the conflict from its commencement and will continue to apply until a peaceful settlement is achieved.[32]

The Panel has already established (in Section 3.2.) that the accused was Commander of the *Viteška Brigade* Military Police in the relevant period and, as such, he was part of the HVO military apparatus. The Panel has found that there is no doubt that the relevant offences were perpetrated at the time and under the guise of the armed conflict between the Army of RBiH and the HVO in the territory of Vitez Municipality and that the accused Ante Kovač carried out the relevant actions as a member of a party to the conflict. Thus, the armed conflict played a key role in creating the opportunity to the accused to commit the offences he is charged with and in the said manner. Some of the offences, like imprisonment of Bosniak men, were perpetrated precisely in the context of achieving military goals of the armed party to which the accused belonged, while the commission of other offences (like the rape of victims A and B) was enabled by the existence of the conflict and the position the accused held during the conflict.

3.3.3. Violation of International law rules

Article 173 of the CC of BiH provides that the offences by the perpetrator have to be "in violation of rules of international law in time of war, armed conflict or occupation."[33] Hence, the preliminary requirement for the existence of the specific offences that are codified in Article 173, paragraph 1 of the CC of BiH is that one of the International Law rules, applicable to the specific conflict, has to be violated.

The Panel notes that the term "International Law rules" does not make any distinction between conventional and customary law. The Panel, therefore, finds that both sources of law are relevant to the application of Article 173 of the CC of BiH.

The Panel further finds that "International Law rules", in both conventional and customary law, may be different depending on the nature of the particular conflict. Different rules of International Law apply to international armed conflicts, non-international armed conflicts and occupation. Notwithstanding that the applicable rules overlap considerably, especially with regard to the minimum guarantee of human treatment set forth in Common Article 3 of the Geneva Conventions, it still remains clear that International Law contains different sets of rules for each category of conflict.

Article 173 of the CC of BiH refers to "rules of international law in time of war, armed conflict or occupation" and incorporates them in the national criminal legislation. Simply to say, if rules of International Law may be applied only to an armed conflict of a specific nature, it cannot be determined that certain rule has been violated, unless the armed conflict was of that specific nature. Therefore, when applying Article 173 of the CC of BiH, the nature of a conflict can be relevant for establishing if some of International Law rules has been violated or not.

To that end and in terms of Article 173 of the CC of BiH, it may be necessary to determine the nature of the conflict to be able to establish whether the offences by a direct perpetrator were in violation of International Law rules. When the Prosecution submits that a direct

[32] *Kunarac* Appeal challenging the Verdict, paragraph 57.
[33] The Panel holds that the rule has to be "a rule applicable to International law, armed conflict or occupation" in order to stress that violations of other International law rules, like the Human Rights Law, do not suffice in terms of Article 173.

perpetrator acted in violation of International Law rules applicable to an international conflict, the Prosecution has to prove also that the armed conflict was an international one in order to establish that Article 173 of the CC of BiH has been violated.

Finally, the Panel holds that there is no need to determine whether the violation of the relevant International Law rule amounted to criminal responsibility under International Law during the relevant period.[34] Article 173, paragraph 1, sub-paragraphs (a) through (f) of the CC of BiH expressly prescribes the violations of International Law that entail criminal responsibility under national legislation. Although it may be expected that such violations also invoke criminal responsibility under International Law, it suffices that they are prescribed as criminal offences under national legislation.[35]

In addition, it is not necessary to determine whether it was a "serious" violation or it was "a breach of a rule protecting important values," or that the breach had to involve "grave consequences for the victim".[36] It should be reaffirmed that the provisions of Article 173, paragraph 1, sub-paragraphs (a) through (f) of the CC of BiH are sufficient, since they expressly prescribe the violations of International Law that entail individual criminal responsibility under national legislation.

The Prosecution argues that by committing the offences specified in the Indictment, the accused violated the provisions of Articles 3 and 147 of the Fourth Geneva Convention; Articles 75 and 76 of Additional Protocol 1 and Articles 1 and 4 of Additional Protocol 2.

The Panel holds that the Prosecution failed to prove the applicability of Article 147 of the Fourth Geneva Convention and Articles 75 and 76 of the Additional Protocol 1 to this proceedings, given that those provisions apply only in the context of an international armed conflict. Also, the Panel finds that the Prosecution did not prove that the provisions are generally applied to a non-international armed conflict as part of customary law or in some other manner (for instance, under an agreement possibly concluded between belligerent parties to abide by those provisions).

The Panel further finds that the Prosecution failed to prove the applicability of the provisions of Additional Protocol 2 to this proceedings. The Panel reaffirms the provisions of Article 1(1) of Additional Protocol 2 that set limitations to the applicability of that Protocol to some sub-categories of armed conflicts that are not international in character. According to the Panel, the Prosecution did not prove that the necessary requirements were satisfied in this proceedings.

Consequently, the Panel will only consider if the offences the accused is charged with were in violation of Common Article 3 of the Geneva Conventions. The Panel concludes that Common Article 3 applies to all armed conflicts under both conventional and customary law and that the Prosecution proved to a sufficient extent the applicability of Common Article 3 by proving the existence of the armed conflict.

The International Court of Justice holds, in the *Nicaragua* case, that Common Article 3, though conventional in origin, has crystallised into customary international law and sets out

[34] Tadić - ICTY case, Appeal Contesting Jurisdiction, Section 94.
[35] To that end, the Panel notes that the provisions of Article 173 are identical to those of the CC of SFRY, therefore there is no need to resort to International law to be able to establish whether any violation of International Law occurred that entail criminal responsibility during the period relevant for the Indictment.
[36] Tadić, Appeal Contesting Jurisdiction, Section 94.

the mandatory minimum rules applicable in armed conflicts of any kind, constituting as they are "elementary considerations of humanity"[37].

It follows from Article 1 of Common Article 3 that its purpose is to preserve and protect human dignity inherent to all human beings.

It can be found that the offences committed by a direct perpetrator amounted to violation of Common Article 3 only if the Prosecution successfully proved that:

- the victim of the offence belonged to those protected by Common Article 3; and
- the offences themselves were prohibited under Common Article 3.

The Panel will elaborate on these issues in the forthcoming two Sections of the Verdict.

3.3.3.1. Status of victims

Paragraph 1 of Common Article 3 protects "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."

The Panel has evaluated the testimonies of the witnesses who spoke about the manner and circumstances surrounding their imprisonment at some of the detention places. Witnesses Enes Šurković, Salih Cicvara, Edin Bešo, Edib Zlotrg, Ermedin Gerina, Muhamed Šehaganović, Samet Sadibašić, Bahtija Sivro, Alija Bašić, Suad Salkić, Mirsad Ahmić, Ćazim Ahmić, Nadžija Pekmić and A, B and D, same as other witnesses who were imprisoned at the Culture Centre and *SDK* in Vitez, did not have weapons, were not on the enemy side army, or took part in the hostilities in any possible way. It clearly follows from their testimonies that they were civilians who were unlawfully deprived of liberty and taken away from their homes to detention centres (as it will be detailed below). None of them was engaged in military activities and all the victims were without any doubt placed "hors de combat" at the time when the criminal offences were committed.

Samet Sadibašić, a defence witness, was a member of the 325 Army of RBiH Brigade, who had an automatic rifle. It is, however, clear that at the moment when he was arrested and taken away by the HVO, this witness did not take part in any military actions and as such, he belonged to the category of individuals protected in terms of Article 3 of the Fourth Geneva Convention.

The Defence argues that all detained Bosniak men were members of the armed forces of the Army of BiH and, according to the Defence, that fact justifies their deprivation of liberty.

The Panel does not agree with this averment by the Defence and finds that it follows from the adduced evidence that the individuals who were detained at the Culture Centre and SDK in Vitez were placed "hors de combat" at the time when they were arrested and imprisoned (those individuals were at their homes when they were deprived of liberty) and they did not take part in any hostilities. Therefore, those individuals, as such, were to be protected pursuant to Common Article 3 of the Geneva Conventions.

[37] See *Aleksovski case*, ICTY Trial Judgment, Section 50.

3.3.3.2 Violation of Article 3 as the relevant rule of International Law

Paragraph 1 of Common Article 3 stipulates that persons who take no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. This provision further prohibits the following acts with respect to the protected individuals:

a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b. taking of hostages;
c. outrages upon personal dignity, in particular humiliating and degrading treatment;
d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The provisions stipulated in paragraphs a) and c), whereby the obligation of human treatment is imposed, and the prohibitions thereof, specifically apply to this case.

Inhuman treatment, prohibited under Common Article 3, represents behaviour that is in contravention of the fundamental principles of humanity. In other words, inhuman treatment is "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity"[38]. Acts that are characterised as inhuman or are inconsistent with the principle of humanity represent the acts that may be characterised as inhuman treatment[39].

The European Court of Human Rights also developed their definition of inhuman treatment by concluding that "the act of abuse has to contain a minimum degree of gravity to allow applicability of the provisions of Article 3 of the Convention". The notion of "a minimum degree of gravity" is entirely relative and dependant on all circumstances surrounding certain incident, like for instance the length of time the victim was subjected to abuse, its physical and psychological consequences, sometimes it depends on gender, age and health of a victim. The definition proposes that the degree of suffering a victim had to endure should be the criterion to make a decision[40].

One of the main principles embedded in Article 5 of the Universal Declaration on Human Rights of 1948 is protection of individuals from inhuman treatment[41], which is a principle that is guaranteed also through prohibitions and other regional and international instruments on human rights[42]. Along the lines of these principles, the General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984. In addition, both Constitutions and laws of majority of countries contain provisions aiming to protect individuals from torture and other cruel or inhuman treatments[43].

[38] See *Kordić and Čerkez* case, ICTY Trial Judgment, paragraph 256.
[39] See *Čelebići* case, ICTY Trial Judgment, paragraph 543.
[40] European Court of Human Rights, *Ireland v. Royaume Uni*, serie A, No 25, 18 January 1978, page 14.
[41] Resolution 217 A (III) (1948) of the UN General Assembly of 10 December 1948.
[42] International Covenant on Human and Political Rights (Article 7).
[43] Report by Special Rapporteur, M.P. Kooijmans, E/CN.4/1986/15, 19 February 1986, para. 97 and 98.

It undoubtedly arises from testimonies of the prosecution witnesses, mainly direct victims of the acts by the accused, that he committed the offences whose purpose was to gravely deprive them of their fundamental rights, like the rights to safety and freedom. This is definitely in contravention of the above mentioned obligations and prohibitions laid down in Common Article 3 of the Geneva Conventions. The Panel holds that this preliminary requirement (violation of Common Article 3 and rules of International Law pursuant to Article 173, paragraph 1 of the CC of BiH) has been satisfied with respect to all three Counts of the Indictment, in the sense that the accused acted and behaved in as much as he:

- unlawfully detained individuals who did not take part in the armed conflict – the Panel finds this to be an intentional act of inhuman treatment, which caused serious mental harm and represented a serious attack on human dignity of the prisoners, given the manner of their apprehension and the conditions of their detention;
- took prisoners for forced labour, to dig up trenches on the front lines between the Army of RBiH and the HVO. This amounts to an intentional inhuman act, which caused serious mental or physical suffering or injury (the Panel notes that some prisoners lost their lives while digging trenches) and it represents a serious attack on human dignity;
- raped two women, which is a clear act of intentional inhuman treatment, which caused serious mental or physical suffering to the victims and represents a serious attack on their human dignity and violation of their body and limb; and
- robbed and/or took away from the prisoners the only personal property they had, the acts that amount to an intentional inhuman treatment which caused serious mental suffering to the prisoners, which represents a serious attack on their human dignity, particularly with the view to the circumstances surrounding the commission of this offence (the prisoners were deprived of liberty in absence of any legal procedure and left at the mercy of the accused and his subordinates).

Therefore, by perpetrating the offences that will be outlined in detail in Section 4, the accused undeniably violated the provisions of Common Article 3 of the Geneva Conventions under each and every Count of the Indictment, thereby violating "rules of International Law", whereby the preliminary requirements have been satisfied to apply Article 173, paragraph 1 of the CC of BiH.

4. Specific offence charged under the Counts of the Indictment

4.1. Count 1 of the Indictment

Since it has already explained the existence of general elements, the Panel will now address the specific offences committed by the accused.

