

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine  
Суд Босне и Херцеговине

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Case No. S1 1 K 014267 13 Kžk (Ref. to X-KRŽ-05/96-1)

Delivered on: 18 December 2013

Written copy sent out on: 24 January 2014

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Before the Panel of the Appellate Division comprising:

Judge Dragomir Vukoje, LL.M., Presiding

Judge Hilmo Vučinić

Judge Redžib Begić

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MIRKO (ŠPIRO) PEKEZ AND MILORAD SAVIĆ

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SECOND INSTANCE VERDICT

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**Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:**

**Mirko Lečić**

**Counsel for the Accused Mirko Pekez:**

**Attorney Janko Nikolić**

**Counsel for the Accused Milorad Savić:**

**Attorney Nebojša Pantić**

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**No. S1 1 K 014267 13 Kžk**  
**Sarajevo, 18 December 2013**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, the Appellate Division Panel of Section I for War Crimes, comprised of Judge Dragomir Vukoje, LLM, as the Panel President, and Judges Hilmo Vučinić and Redžib Begić, as members of the Panel, with the participation of Legal Advisor Medina Džerahović, as the record-taker, in the criminal case against the accused Mirko Pekez (son of Špiro), and the accused Milorad Savić, for the criminal offense of War Crimes against Civilians in violation of Article 142(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia, as read with Article 22 of the same Code, deciding upon an Indictment of the Prosecutor's Office of Bosnia and Herzegovina, No. KT-RZ-116/05 of 22 November 2007, confirmed on 28 November 2007, and amended on 16 December 2013, pursuant to the Decision of the Constitutional Court of Bosnia and Herzegovina No. AP 2948/09 of 22 October 2013, following the main hearing held in the presence of the Prosecutor of the BiH Prosecutor's Office, Mirko Lečić, the Accused in person, Counsel for the accused Mirko Pekez, Attorney Janko Nikolić, and Counsel for the accused Milorad Savić, Attorney Nebojša Pantić, on 18 December 2013 delivered and announced the following

**VERDICT**

**THE ACCUSED:**

**MIRKO PEKEZ, a.k.a. „Guzan“**, son of Špiro and Mara née Glamočak, born on 28 October 1966 in the place of Čerkazovići, the Municipality of Jajce, ethnicity ..., citizen of ..., electro-technician by profession, residing in ..., married, father of two, works at SZR Stupna Šipovo, served the military in Niš and Lastovo, of average financial standing, possesses the ID Card no. ..., PIN ..., no prior convictions, no other criminal proceedings pending against him, sentence serving suspended, **released pursuant to the Decision of the Court of BiH No. S1 1 K 014267 13 Kžk of 18 November 2013,**

**MILORAD SAVIĆ a.k.a. „Mića“** son of Ljupko, born on 25 October 1970 in the place of Čerkazovići, the Municipality of Jezero-Jajce, residing in ..., ethnicity ..., machine fitter, married, father of one minor child, served the military in 1988/89 in Pula and Niš, military records kept with the VE-Gradiška Municipality, works at ..., of medium financial standing, citizen of ..., possesses the ID Card no. ..., PIN ..., long-term imprisonment sentence serving suspended, **released pursuant to the Decision of the Court of BiH No. S1 1 K 014267 13 Kžk of 18 November 2013,**

**Pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina**

## ARE HEREBY FOUND GUILTY

### Because, by acting in concert:

During the state of war in Bosnia and Herzegovina and the armed conflict in the territory of Jajce municipality between the Army of Republika Srpska, on the one side, and the Army of BiH and HVO (Croat Defense Counsel) on the other side, as members of the Army of Republika Srpska and the Reserve Police Force, they acted in violation of Articles 3 and 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, prohibiting violence against life, health or physical or mental wellbeing of persons, by doing the following:

- On 10 September 1992, after the burial of a killed soldier of the Army of Republika Srpska, Rade Savić, as an organized group of armed people, which consisted of Jovo Jandrić, Mirko Pekez (son of Špiro), Simo Savić, Mirko Pekez (son of Mile), Milorad Savić (son of Ljupko), Zoran Marić, Slobodan Pekez, Ilija Pekez, Milorad Savić (son of Đuro) and Blagoje Jovetić, which was organized by Jovo Jandrić, having mutually agreed on the plan to collect civilian Bosniak population located in the place of Ljoljići and Čerkazovići – municipality Jajce, whose freedom of movement was restricted since they had to respond to the roll call on a daily basis, intending to take them away and kill them at the place called „Tisovac“, so they went to this place armed with automatic and semi-automatic rifles, under the threat of using the arms, unlawfully arrested and forcibly took out the civilian Bosniak population from the houses, rounded up women, men and children in the place called „Osoje“, in the commission of which they were aided by the accused Mirko Pekez (son of Špiro), whereupon he left this group, while other members of the group, including Milorad Savić (son of Ljupko), took them all together in a column to the place called „Draganovac“, with the rifles in their hands, walking in front, at the sides and at the rear of the column, while Jovo Jandrić and Mirko Pekez (son of Mile) threatened that they would kill whoever tried to escape, while insulting them, and physically harassing them by calling them different names, by punching and kicking them and by hitting them with rifles, and when they reached the place called „Draganovac“, they stopped them there and Jovo Jandrić ordered them to put at a specifically designated place all valuable items they had on them, while the other armed persons stood aside with the rifles pointed at them, and when they did so, Jovo Jandrić and Mirko Pekez (son of Mile) appropriated those items, and thereupon took them to the place called „Tisovac“, where Jovo Jandrić ordered them to line up against the edge of an abyss, and when they did so, most of them opened fire from the rifles pointed at them, intending to kill them, thus on that occasion they killed **Nedžib Mutić**, son of Osman, born in 1936, **Šećo Malkoč**, son of Ibro, born in 1933, **Irhad Bajramović**, son of Mustafa, born in 1971, **Adnan Zobić**, son of Sabahudin, born in 1979, **Fikreta Zobić**, daughter of Arif, born in 1956, **Fahra Balešić**, daughter of Muslo, born in 1928, **Faza Balešić**, daughter of

Avdo, born in 1918, **Derviša Mutić**, daughter of Hadžo, born in 1933, **Latif Bajramović**, son of Mujo, born in 1959, **Senad Karahodžić**, son of Omer, born in 1968, **Ibrahim Karahodžić**, son of Alija, born in 1933, **Mujo Bajramović**, son of Ibro, born in 1927, **Asmer Zobić**, son of Nurija, born in 1977, **Zarifa Karahodžić**, daughter of Latif, born in 1928, **Đula Zobić**, daughter of Avdo, born in 1924, **Ramiza Mutić**, daughter of Šerif, born in 1936, **Adis Zobić**, son of Nurija, born in 1983, **Fikreta Zobić**, daughter of Tahir, born in 1957, **Fatima Mutić**, daughter of Huso, born in 1963, **Ekrema Bajramović**, daughter of Latif, born in 1939, **Mustafa Bajramović**, son of Aslija, born in 1946, **Mustafa Balešić**, son of Ibro, born in 1950 and **Sabahudin Bajramović**, son of Šemso, born in 1979, while **Zejna Bajramović**, **Nurija Zobić**, **Omer Karahodžić** and **Mustafa Bajramović** survived the execution but sustained physical injuries, while **Fahrija Mutić** suffered no injuries.

**Whereby they committed, namely:**

- the accused Mirko Pekez (son of Špiro), committed the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia (the CC of SFRY) - killings, as read with Article 24 (aiding and abetting) of the same Code,
- the accused Milorad Savić (son of Ljupko), committed the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY - killings, infliction of immense suffering and pillaging of the population, as read with Article 22 (complicity) of the same Code.

Therefore, applying the above said Articles, as well as Articles 38 and 41 of the CC of SFRY, the Appellate Division Panel of the Court of BiH, for the committed criminal offense

## **S E N T E N C E S**

- 1. the accused Mirko Pekez (son of Špiro) to IMPRISONMENT FOR A TERM OF 10 (ten) YEARS**
- 2. the accused Milorad Savić (son of Ljupko) to IMPRISONMENT FOR A TERM OF 15 (fifteen) YEARS**

Pursuant to Article 50 of the CC of SFRY, the time the Accused spent in custody, running from 30 October 2007 through 11 September 2009, and the time they spent serving their respective prison sentences pursuant to the Verdict of the Court of Bosnia and Herzegovina, No. X-KRŽ-05/96-1 of 5 May 2009, during the period from 11 September 2009 through 18 November 2013, shall be credited towards the imposed sentence of imprisonment.

Pursuant to Article 198(2) of the CPC of BiH, the injured parties Nurija Zobić, Zejna Bajramović, Omer Karahodžić, Fahrija Mutić and Subhudin Zobić, are instructed to pursue

their claims under property law in a civil action.

Pursuant to Article 188(4) of the CPC of BiH, the Accused are relieved of the duty to reimburse the costs of these criminal proceedings, which will be paid from within the funds of the Court of BiH.

## R E A S O N S

### I. PROCEDURAL HISTORY

#### A. VERDICTS OF THE COURT OF BIH AND THE DECISION OF THE CONSTITUTIONAL COURT OF BIH

1. The Verdict of the Court of Bosnia and Herzegovina (the Court of BiH), No. X-KR-05/96-1 of 15 April 2008, found the accused **Mirko Pekez (son of Špiro)**, Mirko Pekez (son of Mile) and **Milorad Savić (son of Ljupko)** guilty of committing, by the acts described in the enacting clause of the referenced Verdict, the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) and (f), as read with Article 29 of the CC of BiH, and Article 180(1) of the same Code. For the said crime, the Trial Panel sentenced the accused Mirko Pekez (son of Mile) to a long-term imprisonment of 29 (twenty nine) years, and the accused **Mirko Pekez (son of Špiro) and Milorad Savić (son of Ljupko)** to a long-term imprisonment of 21 (twenty one) years each. Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody, running from 1 November 2007 onwards, was credited towards the imposed prison sentence. Applying Article 188(4) of the CPC of BiH, the Trial Panel has relieved the Accused from the duty to reimburse the costs of the proceedings. Pursuant to Article 198(2) of the CPC of BiH, the injured parties Nurija Zobić, Zejna Bajramović, Omer Karahodžić, Fahrija Mutić and Subhudin Zobić, as well as the injured party Mustafa Bajramović and the relatives of the killed civilians, were instructed to pursue their claims under property law in a civil action.

2. The Verdict of the Appellate Panel No. X-KRŽ-05/96-1 of 29 September 2008 dismissed as ill-founded an appeal filed by the Defense Counsel for the accused Mirko Pekez (son of Mile), Attorneys Duško Panić and Predrag Radulović, and upheld the Verdict of the Court of BiH, No. X-KR-05/96-1 of 15 April 2008, in the part thereof pertaining to this Accused. Under the same Verdict, the appeals filed by the Defense Counsel for the accused Mirko Pekez (son of Špiro), Attorney Slavica Čvoro, and the Defense Counsel for the accused Milorad Savić, Attorney Nebojša Pantić, were granted, and the part of the Verdict pertaining to these two Accused was revoked and a hearing ordered before the Panel of the Appellate Division of Section I for War Crimes of the Court of BiH.

3. Having held the referenced hearing, the Appellate Panel handed down the Verdict No. X-KRŽ-05/96-1 of 5 May 2009, finding the accused Milorad Savić guilty because, by the acts described in the enacting clause of the Verdict, he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) and (f), as read with Article 29 of

the CC of BiH, and sentencing him to a long-term imprisonment of 21 (twenty one) years, and finding the accused Mirko (Špiro) Pekez guilty of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, as read with Article 31 of the CC of BiH, and sentencing him to imprisonment for a term of 14 (fourteen) years.

4. The Decision of the Constitutional Court of Bosnia and Herzegovina on Admissibility and Merits, No. AP-2948/09 of 22 October 2013, rendered upon the appeals filed by Mirko (Špiro) Pekez and Milorad Savić (the applicants), found a violation of Article 7(1) of the ECHR and, accordingly, revoked the Appellate Verdict of the Court of BiH No. X-KRŽ-05/96-1 of 5 May 2009, and referred the case back to the Court of BiH to render a new decision pursuant to the guarantees set forth under the referenced Article of the Convention.

5. Having acted pursuant to the referenced Decision, this Panel concluded that, following the revocation of the final second-instance Verdict, the case is now at the appellate hearing stage and that, accordingly, this hearing should be held before the Appellate Division Panel.

## **B. PROCEEDINGS BEFORE THE APPELLATE DIVISION PANEL**

### **1. Indictment**

6. The Indictment of the BiH Prosecutor's Office, No. KT-RZ-116/05 of 22 November 2007, confirmed on 28 November 2007, charged Mirko (Špiro) Pekez and Milorad Savić with the criminal offense of War Crimes against Civilians under Article 173(1)(c) and (f) of the CC of BiH, as read with Article 29, all taken in conjunction with Article 180(1) of the same Code.

7. At the hearing held on 16 December 2013, the Prosecution stood by the said Indictment, having noted that the Indictment would be modified in compliance with the views taken by the Constitutional Court, namely that the crime would be legally prequalified pursuant to the adopted CC of SFRY, and the Indictment amended by charging the Accused with the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY, as read with Article 22 of the same Code. The Defense concurred with the referenced amendments to the Indictment.

### **2. Evidentiary Proceedings**

8. Considering the new procedural situation, a hearing was held before the Appellate Panel pursuant to Article 317 of the CPC of BiH. More specifically, in these proceedings, the Court is under obligation to undo a violation found by the Constitutional Court's decision. According to this Decision, the CC of BiH was, in the concrete case, retroactively applied to the detriment of the principal applicant-accused Milorad Savić, and there is a realistic possibility that the CC of BiH was also retroactively applied to the detriment of the second applicant-accused Mirko (Špiro) Pekez, as regards the imposed sentence, which determined the scope and the nature of the evidentiary proceedings.

9. Having referred to the Decision of the Constitutional Court at issue, both the Defense and the Prosecution agreed to accept all the evidence adduced in the previous proceedings.

10. The Appellate Panel delivered a procedural decision accepting all the evidence adduced in the previous proceedings, noting that only the evidence which, upon the parties' proposal, may affect the imposing of a criminal-legal sanction, would be adduced.

11. Regarding the length of the imposed criminal sanction, the Defense for the Accused Savić submitted a Convict Conduct Report No. 03-1339/09 of 9 December 2013. The Defense Counsel for the accused Pekez withdrew his earlier proposal to carry out a reconstruction of the crime, since it is unlawful.

12. In view of the foregoing, the Appellate Panel accepted the procedural decisions rendered in the previous proceedings and, having relied on Article 317(2) of the CPC of BiH, concluded that there was no need to present anew the evidence already adduced in first instance, either of testimonial or objective nature. The Appellate Panel has, therefore, fully accepted all the evidence without reading out or reproducing it all over again. All the evidence, for both the Defense and the Prosecution, accepted during the first instance proceedings before this Court, was accepted considering that all this evidence was presented in relation to the same criminal offense, and the Panel could not separate the evidence pertaining to the already convicted Mirko (Mile) Pekez, as, otherwise, the evidentiary material would be deficient. Thus, the Appellate Panel accepted the following:

(a) Prosecution Evidence

13. Audio-video recordings of the statements given by the following witnesses: Nurija Zobić, Borko Oparnica, Dragan Nišić, Dragan Ždrnja, Fahrija Mutić, Nedeljko Jandrić, Pero Savić, Zejna Bajramović, Omer Karahodžić, Subhudin Zobić, Dr. Rajko Todorčević, Dr. Hamza Žujo, forensic medicine expert from Sarajevo, and additional witness Miroљjub Perlaš.

14. In addition, also accepted was the following documentary evidence: Witness Examination Record for Nurija Zobić made in the BiH Prosecutor's Office, No. KT-RZ-116/05 of 27 April 2007; Discharge Letter, RO Clinical-Medical Center Banja Luka of 22 October 1992 for Nurija Zobić; Witness Examination Record for Borko Oparnica, BiH Prosecutor's Office, No. KT-RZ-116/05 of 15 May 2007; Witness Examination Record for Dragan Nišić, BiH Prosecutor's Office, No. KT-RZ-116/05 of 6 June 2007; Witness Examination Record for Dragan Ždrnja, BiH Prosecutor's Office, No. KT-RZ-116/05 of 23 May 2007; Witness Examination Record for Fahrija Mutić, BiH Prosecutor's Office, No. KT-RZ-116/05 of 6 June 2007; Witness Examination Record for Nedeljko Jandrić, BiH Prosecutor's Office, No. KT-RZ-116/05 of 6 November 2007; Military Record Information forwarded by the Public Security Station (SJB) Jajce No. 11-11/01-828/93 of 26 June 1993; Witness Examination Record for Pero Savić, BiH Prosecutor's Office, No. KT-RZ-116/05 of 6 November 2007; Witness Examination Record for Zejna Bajramović, BiH Prosecutor's Office, No. KT-RZ-116/05 of 13 November 2007; Discharge Letter, RO

Clinical-Medical Center Banja Luka of 16 September 1992 for Zejna Bajramović; Videotape “War Crimes against Civilians Committed on 10 September 1992 in the Place of Tisovac-Jajce Municipality”; Witness Examination Record for Omer Karahodžić, BiH Prosecutor's Office, No. KT-RZ-116/05 of 5 November 2007; Psychologist's Finding, Specialist Department of the JU Medical Center Bugojno for Omer Karahodžić, dated 13 April 1997, Specialist's Finding, Specialist Department of the JU Medical Center Bugojno for Omer Karahodžić of 17 March 1997, Findings of the Cantonal Hospital Travnik of 19 March 1997, Findings of the Surgery Clinic, District Hospital Travnik of 17 October 1997; Witness Examination Record for Subhudin Zobić, BiH Prosecutor's Office No. KT-RZ-116/05 of 8 May 2007; Witness Examination Record for Dr. Rajko Todorčević, the BiH Prosecutor's Office No. KT-RZ-116/05 of 14 November 2007; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Sabahudin (Šemso) Bajramović, born in 1979, issued by the Health Center Šipovo, of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Asmer (Nurija) Zobić, born in 1977, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Mustafa (Ibro) Balešić, born in 1950, Health Center Šipovo, of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Mustafa (Alija) Bajramović, born in 1946, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Ekrem (Latif) Bajramović, (Šemso's wife), born in 1939, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Fikreta (Arif) Zobić, (Nurija's wife), born in 1957, issued by the Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Fatima (Huso) Mutić, born in 1963, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Adis (Nurija) Zobić, born in 1984, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Ibrahim (Alija) Karahodžić, born in 1930, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Šećo (Ibro) Malkoč, born in 1934, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Irhad (Mustafa) Bajramović, born in 1971, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Adnan (Sabahudin) Zobić, born in 1979, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Fikreta (Tahir) Zobić, born in 1957, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Fahra (Mujo) Balešić, born in 1927, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Faza (Avdo) Balešić, born in 1918, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Latif (Mujo) Bajramović, born in 1959, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Ramiza (Šerif) Mutić, born in 1936, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the



cause of death of Senad (Omer) Karahodžić, born in 1962, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Nedim (Osmo) Mutić, born in 1936, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Đula (Avdo) Zobić, born in 1924, Health Center Šipovo of 12 September; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Zerifa (Latif) Karahodžić, born in 1965, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Mujo (Ibro) Bajramović, born in 1927, Health Center Šipovo of 12 September 1992; Specialist's Findings and Opinion of Dr. Rajko Todorčević on the cause of death of Derviša (Hadžo) Mutić, born in 1933, Health Center Šipovo of 12 September 1992; Exhumation and Autopsy Findings for the corpses recovered in the Jajce territory, Forensic Institute of the Medical Faculty Sarajevo, of 14 March 2000, made by Dr. Hamza Žujo, Forensic Medicine Specialist, Dr. Nermin Sarajlić, resident in forensic medicine, and Adnan Mušić, Autopsist Assistant, upon an order issued by the Cantonal Court in Travnik, No. KT-55/99-RZ; Decision Declaring the State of War, Official Gazette of the RBiH No. 7/92 of 20 June 1992; Regular Operations Report of the 5th Corps Command, sent to the 2<sup>nd</sup> Military District Command, Op.str.conf. No. 84-84 of 23 April 1992; Regular Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, conf. No. 44-1/160 of 3 June 1992; Regular Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, strict. Conf. No. 44-1/180 of 14 June 1992; Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, strict. Conf. No. 44-1/195 of 23 June 1992; Regular Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, strict. Conf. No. 44-1/248 of 20 July 1992; Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, strict. Conf. No.44-1/286 of 9 August 1992; Regular Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, strict. Conf. No. 44-1/332 of 31 August 1992; Regular Combat Report of the 1<sup>st</sup> Krajina Corps Command sent to the Main Staff of the SR BiH Army, strict. conf. No. 44-1/440 of 26 October 1992; Order of the Commander of the 1<sup>st</sup> Krajina Corps, General-Major Momir Talić to use militia in armed combat, op.str.conf. No. 535-1 of 19 June 1992; Crime-scene Investigation Record made on 12 September 1992, regarding the incident that occurred during night hours on 10 September 1992, in the village of Čerkazovići, Jajce Municipality, made in the Basic Court in Mrkonjić-Grad, under No. Kri. 57/92 of 12 September 1992; Official Letter regarding the Military Records of the Military Post No. 7048 of 5 July 1993; Official Letter of the Ministry of Interior, Crime Police Administration of Republika Srpska, No. 02-11347/07 of 18 July 2007, Decision of the Cantonal Court in Travnik No. Kri 5/99 of 27 April 1999 ordering exhumation and autopsy of the body of Ekrem Bajramović and other civilians from the villages of Ljoljići and Čerkazovići; Exhumation Record No. Kri. 5/99 made on 28 April 1999, by the Investigative Judge Slavica Čurić, from the Cantonal Court in Travnik, at the Draganovac site, the Municipality of Jezero, RS, Rules of the Road File: ROR 810 forwarded to Chief Prosecutor, Marinko Jurčević by Graham T. Blewitt, ICTY Deputy Prosecutor for Mirko Pekez (son of Mile or Mića), Ref. No. 025285/GB/RR810 of 17 January 2002, Rules of the Road File: ROR 810 forwarded to Chief Prosecutor, Marinko Jurčević by Graham T. Blewitt, ICTY Deputy Prosecutor for