This Count of the Indictment charges the accused with inhuman treatment, unlawful bringing in concentration camps and coercing to forced labour, in violation of Article 173(1), sub-paragraphs c), e) and f) of the CC of BiH.

4.1.1. Unlawful bringing in concentration camps and other illegal detention

The Panel holds that the criminal offence of "Unlawful Bringing in Concentration Camps and Other Illegal Detention" under Article 173(1), sub-paragraph e) of the CC of BiH partly

corresponds to the prohibition of an "unlawful confinement of a protected person" imposed under Article 147 ("Grave Breaches") of the Fourth Geneva Convention. However, as opposed to Article 147, the application of Article 173 of the CC of BiH is not limited only to international conflicts. Bearing that fact in mind, along with the different wording of the provisions, the Panel has found that the definition of the criminal offence under Article 147 of the Fourth Geneva Convention cannot be simply transposed to Article 173/1/e/.

Given that the law provides no definition of the offence of "Unlawful Bringing in Concentration Camps and Other Illegal Detention", the Panel has addressed this offence using both ordinary and commonly accepted meaning of the words (such an approach would also be appropriate when interpreting international conventions – see Article 31 of the Vienna Convention on the Law of Treaties 1969). A concentration camp is a place of mass imprisonment designed for forced stay and forced labour. Or, it is a collection camp for prisoners and other people preventively detained during a war[44]. Using such a commonly accepted meaning of the words, the Panel has found that organised and mass forced imprisonment of civilians, with no legal procedure conducted or in absence of specific justified reasons arising from, for instance, extraordinary circumstances, is subsumed under the notion of "unlawful bringing in concentration camps and other illegal detention."

The ICTY Appeals Chamber in the *Čelebići* case set the standards based on which it can be examined whether individuals may be held responsible for unlawful detention of civilians. The Appeals Chamber holds that to establish that an individual has committed the offence of unlawful confinement, something more must be proved than mere knowing "participation" in a general system or operation pursuant to which civilians are confined. For instance, such responsibility is more properly allocated to those who actually place an individual in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their further detention exist[45].

The Panel will evaluate specific evidence below.

The evidence adduced during the main trail substantiates the fact that unlawful deprivation of liberty and detention of Bosniak population of Vitez Municipality started on or around 16 April 1993, when the armed conflict began in Vitez between the Army of BiH and the HVO.

The following witnesses/injured parties were imprisoned during the relevant period at the Culture Centre in Vitez: Enes Šurković, Salih Cicvara, Edin Bešo, Edib Zlotrg, Ermedin Gerina, Muhamed Šehaganović, Samet Sadibašić, Bahtija Sivro, Suad Salkić and Alija Bašić. The witnesses/injured parties: Mirsad Ahmić, Ćazim Ahmić, Sulejman Kavazović, Ahmet Kalčo, Enver Karajko, Senad Hidić, and individuals B and D were imprisoned at the SDK facility. All these witnesses testified before the Court about the events described in the Indictment. It follows from their testimonies that there were more than 250 Bosniak men of

[44] "Dictionary of Foreign Words", Vladimir Anić and Ivo Goldstein, see also "Big Dictionary of Foreign Words and Expressions", Ivan Klajn and Milan Šipka, which defines a concentration camp as - a place in which a number of people are confined and subjected to forced labour and various forms of torture. See also ""SerboCroatian-English Military Dictionary", Jack Jones

[45] See *Čelebići* case, ICTY Appeals Chamber Judgment, paragraph 342.

different age who were imprisoned at the Culture Centre and its basement in April 1993. These testimonies are also corroborated by Exhibit T51[46]. The Panel has already found that no one among the imprisoned people took active part in the ongoing armed conflict, so that they had a status of individuals protected within the meaning of Article 3 of the Geneva Conventions.

According to witness Enes Šurković, he was taken away from his home by HVO soldiers and brought to the Culture Centre basement, where he saw HVO soldiers and police officers, among whom he recognised Zlatko Nakić.

Prior to the commencement of the armed conflict, Salih Cicvara worked in the *Slobodan Princip Seljo* factory. It follows from his testimony that even before the conflict started, military policemen stood guard in the factory and they safeguarded the factory. Following 16 April 1993, it was precisely those policemen who took the Bosniak workers in a van from the factory to the Culture Centre. The witness could not remember that anyone noted their names at the entrance to the Centre, but he could remember seeing armed soldiers who placed them into the basement rooms. Salih Cicvara further testified that he saw a number of policemen who had police insignia, pistols and wore white belts with their camouflage uniforms. Detainees could not move freely, they could go out only to the toilette inside that space and HVO soldiers and policemen were always there.

Edin Bešo was first taken to the Veterinary Station and from there he was taken to dig up trenches. On one occasion, after digging the trenches, he was taken to the Culture Centre in a van. Both in the van and in front of the Culture Centre building were people in uniforms and armed. There was a number of individuals in camouflage uniforms inside the Centre, wearing Military Police insignia on their sleeves. The witness maintained his statement given under the investigation[47], when he stated to have known that those were military policemen because they wore white belts and had Military Police insignia on their sleeves.

Edib Zlotrg worked as a police officer in the relevant period. According to him, members of the HVO Military Police came to his flat around 19 April 1993, searched the flat, took what they wanted and took him in a van to the Culture Centre. There were other Bosniak men with him in the van. Members of the Military Police locked him in the basement of the Culture Centre, where the detainees were guarded also by the Military Police. Witness Zlotrg saw several different HVO units in front of the Culture Centre building, including members of both Civil and Military Police. Since the witness was a member of the Police himself, there is no doubt that that he could distinguish Civilian from Military Police and he stated that the Military Police wore white belts and the HVO insignia and that some wore badges on their shirt pockets. He said that Civil Police did not have white belts (except for Traffic Police). The Panel has found that this witness was entirely credible when he stated that he was taken to the Culture Centre by the HVO Military Police and that a member of the Military Police whose nickname was *Sijedi* (grey-haired) wrote down his name at the entrance. Several days afterwards, Military Police billeted the prisoners from the basement to the rooms upstairs, where the Movie Theatre was. The prisoners were prohibited from leaving the Culture Centre area.

As it has been already stated, Bahtija Sivro and Suad Salkić were members of the War Presidency of the Vitez Municipality during the relevant period.

[46] List of apprehended people, drafted by the Viteška Brigade Command, total number 299 people (exhibit T 51)
[47] Witness examination record for Edin Bešo, KT-RZ-106/06 of 16 October 2007 (Exhibit 3)

Witness Bahtija Sivro testified to have been taken in a van to the Culture Centre cellar by 5-6 members of the HVO Military Police one day after the conflict started, following the search of his flat. Those policemen wore white belts and "long barrels" and had insignia of the Brigade Military Police of the HVO. The witness saw other policemen and soldiers in camouflage uniforms in front of the Culture Centre, who safeguarded the building and the prisoners inside. The witness could remember that the names of prisoners were noted down at the entrance of the building and that they were placed in the Culture Centre basement. Several days afterwards, some of them were moved to the Movie Theatre and some to the offices used by social-political organisations in the same building. According to witness Sivro, it was also military policemen who billeted the prisoners and the prisoners could not leave the building because they were guarded by military policemen.

In his testimony, Suad Salkić said that several days following the commencement of the conflict, two armed members of the HVO Military Police came to take him away (the witness claimed that they wore Military Police insignia) and they told him to get ready and to go with them. He saw in front of the building that the same thing happened to all Bosniaks in that part of the town and that everything was done in an organised manner. Bosniak men were taken in a van to the Culture Centre building, there were armed men in camouflage uniforms in front of the Centre, wearing HVO Military Police insignia. Military policemen could be distinguished from others by their white belts. This witness too claimed that some of prisoners, including himself, were placed into the basement.

Alija Bašić was captured on or around 18 April 1993 and taken to the Culture Centre in Vitez. He was placed into the former Trade Union offices on the upper floor of the Centre.

Several days following 16 April 1993, Ermedin Gerina, Muhamed Šehaganović and Samet Sadibašić were taken to the Culture Centre in Vitez. They were taken away from their homes also by armed members of the HVO Military Police.

Witness Ermedin Gerina did not mention at the main trial that those were members of the Military Police, but having been confronted with his statement under the investigation in which he stated: " (...) I noticed that those were members of the Military Police because I saw that some of them had white belts (...) When I entered the building, I noticed that there were a lot of soldiers and military policemen in the hall and since some of them had white belts, I concluded that they were military policemen", the witness said that that statement could have been correct. The Panel notes that the statement given by this witness under the investigation was partially changed at the main trial and that the witness, as it has been already mentioned, showed his interest in changing his statement in order to help the accused.

With regard to the imprisonment of Bosniak civilians in the *SDK* offices, Mirsad Ahmić testified that 7-10 days after the conflict started, military policemen came to the building in which he lived to take away Bosniak men to the SDK. On that occasion, one of the policemen explained to them that they had better go with them, otherwise "someone angry coming from the battlefield" could harm them. Witness Ahmić said that this policeman had Military Police insignia, while all other policemen who were there had white belts. Bosniak men who were taken from the building in which the witness lived were brought to a *TAM* van with a Military Police insignia on it, and taken to the SDK. According to this witness, they were safeguarded by the Military Police at the SDK, including "this Čalić guy" and

that they were not treated “so badly” at the SDK, apart from the fact that they were taken away from their homes and imprisoned against their own will.

Sulejman Kavazović was brought into the SDK. According to his testimony, members of the Civil and Military Police came to take him away - he clarified the difference between the two police formations. Military Police had camouflage uniforms with “HVO-VP” white letters on them, while Civil Police had ordinary blue police uniforms. In addition, Military Police wore white belts, automatic rifles and pistols. The witness claimed to have asked a colleague Ivica Marković, who was a civil policeman, to take him to the SDK, because he knew that people were being taken daily to dig up trenches and to the camps and because he felt more secure in the presence of Dragan Čalić (member of the Viteška Brigade Military Police), who was a guard at the SDK and who he knew, than in the presence of someone he did not know. Ivica took him to the SDK, where the witness was handed over to military policemen who safeguarded the prisoners at the SDK.

Ćazim Ahmić said that it was already made public during the relevant period that Muslim men were imprisoned at the Movie Theatre and SDK in Vitez, so that four days after the conflict broke out, he too was on his the way to the SDK. On the way to the SDK, some armed members of the HVO met him and told him to go to the SDK. At the entrance to the SDK, he recognised Zlatan Nakić, who was standing behind the counter with Vlado Čalić, writing down the names of civilians who were brought there. Both of those two individuals wore camouflage uniforms, but there were also soldiers in black and olive-drab uniforms around. According to the witness, Zlatan Nakić and Vlado Čalić could be distinguished from others by their white belts (both of them were members of the Viteška Brigade Military Police, as follows also from Exhibit T 30). Zlatan Nakić asked him if he was a member of the Army of BiH or Territorial Defence and the witness said that he was not.

In the cross-examination of this witness, the Defence tried to prove that Bosniak men were imprisoned for their own safety and that some of them came there on their own free will. The Panel will elaborate on this and other related averments by the Defence below, following the presentation of testimonies of other Prosecution witnesses.

Ahmet Kalčo was incarcerated at the SDK around 19 April 1993. Soldiers in camouflage uniforms came to take him away and he was taken to the SDK on foot because the van used to transport Bosniak men was already full. Witness Kalčo testified that the prisoners were safeguarded at the SDK by military policemen Dragan Čalić, Zoran Šero and Vlado Čalić, among others.

According to Senad Hidić, he was taken to the SDK by HVO members in camouflage uniforms with white belts. Among the policemen who safeguarded the prisoners at the SDK, he recognised Vlado Čalić and Srećko Čalić.

Several days after 16 April 1993, witnesses B and D were taken to the SDK. There were individuals in camouflage uniforms with white belts in front of the building. Witness D testified to have seen Dragan Čalić among the soldiers who safeguarded the prisoners and he told her that he was a member of the Military Police.

The Defence attempted to prove a number of theories to support their averment that the above described taking away and imprisoning of Bosniak men was justified or lawful.

One of the theories by the Defence was that Bosniak men were kept there for their own safety. The Defence further claimed that all detained men were members of the Army of BiH, so that their detention was legal and their "forced stay" was absolutely necessary. First of all, the Panel wants to point to the contravention between these two theories, the Defence anyway failed to prove either of them (if the civilians were kept for their own safety, then they were not members of the enemy kept during an armed conflict and vice versa).