Milan Savić aka Mića, Ref. No. 025286/GB/RR810 of 17 January 2002, Rules of the Road File: ROR 810 forwarded to Chief Prosecutor, Marinko Jurčević by Graham T. Blewitt, ICTY Deputy Prosecutor for Mirko Pekez, Ref. No. 025281/GB/RR810 of 17 January 2002, Official Letter of the Jajce Police Department, No. 04-10/3-2-1-1119/02 of 10 December 2002 sent to the Cantonal Court Travnik with Ref. No. Ki-1/02 RZ of 29 November 2002; Decision of the Court of BiH No. X-KRN-05/96 of 17 October 2005 taking over the criminal case against the suspects Jovo Jandrić, Mirko Pekez, Simo Savić, Ilija Pekez, Milorad Savić, Mirko Pekez (son of Mile), Milan Savić aka Mića, Zoran Marić, Slobodan Pekez and Blagoje Jovetić, which was pending before the Cantonal Prosecutor's Office under No. KT-55/99; Certification of Death for Sabahudin (Šemso) Bajramović, born in 1979, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 117/99 of 8 May 1999; Certification of Death for Mustafa (Ibro) Balešić, born in 1950, from Čerkazovići issued by the Public Utility Enterprise City Cemeteries Visoko, No. 116/99 of 8 May 1999; Certification of Death for Mustafa (Alija) Bajramović, born in 1946, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 115/99 of 8 May 1999; Certification of Death for Ekrema (Latif) Bajramović (née Škopo), born in 1939, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 114/99 of 8 May 1999; Certification of Death for Fatima (Huso) Mutić, born in 1963, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 113/99 of 8 May 1999; Certification of Death for Fikreta (Tahir) Zobić (née Krak), born in 1957, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 112/99 of 8 May 1999; Certification of Death for Adis (Nurija) Zobić, born in 1985, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 111/99 of 8 May 1999; Certification of Death for Ramiza (Šefik) Mutić (nee Mujak), born in 1936, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 110/99 of 8 May 1999; Certification of Death for Džula (Avdo) Zobić (née Haseljić), born in 1924, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 109/99 of 8 May 1999; Certification of Death for Zarifa (Latif) Karahodžić (née Škopo), born in 1928, from Ljoljići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 108/99 of 8 May 1999; Certification of Death for Asmer (Nurija) Zobić, born in 1977, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 107/99 of 8 May 1999; Certification of Death for Mujo (Ibro) Bajramović, born in 1927, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 106/99 of 8 May 1999; Certification of Death for Ibrahim (Ale) Karahodžić, born in 1933, from Ljoljići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 105/99 of 8 May 1999; Certification of Death for Senad (Omer) Karahodžić, born in 1968, from Ljoljić, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 104/99 of 8 May 1999; Certification of Death for Latif (Mujo) Bajramović, born in 1959, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 103/99 of 8 May 1999; Certification of Death for Derviša (Hadžo) Mutić (née Balešić), born in 1933, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 102/99 of 8 May 1999; Certification of Death for Faza (Avdo) Balešić (née Mujkić), born in 1918, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 101/99 of 8 May 1999; Certification of Death for Fahra (Muslo) Balešić, born in 1928, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 100/99 of 8 May 1999; Certification of Death for Fikreta (Arif)

Zobić, born in 1956, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 99/99 of 8 May 1999; Certification of Death for Adnan (Subhudin) Zobić, born in 1979, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 98/99 of 8 May 1999; Certification of Death for Irhad (Mustafa) Bajramović, born in 1971, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 97/99 of 8 May 1999; Certification of Death for Šećo (Ibro) Malkoč, born in 1933, from Ljoljići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 96/99 of 8 May 1999; Certification of Death for Nedžib (Osman) Mutić, born in 1936, from Čerkazovići, issued by the Public Utility Enterprise City Cemeteries Visoko, No. 95/99 of 8 May 1999; Suspect Interrogation Record for Mirko (Špiro) Pekez aka „Guzan“, BiH Prosecutor's Office, No. KT-RZ-116/05 of 30 October 2007; Witness Examination Record for Miroljub Perlaš, BiH Prosecutor's Office, No. KT-RZ-116/05 of 17 March 2008 and geographic maps of the Municipalities of Jajce and Šipovo.

(b) Defense Evidence

15. Audio-video recordings of the evidence given by the Defense witnesses for the accused Mirko (Špiro) Pekez, namely by: Ljubo Jovičić, Đuro Vukadin, Pero Marić, the Accused in the capacity of a witness, as well as the evidence of additional witnesses, Goran Jović and Dragan Rodić, defense witnesses for the accused (now convicted) Mirko (Mile) Pekez, Nikola Nikolaš, Nedeljko Jandrić, Jovo Topić, Jovo Prole, Vlajko Radić, Bosiljka Rosić, and this accused in the capacity of a witness given at the hearing closed for the public. The accused Milorad (Ljupko) Savić did not propose that the evidence be presented by hearing the witnesses in first instance.

16. The Panel has accepted the following documentary evidence submitted by the Defense for the accused Mirko (Špiro) Pekez: Findings and Opinion of Dr. Rajko Todorčević, Industrial Medicine Specialist, concerning the Accused's state of health on 17 December 2002, issued by the Health Center Šipovo; Official Letter of the Public Security Station Mrkonjić-Grad No. 10-2-16/02-2-434/07 of 26 November 2007; Official Letter of the Police Station Šipovo, No. 10-2-17/02-1223/07 of 23 November 2007; Official Note of the Police Station Šipovo, No. 10-2-17/02-55/07 of 23 November 2007; Official Letter of the Public Security Center (CJB), Crime Police Sector Banja Luka No. 10-02/2-230-2831/07 of 11 December 2007 delivering the Official Note No. 10-02/2-838/07 of 11 December 2007 and a copy of a page from the on-sight Investigations Register of the CJB Banja Luka from 1992. Also accepted was the evidence adduced by the Defense for the accused Milorad Savić, namely: Official Note of the SJB Jajce of 12 September 1992 made by Borko Oparnica; a photo made on the burial day of Rade Savić, depicting the accused Milorad Savić, and the Suspect Questioning Record for Milorad Savić, made in the BiH Prosecutor's Office No. KT-RZ-116/05 of 30 October 2007.

17. Considering the Defense's withdrawn earlier proposal to carry out a reconstruction of the event, this Panel has not dealt with this issue.

18. The proposal of the accused Pekez to confront the accused Savić had to be

dismissed as ill-founded since it would make no substantial contribution to determining the relevant facts in these criminal proceedings, namely, it would not affect the Court in drawing a different conclusion regarding the movement of the accused Pekez on the critical evening.

19. The Appellate Panel has also accepted the evidence adduced in the earlier appellate proceedings, namely the hearing of Jovo Jandrić in the capacity of a witness pursuant to Article 9 of Protocol II to the European Convention on Mutual Assistance in Criminal Matters who was, in the presence of his Counsel, heard through a video-link with the District Court in Belgrade, Republic of Serbia, where he resides, namely, who was directly examined and cross-examined by both the Prosecution and the Defense. Considering that the Defense had no objections, this Panel has also held that this evidence adducing was properly accepted. This was so because of the Court's conclusion that the Prosecution reasons, provided in support of its objective inability to examine this person, were well-founded, given the fact that Jovo Jandrić was still unavailable to the law enforcement agencies of this state, and that he expressed his readiness to cooperate and testify in these proceedings only after the first-instance proceedings were completed. Ultimately, in rendering such a decision in the earlier appellate proceedings, the Court was mindful of the application of the principles of judicial efficiency and economy, and, in order to meet them, it was decided as stated above.

### **3. Closing Arguments**

#### **(a) Prosecution**

20. The Prosecutor stood by his closing argument presented at the earlier hearing held before the Appellate Division Panel on 28 April 2009. At the time, the Prosecutor provided a comprehensive review and an analysis of the adduced evidence, both the documentary evidence and the testimonials, explained the existence of the essential elements of the criminal offense charged against the Accused, and their criminal liability for the commission thereof.

21. The Prosecutor argued that, based on the evidence adduced at the main hearing, and following its evaluation, both individually and in combination with the other items of evidence, the single proper conclusion could be drawn that the accused Mirko Pekez and Milorad Savić, as co-perpetrators within a group, indeed committed the criminal offense of War Crimes against Civilians. For these reasons, the Prosecutor proposed that the CC of SFRY be applied pursuant to the decision of the Constitutional Court, that the Accused be found guilty of the crime committed in the way and at the time as described in the operative part of the Indictment, and that, considering the gravity of the offense and the consequences thereof, an adequate punishment within the magnitude of 5-20 years be imposed on them. The Prosecutor noted that the death penalty was an earlier prescribed criminal sanction for the crime at issue, and that its alternative was a 20-year sentence of imprisonment.

#### **(b) Defense**

22. The Defense Counsel for the accused Mirko (Špiro) Pekez, Attorney Janko Nikolić, stood by the closing argument presented in the earlier proceedings by the then Attorney, Slavica Čvoro, pointing to the fact that the Accused did not commit the crime charged against him under the referenced Indictment, as proved by the facts presented during the main hearing, particularly those presented exactly by the Prosecution witnesses. Presented at the time were parts of the statements given by the Prosecution witnesses, relevant to the Defense, with the ultimate conclusion that the Prosecution failed to prove, based on all presented facts, that on the critical day, Mirko (Špiro) Pekez was present at the crime scene at all, let alone that he participated in the killing of a portion of the population from the villages of Ljoljići and Čerkazovići. Counsel Nikolić argued that the Accused's conduct was still undetermined considering that he withdrew from the commission of the crime, that he gave no contribution to its commission, that there is no specification of the place and time of the critical incident commission, that he has served more than 6 years of his sentence, and also, that his health condition is seriously impaired.

23. The accused Pekez fully stood by his Counsel's closing argument.

24. The Defense Counsel for the accused Milorad Savić, Attorney Nebojša Pantić, stood by his earlier closing argument, having specially referred to the circumstances affecting the reduction of sentence. Counsel Pantić argued that, pursuant to the CC of SFRY, the special maximum punishment for the referenced offense is a 15-year imprisonment. The Defense stated that, regarding the evidence, nothing new occurred in the reopened proceedings, except for the new piece of Prosecution evidence – the hearing of witness Jovo Jandrić. The Defense did not contest this witness's testimony since he had, by his testimony, created his own defense, and any acceptance of his allegations as true would bring into question almost all evidence given by the heard Prosecution witnesses. Examining this witness's testimony, and pointing to the other evidence, the Defense argued that the Prosecution failed to prove the accused Savić's role in the criminal acts charged against him, and that the Prosecution assigned him a role he did not really have.

25. The accused Savić fully stood by the closing argument presented by his Counsel.

## **II. CONCLUSIONS AND FINDINGS OF THE APPELLATE PANEL**

### **A. GENERAL FINDINGS (CHAPEAU ELEMENTS OF THE CRIME)**

26. The Appellate Panel has noted that, even though the Accused's guilt was not the subject of consideration of the Constitutional Court's decision, it will nonetheless provide a review of the proved facts on which the decision was based, and apply to such an established state of facts the provisions of the law which was in force at the time when the crime was committed, that is, the Criminal Code of the Socialistic Federative Republic of Yugoslavia (the CC of SFRY), adopted as the Code of Republic of Bosnia and Herzegovina under the Decree with the Force of Law (Official Gazette of the R BiH, No. 2

of 11 April 1992).

27. In fact, the Prosecution's amended Indictment charged the Accused that they committed the criminal offense of War Crimes against Civilians under Article 142 of the CC of SFRY, namely the charges prescribed under Sub-paragraph 1 of this Article, which reads as follows:

*“Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack against civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people’s health; an indiscriminate attack without selecting a target by which civilian population gets hurt; that civilian population be subject to killings, [...], immense suffering or violations of bodily integrity or health; [...], pillaging, [...], or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty”.*

28. The following general (*chapeau*) elements of the criminal offense of War Crimes against Civilians to be determined ensue from the cited legal definition:

- The act of the perpetrator must be committed in violation of the rules of international law, in a way that it was directed against the civilian population, or persons who do not take an active part in the armed conflict, or have laid down their arms, or were placed hors de combat, and who are protected under the provisions of the Geneva Convention on the Protection of Civilian Persons in Time of War dated 12 August 1949;
- The violation must be committed in time of war, armed conflict or occupation;
- The act of the perpetrator must be related to war, armed conflict or occupation;
- The perpetrator must order or commit the act.

### **1. Violation of the rules of international law**

29. The essential elements of this crime, primarily the different acts of commission, confirm that the legislator has provided for the protection of values enshrined under international law to the full extent. Exactly for the foregoing reason, no division has been made, within the war crimes against civilians, to international and national armed conflicts, nor were violations of international law classified as grave breaches of the Geneva Conventions and other violations that do not represent grave breaches.

30. The existence of this criminal offense requires that the acts of its commission amount to violations of the rules of international law, pointing to the blanket nature of the offense.

31. In this regard, this provision is, *inter alia*, also based on the Geneva Convention on the Protection of Civilian Persons in Time of War of 12 August 1949. The Indictment charged the Accused with acting in violation of Article 3 and Article 147 of the Convention. The rules contained in Article 3 of the Convention are considered as customary law, and represent a minimum standard from which the belligerent parties should never depart. It provides the following:

*“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.*

*To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

*a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*

*b) taking of hostages;*

*c) outrages upon personal dignity, in particular humiliating and degrading treatment;*

*d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”*

32. Article 147 of the Geneva Convention defines cases where grave breaches of the Convention rules would be those where the acts of the perpetrator are directed exactly against persons or property protected by the Convention, including:

*“wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.*

33. Therefore, first to be determined is the application of international rules during the relevant period. In the ICTY case *Prosecutor v. Tadić*, No. IT-94-1 (Appeals Chamber), it was stated that: “International humanitarian law applies since the beginning of armed conflicts until after the hostilities ceased...”

34. Interpreting the very provision of Article 142(1) of the CC of BiH, clearly it is not necessary (is not a requisite for the existence of offense) that the perpetrator knows, or intends to violate an international norm (it is not necessary that a violation of blanket norms be included in the perpetrator's consciousness), rather it is sufficient that his conduct objectively amounts to a violation of the rules of international law, while in taking concrete individual acts of commission, the perpetrator's subjective relationship toward the offense must certainly be taken into account.

## **2. Civilian status of the victims**

35. In order to establish violations of the rules of international law, it is necessary to determine against whom the act of commission was directed, namely whether the act was directed against the special category of the population protected by Article 3(1) of the Geneva Convention, which has been in application in BiH based on Annex 6 to the Dayton Peace Agreement for BiH, which pursuant to the ICTY's case law also forms part of customary international law (*Kunarac, Kovač and Vuković* – Appeals Chamber, Judgment of 12 June 2002, para. 68).

36. According to the definition provided in Article 3(1) of the Geneva Convention, **the notion of protected category** implies that the term "civilian" refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms, and/or those placed hors de combat (*Blagojević and Jokić* – Judgment of the ICTY's Trial Chamber dated 17 January 2005, para. 544).

37. On the basis of the adduced evidence, and particularly based on the witnesses' statements, this Panel has concluded beyond a doubt that the persons forcibly taken out of their homes and subsequently executed on the critical day, were unarmed civilians, who had in no way participated in the armed conflict (were not affiliated to any party to the conflict), and who were certainly the persons protected by the Geneva Convention on the Protection of Civilian Persons in War Time of 12 August 1949.

38. All the witnesses mostly consistently testified that, after the failed mobilization, the population started leaving the villages of Čerkazovići and Ljoljići, that only around thirty Muslims stayed in this territory, and that they had to respond to the roll call on a daily basis to one reserve and one active police officer.

39. On the critical night, all Bosniak civilians, victims of the referenced crime, 29 of them, including several children, all aged 9-74, were taken out of their homes under threat of weapons, in such a way that they even had no time to dress themselves. The foregoing, *inter alia*, ensues from the testimony of witness Nurija Zobić, who had been in the house, with his wife and children, when the armed group arrived. At around 21:15 hrs, his wife looked through a window, and saw armed soldiers entering the front yard, whereupon Jovo Jandrić called them to come out. Witness Fahrija Mutić, also the survived victim of the crime at issue, testified that on the critical night he stayed together with Omer Karahodžić, his wife Zerifa Karahodžić and their son Senad Karahodžić, Šećo Malkoč, Ibrahim Karahodžić and his (witness's) father Ibrahim Mutić in Omer Karahodžić's house, when the



house was surrounded, and when they were taken out of the house. The witness's father and Omer Karahodžić jumped through a window, but the armed persons called Omer to come back, threatening they would kill his wife and the son if he did not do so, thus he returned.

40. Witness Omer Karahodžić also confirmed the foregoing. On the critical night, the witness stayed, together with his wife and children, on the house's upper floor, until his brother called him from downstairs, saying that the Military Police came for a roll call. The witness heard his brother telling Mirko (Mile) Pekez: "Pekez, let him get dressed!" However, Pekez ordered him to immediately get out. Having come down the stairs, this witness saw Jovo Jandrić and Mirko Pekez (son of Mile) armed. He also saw that Muharem Mutić was no longer in the room in which he had previously been since he had escaped through the window.

41. Jovo Jandrić also testified about the civilian status of the victims. The documentary evidence tendered in the case file by the Prosecution supports this fact, particularly the Record made by an investigative judge of the Basic Court in Mrkonjić Grad, No. Kri-57/92 dated 12 September 1992. This Record stated that the incident, in which a large number of civilians were deprived of their lives by fire weapons, took place on 10 September 1992.

42. Therefore, testifying about the abduction of people and their round-up in the place of Osoje, all the witnesses consistently stated that none of these persons had any weapons, or any part of the clothing indicating their affiliation to any military or police formations. These persons were absolutely unable to offer any resistance to the armed persons, and they had no means of defense available to them. In addition, all civilians were Muslims, and at the time of this incident they resided in the territory controlled by the Bosnian Serbs forces.

### **3. The existence of armed conflict**

43. The following essential element of the crime is that **a violation of international rules must be committed in time of war, armed conflict or occupation**. An armed conflict exists whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities, or between such groups within a State. In terms of Common Article 3, the nature of this armed conflict is irrelevant. It is not important whether grave breaches were made within the context of an international or internal armed conflict as long as the following requirements were met: the violation must constitute an infringement of rules of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim, the violation of the rule must entail the individual criminal responsibility of the person breaching the rule. In addition, the Criminal Code of SFRY also does not differentiate between international and non-international armed conflicts either, wherefore the international law directly applies to the full extent.

44. In the concrete case, the Panel has concluded that, by the acts of which they were found guilty, the Accused acted with the intent also in relation to the rules of international law, as their acts were directed at the most important protected values, that is, people's lives, and that at the time of the commission of the crime they were undoubtedly aware that their acts were unlawful in all legal systems. Thus, there is no doubt that, by their acts, the Accused wilfully breached the rules of international law. Therefore, violence upon life and person, in particular murder of all kinds, mutilation, cruel treatment and torture against this category of the population are particularly prohibited. It is, therefore, logical that the criminal acts of the Accused, of which they were found guilty, were committed fully in violation of the rules of international law.

45. That there was an armed conflict between the VRS, on the one side, and the Army of BiH and the HVO, on the other side, in the territory of the Jajce municipality, during the state of war in BiH, as one of the general elements of this criminal offense, in this concrete case, the Court concluded on the basis of the documentary evidence admitted in the case file, namely: Decision on the Proclamation of the State of War in the BiH territory (Official Gazette No. 7/92 of 20 June 1992), the Regular Operational Report of the Command of the 5<sup>th</sup> Corps of the VRS of 23 April 1992, and regular combat reports of the Command of the 1<sup>st</sup> Krajina Corps of the VRS, and based on the statements of the examined witnesses for both the Prosecution and the Defense. Accordingly, this evidence demonstrates beyond a doubt that there was an armed conflict in the territory of BiH, including the territory of the Jajce municipality too.

46. The Prosecution witnesses, Nurija Zobić, Fahrija Mutić, Zejna Bajramović, Omer Karahodžić, Subhudin Zobić, Borko Oparnica, Nedjeljko Jandrić, Dragan Nišić, Pero Savić and Jovo Jandrić, and the Defense witnesses, Đuro Vukadin and Pero Marić, also testified about the fact that there was an armed conflict.

47. It is apparent from the referenced witnesses' statements that, in the territory covered by the Indictment, the first mobilization started already in late 1991, when members of the Territorial Defense were invited to be issued with uniforms and weapons due to the war in Croatia at the time, that Muslims refused to do so, and that this was one of the reasons why joint guards were separated, and first fires opened at the houses were Muslim families lived. According to witness Nurija Zobić, who lived in the village of Čerkazovići during the war, and where he was born, the first attack on the village of Ljoljići started on 22 March 1992, at around 11:00 hrs, while the second attack concerned the village of Čerkazovići, located around 1.5 km further away. Witness Zejna Bajramović also confirmed that troubles in these villages started in March, during the Muslim religious holiday of Ramadan, when, in fact, the shooting started. According to witness Fahrija Mutić, the shooting was mostly heard around the houses, first from the infantry weapons, then from mortars. All witnesses mostly consistently testified that, after the unsuccessful mobilization, the population started leaving these villages and that only thirty one Muslims stayed. Those who stayed had to respond to the roll call on a daily basis to one reserve police officer and one active police officer.

48. The Court has concluded, also based on the examined witnesses' statements, that

during night hours, trucks with sand bags would come, and that these bags were used for setting up check points. According to witness Omer Karahodžić, these check points were located near the house of Mirko (Mile) Pekez, in which way the Serbs controlled the road toward Mrkonjić Grad. Witness Subhudin Zobić testified that check points were also set up by the so called Relja's house, located in the direction opposite to Ljoljići and Čerkazovići, and that they were subsequently moved near the place of Perućica, and a couple of days later, further down from the place of Jezero.

49. Witnesses Nedjeljko Jandrić and Borko Oparnica testified about the roll calls of the Muslim population from the villages of Ljoljići and Čerkazovići, which are significant for the existence of armed conflict. In fact, according to Nedjeljko Jandrić, the then Chief of the Police, the roll calls of the population were indeed conducted in the said villages. This was also confirmed by witness Borko Oparnica, an active police officer at the critical time. According to witness Oparnica, in March 1992, fire was opened from the village of Ljoljići against the check point in Stupna held by Red Berets. He subsequently visited these places with his Commander in order to check the security situation. When this was no more required, but in order to maintain the public order and security of the remaining Muslim population in the villages, around thirty two of them, the roll calls were ordered to be held at 10:00 hrs, at certain locations in these villages, which were carried out by two police officers.

50. Witness Jovo Jandrić testified that, just before the conflict outbreak, relations between Serbs and Muslims were disturbed by the Muslims' acts. He also testified that the armed conflict between members of these two ethnic groups started on 22 March 1992, when unknown Serb soldiers came, started shelling the villages of Ljoljići and Čerkazovići, and pitted Serbs and Muslims against each other. Most Muslims started leaving these villages, and, according to this witness, those were mostly the Muslims whose "*debts dated back to 1941*".

51. As already stated above, the Defense witnesses, Đuro Vukadin and Pero Marić, also testified that there was an armed conflict.

52. Considering the foregoing, as well as the fact that, neither during the proceedings, nor in its closing argument, the Defense contested that there was an armed conflict, this Panel's conclusion is that it was properly found beyond a doubt that there was a conflict, in the way as described, between members of the Republika Srpska Army, on the one side, and members of the Army BiH and the HVO on the other side. Thereby, the second essential element of the crime charged against the Accused has been met.

53. In view of the foregoing, this Panel has omitted from the factual substrate the blanket norm set out in Article 75(2) of the Additional Protocol I to the 1949 Geneva Conventions on the Protection of Victims of International Armed Conflicts, considering that it applies to cases where there are international armed conflicts. In the concrete case, the Panel has neither dealt with, nor was under obligation to deal with determining the character of the armed conflict at issue.

#### **4. Nexus between the perpetrator's act and the armed conflict**

54. Dealing with the Accused's status during the critical period is also significant from the perspective of another requisite necessary for the existence of crime, namely that **the perpetrator's act must be related to war, armed conflict or occupation.**

55. What is important here is that "the existence of an armed conflict have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed" (*Prosecutor v. Kunarac et al.*, case No. IT-96-23 and IT-96-23/1-A, Judgment of 12 June 2002, para. 58).

56. Therefore, it was necessary, in the concrete case, to determine the status of the Accused at the time when the crime was committed, namely at the time when there was an armed conflict between members of the Republika Srpska Army, on the one side, and the Army BiH and the HVO, on the other side.