When investigating the theory that unarmed men were detained for their own safety, one can ask a perfectly logic question – why were then only men detained. The Panel holds that whoever honestly attempts to secure the safety of people would first take care of elderly people, women and children. In any case, it would be absolutely unnecessary that the people "who are being helped" be guarded by armed members of the Military Police at the given circumstances, in particular having in mind that those people were in the area that was not affected by combat activities.

To that end, having carefully evaluated all the adduced evidence, the Panel has found this theory to be absolutely inapplicable. It is clear that the majority of civilians were deprived of liberty and taken to the places where they were kept against their own will, by armed guards and in inhumane conditions. It is also clear that the action was conducted in absence of any legal procedure, that they were forcibly detained and that the detainees were not given any valid reason for their deprivation of liberty and imprisonment (except some general and obviously untruthful "explanations" given to some people, that they were imprisoned for their personal safety). Although some people asked (when being deprived of liberty) to be taken to the safer place, or that some others (like witness Ćazim Ahmić) went on their own in the direction of detention facilities (thereby showing a certain degree of cooperation, as was perfectly understandable in the given circumstances), this cannot cast any doubt on the conclusion that it was an unlawful detention in view of other clearly proven facts.

To that end, the Panel notes that even the witness Ćazim Ahmić, who left towards the SDK on his own will, said that the prisoners who were at the SDK were so frightened that they could not sleep and that the armed guards made sure that none of the prisoners went outside. He further stated that no one even thought of going out because it would be considered as fleeing and they would be killed. With regard to this, the witness said: "With this in mind, we were far from feeling safe."

Some of the Prosecution witnesses testified to occasionally went home to have a bath. However, even if the guards let some prisoners go home to have a bath, still none of the prisoners could leave the Culture Centre for good on their own will. In that regard, the testimony by witness Suad Salkić is found to be convincing. He described how the prisoners went to the Chess Club on their own, but they did not dare to flee because they were afraid that members of the HVO would kill them. Witness Senad Hidić too described how the accused let him go to have a bath, but he had to return before the morning shift arrived at the SDK.

In the Closing Argument, the Defence mainly opted for the theory that men were imprisoned as members of the enemy. According to the Defence, other categories of people were not imprisoned to avoid breaching the Geneva Conventions (since those categories were protected under the Conventions). The Panel notes again that the Defence proffered two mutually exclusive theories at different stages of the proceedings and failed to prove

both of them. As for the theory that the imprisoned men were members of the enemy, the Defence did not present a single piece of evidence to prove that the prisoners took part in the hostilities in any way and as such, were not covered by the provisions of Common Article 3 of the Geneva Conventions.

The Panel has found that even the testimonies of some Defence witnesses were directly contrary to the mentioned theory. To that end, witness Stipo Čeko (Assistant Commander for Logistics of the Viteška Brigade during the relevant period) mentioned that when the conflict started, certain number of military aged civilian men was brought in to the Culture Centre. According to him, one of the reasons for their apprehension was to take away military aged men and prevent them from taking up weapons and attacking the HVO.

Other Defence witnesses (Ivica Jukić, Dragan Križanac, Goran Kovač, Dragan Toljušić, Ilija Križanac, Slavko Vidović and Ivica Rajić – former members of the Military Police) stated that the Military Police was not in charge of civilians, so that they did not imprison the civilians in the detention facilities, that they only safeguarded them there. According to them, civilians were brought there by various soldiers.

The Panel holds that such testimonies by the former members of the Military Police could be expected and that they are understandable, but unfounded, given the role the witnesses played in the relevant events and that they were certainly interested in helping the accused. A lot of victims provided a precise, convincing and explicit account of events in their testimonies. The Panel recalls that even those witnesses for the Defence did not deny that civilians were "safeguarded", meaning that their freedom of movement was restricted in any case. Dragan Križanac, who testified for the Defence, stated among other things that civilians could not leave the premises of the Culture Centre.

With regard to the direct participation of the accused in taking away the men, the Panel reiterates that on 16 April 1993, when civilians started to be apprehended and brought to the Culture Centre, the accused himself testified to have personally gone to bring in doctor Mujezinović, whom he knew. The accused stated that doctor Mujezinović was on the list of people who were to be brought to the Centre, so that someone would anyhow go to bring him in, but the accused volunteered to do that because they were friends for years. Also, it follows from Exhibit T 38 that the accused took part in the arrests and imprisonment of Bosniaks in the Culture Centre. Among other things, the document states: "Žabac was an insolent person, he behaved so towards Bosniaks during the latest incidents, when they were physically abused, arrested and imprisoned. After carrying out the looting, ethnic cleansing, deprivation of liberty and apprehension of people, he stood guard at the Culture Centre, where Muslims were imprisoned" [48].

In addition, as we have already noted, the Prosecution witnesses who were also injured parties, mentioned the names of the following individuals who apprehended them and safeguarded them at the Culture Centre and SDK: Vlado Čalić, Zlatko Nakić, Slavko Vidović, Dragan Toljušić and the accused. There is no doubt that these individuals were members of the Viteška Brigade Military Police (it has already been established that the accused was their Commander), as was proved not only through testimonies, but also on the grounds of Exhibit T 30[49]. Prosecution Exhibit T 29[50] substantiates the fact that military

[48] Document sent to the 3rd Corps Security Department dated 2 June 1993 (List of persons of interest to the security service), item 19.
[49] List of employees and military police officers of the 4th Battalion of the Military Police of Vitez of 27 March 1993.

policemen wore camouflage uniforms, white belts, pistol holsters and Military Police badges, which also follows from testimonies by witnesses both for the Prosecution and the Defence: Slavko Vidović, Mario Raić, Vladimir Šantić and Ivica Jukić.

The Panel has found that it arises from the adduced evidence that there is no doubt that members of the Viteška Brigade Military Police guarded the prisoners at the Culture Centre and SDK, that the accused was their Commander during the relevant period, that he issued orders to them, gave approvals and participated in the deprivation of liberty of some individuals.

According to the witnesses who were imprisoned in the mentioned detention facilities, no one ever told them why they were imprisoned, or they ever received any written document based on which they were deprived of liberty and imprisoned in the Culture Centre and SDK.

The Panel holds that not only that the provisions of Common Article 3 of the Geneva Conventions were breached (together with Article 173/1/e/ of the CC of BiH), but the members of the Brigade Military Police, including the accused, acted in contravention of the *Instruction on the conduct of the Military Police in conditions of the applicability of the Decree on the CPC application in the event of the state of war or the Croat Community of Herceg-Bosna being directly endangered*[51].

In early May 1993, following a meeting between Croat and Bosniak officials, 13 Bosniaks were transferred from the Culture Centre to the Chess Club first and then to the Kaonik camp in Busovača. Witnesses Edib Zlotrg, Bahtija Sivro, Suad Salkić, Ćazim Ahmić and Enes Šurković, who personally experienced it, testified about that. Their transfer from the Culture Center to the Chess Club, and subsequently to the Kaonik camp, was carried out by the Military Police. According to witness Edib Zlotrg, after the majority of prisoners were released from the Culture Centre, 30 of them were kept and taken to the Movie Theatre, where the accused and a person whose nickname was Butura came. They ordered the prisoners to go the back rows of the Movie Theatre, while the accused and Butura sat behind the table with notebooks in front of them. Then, the accused called their names and the accused and Butura wrote down each of their names in one of the notebooks. All those whose names were written down in the accused's notebook ended up as prisoners at the Chess Club. It follows from Edib Zlotrg's testimony that the names of all individuals whose names were listed in the accused's notebook were called by military policemen that same night around 2 or 2.30, the military policemen forced them to a van and brought them to the Chess Club, where one military policeman stayed to guard them. After spending several days at the Chess Club, military policemen took 13 imprisoned men to the Kaonik prison in Busovača. Those 13 civilians included: Bahtija Sivro, Suad Salkić, Sulejman Kavazović, Alija Bašić, Derviš Subašić, Enes Šurković and Ćazim Ahmić, as follows from Prosecution Exhibit T 36[52].

Witness Suad Salkić stated that only prominent people of Vitez were kept at the Chess Club, so that it seemed like people who were to be imprisoned in the Chess Club were specifically selected. This is also consistent with the mentioned Exhibit T 36. The prisoners

[50] Instruction for the operation of units of the HVO Military Police – Croat Community of Herzeg-Bosnia.
[51] Instruction on the conduct of the Military Police in conditions of the applicability of the Decree on the CPC application in the event of the state of war or the Croat Community of Herzeg-Bosnia being directly endangered" (T 28).
[52] List of 13 prominent Muslims who were arrested in Vitez, dated 15 May 1993 (T 36).

who were kept in this facility could not move freely either, since there were several armed individuals who stood guard outside.

These 13 civilians were imprisoned in the Kaonik camp up to mid May 1993, when military policemen brought them back again to Vitez in a van, to the Culture Centre (Movie Theatre) and a day or two after that, they were released. Witnesses Suad Salkić, Alija Bašić, Ćazim Ahmić and Derviš Subašić testified about that.

Having evaluated all the evidence adduced during the main trail, the Panel has found that it is proved beyond any reasonable doubt that the mass and unlawful imprisonment of people who did not take part in the armed conflict, as it is outlined in Count 1 of the Indictment, amounts to the criminal offence of Unlawful Bringing in Concentration Camps and Other Illegal Detention in violation of Article 173/1/e/ of the CC of BiH, given that all the elements of the criminal offence have been satisfied. The presented evidence leaves no doubt that unarmed men were taken away and imprisoned in an organised manner and forcibly, in absence of any legitimate reason.

With respect to this specific offence, the accused is charged under Article 180/1/ of the CC of BiH with bearing individual criminal responsibility specifically for issuing orders and the execution thereof. Given that the responsibility of the accused for the perpetration of the criminal offence has already been examined, the Panel finds it useful to reflect upon the issues of responsibility of the accused as the ordering party.

"Ordering" entails a person in a position of authority using that position to convince another to commit an offence[53]. The ICTY Trial Chamber in the *Galić* case held that ordering could be proved also indirectly, not only by means of written orders or witness statements about whether the accused issued the order that a criminal offence be perpetrated. The position taken by the Panel is that "an order need not to be in a particular form, it can be given in a wide variety of manners."[54]. Such a position was upheld in the decision made by the ICTY Appellate Chamber in the Galić case.[55].

Witnesses for the Defence, Goran Kovač, Dragan Križanac and Ivica Rajić (former members of the Brigade Military Police) confirmed to have received verbal orders from the Military Police Commander. The Panel has already established that the accused was the Commander of the Military Police during the relevant period.

An order did not have to be in a written form. The mere presence of the accused on the spot shows his tacit agreement, so does his approval of the actions taken by his subordinates. Witnesses for the Defence, who were imprisoned in the detention facilities during the relevant period, testified about his *de facto* position of a superior.

All previously mentioned elements of this type of responsibility of the accused have been satisfied. It can be concluded on the grounds of the fact that he was Commander of the Viteška Brigade Military Police that he issued orders to his men. His presence at the places where civilians were imprisoned also shows that he approved of the actions taken by his subordinates and additionally encouraged them to obey the orders they received.

[53] See *Krstić* case, ICTY Trial Judgment, paragraph 601.
[54] See *Galić* case, ICTY Trial Judgment, paragraph 740.
[55] See *Galić* case, ICTY Appeals Judgment, paragraph 740.

Notwithstanding the efforts made by the Defence to depict the accused as a person who helped the imprisoned civilians, they could not cast doubt on the prosecution evidence, or the conclusion reached by the Panel that the accused issued orders and approved the unlawful bringing of civilians into the camp. When meting out the sentence to the accused, the Panel evaluated this fact as extenuating.

The Panel has found that the accused committed the above stated criminal offence with direct intent, aware of the offence he perpetrated and willing to commit it, as follows from his entire behaviour and conduct during the relevant period.

4.1.2. Forced labour

Article 173/1/f/ of the CC of BiH specifies the elements of the criminal offence of Forced Labour:

1) issuing orders or wilful perpetration;
2) coercing to forced labour.

The Panel, first of all, points to the inconsistency between the wording of these two stipulations in the official languages of BiH ("coercing to forced labour") and in their translation into the English language (only – "forced labour"). This is not only a spelling error, but it could also result in a different meaning, since the text in the official languages (that will, of course be implemented by the Panel) could be interpreted so that the mere act of coercion is unlawful, while the meaning of the text translated into English is that forced labour has to take place to allow the application of this provision. Anyway, in this specific case, this difference is not at issue since the Panel is satisfied in concluding beyond any reasonable doubt that it follows from the evidence that the accused not only willfully coerced the prisoners, but that the coercion actually resulted in forced labour of the prisoners.