57. There is no doubt for this Panel that at the time when the referenced crime was committed both of the Accused were members of the Reserve Police Forces. This ensues from the documentation submitted by the Prosecution, the witnesses' statements, particularly the Prosecution witnesses Borko Oparnica, Nedjeljko Jandrić, Miroljub Perlaš and Jovo Jandrić, as well as the Defense witness, Goran Jović. This fact was neither contested by the Accused themselves.

58. The foregoing first ensues from the Prosecution documentary evidence, namely the Official Letter of the Public Security Station Jajce No. 11-11/01-828/93 of 26 June 1993, and the Official Letter of the Republika Srpska Ministry of Interior No. 02-11347/07 of 18 October 2007, stating that the accused Mirko (Špiro) Pekez was a member of the Reserve Police Force during the 1992-1995 period, and the accused Milorad Savić through late September 1992.

59. The referenced fact is additionally supported with the statements of both the witnesses and the Accused themselves. The Prosecution witness Borko Oparnica was, at the critical time, an active police officer in the Jezero Local Community. It covered the villages of Ljoljići and Čerkazovići. At the main trial, this witness testified that he personally knew the accused Mirko (Špiro) Pekez and Milorad Savić, that during the critical period they were members of the Reserve Police Force, and that, as such, they were issued with weapons which they always carried around. Witness Nedjeljko Jandrić, the then Chief of the Bravnice Police Station, also confirmed the foregoing.

60. The accused Pekez himself testified before the Court that, in late May 1992, he moved to the Reserve Police Force of the SJB Jajce, that he stayed there until 1995, but that in late 1992, he was assigned the duties of a communications officer.

61. This fact was confirmed by the Defense's additional witness, Goran Jović. This witness testified that during the war he was within the Reserve Police Force in Bravnice, as well as Mirko (Špiro) Pekez, whom he identified in the courtroom. The

Prosecution's additional witness, Miroљjub Perlaš, also confirmed the foregoing, stating that he knew that both the Accused were members of this Reserve Police Force. Ultimately, in the proceedings before this Panel, witness Jovo Jandrić affirmed the foregoing too.

62. Due to their status during the armed conflict, certain duties were assigned to these persons, they regularly carried their weapons, and the population indeed recognized them as members of the Reserve Police Force, or the Military Police to whose roll calls they had to respond.

63. Therefore, since there was an armed conflict, these persons were engaged in the police structures of the newly established Serb Republic of BiH, and they could spread fear among the population owing to their status gained in such a way. More precisely, by using their position in the police structures, they could force the population to abide by their orders with no resistance, as they had done in the concrete case, when on the critical night they took the remaining civilian population to the execution site in Draganovac (also called Tisovac), on the pretext of taking them only "to be exchanged in Bravnice," or of "interviewing them", while those persons could not resist the forcible apprehension.

64. It is clear from all the foregoing that the existence of an armed conflict had, to a large extent, affected the ability and the decisions of the perpetrators to commit the crime, as well as the method of the commission of the crime itself. In fact, as members of the Police formations of the armed forces which had controlled the referenced territory, the Accused had an impression that they were untouchable as they had power and control over the civilians-victims. In this way, they could also achieve their goal – to retaliate for the death of a Serb soldier, Rade Savić, and for the death of Serbs in 1941.

##### **5. The perpetrator must order, or commit the act**

65. Ultimately, as reasoned above in detail, in addition to the undisputed existence of three, out of four, general (Chapeau) elements of the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY, the Panel considers as well-founded the fourth element (that the perpetrator must take an act of commission of the crime which comprises committing, or ordering certain actions alternatively set out under sub-paragraphs of this Article), which was contested during the entire proceedings. It was determined beyond a doubt, based on the evidence adduced, that the accused Mirko Pekez (son of Špiro) actively participated in the rounding up and unlawful deprivation of liberty of, and forcing the Bosniak civilians out of their houses, that he knew that the final goal of the undertaken actions was the execution of these persons, and that he aided and abetted the commission thereof in the described way. It has been also undoubtedly concluded that the accused Milorad Savić (son of Ljupko) gave a significant contribution, as a co-perpetrator, to the commission of the crime at issue, having participated in the rounding up, taking away and pillaging of the civilians, and that he was at least present at the site where Bosniak civilians were executed in the way as described in the enacting clause of the Trial Verdict, even if he himself did not actually participate in the execution.

This certainly amounts to a decisive contribution to the commission of the crime at issue.

66. Examining the existence of this last element should start with the existence of a common criminal design, and the knowledge and participation of the Accused persons in the realization thereof.

67. Pero Savić, Miroljub Perlaš and Jovo Jandrić, who had themselves been present during this incident, testified with regard to the foregoing.

68. Witness Pero Savić testified in detail about the events which occurred during the memorial service lunch, where the common design for the subsequently committed crimes, was developed. It manifested through Jovo Jandrić's invitation to all present persons to retaliate for the death of the killed soldier, Rade Savić, and to liquidate Muslims. According to this witness, everybody could clearly hear these words since Jovo Jandrić had said them very loudly. After the witness opposed this invitation, together with some other elderly neighbors, a quarrel started, and shortly thereafter the witness went home.

69. The foregoing is also confirmed by witness Miroljub Perlaš, an active police officer during the critical period. This witness was also present at the memorial service lunch when Jovo Jandrić addressed all those present with a clear invitation for retaliation, whereupon he left the gathering, and headed toward Šipovo.

70. Jovo Jandrić, one of the main actors in this crime, and an accused in the case pending before this Court (case No. X-KR-05/96-2), was heard in the capacity of a witness in this case. Witness Jandrić testified that he knows both the Accused very well, as well as Mirko Pekez (son of Mile), already convicted under a final verdict for complicity in the same crime. Witness Jandrić testified with certainty that, on the critical day, Mirko (Mile) Pekez and Milorad Savić attended the memorial service lunch, but that he did not remember if Mirko Pekez (son of Špiro) was present. According to witness Jandrić, Milorad Savić's presence is logical considering that it was his uncle's burial ceremony, that is, the killed Serb soldier, Rade Savić. This witness testified that the initiator of a common design aimed to kill and liquidate Muslim civilians was Mirko (Mile) Pekez, who had, at a certain point, addressed a small group of 5-10 men with the words "*Neighbors should disappear tonight* ", implying the Muslim neighbors from the village. According to witness Jandrić, all the present persons understood this proposal carelessly and with tacit agreement as they were "*half-drunk*", whereupon they went to the memorial service lunch.

71. Upon the Prosecutor's question if Mirko (Špiro) Pekez was within this group of men, witness Jandrić responded that he did not remember this detail.

72. A reference should be made here to the credibility and reliability of witness Jandrić's testimony, which was contested by the Defense for the accused Milorad Savić. In rendering its final decision, the Panel has used the referenced testimony merely as a corroborating piece of evidence, being aware of the witness's privilege against self-incrimination. Thus, having concretely examined a section of the above referenced witness's testimony, and having compared it with the other items of evidence regarding

the facts of the common criminal design development and the Accused's awareness of this design, the Panel concluded that this testimony is, in its key points, consistent with the other items of evidence, except in the part in which Jandrić directly incriminated himself as an organizer and creator of the criminal design. Witness Jandrić shifted the responsibility to the already convicted Mirko (Mile) Pekez, stating that Mirko was the person who had proposed retaliation against the Muslim neighbors. This is significant for this Panel because, in these parts, witness Jandrić tried to avoid or diminish his criminal responsibility. This could be logically expected considering Jandrić's awareness of the gravity of the committed crime with which he is charged (under the Indictment confirmed before this Court). Therefore, in correlation with all other items of evidence, this Panel gave credence to this testimony to the extent to which it was required to create a full picture of all incidents that had occurred on the critical night, naturally with reservations pertaining to the acts directly taken by Jovo Jandrić. This is so because it can be expected that the goal of Jandrić's testimony was to diminish his own criminal responsibility in the aspects of the referenced crime realization.

73. Ultimately, even without this witness's testimony, the Court's conclusion regarding the essential findings of facts would be the same.

74. In view of the foregoing, the Panel has concluded that Jovo Jandrić is indeed the initiator of the criminal design to liquidate the remaining Muslim population from the villages of Ljoljići and Čerkazovići, in retaliation for the Serb soldier's death, which he had actually stressed on the referenced occasion. Also in support of this is the fact that it was exactly witness Pero Savić who stated that retaliation was indeed the reason, considering that the site where the civilians were summarily executed was not randomly selected. This is so because he learned from his late father that, during World War II, Serbs were summarily executed by Ustashas exactly at this place of Draganovac, and that on that occasion 21 persons were killed, and only a few survived.

75. The Accused themselves also did not contest that they were in attendance at the memorial service lunch. What was disputable, however, is whether they indeed heard Jovo Jandrić's call for retaliation on this occasion, that is, whether they were aware of the criminal design from the very beginning, and whether by their actions they accepted or agreed to contribute to its realization.

76. In this regard, the Panel has concluded that there are very strong and convincing facts, established on the adduced evidence, demonstrating both that the Accused had knowledge of the common design, and that there was an intellectual and voluntaristic element on their part to participate in the common design realization, their nexus with this design, and the onset of the consequences anticipated under the common design.

77. According to this Panel, there is no doubt that the common design indeed existed, that its creator was Jovo Jandrić, and that the Accused were aware of the ultimate goal of this design. Moreover, the Accused persons shared this criminal intent as members of an organized group of armed men, whose acts were directed towards realizing this design. Based on all the subsequent circumstances, they could have with certainty anticipated its

actual goal, that is, the killing of the remaining Muslim population from the villages of Ljoljići and Čerkazovići.

78. Therefore, this Panel has concluded that the Accused were indeed aware of the ultimate outcome, and the consequences of the design, already from the early stages of its realization, that they shared the criminal intent of other participants, and ultimately liquidated the collected civilian population. The foregoing can be concluded from all the acts individually taken by both Accused on the critical night, when in concert with other armed like-minded persons, they rounded up and took to the certain and unavoidable death a group of helpless civilians, men, women, children, their neighbors. All the circumstances on the critical night indicated that the Accused could not but be aware of the ultimate goal. In fact, all this took place during the night hours, between 21:00 and 22:00 hrs, when a group of armed men came to the civilians' houses, unlawfully forced them out of their homes, arrested them, and took them not to the Police Station for possible interrogation, but rather, under an armed escort, kicking and insulting them, and indirectly telling them that they would be killed, took them to a remote location, which was itself a symbol of execution. All this suggested the logical conclusion as to what the destiny of these persons would be.

## **B. INDIVIDUAL ACTS OF COMMISSION OF THE CRIME**

### **1. Mirko (Špiro) Pekez**

79. The acts taken by each of these two Accused individually should be differentiated here, as was clearly done in the factual description of the enacting clause of the Verdict. The form of participation of each accused individually, the degree of their contribution to the commission of the referenced crime, and ultimately, the issue of their guilt directly depend on this factual matter.

80. The Panel has concluded beyond a reasonable doubt that both these Accused, along with other like-minded persons, and they all together as members of an organized group of armed men, started on the critical night, around 21:00 hrs, with the realization of the common criminal design.

81. The accused Pekez was charged that, in concert with other members of an organized group of armed men, as a co-perpetrator, he took part in rounding up, taking away, abusing, pillaging, and ultimately, the killing of 23 Bosniak civilians, and that he committed the killings, infliction of immense suffering, violation of bodily integrity, and pillaging of the property of the population under Article 142(1), as read with Article 22 of the CC SFRY.

82. The Defense argued that this Accused was not in the group which, on the referenced night, committed the referenced crime, and that he was in Šipovo at the time. During the whole proceedings, the Defense was trying to prove that the Accused was neither aware of, nor participated in any stage of the realization of the design at issue. The Defense also tried to create an alibi for this Accused, first through Miroљjub Perlaš's



testimony, and after this theory failed, the Defense called witness Goran Jović.

83. The Prosecution witnesses Fahrija Mutić, Nuriya Zobić and Zejna Bajramović, Goran Jović, Jovo Jandrić, Miroljub Perlaš and Mirko Pekez (son of Mile) testified about the participation of the accused Mirko Pekez (son of Špiro) in the referenced crime. Goran Jović testified for the purpose of creating the Accused's alibi for the night at issue.

84. The Panel will analyze these witnesses' statements in relation to the other statements given with regard to this fact, with a detailed explanation of the reasons for which certain evidence was given credence, and based on which certain facts were found proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, as required under Article 290(7) of the CPC of BiH.

85. First, the accused himself stated that, on the critical night, he went to Šipovo with Miroljub Perlaš to visit his girl-friend, and that he stayed overnight. This statement was contested by the statements of the other heard witnesses and of the Accused persons. In fact, witness Perlaš, who was supposed to confirm his alibi, testified that, on the critical night, he headed toward Šipovo with his brother and the Accused, but that after around 3-4 km they ran out of fuel, and that the Accused offered to bring some fuel from his house, whereupon he did not return. The Accused's brother brought the fuel at around 05:00 hrs in the morning, and told them that Mirko would not come back. Thus, witness Miroljub Perlaš denied that he was with Mirko in Šipovo on the critical night, as the Accused initially stated.

86. Following witness Miroljub Perlaš's testimony, on 29 February 2008, the accused Mirko (Špiro) Pekez testified at the main hearing in the capacity of a witness. This Accused differently presented the events in relation to both his statement given before the Prosecutor's Office, and witness Perlaš's testimony. More specifically, the Accused did not contest his attendance at the memorial service lunch after Rade Savić's burial, where he came with witness Perlaš. However, he testified that he did not leave the burial with witness Perlaš but rather alone, that he went to his home before nightfall, where he slept for a while, and that around 21:00 hrs, he headed toward Šipovo to visit his girl-friend. In the place of Osoje, located around 150 m away from his house, the Accused noticed a group of people and Jovo Jandrić. Jovo Jandrić told him that he was taking the gathered group of people for exchange. The Accused responded to Jandrić with the words "*Jovo, let those men be, what did they do to you*", adding that they had regularly responded to the daily roll calls. Thereupon, the Accused headed along the road toward Šipovo, and reached the Ljoljići Bridge where he met witness Ljuba Jovetić. Witness Jovetić testified that she saw him during the 21:00-21:30 hrs period, and that she spoke with him.

87. Ultimately, having failed to create a convincing line of arguments for its theory based on witness Perlaš's testimony, the Accused's Defense unsuccessfully tried to build an alibi through witness Goran Jović. Witness Jović testified that, on the critical night in Šipovo, around 22:00 hrs, he sat with the Accused in an inn called "Kuća Prole" (Prole's House), even though they had not known each other from before the war. According to this witness, they had a drink in this inn only once, exactly at the critical time, and they never

spent any time together in this way, neither before, nor after this first time.

88. The Panel has analyzed in detail all the Accused's statements given at the various stages of the proceedings, and concluded that there are certain discrepancies and differences concerning the key issues. Even though the decisive part of the court's decision cannot be based on the Accused's testimony, as it should only serve as a control means if there is other evidence proving certain assertions, the fact that there are differences in the Accused's statements, correlated with all other mentioned statements, justifiably points to the conclusion that, at the critical time, the Accused was not present in Šipovo, as the Defense unsuccessfully argued.

89. Witness Fahrija Mutić testified that, after they (civilians) were taken away from the village of Ljoljići, and while they were moving in a column toward the place of Osoje, they also passed by the house of the accused Mirko Pekez (son of Špiro), whom he had seen at the Osoje crossroads, but that thereafter he did not notice him among the persons who escorted the civilians to Draganovac.

90. Witness Nurija Zobić, also a survived victim of this crime, described the Bosniak civilians abduction from the village of Čerkazovići. This witness particularly remembered Mirko Pekez (son of Mile). After the witness went out with his bare feet, he told him to get back to the house, put his shoes on, and take his wife and children out with him. On this occasion, the witness also saw Jovo Jandrić hitting his neighbors who had also been forced out of their homes. After he had for the second time come out of his house, witness Zobić saw Milorad Savić (son of Đuro), Simo Savić (son of Mile), Milorad Trkulja, and some other persons whom he did not immediately recognize. Subsequently, in the moonlight, he could also see Mirko Pekez (son of Špiro).

91. Witness Zejna Bajramović testified about the civilians abduction from the village of Čerkazovići. Testifying at the main hearing, this witness confirmed that the abduction started during the night hours, on the very day of the burial of killed soldier Rade Savić. On the critical night, the witness stayed in Fahra Balošić's house, when someone started thumping at the door shouting: "Get out, open the door!" Witness Bajramović opened the door and saw her husband and her son, Nedžib Mutić and his wife, Mustafa Bajramović and his son. She also recognized Jovo Jandrić and a person she thought to be Mirko (Špiro) Pekez, whom she could not identify in the courtroom. However, this witness was certain that there were two persons named Mirko Pekez. She recognized Špiro's son on the critical night because he had attended her son's wedding and spent overnight in her house. In her statement given in 1994, which was reproduced at the main hearing, the witness stated that "*all the Pekez boys – both Mića's boys and that one from up there*" were there on the critical night.

92. Evaluating witness Zejna Bajramović's statements, the Panel took into account that there were slight discrepancies among them, but not in the key parts thereof. More specifically, such discrepancies are realistic and logical, considering that more than 15 years have elapsed since the commission of the crime. Thus it is justified to conclude that, even though witness Bajramović did not identify the Accused in the courtroom, her

memory was fresh and of a better quality in 1994, that is, two years after the incident, when she determinedly stated that “*all the Pekez boys-both Mića’s boys and that one from up there*” attended the incident. This is all the more so particularly because on the one hand, this witness is an elderly woman, with certain health problems that have aggravated over the time, while on the other hand, it is logical that the Accused’s physical appearance has changed after so many years, and that he certainly does not look like he used to 15 years ago.

93. In the Panel’s view, the foregoing is also supported with the fact that, describing the referenced events and the Accused’s participation therein, this witness stated that she had only seen him when the civilians were rounded up and taken away, merely pointing to his presence. This is consistent with the other witnesses’ statements and with the final Verdict of this Court, of the same reference number, dated 29 September 2009, establishing that, by their actions, the convicted Mirko Pekez (son of Mile) and Jovo Jandrić particularly stood out in the realization of the criminal intent. Pursuant to the established facts, the witness did not specify the Accused’s acts since she was not certain about this. She only knew that she had seen him when she was taken away. Correlating this fact with the other related statements, it can be clearly concluded that witness Bajramović testified about what she had indeed seen and experienced, rather than about some subsequently learned information about the incident, with no attempt to unreasonably incriminate the Accused, just in order to have somebody held criminally liable.

94. The Panel has also evaluated witness Jovo Prole’s testimony, the then Police Commander in Bravnice, who had interviewed, in the police station, the participants in the referenced crime. On that occasion, Jovo Jandrić told him “*Don’t ask me nothing, this kid did not participate*” (implying that Mirko Pekez (son of Špiro) did not participate in the commission of the crime). Witness Prole added that, as far as he knew, the said investigation, that is, the criminal report upon which the investigation had been initiated immediately following the commission of the crime, did not include this Accused. Testifying through a video-link, Jovo Jandrić stood by all that he had said during the referenced interview. Witness Jandrić stated that he did not remember that the accused Pekez was present from the very beginning, when they all gathered, and started rounding up the Muslims from the village of Čerkazovići. Jandrić added that near the place of Osoje the others joined them along the way toward the village of Ljoljići, and that he remembered well that the Accused was among them. After all the captured civilians had been gathered at the Osoje crossroads, the accused Pekez swore something, grabbed his rifle and went away. This is additionally confirmed by the testimony of Mirko Pekez (son of Mile) (already convicted under the final Verdict), who testified in the capacity of an accused in the first instance proceedings, who stated that, following a conversation with Jovo Jandrić, the accused Pekez went in the direction of his home. Even though Mirko Pekez (son of Mile) directly incriminated both himself and the accused Savić, he was determined that the accused Mirko (son of Špiro) was not present when the crime against the civilians was committed.

95. The accused Milorad Savić explicitly stated for the Suspect Questioning Record

that, following his return to the village, and after the incident at Draganovac, he saw Mirko (Špiro) Pekez.

96. Evaluating all the referenced statements, individually and in combination, the Panel could conclude beyond a reasonable doubt that, on the critical night, in concert with other armed persons-members of the group, the accused Mirko Pekez (son of Špiro) indeed participated in the round up and abduction of the Muslim civilians, in a way that he gathered the civilian Bosniak population, women, men and children from the villages of Ljoljići and Čerkazovići - the Municipality of Jajce, with the intent to take them and kill them at the site called "Tisovac", that is, by sharing the criminal intent with the other group members, the ultimate goal of which was to liquidate these persons. Having acted in this way, the Accused aided and abetted other members of the armed group to commit the crime at issue.

97. In establishing the Accused's participation and contribution, by individualizing his concrete acts, the Panel did not start with negative arguments, that is, with the denial of the Defense's theory that, on the critical night, the Accused was in Šipovo. The Panel has dealt with the issue of his possible visit to Šipovo, and with examining the evidence pro and contra this assertion only to the extent to which it was necessary to additionally confirm the conclusion confirming his participation in a way as established based on the other relevant evidence. This is so because the Panel found sufficient evidence on the grounds of which a clear and complete picture was created about the events which took place on the critical night, as well as evidence on the specific moment when the Accused left the scene, taking no active part in the acts of further realization of the criminal design. Therefore, the obviously subsequently learned testimony of witness Goran Jović, to which no credence was given, and the Accused's changed testimony, were only examined as control evidence, and they just confirmed that the Accused did undertake the acts as stated in the enacting clause of the Verdict.

98. It is quite irrelevant to the Panel whether, after this point, the Accused possibly went to Šipovo and stayed there overnight, or whether he went home. What is important and relevant here is that it is established beyond a reasonable doubt that the Accused indeed participated in the population round up, that is, in forcing them out of their homes, and taking them to the Osoje cross-roads, and that the final result, their killing, formed part of his intent.

99. On the grounds of the evidence adduced, the Panel has established the Accused's participation only until the moment when the civilians were rounded up. Neither the Prosecution nor the Defense witnesses testified that they saw the accused Mirko Pekez (son of Špiro) after that point in time. However, concerning the accused Milorad Savić, Mirko Pekez (son of Mile) and Jovo Jandrić, they explicitly and specifically stated the details of their participation in the event, including their taking part in the very act of summary execution.

100. A section of Jovo Jandrić's statement given in the Bravnice Police Station during the investigation, in which he said "*Don't ask me nothing, this kid did not participate*",

correlated with his testimony before this Court, very clearly indicates that for him, the fact that the Accused Pekez left the group before the commission of the very act of summary execution means that he “did not participate” in the ultimate act of the civilians execution.

101. The Panel’s view is that, to deal with the issue of guilt, on the one hand, such an act of the Accused is not sufficient to acquit him of the guilt for the crime committed. On the other hand, the Accused’s act cannot be qualified as his participation, in the capacity of a co-perpetrator, in all individual acts of perpetration of this crime, including bringing the civilians to the place of Draganovac, insulting, abusing, pillaging, and ultimately, the summary execution of the civilians, as argued by the Prosecution. On the basis of the presented evidentiary materials, the Panel has established as proved that the accused Mirko Pekez participated in the referenced crime as an aider and abettor, by taking part in the act of rounding up, or in the forcible deprivation of liberty of the Bosniak civilians, whereupon he left the group of armed men.