Not all types of forced or compulsory labour are *per se* unlawful under International Humanitarian Law.[56] For instance, during armed conflicts to which the provisions of 3rd Geneva Convention apply, prisoners of war may be required to work, provided that this is done in their own interest and that those considerations relating to their age and sex, physical aptitude and rank are taken into account.[57] International Law prohibits, on the other hand, compelling prisoners of war to do work connected with military operations.[58] The ICTY Trial Chamber in the *Naletilić and Martinović* case implemented these rules (relating to the labour of prisoners of war) to civilian prisoners.[59]

While the above stated principles, that are based on the provisions of the Geneva Convention that apply to international armed conflicts, may not be directly applied to this specific case, they still provide a useful context for the Panel to evaluate the elements of the criminal offence of Coercing to Forced Labour.

When analysing the issue of coercion to forced labour, the Panel holds that the force exerted in order to have the work done should be interpreted to involve the use or threat of physical violence, like the one that is caused by fear of violence, coercion, imprisonment,

[56] ICTY Trial Judgment in the *Blagoje Simić et al.* case, paragraph 88.
[57] ICTY Trial Judgment in the *Naletilić and Martinović* case, paragraph 254
[58] Ibid, paragraf 256
[59] Ibid, paragraf 252.

physiological oppression or abuse of power, or by taking advantage of the circumstances surrounding the coercion. According to the Panel, the important issue is whether an individual who was allegedly compelled to forced labour, bearing in mind the relevant circumstances, actually had any choice.

The Panel has concluded that in this specific case the prisoners were taken for forced labour to the front lines between the HVO and the Army of BiH while they were imprisoned. They were taken to the lines of separation by members of the Viteška Brigade Military Police (whose Commander was the accused), usually in a van and they were brought back to the detention facilities in the same manner. Witnesses Edib Zlotrg, Samet Sadibašić, Mirsad Ahmić, Salih Cicvara, Edin Bešo, Sulejman Kavazović, Alija Bašić and Enver Karajko testified about that. These individuals testified to have been taken in a van for forced labour by the Viteška Brigade military policemen (whose Commander was the accused), to the separation lines at Krčevine, Kratine and Pirići. According to them, the warring parties opened fire at those places, so that some prisoners got killed. To that end, the Panel has established that Almir Gađun, Adis Tuco, Redžep Zahirović and Jusuf Ibraković, among others, got killed while digging up the trenches and witnesses Edib Zlotrg, Muhamed Šehaganović, Ermedin Gerina and Samet Sadibašić testified specifically about those incidents. The death of these individuals in the relevant period was recorded in the Register of Deaths[60].

The Defence attempted to prove that these killed individuals were not imprisoned in the detention facilities, but that they got killed in combat. However, such an averment by the Defence is in contravention with the testimonies of the prisoners, who were consistent when they testified about the taking of prisoners to dig up trenches and mentioned precisely the above mentioned individuals as victims who were killed while digging up the trenches. Some of the witnesses were personally taken for forced labour, while others could see prisoners being taken away and they learned afterwards from the prisoners who survived and returned after the digging of trenches that some people were killed. In addition to the fact that a death of a prisoner while doing forced labour is very important, the Panel recalls that the mere taking of prisoners to such forced labour, when their lives are directly threatened, *per se* amounts to a criminal offence.

The prisoners who were at the SDK were also taken to dig up trenches. Mirsad Ahmić testified to have been taken to dig up trenches at Kratine, close to the front lines between the Army of RBiH and the HVO, therefore a very dangerous spot.

According to witness Sulejman Kavazović, the accused was present when he was taken away to dig up trenches at Nadioci and Rijeka. The witness described the situation and said that Žabac came that day with four of his soldiers and told him "you are the fifth one, we need you" and after that, he was placed in a van together with several other prisoners and taken to Rijeka to dig up trenches.

Witnesses for the Defence: Mahmut Tuco, Željko Sajević, Ivica Jukić and Mario Raić also testified about the taking of civilians to dig up trenches. Even the accused himself confirmed that, and stated that in some instances, Military Police escorted civilians on their way to dig up trenches. However, he claimed that Military Police did not decide who among the prisoners would go and that on some occasions the Viteška Brigade Command issued

[60] Excerpt from the Register of deaths for Almir Gađun (26.04.1993 – day of death) exhibit T 43, Excerpt from the Register of deaths for Redžep Zahirović (23.04.1993 – day of death) exhibit T 42, Excerpt from the Register of deaths for Adis Tuco (21.04.1993 – day of death) exhibit T 41

orders to the Military Police to escort the civilians. According to the accused, in situations when he was present, he did not have any influence on the taking away of those people. The Panel points to the testimony given by Sulejman Kavazović, who claimed otherwise by stating that it was precisely the accused who selected him to go to dig up trenches.

The Defence further submitted that the Military Police only secured the transport of prisoners to the spot, where they were taken over by the HVO and distributed along the lines of separation, while the Military Police transported them back to the Culture Centre. The Prosecution witnesses confirmed that the Military Police was in charge of transport to the location of digging and back from there.

With regard to these averments by the Defence, the Panel has reached the following conclusions:

First of all, given that a number of witnesses gave plausible accounts of the circumstances surrounding their taking away to dig up trenches and the role the Military Police played in that (including the accused himself), the Panel does not agree that the Military Police had just a passive role in those incidents. The Panel has also found that the Military Police was the key participant and took active part in coercing the unlawfully detained prisoners to forced labour. Among other things, the Military Police took active part in selecting the prisoners to dig up trenches, their securing (preventing them from fleeing), taking them away and bringing them back after digging the trenches and in using force or threatening them to use force. The Panel sees such an active participation by the Military Police as an inherent and central element in coercing the prisoners to do such an obviously dangerous and forced labour. Such a coercion did not take place and could not have taken place without the participation of the Military Police.

It should be noted that the incidents took place within a broader scope of unlawful actions taken against the population of Vitez Municipality following 16 April 1993. The Panel has already established that Bosniak men from the town of Vitez were systematically and randomly imprisoned and kept in the state of absolute uncertainty and fear. People in such condition were selected individually and taken to forced labour, to dig up trenches, guarded by those same armed individuals who kept them imprisoned.

Even if the Panel accepted the theory that the Military Police was bound by orders issued by some other, or higher authorities, the participation of the accused in the incidents, the way it was described, would invoke his criminal responsibility.

The Panel has earlier explained and analysed the position of commander that the accused held at the relevant period. There is no doubt that, as the Commander who was present on the spot, the accused was aware that the prisoners were being taken to dig up trenches at the lines of separation between the HVO and the Army of RBiH, and that he personally participated in some of those incidents when prisoners were taken away (as it was already stated). Therefore, the accused knowingly and willfully issued orders and approved of those unlawful actions and he was the strongest link in the chain of coercion that included threats of force and abuse of powers over the prisoners who did not have absolutely any choice as to whether to dig up trenches or not. Since the prisoners were guarded by armed guards during the armed conflict, then selected and taken away to dig up trenches at the lines of separation (some of them got killed there), it is clear beyond any reasonable doubt that every individual prisoner was a victim of coercion to forced labour.

In addition, it is clear that members of the Military Police could not take away civilians on their own initiative, but that they had to get an approval by the accused. This leaves no doubt that, given the position of the accused (already established) and his presence on the spot, military policemen took imprisoned civilians for forced labour with his knowledge and approval.

Thus, by violating the rules of International Humanitarian Law and by playing the most important role in the taking away and coercing the imprisoned Bosniaks to dig up trenches during the relevant period, the accused committed the criminal offence of Ordering Coercion of Prisoners to Forced Labour in terms of Article 173/1/f/ of the CC of BiH.

4.1.3. Inhuman treatment

The accused is charged under Count 1 of the Indictment with Inhuman Treatment of imprisoned Bosniak men, among other offences.

The elements of the criminal offence of Inhuman Treatment under Article 173/1/c/ of the CC of BiH are:

1) wilful acting or ordering;
2) inhuman treatment (the act that caused serious mental or physical suffering or injury or constituted a serious attack on human dignity[61]).

Civilians who were imprisoned in the facilities mentioned in Section 4.1.1. were kept under inhuman conditions. It follows from the testimonies of a number of Prosecution witnesses that the prisoners had to sleep on the floor, curled up, in the space so crowded that they could not even stretch, they did not get enough food (only one meal a day).

According to the defence witness, Stipo Čeko, who was Assistant Commander for Logistics in the Viteška Brigade during the relevant period, the prisoners kept at the Culture Centre had only one meal a day, while members of the Military Police had three meals a day. Mario Raić, the witness for the Defence said about the prisoners "…that was not a nice place to stay, conditions were very poor, there were a lot of them at one place, with not enough sanitary facilities, food…".

On the other hand, the witnesses who were imprisoned in the SDK: Senad Hidić, witness B, witness D, Ćazim Ahmić, Ahmet Kalčo and Mirsad Ahmić, testified to have had enough food and water since their families were allowed to visit them. However, it followed from their testimonies that there was not enough space for sleeping for all the prisoners, so that they had to sleep curled up on the floor.

The accused claimed that the Military Police was not at all tasked to supply food to the prisoners and that it was the responsibility of the Viteška Brigade Command.

Notwithstanding that the Panel has found that it follows from the above mentioned testimonies that Bosniak civilians were kept under inhuman conditions, the Panel holds that the accused did not create those conditions. The Panel, therefore, concludes that the accused, although aware of the conditions in which the prisoners were kept, did not

[61]ICTY Trial Chamber Judgment in the *Čelebići* case, paragraph 543., ICTY Trial Chamber Judgment in the *Vasiljević* case, paragraph 234.

perpetrate the offence of "Inhuman Treatment" in violation of the provisions of Article 173/1/c/ of the CC of BiH.

Despite the fact that the accused clearly committed the criminal offences (as stated earlier) with respect to the imprisonment of civilians and coercing some of them to forced labour, the Panel has concluded that the accused did not cause their inhuman treatment. The Panel holds that the accused was not responsible for the conditions in the detention facilities, and/or that he could not have any influence on those conditions. The Panel has taken into account that the accused allowed that food be brought to prisoners from the outside, by their families and friends and that he allowed some prisoners to go home to maintain their personal hygiene.

4.2. Count 2 of the Indictment

Count 2 of the Indictment charges Ante Kovać with the criminal offence of Rape punishable under Article 173(1)(e) of the CC of BiH.

4.2.1. Rape

4.2.1.1. International Humanitarian Law and International Law on Human Rights

The rape during the war is prohibited by the contract law, more precisely, by the 1949 Geneva Conventions[62], Additional Protocol I[63] and Additional Protocol II[64]. The rape and inhuman treatment as war crimes are prohibited also by Article 142 of the SFRY Criminal Code.

As it is already stated in Chapter 3.3.3.2., the Common Article 3 of the Geneva Conventions[65] is applicable to the case at hand and the Panel has already explained that regarding this Count of the Indictment the preliminary requirement is satisfied, which is the violation of that Article. More specifically, the prohibition of cruel treatment under Common Article 3 incontestably includes the prohibition of the act of rape, as the rape itself constitutes, to put it mildly, a serious attack on human dignity.

Although rape is not expressly prohibited under Common Article 3, the prohibition of rape in armed conflicts has been long recognized in international treaty law as well as customary international law.[66] It has gradually crystallized from the strict prohibition of Rape under Article 44 of the Lieber Code and the general provisions under Article 46 of the Rule Book in Annex IV to the Hague Convention together with the Martens Clause in the Preamble of the Convention[67].

[62] Article 27 of the Fourth Geneva Convention;
[63] Article 76(1) of the Additional Protocol I;
[64] Article 4(2)(e) of the Additional Protocol II;
[65] Bosnia and Herzegovina ratified the Geneva Conventions and both Additional Protocols on 31 December 1992;
[66] Kvočka, Appeal, para. 395.
[67] See *Furundžija case*, ICTY Trial Judgment, para. 168.

4.2.1.2. Article 173(1)(e) of the CC of BiH (rape)

The criminal offence of Rape as a war crime against civilians is provided for in Article 173(1)(e) of CC of BiH and is defined as: "*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"*.