102. Therefore, the Prosecution did not prove beyond a reasonable doubt that the Accused indeed also undertook the other acts of commission of the crime at issue, or that he was at least present during the commission thereof. This is why the Panel’s conclusions regarding the factual findings description are different from the conclusions offered by the Prosecution. The Panel has therefore modified the Accused-related facts and circumstances, but has not brought the Accused in a less favorable position. Ultimately, according to the modified factual description in relation to this Accused, the Panel has omitted from the legal qualification of the crime the commission of the criminal act of inflicting immense suffering, violation of bodily integrity and pillaging of the population under Article 142(1) of the CC of SFRY. As to the omission of the criminal act of violation of bodily integrity, see the reasons provided in para. 153 of this Verdict.

103. In addition, the Accused is convicted for the commission of the referenced crime in the capacity of an aider and abettor, rather than a co-perpetrator, as charged under the Indictment.

104. Article 22 of the CC of SFRY (Complicity) provides as follows:

*“If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.”*

105. Thus, the general prerequisite for complicity, as a joint commission of crime, is that there is a joint decision to commit a criminal act: each perpetrator decides to commit a crime, they each decide to commit the crime together with others, but the contribution itself is such that, within a joint decision to commit the crime and within the division of roles, it constitutes an important element in the planning process to execute the crime. The focus is on the joint commission of the crime which is being realized through a joint participation in the act of commission itself, or in some other way.

106. Evaluating the form of the accused Mirko Pekez’s participation, the Panel has concluded that there is no evidence proving that the Accused directly participated in the

civilians' killing, and that there is no evidence that other members of the armed group had relied, to a decisive extent, on the Accused's contribution in the commission of the killings, namely that his contribution cannot be categorized as complicity. Therefore, bearing in mind that the essential factual findings were proved, the Panel has concluded that the accused Mirko (Špiro) Pekez gave no decisive contribution to the commission of the crime, as required under Article 22 of the CC of SFRY, and as charged under the Indictment, but rather that, in the commission of the crime at issue, he acted as an aider and abettor.

107. Therefore, addressing the issue of subjective element – the accused Pekez's guilty mind/intent, the Panel has first concluded, as reasoned above through the issue of proved general elements of the criminal offense of War Crimes against Civilians, that the Accused knew that the civilians were helpless and innocent, that children were among them, and that, being aware that they would ultimately be deprived of their lives, he wanted the execution of the crime, or the onset of the prohibited consequence, wherefore he acted with the direct intent in the capacity of an aider and abettor.

108. More specifically, Article 24 of the CC of SFRY has defined the responsibility of an aider and abettor as follows:

*(1) Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment, may also be reduced.*

*(2) The following, in particular, shall be considered as aiding: the giving of instructions or counselling about how to commit a criminal act, the supply of tools and resources for the crime, the removal of obstacles to the commission of a crime, as well as the promise, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained through the commission of a criminal act.*

109. The essence of this notion is that, physically or mentally (morally), that is, by act or omission, an aider and abettor takes certain actions to aid the perpetrator in the crime commission. At the subjective level, it is required that: 1) the aider and abettor is aware that, by his acts, he is aiding the perpetrator to commit the crime, and 2) he must be aware of the essential elements of the crime.

110. On the basis of all the referenced findings, it was concluded beyond a reasonable doubt that, on the critical night, the accused Mirko Pekez (son of Špiro) participated, together with other armed persons, in rounding up the population from these villages, or in forcing them out of their homes, and that by his acts, he aided the perpetrators to commit the crime, to ultimately summarily execute the persons deprived of their liberty. Being aware of the criminal design, the Accused joined the realization thereof, being aware that by his acts, he aided the perpetrators to commit the prohibited act, he was aware of the essential elements of the offense and of its prohibited consequences, but he nevertheless wanted the onset thereof. Considering all the circumstances, and the dynamics of the concrete case, the Accused knew, or at the very least, it could not have stayed unknown to him, that the civilians deprived of liberty, in whose arrest he himself participated, would be executed. Therefore, his intent included the<sub>30</sub> killing of civilians, which subsequently

indeed occurred. Even though the accused Mirko Pekez did not himself participate in the act of killing, since he withdrew after the first stage of the common design realization, and since his activities ceased after the population was rounded up and brought to the Osoje cross-roads, he aided and abetted the other executors of the joint criminal design, and by his acts, he entered the criminal zone of the referenced crime in the capacity of an aider and abettor. This renders irrelevant the fact that, at the place of Osoje, the Accused withdrew from the further realization of the criminal intent perpetrated by other members of the criminal group.

111. The Panel has concluded that the Accused acted with the direct intent, namely that he had undoubtedly anticipated that the prohibited consequences would certainly occur, that he wanted their onset, and that for this very reason he participated in rounding up the civilian population. By its quality, intellectual and voluntaristic element, the Accused's acts fall within this type of psychological relation of the perpetrator to the crime.

112. Therefore, the Court was mindful of the Accused's relation to the incriminating incident, and it did not extend, by the corrections made, the limits of the Prosecution's factual description of the incident. Therefore, the Panel has not violated the objective identity of both the Indictment and the Verdict, and has not brought the Accused in a less favorable position either. In terms of Article 25 of the CC of SFRY, the Accused's guilt, and ultimately his criminal responsibility for the committed crime, have been established on the basis of clear differentiation of the acts of this Accused in relation to the other participants and perpetrators, as determined on the basis of the fully and properly established factual substratum.

## **2. Milorad (Liupko) Savić**

113. The accused Milorad Savić was charged that, in concert with other members of the group of armed men organized by Jovo Jandrić, he participated in the forcible deprivation of liberty of Bosniak civilians, that is, in rounding up and taking them to the place of Draganovac, in abusing and insulting them along the way, and in pillaging the civilians who were subsequently summarily executed, which acts resulted in the death of 23 persons, while 5 civilians survived, of whom 4 survivors sustained serious bodily injuries.

114. The Accused's Defense denied his participation in the acts of commission of the referenced crime. The Defense presented a theory that the Prosecution failed to prove that this Accused indeed participated in making the arrangements for, or in planning the crime, having unreasonably attributed to the Accused the role which he, in the Defense's view, did not have.

115. On the basis of all the evidence adduced during the first-instance proceedings regarding the Accused Savić's participation, the Panel has also had no dilemma as to his responsibility. The Panel has concluded that, being aware of the criminal design, and sharing the criminal intent with other members of the group, the Accused gave by his acts a decisive contribution to the perpetration of the criminal offense charged against him

under the Indictment.

116. First, the Accused himself did not contest that he attended the memorial service lunch where the criminal design was devised. The introductory part herein addressed his proved awareness of the criminal design. Therefore, this Panel has no doubts as to this factual finding. On the basis of all subsequent circumstances, the Accused could have anticipated with certainty what would the realistic goal be, that is, the killing of the remaining Muslim population from the villages of Ljoljići and Čerkazovići.

117. The Panel has, therefore, concluded that, already from the early stages of its realization, the Accused was indeed aware of the ultimate outcome and the consequences of the plan, and that he shared the same criminal intent with other participants, namely the liquidation of the gathered civilian Bosniak population. The foregoing can be concluded from the Accused's presence at all stages of the criminal design realization. The Accused did nothing to demonstrate his disagreement with the criminal plan, and based on the entire Defense's evidence presented, the Panel could not possibly draw such a conclusion, but rather just an opposite one.

118. Examining the psychological grounds for the acts objectively taken by the Accused, the Panel has noted that the mere fact that this criminal design was devised out of vindictive motives, namely in order to retaliate for the death of Serb soldier Rade Savić, the Accused's uncle, points to the logical conclusion that, in the commission of the crime at issue, the Accused himself was led by retaliatory motives. The Accused also knew that, already since World War II, the location to which a group of helpless civilians, women, children and men, was taken has been a symbol of civilian casualties because, exactly on this very site, Serb civilians had been summarily executed by Ustashas. The Accused was very well aware of all these circumstances considering that this is a small geographic area, and considering the fact that several witnesses (see, for example, Pero Savić's stirring testimony in the referenced part) stated that they had learned, from their elderly relatives, about the incidents from the previous war (World War II). It is, therefore, clearly concluded that the accused Savić was aware of the ultimate outcome, that is, of the onset of the prohibited consequences, and that by giving a decisive contribution to the realization of the criminal plan realization he indeed wanted the onset of this consequence.

119. In fact, in his testimony of 30 October 2007, the Accused himself did not contest that he participated in the abduction of civilians from the village of Ljoljići, as initially indicated by Mirko Pekez (son of Mile).

120. Witness Fahrija Mutić also testified with regard to the foregoing circumstance. He stated that, after Mirko (Mile) Pekez and Jovo Jandrić had forced them out of their houses, two sons of Ljupko Savić and a person whom he knows by his nickname Mićo and whom others called Paja, met them further down the road. During the cross-examination by Milorad Savić's Defense, this witness confirmed the foregoing, being determined that he had recognized this Accused when he was taken out of Omer Karahodžić's house.

121. Witness Nurija Zobić testified that, in the place of Osoje, he also saw the accused Milorad Savić (son of Ljupko), who had<sup>32</sup> waited for them with other neighbors, and



who wore a camouflage uniform, just like the other persons who forced them out of the houses. The witness explained that there were two groups engaged in rounding up the population. One group comprised Jovo Jandrić and Mirko (Mile) Pekez, and this group came to this witness's door. His house was near a water-well, and it was the last house in the village. Therefore, it was the other group with Milorad Savić which probably forced people out of other houses. However, this witness is certain that both these groups met at the Osoje cross-roads, which is where he saw this Accused for the first time.

122. Witness Jovo Jandrić testified in cross-examination that the accused Savić “*was present all the way to the very end*”, implying through the ultimate act of summary execution.

123. The survived witnesses testified that the captured civilians were together taken to the place of Draganovac or Tisovac, as some call it, referring to the same site. All these witnesses testified that they moved in a column, and that armed persons escorted them on both sides and at the back of the column. Along the way, Jovo Jandrić and Mirko (Mile) Pekez threatened that they would kill anyone who tried to escape, and they insulted and physically abused them. Witness Fahrija Mutić described in detail the civilians' movement. He stated that they moved two by two in the column, and that they were not allowed to look either to the left or to the right. Just before reaching the site of Draganovac, the column stopped at Pero Savić's meadow, located close by the execution site. Jovo Jandrić ordered that all valuable items the civilians had with them be put down on a jacket previously taken off by Mirko (Mile) Pekez, which was put on the grass. Other armed persons stood aside holding their rifles pointed at them. According to witness Nurija Zobić, Jovo Jandrić and Mirko (Mile) Pekez collected all gathered items, including a watch and golden jewelry, and put all that in a bag. The witness confirmed all the foregoing in cross examination too. Omer Karahodžić and Zejna Bajramović also confirmed the foregoing, and their statements were, along this line, consistent with the previously mentioned witnesses' statements.

124. The criminal-legal act of **pillaging the population property** is set out in Article 142(1) of the CC of SFRY. In the absence of concretization of this act, as an underlying act of the offense of War Crimes against Civilians in the domestic law, the Panel has accepted the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which defines the crime of plunder as “willful and unlawful appropriation of property”, which pursuant to Article 3(e) of the Statute, may affect both private and public property. The term is general in scope, comprising not only large-scale seizures of property within the framework of systematic economic exploitations of occupied territory but also acts of appropriation committed by individual soldiers for their private gain. Dispossession of personal property, a common way individual soldiers gain illicit booty, is considered a war crime of the more traditional type<sup>1</sup>.

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<sup>1</sup> Trial Chamber Judgment in *Naletilić and Martinović* (October 2003), para. 612.

125. Also, as concluded in one of the ICTY judgments<sup>2</sup>, plunder should be understood to embrace all forms of unlawful appropriation of property in armed conflict to which individual criminal responsibility attaches under international law, including those acts traditionally described as ‘pillage’.