The ICTY Trial Chamber in the *Furundžija case*[68] finds that the following elements may be accepted as objective elements (*actus reus*) of rape:

- the sexual penetration, however slight:
- of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- of the mouth of the victim by the penis of the perpetrator;
- by coercion or force or threat of force against the victim or a third person.

In this case the Panel previously found that the person B was on the SDK premises together with the person D, where they were brought after the armed conflict had broken out on 16 April 1993, as it was described in detail in Chapter 4.1.1. of the Verdict.

In this part the Panel will deal with the specific criminal and legal acts of the Accused in the commission of criminal act against the person B.

The victim B is a spouse of the person C who, during the material time, was highly-positioned within the structure of the BiH Army formations in the region where the incident indicated in the Indictment took place. At the relevant time the person B was the girlfriend of the person C.

The person B testifies that in April 1993, immediately before the conflict broke out, she went to Travnik to have an abortion, and then she proceeded to Vitez to the person D's place to recover. When the conflict broke out on 16 April, a shooting was heard in the morning, so the persons B and D, together with other dwellers of the building where the person D lived, went to the hallway and then to the basement. On the same day, in the afternoon, the person B spoke over the phone with the person C who suggested that she and the person D should cut themselves to be considered as wounded, for the UNPROFOR members to think that they were wounded and to drive them out of Vitez. However, on the same day three or four soldiers banged on the door of the apartment of the person D, asking about the person B, and they put both of them into the car, threatening them that they would take them to Lašva to kill them. The soldiers took the persons B and D to the SDK, where there were several persons in uniforms, in multi-colored uniforms, with white belts and pistols. The persons B and D were placed in the hall in SDK. The night after being locked in there while person B was asleep, an unknown person pointed a torch into her eyes saying: "*You are going with me"*. The witness B stated that it was a man who wore a multi-colored uniform and pistol. He took her out of the SDK and brought her to the apartment on the third floor of the Building called *Crnogorka*. While he was taking her there he cursed her "Balija's mother", saying: "*You will see now who Žabac is*". Having entered the apartment, the person B saw two persons, a woman and a man (the Hidić spouses), whom she knew by sight. She did not see these persons later on when she was going out of the apartment.

[68] See *Furundžija case*, ICTY Trial Judgment, para 185, then *Kunarac* case, ICTY Trial Judgment, para. 437.

The man who brought the person B into the apartment took her to the room, closed the door and pushed her on the couch. He told her to undress. The witness stated that she did not want to do that, so he pulled down her trousers and underwear without taking off her top. Then he pulled his trousers down to his knees, lied on her, punched her in the head and had a sexual intercourse with her. Then he got up and while he was putting his clothes on he told her to say hallo to the person C whom he knew, because they used to play football together in Vitez. Also, he told her that his nickname was "Žabac". The witness said that from that place Žabac brought her back to the SDK premises. After being released from detention (she was released after the exchange arranged by the witness C) she told everything only to the person C which is when he said that he indeed knew Žabac and that his name was Ante Kovać. She did not tell anything to anybody else about this incident because she was ashamed, nor did she seek any medical assistance because at the time the place where she lived was blocked.

The person B further testified that after the war (she did not specify the year) she went with her husband (the person C) to a football match in Vitez and Žabac entered the café where they were and stood by the bar. Then she pointed to him for the person C telling him that he was the person who had raped her on the given occasion. Then the witness C approached Žabac, told him something and then Žabac left the cafe. The victim averred that she saw the Accused a few times in Vitez in passing, and she said that then he was skinny at the time, of average height and with a slightly wavy brown hair. She did not recognize the Accused in the courtroom, but in response to the comment of the Accused that he had never seen her in his life said: "I have never seen you either, looking at you now, because you have grown older and changed a little."

The witness C confirmed the testimony of the victim B about her going to Travnik and Vitez before the conflict. Also, he testified that after the conflict had broken out he called Mario Čerkez, Darko Kraljević, "Berija", "Niko" i Jako Križanac and negotiated with him the exchange of the witness B for Dalibor Drmić and two other ethnic Croats. The exchange took place a few days later without the presence of UNPROFOR in the place of Dubravica.

The person C testified that the person B even before she was released from detention mentioned to him over the phone that she had "some problems", and when she came back home she appeared to be "a little absent-minded and emaciated". The witness C said that the witness B told him then about what had happened to her, and it was within that context that she immediately mentioned the Accused. The witness said that he did not insist on her telling him all right away because she was not able to do so, thus it was over the following 3-4 months that she told him all she had been through in the detention. She described the persons who came to take her out of the apartment. She described the person nicknamed "Žabac", who took her out of the SDK and brought her to the apartment. She said that he had a forcible intercourse with her, and subsequently he told her to say hallo to the person C because he knew him, then he brought her back to the SDK. The person B mentioned to him that she saw two neighbors (the Hidićs) in the apartment where the Accused had taken her to. The witness further stated that he knew the Accused since his childhood through the sports and that they were acquaintances, and that there were no disputes between them. The witness further stated that he was waiting for the person B herself to show him and recognize "Žabac", which happened in late 1994 when they were sitting in a café in Vitez. After the person B had pointed to the Accused as the person who raped her, the person C approached the Accused telling him that he had one minute to leave the café, and then Kovać left. Nihad and Senad Petak were in the company of the Accused and then they

started acting violently in the café, breaking glasses as a sign of protest against such departure of the Accused.

The witness D also confirmed the testimony of the witness B regarding her arrival in Vitez and her being taken to the SDK premises. She also described a previous incident when on the first day of the conflict "the *crnokošuljaši*" /black shirts/ came to the door of her apartment and brought her and the person B to the cafe "Benz" to Darko Kraljević, held them there for a few hours and then brought them back home. The witness D believes that she was apprehended only because she was with the person B (because the person B was a girlfriend of an RBiH Army officer, that is, of the witness C).

The witness D further stated that after a few days she and the person B were taken to the SDK by the soldiers in camouflage uniforms where she saw a number of detained Bosniak men. The night after their arrival she saw a person coming into the room and lighting with the torch the person B and taking her out. The witness D stated that she did not know where the person B was taken to on that occasion, but she recalled that she was brought back that same night, although she did not know how much time elapsed. They did not speak, but the witness D did not notice anything special on the person B. She also says that she could not notice anything on the person B because it was night and the person B was silent because they were afraid of speaking with one another. The person D did not recall how long she was detained in the SDK, she thought it might have been some 10 days, and then she returned to her apartment but she did not know where the person B went.

The witness D knew the Accused since before the war and she stated that she saw him in the SDK on one occasion in a camouflage uniform, and she averred that the person who took the person B out on the material night was not the Accused. However this witness also stated that on the given occasion it was dark, thus she could recognize the person who took the person B out only by the contours, and she pointed out that she was not able to see "all particulars". Furthermore, this testimony of the witness D did not put in question the fact that the Accused took the witness B to the apartment in the Crnogorka building. More specifically, in addition to the testimony of the witness B regarding this circumstance, it was confirmed also by the Accused himself and the witness Senad Hidić (whom the person B met while entering the apartment with the Accused in the Crnogorka building in Vitez).

The witness Hidić, who was also detained on the SDK premises, testified that he saw the persons B and D on the SDK premises in the hallway, but he did not speak to them because they were not close friends. The witness stated that on one occasion, when he had come back from the trench digging, he asked the Accused to go for a bath to his apartment, which the Accused approved. Some 15 minutes later, after the witness Hidić had arrived to his apartment, the Accused came to his apartment with the person B. The witness said that the Accused asked him if he could have a coffee and went to the room next door, telling him that he had to speak to the person B about something there. The Accused closed the door and stayed in that room with the person B for about one hour. Then the Accused left the apartment and the witness assumed that also the person B went out with him.

The expert in neuropsychiatry Dr. Alma Bravo-Mehmedbašić has had a psychiatric interview with the person B, whereas the psychologist Mr. Sci. Elvedina Dervović made psychological tests of the victim. The expert witness Bravo-Mehmedbašić stated that the person B described the incident concerned to her in detail. The person B told the expert witness that at the material time she was only 17 and that after the war the images of Žabac started appearing to her, and that she did not get any satisfaction during sexual intercourse.

Furthermore, the expert witness stated that the person B told her that she felt as being marked, that she withdrew from people, that she was snappy and impulsive and that often she had a desire to commit a suicide. The person B told her that she visited a doctor four years ago for the suffocating in her chest and lack of air and high blood pressure. Since the end of the war she has been taking tranquilizers. She has been restless and had nightmares and flash-backs as the repeated experiencing of the traumatic events. Based on the aforementioned, the expert witness Bravo-Mehmedbašić concluded that the B was of average intellectual abilities and that the applied personality inventory indicated that she was a person with a highly intensified post traumatic stress disorder (PTSD). The expert witness Bravo-Mehmedbašić further stated that the person B had the irreversible position toward the world, the social withdrawal, which indicated the diagnosis of a permanent change of personality after a severe trauma which is manifested through a marked feeling of low self-esteem, loss of self-respect, feeling of unjust treatment and humiliation. The expert witness further stated that she concluded that, with regard to the sexual relations, the person B had a feeling of worthlessness, of being labeled and destroyed, which were the common symptoms of rape victims, in particular when they were detained, when the victim was not able to put up any resistance and was faced with a life threat. Finally, the expert witness said that the person B had all elements of the serious type of PTSD and a permanent change of personality which was undoubtedly associated with the traumatic rape experience.

The witness Bravo-Mehmedbašić testified at the main trial that she and Mr.Sci. Elvedina Dervović assessed that the testimony of the witness B was entirely authentic, without any simulations. She also clarified that there were situations where the victim experienced a number of traumatic events, and in that case the victim was asked to say which was the most traumatic one to her. The witness B said that it was the rape itself which was the most traumatic event for her committed against her by the Accused. The expert witness further stated that victims very often remembered the face of the perpetrator for life, and even in case that they forget it, some images and events may “trigger” the symptoms for that face to reappear. In the case at hand, the person B saw the accused even after the rape, and got stressed each time in such situations.

When the witness B testified, the Accused stated that he had never seen her in his life, which is an entirely groundless averment, as the Panel will show below.

As it has been stated, the Accused presented his defense twice, but his testimony in both cases regarding the meeting of person B was confused and inconsistent. Both testimonies of the Accused happened when the defense evidence was presented, that is, after the persons B and C had testified. During his first testimony (on 26 November 2008) he averred that it was only in the courtroom that he met the person B for the first time, and he stated that it was possible that he had seen her at the material time too, but he did not recall “this detail from that time”. However, the Accused stated during the same testimony that he had seen the person B for the first time when, having visited the members of the Military Police members in the SDK, while leaving the SDK he met two members of the Vitezovi /*knights/* Unit escorting the person B to the SDK detention (allegedly, those two Vitezovi members explained to him that they were doing so following the order of Darko Kraljević). The person B, based on the further averments of the Accused, started crying, and in the conversation with her he figured out that she was an ethnic Bosniak and he allegedly offered her his escort to the apartment where his acquaintance was living, who was also an ethnic Bosniak, with his wife and child (referring to Senad Hidić whom he had just allowed to go home to take a bath). The Accused stated that in that apartment he had a coffee with the person B, together with the people who lived there and that he left afterwards, while the

person B stayed in the apartment. He denied that he had sexually harassed her and that he had ever met or known her before.

During the testimony on the hearing held on 11 June 2009 the Accused mentioned the same event when, having visited the duty officers, he met the person B escorted by two members of *Vitezovi* but this time he did not mention that these two persons told him that the person B was brought in upon the order of Darko Kraljević. More precisely, in this testimony he averred that the two members of Vitezovi said that they did not have the order by Mario Čerkez to bring in the person B to SDK, therefore they "simply left", leaving the person B some 10 meters from the SDK entrance.

The theory of Defense is that the conflict had existed between the person C and the Accused, which was why the person B purportedly intentionally Accused Ante Kovać of rape. The testimonies of the Defense Witness 002 and Zlatko Krišto about the alleged conflict were almost identical, which is why they were unconvincing, and the incident they mentioned was not mentioned by the Accused at all. Namely, they spoke about the conflict which happened some time in 2007 between the Accused and the person C. The witness Krišto stated that the Accused allegedly refused to help the person C when some footballers wanted to become referees (and this should be the motive for the person C to do harm to the Accused). The Panel found the mentioned theory entirely unfounded and incredible, particularly having in mind that the testimonies and conduct of the mentioned persons before the Court were carefully analyzed by the Panel, and they made a strong impression that there was a mutual pre-arranged agreement among them regarding the stated facts.

The Accused and the witness for the Defense 003, on the other hand, described the conflict which the Accused had with the person C in late 1994 about which the witnesses B and C testified too. Based on the presented evidence, the Panel concluded that after the armed conflict had ended the described incident (between the person C and the Accused) happened indeed. This incident took place after the person B recognized the Accused as the person who had raped her, and after she pointed him to person C, thus the Panel finds the existence of the described conflict irrelevant with regard to the allegations in the Indictment.

The Panel finds it ill-founded, even on the verge of absurd, other theories presented by the Defense Counsel for the Accused in his closing argument, which are directed toward the theory that all averments of the witnesses for the Prosecution are in fact the product of conspiracy by the person C against the Accused. Among other things the Defense Counsel offers the theory that the witness B is a victim of the person C (with whom she willingly spent the war and post-war years to date) and that the symptoms of PTSD she is suffering from are a result of traumas caused by the person C. The Court was not presented a single piece of evidence which would even indirectly confirm this finding, while on the other hand the Panel finds a series of proofs (including the expert witness findings) which are consistent, credible and mutually congruent regarding the rape of the person B by the Accused. Without going into the detailed analysis of these arguments by the Defense, the Panel recalls the inherent contradiction of the averment that the person B, who is allegedly the victim of the person C, stayed with him for 15 years after she had run from him (which is a part of the Defense Counsel's theory), that she suffers from the PTSD as his victim, and in spite of that she helps him in his alleged conspiracy against the Accused, thus she is ready to appear even before the Court and present lies about her being raped exposing herself to the forensic evaluation and testimony traumas.

The Panel finds that the victim B during her testimony presented a great number of facts and details which were not mutually contradicted. The victim and the Accused did not know each other before the given incident (the opposite situation would possibly suggest a motive on the part of the witness to harm the Accused). The Panel finds that the sexual intercourse happened in the circumstances where the victim was in detention under the direct control of the Accused, and was physically attacked by him and was under the threat of further physical violence and was in great fear for her personal safety. These are circumstances where it is clear that the victim was forced to the sexual act in the context of "*coercing another by force or by threat of immediate attack upon his life or limb"*. The Panel had in mind also the overall circumstances surrounding the incident. The person B was unlawfully detained in the SDK. She was watched by the military police officers to whom the Accused was superior, and the Accused took her at midnight to an apartment in a nearby building (which he himself admitted to, having firstly averred that he had never seen her before).

The Panel believes that the victim B testified in detail and credibly about the mentioned circumstances, about the person who took her to the apartment where the family of Senad Hidić lived, and about the act itself which the accused committed against her. The Panel finds her testimony about what happened to her entirely consistent and true. Her testimony is corroborated by the testimonies of the witness C and the witness Hidić, and in part by the testimony of the witness D. Furthermore, the testimony of the person B about the experienced rape is consistent also with the testimony which points to the serious consequences of rape and a number of symptoms from which the witness still suffers. The Panel took into account that the witness did not recognize the Accused at the hearing, which is understandable given that the witness did not meet the Accused for many years now. This, nevertheless, did not brought in question the final conclusion about the specific events, among other things, because the witness recognized the Accused shortly after the rape (which led to the incident which was confirmed both by the witnesses for the Prosecution and by the witnesses for the Defense), and on that occasion it was confirmed that it was Ante Kovać. The identification of the Accused by the witness is not questionable also because the Accused himself admitted to taking the witness to the Hidićs' apartment (which was confirmed also by the witness Senad Hidić) on the relevant occasion.

On the basis on the aforementioned evidence, the Panel is satisfied that the Accused, violating the rules of international law during the armed conflict, with a direct intent using force and threats during the direct attack on her life or limb, coerced the person B to sexual intercourse, and by doing so committed the criminal offence of Rape under Article 173(1)(e) of the CC of BiH.

4.3. Count 3 of the Indictment

Count 3 of the Indictment charges the Accused with the unlawful bringing into concentration camps and other illegal arrests, property pillaging and rape under Article 173(1)(e) and f) of the CC of BiH as read with Article 180(1) of the CC of BiH.

The Panel has already analyzed the general requirements for the existence of an armed conflict and the connection between the acts of the Accused and that conflict, and found them satisfied in Chapters 3.3.1. and 3.3.2. As for the violation of the rules of international law, the Panel also found that the acts of the Accused under this Count of the Indictment violated the obligations and prohibitions set forth in Common Article 3 of the Geneva Conventions (See Chapter 3.3.3.2.). The Panel also considers clearly proven that Mirsad Grabus and the witness A and Nadžija Pekmić (which was not contested) enjoyed the status

of the persons entitled to protection measures under Common Article 3 of the Geneva Conventions.

The Panel will analyze below the specific offences under Article 173(1) (e) and (f).

4.3.1. Unlawful Bringing into Concentration Camps

The elements of unlawful bringing into concentration camps and other unlawful imprisonments under Article 173(1) (e) of the CC of BiH are described in Chapter 4.1. of the Verdict (in conjunction with Count 1 of the Indictment).

The Official Letter written on 23 August 1993 by the Accused as a Commander of the HVO Military Police states, among other things, that on 21 August 1993 he issued an order to a patrol to stop a vehicle of the International Committee of the Red Cross (ICRC) that allegedly had not obtained the approval for movement from the Mahala settlement (in the part of Stari Vitez), and bring the passengers in an appropriate manner in front of the Command for checks. The vehicle was operated by Sister Kler, while the passengers comprised the witness A, Nadžija Pekmić and Mirsad Grabus, whom Sister Kler was driving to Zenica for medical treatment.

According to the Official Letter, the three mentioned passengers were examined in the *Nova Bila* Hospital where it was established that there was no need for them to be sent to Zenica, but that they can receive medical treatment in the settlement of Mahala. In the conclusion of the mentioned Letter the Accused stated that the persons Mirsad Grabus, the person A and Nadžija Pekmić were after that held on the detention premises of the Vitez Brigade. This was entered in the Report of Daily Events made on 24 August 1993[69], signed by the Accused.

The witness Nadžija Pekmić and person A confirmed that on 21 August 1993 together with Mirsad Grabus, they were stopped by the Military Police and taken to the *Dom Kulture* in Vitez. After they had been searched by the members of the Military Police, Nadžija Pekmić was taken to Dom Zdravlja /*health center*/(the then War Hospital) while the person A and Mirsad Grabus remained detained in *Dom Kulture* (culture center). The mentioned witnesses are consistent in saying that they never received any decision on detention nor were informed about the reasons why they had been deprived of liberty or detained.

The witness A lived in Vitez before the war. She testified that on 21 August 1993, together with Mirsad Grabus and Nadžija Pekmić, she was supposed to be evacuated by the ICRC vehicle to Zenica, but the military police officers deprived them of liberty and detained in *Dom Kulture* which is where she saw the Accused. The witness A stated that she had known the Accused by sight since before the war, and also from the video store where she used to work, where the Accused used to come to borrow video tapes.

The witness stated that, when she met the Accused during her detention, he was wearing a camouflage uniform with the white belt and he had a pistol. Following the arrival of the witness and other two persons to *Dom Kulture*, the military police officers said that they had to search them, thus the witness was searched by a girl who took all jewelry and money she had with her. The seized items were never returned to her, and she knows that other two persons who were with her were searched too, and that they also took money from Nadžija

[69] Report of Daily Events made on 24 August 1993 (T 33);

Pekmić which she had with her. The military police officers and the Accused took the three of them (the witness A, Nadžija Pekmić and Mirsad Grabus) to the Nova Bila Hospital where they were examined. The witness A stated that after that she and Mirsad Grabus were taken to the *Dom Kulture* boiler room, which was damp and cold, while Nadžija Pekmić did not return together with them.

The witness Nadžija Pekmić confirmed the testimony of the witness A regarding the circumstances surrounding the interception of the ICRC vehicle, their taking to *Dom Kulture*, and then to the Nova Bila Hospital, which was followed by her being taken to the Health Center in Vitez where she stayed until 3 September 1993, which is when she went to Zenica. This witness also testified that at the *Dom Kulture* she was frisked by "a short, blonde" woman whom she did not know and she took money from the witness, telling her:" I have to take it and give it all to the Chief of the Police". That money has never been returned to her.

Some 2-3 hours after the return from the hospital, the military police officers moved the person A to a smaller office room where there was a table, cabinet, bed and TV-set and the windows were sealed. After this the witness A was detained in this room while Mirsad Grabus stayed in the boiler-room.

The witness A recalled that while she was detained she was interrogated by Mijo Taraba and some other people whose names she did not know (she was interrogated three times), and she also saw Željko Sajević in the *Dom*. She signed all records after interrogation, during which she was questioned about the arms, soldiers and living conditions in Mahala. She was allowed to go to the toilette only with the military policeman escort. The Accused would often come to the office where she was detained, with other uniformed persons. On one occasion the Accused stayed with her alone in the room and threatened to kill her and that she would never see her children again, that he would bring "Cicine" and she would see what they would do to her, then he asked her where her husband was, if he was on the frontline. The witness stated that all the time she was in fear because of these threats.

The Defense Counsel for the Accused avers that the Accused did not know at all about the interception of the ICRC vehicle at the checkpoint, and that at the checkpoint where the vehicle was stopped there was no members of the Military Police whatsoever. These averments are obviously in contravention of the physical evidence (Exhibit T31) and the testimony of the person A.

During the presentation of his defense on 26 November 2008, the Accused confirmed that on the material day the aforementioned three persons were brought to the Command of the Vitez Brigade (which, as established before, was in the *Dom Kulture*) where they were frisked and then taken for medial examination to the Nova Bila Hospital. He further testifies that he escorted them to the hospital, that Nadžija Pekmić remained in the war hospital, and that Mirsad Grabus and the person A were held by the Brigade Military Police. The Accused contested that he ordered the apprehension and detention of these persons, and he denied any involvement in their searches when the money and jewelry was taken from them. He stated that it was the police officers from the 4th Battalion that searched them. When the Brigade Police Record dated 23 August 1993 was presented to him with his signature affixed thereon, the Accused stated that he did not make that record and that the Commander of the Vitez Brigade (Mario Čerkez) through his personal assistant ordered him to sign that document.

Ankica Pranjković testified that she personally typed the given Record and due to the absence of the Brigade Commander, the Record was signed by the Accused. When the testimonies of the Accused and this witness are compared one can notice that they are not consistent. Namely, the Accused avers that he was ordered to sign the Record while the witness Pranjković states that the Accused signed the Record because the Commander was absent. She does not mention any order or that the Accused signed the Record against his will, as he points out all the time. In addition, the Accused avers that he did not sign the Record immediately, but that he resolutely refused it, and that he only signed it having refused to do it two or three times. The witness Pranjković did not say anything about this either.

The entire situation in which the persons from the ICRC vehicle were apprehended clearly suggests that it was planned in advance, which can be seen from the mentioned Official Letter of the Accused where the stopping of the vehicle was described (T 31). The Accused had prior knowledge that this vehicle would leave for Zenica. It clearly follows from the document that the Accused knew that it was an ICRC vehicle.

The Panel carefully considered all evidence regarding the circumstances surrounding the deprivation of liberty and detention of the three persons, and concluded that in these circumstances all elements of the given criminal offence were satisfied and that the Accused committed it by giving orders.

Having followed the entire proceedings, the Panel finds that although the three person were apprehended in line with some military procedures which were established by the HVO at the material time, the moment when these persons were detained on the *Dom Kulture* premises without a trial, their detention became unlawful. As has already been stated, these persons were deprived of liberty under duress and arbitrarily, and were never informed about the reasons of their detention, which was not justified on any legal ground, which makes their detention in the *Dom Kulture* unlawful.

What makes the conduct of the Accused under these circumstances particularly severe in the opinion of the Panel is the fact that these persons were driven in a clearly marked ICRC vehicle by members of the ICRC. Although the Accused wanted to avoid the personal responsibility for these offences, he did nothing to explain why he failed to give warning that such detention of civilians under the care of ICRC was unlawful, which would be expected (particularly having in mind his position) unless he directly participated in it.

The Defense's theory is that all three detained persons "misused" the ICRC vehicle because allegedly nobody among them was so seriously ill to be evacuated from Vitez. This theory is not only factually incorrect (Nadžija Pekmić remained in hospital for further treatment) but is also illogical. The question is, having in mind that the detainees were civilians (whose involvement in any combat activities was not established even by the HVO), should their "abuse" of the ICRC transport be "punished" by their unlawful detention.

The Panel does not accept the version of the event presented by the Accused because it is in contravention of the other credible evidence and of the testimony of the witness for the Defense, Ankica Pranjković. Among other things, the Accused did not explain why the persons were brought in, whom he escorted to the hospital in the course of their health checks and over whom he had a direct control, and held on the *Dom Kulture* premises. The Panel particularly considered the presence of the Accused in the key events, and the

contents of the Official Letter which he willingly signed confirming that it was him who gave the orders to bring them in and to hold them there.

In conclusion, the Panel finds proven beyond any reasonable doubt that the Accused ordered that the witnesses A, Nadžija Pekmić and Mirsad Grabus who were under his direct control, be deprived of liberty and unlawfully detained, and in doing so he committed the criminal offence under Article 173(1)(e) of the CC of BiH.

4.3.2. Property Plunder

In the ICTY jurisprudence the specific elements of the criminal offence of Plunder are the following:

1) the perpetrator willfully and unjustifiably appropriated the victim's property; and
2) unjustified appropriation involved grave consequences for the victim.[70]

The ICTY Trial Chamber in the Blaškić case (para. 180.) established :"*Civilian property covers any property that could not be legitimately considered a military objective*". Plunder as a crime has been committed when general requirements are fulfilled including the seriousness of the violation and if private and public property was appropriated unlawfully and willfully[71]. Plunder does not require the appropriation to be extensive or to involve a large economic value[72]. The Trial Chamber concluded in the Blaškić case: "*the prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interests and to the organized seizure of property…"*[73]. Plunder must imply grave consequences for the victims thus amounting to a serious violation[74].

Although this case does not concern a criminal offence which includes as an element "a grave violation of the Geneva Conventions" the Panel finds the mentioned case law as relevant in terms of understanding the context of this offence given that Article 173(1) does not contain a definition of the term of plunder of public property. In doing so, the Panel notes that in the ICTY case law the plunder, if it is serious enough, may amount to the violation of international law (assuming that the general elements are satisfied) even in the isolated acts of plunder for private purposes.

This Panel deems that the gravity of violation must be established for each act individually, taking into account the specific circumstances of each situation. More precisely, the Panel believes that the property value should be considered in terms of its money value and the overall victim's property.

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[70] The following judgment dealt with the plunder: *Čelebići* Trial Judgment, para. 584-592; Blaškić Trial Judgment, para. 184; *Jelisić* Trial Judgment, para. 46-49; Kordić Trial Judgment, para. 349-353. *Čelebići* Trial Judgment, para. 587-592, does not expressly refer to the subjective element of plunder; however, it mentions that the plunder by the soldiers for private interest and systematic economic exploitation of occupied territory" whereby both categories clearly imply the intent, par. 590. *Blaškić* Trial Judgment reads in the para. 184, that the plunder is "a wanton appropriation", which seemingly refers more to the indifference to the consequences for the victims, than to the specific requirement of *mens rea*. *Kordić* Trial Judgment, par. 349, requires that the property was acquired "willfully". *Jelisić* Trial Judgment, par. 48, requires that the appropriation should be "fraudulent " and motivated by greed. The Panel interprets the said judgments as the confirmation of the current state of the international law on that issue, that the intent in the appropriation is a required subjective element. Of plunder.

[71] *Naletilić and Martinović* ICTY Trial Judgment, para. 617.

[72] Ibid, para. 612-613

[73] *Blaškić* ICTY Trial Judgment, para 184.

[74] *Naletilić and Martinović* ICTY Trial Judgment, para. 613-614.

The Panel evaluated the evidence which refer to the appropriation of the property of the apprehended persons.

The witness Nadžija Pekmić and the witness A testified about the appropriation of money and jewelry they had with themselves. The witness Pekmić, among other things, stated that a female person frisked her, which she sad was "short, blonde", and that she took from her the envelope with the money in it, explaining that she had to "take it all, and give it all to the Chief of the Police".

None of the witnesses ever received any receipt for the seized items and the items have never been returned to them either.

The Record about the jewelry found dated 23 August 1993 notes that on 21 August 1993 at 16,00 hours golden jewelry was seized from the persons Nadžija Pekmić and the person A. It is also stated that the seized items were appropriated and saved in the safe, that is, the cash box. It is noted in the Record that the commission which was present during the search and finding of the items was composed of 5 military police officers, including the Accused himself. The Accused himself was signed as the person who drafted the given Record in the capacity of the Military Police Commander.

As to the plunder of property, the Defense Counsel points to the Record on Appropriation of the Property concerned (compiled by the Accused), claiming that it is that factor alone which confirms that it was not an unlawful appropriation of items. The Defense Counsel further notes that the seized items were saved in the Command Safe of the Vitez Brigade, not of the Military Police of that Brigade.

Asked about the circumstances surrounding the making and signing of the Record on the found golden jewelry dated 23 August 1993, the Accused stated that the military police officers informed him that the apprehended persons were searched by the members of the Military Police of 4th Battalion, and that the jewelry and gold found during the search was put in the safe in the Brigade Command, thus, believing in what he was told, he personally signed the Record.

The Defense also submitted in its closing argument that the persons detained in *Dom Kulture* were searched by the members if the Military Police of 4th Battalion and that they were responsible for the treatment of detainees in this case. This theory of the Defense is ill-founded given that no evidence presented regarding this Count of the Indictment indicates the presence or involvement of the members of the 4th Battalion Military Police.

The Panel inferred that the Accused ordered the seizure of property from the mentioned civilians, which follows both from the documents and from the consistent testimonies of both witnesses. The Panel also found that the seizure of these items was not based in law, and that the victims were not informed about the reasons why those items were appropriated from them.

Apart from being responsible for the appropriation of these items, the Accused made (and/or signed) the Record on Seizure of Property. The existence of the Record would possibly suggest under other circumstances that the seizure of property was not unlawful. However, the existence of the Record in the circumstances where the detention of persons itself was unlawful (and was followed by a grave criminal offence against one of the

victims), and the seizure of property without any lawful ground, cannot make an unlawful act lawful. As has already been stated, the detainees were never explained as to why their property was appropriated, the receipt on seizure was never given to them, and the seized items were never returned to them. Also, no legally-prescribed proceedings regarding the seizure of property were ever conducted against them (as well as regarding their deprivation of liberty). The Panel finds that under the given circumstances the Accused never intended to return the items to their owners (which he could have done easily when they were released, or even later on). Having further considered all relevant facts the Panel finds that the Accused ordered that the money and personal valuables be seized with the intention to misappropriate or to take possession of them. Among other things, this conclusion is confirmed with what Witness Pekmić was told by the member of the Military Police who seized her property from her (that she had to take it all and give it to the Chief of the Police").

Referring to the ICTY case-law and the gravity of offence to the victim, the Panel finds that in the case at hand the seizure of money and jewelry had severe consequences to the victims.

Namely, both victims (the witness A and Nadžija Pekmić) testified that they had with them some amounts of money which they took with themselves to facilitate their stay once they reach the RBiH Army-controlled territory. The witness A states that she had with herself an amount of gold and money (she does not recall the exact amount),while the witness Nadžija Pekmić stated that among other things, she had with herself around KM 500, and the additional KM 500 which her neighbor gave her to take it to his wife in Zenica.

The Panel notes here that this offence happened during the armed conflict when these items have special value because they may be traded for food and medical aid, or any other relevant help to the victim. In other words, the possession of money or jewelry under these circumstances provides a civilian with the special security, and being deprived of it (as it was the case here) a victim is put into a much more difficult situation and the state of helplessness. The seriousness of this appropriation is even more evident when one takes into account that the seized property was the only property which the victims had at the time.

In the aforementioned acts of Plunder, the Accused acted as the Military Police Commander and he ordered the plunder of property and, in doing so, he satisfied the elements of the criminal offence under Article 173(1)(f) of the CC of BiH.

4.3.3. Rape

In this Chapter the Panel will analyze in detail the evidence presented with regard to the rape of the person A by the Accused, which the Panel found proven.

Elements of this offence are stated in Chapter 4.2. of the Verdict (in conjunction with Count 2 of the Indictment and the rape of the person B).

The incidents related to the rape of the witness A followed her detention in the office and separation from Mirsad Grabus, as was described under Chapter 4.3.1. of the Verdict.

The witness A testified that one night, a few days after she was detained alone in the *Dom Kulture* office, the Accused arrived and questioned her again about the weapons and the troops in Mahala. After she said all she knew about it, the Accused took the gun and pressed

it firmly against her forehead. The witness said: “I really got scared, (...), I was so scared that, I think, I almost lost my mind“. Then he slapped her, pressed the pistol on her chest, and told her to undress. The witness begged him not to do it. The Accused pushed her to the bed, she does no recall how he took off her clothes, she said that her body ached, her face turned numb and he took off her trousers and underwear and had a sexual intercourse with her. The victim A said that the Accused put his clothes on thereafter and went away, while she stayed lying in bed, staring at the ceiling. The victim further testified: “I was not strong enough to stand up, to walk, to breathe, I couldn't do anything, I was not strong enough to do anything“. While leaving, the Accused threatened her not to speak about what had happened to anybody, otherwise he would kill her. The next morning he brought in her room Mirsad Grabus. The witness was crying, being aware that she looked bad, thus Grabus told her only: “You don't have to say anything. I can see it all.“

Representatives of ICRC visited the *Dom Kulture* 2-3 days thereafter, and asked the witness about the conditions in that building, to which she replied that it was all right. She testified that the Accused was standing behind the ICRC representatives' back, facing her and holding his hand on the pistol, which she took as a warning not to say anything about what had happened to her.

The witness, together with Nadžija Pekmić and Mirsad Grabus, was exchanged on 3 September 1993, and she went to Zenica. In 1994 she returned to Vitez, and in 1995 or 1996 when the Medica Association arrived in Vitez, she told Dr. Sabina and Dr. Šabić everything that had happened to her. Dr. Šabić told her that she had to undergo a therapy and advised her to tell everything to her husband, which the witness did around a half a year after the conversation. The victim said that her husband already suspected and assumed, based on her behavior, that something had happened to her. More specifically, according to her testimony “Nothing was functioning“, she was not paying attention to children, she did not work, she was only watching through the window and crying. The victim stated that she accepted the advice of Dr. Šabić and started with the therapies in Medica.

She stated that she met the Accused after the war, because he was constantly passing by her house. Also, she mentioned two incidents. First when she met him in the post office, when he was laughing and the second when she met him at the Lutrija /*lottery office*/, which is when the Accused said:“ You are so good“, which made the witness shiver, she was sick of his words. She further testified that the Accused always laughed when he saw her and because of that she always got upset and stressed.

The witness Kadrija Haračić-Šabić testified that in 1994, within the program “Medicines sans Frontieres“, she established the first contact with the person A, when she had a short interview with her and arranged for a therapy for her. Then the file of the person A made in handwriting was opened for her. The witness A told her that she was a rape victim and that she started visiting Medica in Zenica because it was a specialized rape victim center and because of the discretion. The witness Haračić-Šabić testifies that gynecological examinations and the psychological test of the person A were done, and that it was in Medica when she said the name of the rapist, saying that she was raped by Ante Kovać a.k.a. Žabac whom she had previously known. During her testimony the witness Haračić-Šabić recognized all her original notes (Exhibit T 21) written in hand which were presented to her by the Prosecution. These notes refer to the contacts with the person A since 23 November 1994, then on 14 June 1995 (which clearly shows that, among other things, the rape of the person A was committed in August 1993 by Ante Kovać Žabac) and on 28 November 1995.

The witness Haračić-Šabić testified that the person A left the impression of being a traumatized person who was very scared and insecure. She stated that the person A needed help, and she did not feel better even after the medicine therapy, and it was only after she told her husband what had happened to her that her health improved.

The expert witness Dr. Abdulah Kučukalić conducted a neuropsychiatric evaluation of the person A to give an opinion about the intensity of mental traumas she experienced, then about the consequences that followed those traumas and if the mental symptoms and reactions were characteristic for the rape trauma. Accordingly, the expert witness gave his opinion at the hearing held on 7 November 2008 that the person A was neat, with the feeling of anxiety, tense, well-oriented, of a low mood, with flash-backs, with diminished attention and focus, diminished self respect and self confidence, and reduced social contacts. In the expert witness's opinion, those symptoms may be associated with the intensive trauma of war rape. The expert witness stated that person A had the PTSD symptoms which developed into the chronic, structural disorder and change of personality. He states that the person A experienced the rape as extremely traumatic because she was not able to put up any resistance while her life was in danger. In his opinion, very negative prerequisites were created which destroyed the personality structure of the person A, and this led to the identity disorder, in having a wrong perception of herself. She had extremely strong feelings of guilt and shame, loss of the self respect and self-confidence. In addition, the expert witness stated that the person A was socially isolated because she underwent a very intensive trauma, where the rape was used as an expression of sexual aggression in order to destroy the personality and practically change the identity of the person by such a strong trauma.

The expert witness noted that those were typical sufferings of a person who experienced the rape trauma. The expert witness explained that in his work he uses the international classification which was valid and credible in diagnostics, in which some preconditions have to be fulfilled in order to establish the diagnose of a mental disorder. In case of a severe trauma, such as rape, then it resulted in serious changes and the personality structure change. It leads also to the identity change, social withdrawal, permanent irritability, and all this was characteristic of strong intensive traumas such as rape and severe wounding.

The Accused denies any involvement in the rape of the person A.

The witness for the Defense Mijo Đotlo was a driver at the Vitez Brigade Command at the relevant time. He testifies that he often contacted the person A while she was in *Dom Kulture*. The witness further averred that he often talked to her and that he still maintains contacts with her nowadays. He further avers that the person A never complained to him that the Accused had raped her, and he also said that on one occasion, after Ante Kovać was indicted, she said that she did not accuse anyone but wanted to take her revenge on the Accused, she wanted "to frame him". Having in mind the aforementioned evidence (which supports the rape of the witness A), the Panel finds the testimony of the witness Đotlo unconvincing, given that it has no ground in other presented evidence, and it was obviously given with the intent to help the Accused in avoiding criminal responsibility for the rape of the person A.

In his closing argument the Defense Counsel for the Accused averred it was possible that the person A was in love with the Accused who used to be a famous footballer before the war, and that she took advantage of the opportunity while being detained in *Dom Kulture* to

sleep with him. The Panel finds this theory absurd and unsupported. The theory of the Defense Counsel is but a conjecture without any ground in the evidence in the records.

The Defense for the Accused further averred that the Accused, because he knew the husband of the person A, placed her alone in one room and gave her the key of that room, and then he took Mirsad Grabus later on to be with the person A for her to feel safer. This theory is not corroborated by any evidence so the Panel rejects it.

The Defense Counsel also submits that the credence cannot be given to the testimony of the person A when she claimed to have lost her consciousness during the rape, because, in the opinion of the Defense Counsel, it is impossible to lose consciousness during the rape, which is "a terrible thing to do", that is, in his opinion, it was possible to lose consciousness only after the rape. The Panel considers this theory to be absurd too. The argument given without any scientific or other evidence, that one cannot lose consciousness during the rape, cannot constitute a serious ground on which the sincerity of the witness would be contested. The Defense Counsel had an option to try to corroborate this position with the evidence or facts in the evidentiary proceedings, which he did not do. In these circumstances, the Panel finds that the presentation of such an entirely new and unchecked (even naive) theory in the closing argument alone is inappropriate and an unsuccessful *post facto* attempt to bring in question the credibility of the victim.

The Defense Counsel further averred in the closing argument that the rapes of the persons A and B was "a game" led by the person C out of hatred toward the Accused. Contrary to this theory, which was not supported by any fact, the honesty of the witness A was evident in her posture and behavior, which reveals the severe consequences which the criminal offence caused to her. As it has already been stated, the expert opinion confirms that the witness is a rape victim, which is consistent with other evidence presented in the course of the proceedings.

The Panel considered with special attention the testimony of the victim A, her conduct before the Court and her attitude toward what happened. The victim presented clearly and in detail all circumstances of the incident. She described the manner in which the Accused treated her and the threats he made and how he physically demonstrated those threats slapping her and raping her. She described also her severe mental and physical state after the incident. The witness also recalled the threat of the Accused on his way out of the room, when he told her: "Don't speak about this or I will kill you, be sure".

It is beyond doubt that the situation in which the person A found herself caused on her part a great fear and threat to her life, and that the Accused, by using force or threat by direct attack on her life and limb, forced her to sexual intercourse.

The fact that the person A reported to the Medica Center immediately after the conflict and that it was already then when she stated the name of the rapist additionally supports the conclusion of the Court that what she said was entirely grounded, and that the theory of the Defense that the victim in fact wanted to have a sexual intercourse with him and took advantage of the opportunity when she was detained in *Dom Kulture* is absolutely ill-founded with regard to the presented evidence.

The Panel also had in mind that the person A was a family woman who had children. The fact that for a long time she was hiding inside of her what had happened to her is, in the opinion of the Panel, a logical reaction of a person with a family. During her testimony the

victim described a number of facts and details (regarding the incident) which are not contradictory. She testified about her fear, pain and humiliation she experienced, and the Panel finds her conduct before the Court sincere and her description of the event under this Count consistent. Also, the Panel submits that the victim A has no motive to incriminate the Accused and to bring herself into such proceedings before the Court, which surely caused additional stress and suffering.

The Accused, by committing the rape, acted with a direct intent as an individual perpetrator during the conflict between the HVO and Army BiH forces in the territory of the municipality of Vitez.

Taking into account all aforementioned factors, the Panel is satisfied that Ante Kovać bears individual responsibility for Rape under Article 173(1)(e) of the CC of BiH. The Panel concludes that the Accused committed the act with direct intent, being aware of his acts and willing to commit them, which follows from his conduct and acts at the material time.

Based on the analyzed evidence, mentioned above, the Panel rendered the decision as indicated in the operative part of this Verdict. As for other presented evidence, the Panel took them into consideration, but found that it did not have a decisive effect on the decision.

5. Meting out the Punishment

While meting out the punishment the Panel was mindful, among other things, of the provisions under Article 2 of the CC of BiH based on which the type and the range of the criminal sanctions depends on the necessity to apply the criminal duress and its reciprocity, the seriousness of threat to the personal freedoms and rights, and other fundamental values, which defines the purpose of criminal legislation, which consists of the protection of individual and general values, and in defining the manner of exercising that protection. In that context it is necessary to take into account elements which relate to that purpose, that is, the suffering of the direct and indirect victims of the given criminal offences, and of the members of their families and their community, as well as the participation of the Accused Kovać in the commission of the specified criminal acts.

The provisions under Article 39 of the CC of BiH provide for the general purpose of the stipulation and imposition of the criminal sanctions which is the prevention of unlawful behavior that violates or jeopardizes the fundamental general and individual values. Pursuant to this Article, the purpose of punishment is to express the community's condemnation of the perpetrated criminal offence, to deter the perpetrator from perpetrating criminal offences in the future, to deter others from perpetrating criminal offences and to raise the awareness of citizens of the danger of criminal offences and of the fairness of punishing the perpetrators, which has a preventive effect on the awareness of citizens about the necessity to abide by the law. The meting out of the punishment for the commission of a criminal offence, with regard to the perpetrator of that offence, is related to the satisfying of the purpose of punishment.

Fairness as a legal requirement has to be taken into account, too, in meting out the punishment, as well as the specific circumstances not only surrounding the criminal offence but also its perpetrator (as stated above). The law stipulates two goals which are relevant to the person who is convicted of the criminal offence: deterring the perpetrator from perpetrating criminal offences in the future (Article 6 and Article 39 of the CC of BiH) and rehabilitation (Article 6 of the CC of BiH). The rehabilitation is not the purpose stipulated

only by the CC of BiH, but it is the only purpose of punishment which is recognized by and expressly required by the international law on human rights which the Court has to comply with. Article 10(3) of the International Covenant on Civil and Political Rights reads: *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*

Governed by the goals of general and special prevention, the Panel had in mind all circumstances "*bearing on the magnitude of punishment* " pursuant to Article 48(1) of the CC of BiH.

The Panel finds that the aggravating circumstances in the case at hand are the status of the Accused, the number of the aggrieved parties (persons detained in detention camps), then the number of the criminal acts of rape and the consequences of rape for the victims, and the fact that the person B was underage when she was raped.

Namely, the Panel, as was explained above, established that at the relevant time the Accused Ante Kovać, as the commander of the Vitez Brigade Military Police, committed the aforementioned criminal acts. The victims of his acts were numerous Bosniak civilians, more specifically over 250 persons who were unlawfully deprived of liberty and detained in the above mentioned detention facilities. In addition, the Accused is personally responsible for the rape of two Bosniak women, one of whom was underage. The Panel recalls that the Accused committed the criminal acts as the Military Police Commander, which means as a person who was in the position to make decisions and implement them. The Accused Ante Kovać himself took active part as a direct perpetrator of criminal offences (as explained above) of which he was found guilty.

The fact that a number of witnesses stated that the Accused had helped them (regarding Count 1 of the Indictment) is a circumstance the Panel has already taken into account as a mitigating one. However, in the opinion of this Panel, the mentioned circumstance is not of the decisive importance, bearing in mind that the Accused did not do anything to prevent the unlawful detention of Bosniak men in the municipality of Vitez and their being taken to forced labor on digging trenches at the separation lines between the adversary military forces of the HVO and the Army BiH. The Panel further considered as a mitigating circumstance the fact that the Accused was a family man and father of three children and that he had not been convicted to date. The conduct of the Accused during the trial was appropriate and satisfied the Panel's expectations, and the Panel did not consider it to be either a mitigating or an aggravating factor.

The Panel believes that in this case the reasons under Article 49 of the CC of BiH which constitute the grounds for the reduction of punishment do not exist.

Having in mind the established facts and the ensuing consequences, as well as the cause and effect relation between them, the Panel found the Accused guilty and imposed on him the imprisonment sentence for the term of 13 (thirteen) years. While meting out the type and the length of criminal sanction, the Panel was governed by the provision under Article 39 of the CC of BiH, being convinced that the imposed punishment is reciprocal to the gravity of the criminal offence and the degree of the criminal responsibility of the Accused. Furthermore the Panel considers that the imposed punishment will be sufficient to deter the Accused from committing criminal offences in the future and that the purpose of the general prevention will have been met. In conclusion, the Panel finds that the imposed punishment

will also raise the awareness of citizens of the danger of criminal offences and of the fairness of punishing the perpetrators.

6. Custody Decision

Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody upon the Court's Decision starting on 30 January 2008 to date shall be credited towards the sentence imposed.

7. Decision on Costs of Criminal Proceedings

Since the Accused was found guilty as charged by the Indictment, pursuant to Article 188(1) of the CPC of BiH the Panel mandates him to pay all costs of the criminal proceedings. The amount of the costs shall be determined by a separate decision once the Panel has collected the relevant information. In doing so, the Panel had in mind that none of the parties to the proceedings proved the fact under Article 188(4) of the CPC of BiH which would result in relieving the Accused from the obligation to pay the costs of the criminal proceedings.

8. Decision on Claim under the Property Law

The aggrieved parties Ćazim Ahmić, Senad Hidić, Nadžija Pekmić, and the witnesses A, B and D have filed claims under the property law requesting compensation of the damage inflicted by the commission of the criminal offence by the Accused. As deciding on such a claim would significantly delay these proceedings, pursuant to Article 198(2) of the CPC BiH, the Panel instructed the aggrieved parties to pursue their claims under property law in the civil proceedings. The victim Enver Karajko is also instructed to pursue his possible property claim in the civil proceedings, pursuant to Article 198(2) of the CPC of BiH.

In accordance with all the aforementioned, the Panel rendered the decision as stated in the operative part of the this Verdict.

Minutes taker **PRESIDENT OF THE PANEL**
JUDGE

Lejla Konjić **Šaban Maksumić**

LEGAL REMEDY: An appeal from this Verdict may be filed with the Panel of the Appellate Division of the Court within 15 (fifteen) days of the day when the written Verdict was delivered.

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

Sarajevo, 28 September 2009

Ermin Mulabdić (page 1-22)
Certified Court Interpreter for English Language

Amela Zubčević (page 22-42)
Certified Court Interpreter for English Language

Dinka Bevrnja (page 42-60)
Certified Court Interpreter for English Language