126. Analyzing the related provisions of international law, the Panel has concluded that, pursuant to this law, for the existence of plunder, it is not necessary that the appropriated property be of high economic value, as *in concreto* case. In fact, the Panel has concluded based on the witnesses’ statements that the appropriated property was not of high value. However, the circumstances in which the offense was committed, particularly the way of its commission, by forcing the group of helpless civilians, under threat of death, and with the rifles pointed at them, to hand over all their valuables, certainly amount to grave breaches of international humanitarian law.

127. Such a conclusion of this Panel is also supported by the ICTY Trial Judgment in *Jelisić*<sup>3</sup>, where the factual basis attached to plea guilty indicates that the accused stole money, watches, jewelry and other valuables from the detainees upon their arrival at the Luka camp by threatening with death those who did not hand over all their possessions.

128. Therefore, considering all the foregoing, as well as the findings of this Court’s final Verdict (against the accused *Mirko (Mile) Pekez* No. S1 1 K 014267 13 Krž), confirming the existence of this criminal-legal act too), the Panel has concluded that, as a member of an armed group, the accused Savić was present at all stages of the criminal design realization, which he himself did not contest either, including the commission of the acts of physical abuse and plundering of civilians, by holding, together with other group members, rifles pointed at the civilians, thereby enabling Jandrić and Pekez to directly commit these acts.

129. Therefore, his commission of the referenced crime comprises his decisive contribution to the realization thereof, by holding his rifle (or another fire weapon) pointed at the civilians, that is, enabling the principal perpetrators by his very presence to directly commit the act of plundering.

130. As to the subjective element, the Panel has concluded beyond a doubt, on the basis of the presented factual findings regarding the way in which this Accused participated in the commission of crime, that the accused Savić participated in the crime at issue in the capacity of a co-perpetrator, having acted with the direct intent.

131. The Prosecution charged this Accused that, in concert with other armed persons, he *directly undertook* the acts of abusing, insulting, and hitting civilians while they walked in the column, and of their plundering. However, the Panel did not conclude so on the basis of the presented evidentiary materials. The Panel established that his participation manifested through *enabling the commission of* these criminal-legal acts, that is, *through*

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<sup>2</sup> Trial Chamber Judgment in *Blaškić* (March 2000), para.184.

<sup>3</sup> Trial Chamber Judgment in *Jelisić* (December 1999) para.49.

*the decisive contribution*, required for complicity. Therefore, the Panel has modified the factual description offered in the Indictment by specifying the Accused's individual acts of commission, thereby also individualizing his contribution and, ultimately, his criminal responsibility, wherein the legal qualification remains unchanged (Complicity).

132. Analyzing whether the incriminating act of **the civilians killing** has been proved should start from the fact that, in his statement of 30 October 2007, the accused Savić confirmed that he was present when the civilians were executed in the place of Draganovac. However, during the first instance proceedings, he testified that at the critical time, he had on him a pistol caliber 7.62 or "Tetejac" pistol, which should indicate that he did not shoot at the civilians on the critical occasion.

133. Jovo Jandrić also testified about the execution of civilians. He stated that the Accused was present there all the time, including during the firing, but that he does not know if the Accused fired at all.

134. However, the view of the Panel is that this submission was successfully contested by the statements of the witnesses, the then members of the Reserve or Regular Police Force. Also, it was undoubtedly established during the proceedings that police officers were mostly issued with automatic or semi-automatic weapons, and that this was side arms they always carried around. The foregoing particularly ensues from Nedjeljko Jandrić's and Jovo Jandrić's statements. In addition, all survived witnesses consistently testified that all members of the group which had taken them to death on the critical night were armed with this type of weapons.

135. Therefore, the results of the conducted evidentiary proceedings show that the accused Savić was present until the very end of the execution of civilians, and that prior to this, he took an active part in rounding up and escorting the civilians, and in seizing their valuables. If the fact of the Accused's proved awareness of the joint criminal design from its very outset is added to these factual findings, it is clearly concluded that the Accused's conduct of a co-perpetrator was in such an objective-subjective link with the conduct of other co-perpetrators, members of the armed group, that it directly caused the prohibited consequences, and constituted with them a single, coherent unity. The described activities, which Savić continued taking, armed with a rifle, until the very end of the incident, were necessarily projected on the common activities of the other co-perpetrators, members of the armed group, becoming their common element. Considering the general notion of complicity (which is "*but multiplied complicity, admittedly with specific objective-subjective, [...], meaning that they have the same ontological nucleus*"<sup>4</sup>), as well as the factual findings of this case, generally it was not possible to commit this crime without the Accused's contribution, which is qualified as a decisive contribution. In view of the foregoing, it is clear that the mental basis of his activities was also complemented with his awareness of joint action.

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<sup>4</sup> Verdict of the RS Supreme Court, No. Kvlp: 6/93 of 20 December 1993.

136. Witness Nedjeljko Jandrić's testimony also supported the foregoing Panel's view. As Chief of the Police, this witness concluded from the Official Notes made by police officers after the investigation conducted immediately after the incident that Jovo Jandrić and Milorad Savić aka "Mića" were involved in this incident, so he immediately removed them from the Police.

137. In the concrete case, the Accused need not physically commit the crime of killing in order to be held criminally liable. Thus, taking into account the presented evidence, the issue raised by the Defense regarding the type of fire weapons that the Accused had on him on the critical night (short-barreled or long-barreled), was not disputable for this Court, even if it was disputable for the Defense. It was sufficient to determine that the Accused voluntarily participated in an aspect of the criminal design, and that he intended such an outcome thereof. Least of all, that the Accused was present during the act of killing the captured civilians, and that he held his rifle pointed at these civilians, enabling the others to directly commit this criminal-legal act, was proved beyond a reasonable doubt. Thus, if the Accused's participation in all aspects and stages of realization of the final intent-execution of civilians is taken as undisputed, his very presence at the execution site concretely means that he had a continued will to have the onset of the prohibited consequences, which amounts to a decisive contribution to the criminal design realization. Therefore, it is sufficient that the Accused, as undisputedly determined, merely stood armed while the others fired at the civilians, to qualify his act as an act of commission of the referenced crime in the capacity of a co-perpetrator.

138. In drawing such a conclusion, the Panel has reviewed the documentary evidence, Record of the Basic Court in Mrkonjić Grad No. Kri-57/92 of 12 September 1992, and irrefutably determined that, empty shells, caliber 7.62 mm for automatic and semi-automatic rifles, were found at the civilians' execution site. The Findings and Opinion of forensic expert, Dr. Rajko Todorčević of 12 September 1992, following an external examination of corpses, showed at least 94 entry-exit wounds. If the wounds of four survived persons inflicted by fire weapons, and the terrain configuration are taken into account, it is clear that all empty shells could not be found. The Panel has therefore concluded that, on the critical occasion, as properly argued by the Prosecutor, far more than 100 bullets were fired. Accordingly, considering that it is not possible to prove beyond a reasonable doubt that the accused Savić indeed participated in the very act of shooting, on the one hand, and considering the presented factual findings concerning the number of fired bullets, and the approximate number of persons who took part in the crime on the other hand, the Panel stated in the factual description that, following the civilians' line-up, *most* of the members of the armed group opened fire with the intent to kill them all.

139. The Appellate Panel has modified the factual description of this count of the Indictment too. In fact, it was determined beyond a doubt that, by participating in rounding up the civilian population, and by escorting them to the execution site, this Accused gave a decisive contribution to the commission of the crime, even though he himself did not participate in their execution. According to the theory of complicity, individual roles of co-perpetrators are not decisive for the existence of complicity, but rather it is quite sufficient that their individual acts complement each other, that they all constitute a unity which

necessarily results in the prohibited consequences, as in the concrete case. The extent to which any member of the armed group participated on that occasion in the commission of crime is irrelevant. Therefore, the accused Savić's conduct need not represent the very act of commission. His conduct in the concrete case was rather an act of complicity as it was linked with the acts of other co-perpetrators, which directly resulted in the prohibited consequences. In fact, this constitutes their joint activity, and thereby the sense of the notion of complicity itself.

140. The Accused is also charged with the commission of the criminal-legal act set out in Article 142(1) of the CC of SFRY - **inflicting immense suffering**. This implies willfully causing great suffering or serious injury to body or health, provided the requisite level of suffering or injury can be proven<sup>5</sup>. Article 2(c) of the Statute has defined this crime as:

- a) an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health;
- b) committed against a protected person.

141. The Commentary on Article 147 of the IV Geneva Convention describes the offense of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering (The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person<sup>6</sup>). In describing serious injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work<sup>7</sup>.

142. Serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.<sup>8</sup>

143. Established on the basis of all adduced evidence, both documentary and subjective, as undisputed by the Defense, was the death of 23 persons, and wounding or causing serious injury to body by firearms to 4 of the 5 survived civilians, which certainly amounts to severe bodily injury, and definitely implies a great extent of mental and bodily harm.

144. The survived victims of the crime testified about the injuries sustained, namely: Nurija Zobić, Zejna Bajramović and Omer Karahodžić. These witnesses still suffer from the

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<sup>5</sup> *Kordić and Čerkez* (Trial Chamber), 26 February 2001, para. 245.

<sup>6</sup> *Kunarac*, Appeals Chamber Judgment, para. 142.

<sup>7</sup> *Naletilić and Martinović* (Trial Chamber), 31 March 2003, para. 340.

<sup>8</sup> *Naletilić and Martinović* (Trial Chamber), 31 March 2003, para. 342, referring to the Trial Judgment in *Krstić*, 2 August 2001, para. 513.

consequences of the sustained injuries, the gravity of which is sufficiently supported by the medical findings and the discharge letters tendered as Prosecution exhibits.

145. On the basis of the testimony of witness-victim Omer Karahodžić, and particularly upon reviewing the documentary evidence proving the gravity of the sustained injuries, and their consequences for this witness (the Specialist's Finding of the JU Medical Center Bugojno for Omer Karahodžić of 17 March 1997, Findings of the Cantonal Hospital Travnik, of 19 March 1997, Findings of the District Hospital Travnik, Surgery Clinic of 17 October 1997 and the psychologist's findings issued by the Specialist Department of the JU Medical Center Bugojno for Omer Karahodžić, of 13 April 1997), this Panel has concluded that the witness sustained injuries from fire weapons in his right lower leg and his thorax, with severe consequences manifested in pains, and impaired ability to walk. Also, the neuro-psychiatric findings show that since the day of execution, when his family was killed, and he survived, the injured party has been suffering from occasional ..., wherefore he was diagnosed with (...).

146. Reviewing a Discharge Letter of the RO Clinical-Medical Center Banja Luka, of 22 October 1992 for Nurija Zobić, the Panel has noted that he received medical treatment due to the defect in his right lower leg, that he was subjected to surgery and that he was found to be unfit for work. Also, the Discharge Letter of the RO Clinical-Medical Center Banja Luka, of 16 September 1992, for Zejna Bajramović, stated that the injured party was hospitalized due to the thorax and abdomen injuries, to which primary bandage was applied in Šipovo, and that these (war) wounds were subsequently surgically treated. Inability to work was noted in respect of this person too.

147. It has been clearly and undoubtedly concluded from all the foregoing that the injuries sustained by these persons following the execution, as well as the consequences thereof, were grave in nature.

148. In addition, during the proceedings, the Prosecution tendered as evidence for the death of 23 persons, the documentary materials comprising findings of the autopsies carried out at the City Cemeteries Visoko. It was apparent from this evidence that these persons died a violent death, as also supported with the hearing of forensic expert witness Dr. Hamza Žujo. In his testimony, this witness presented details from his written findings for each corpse individually. Regarding the cause of the referenced persons' death, expert witness Žujo stated that he did not exclude that head and thorax injuries resulted from fire weapons activity. With regard to the corpse No. 13, identified as Asmer Zobić, the expert witness stated that no injuries to the skeleton were found, but rather that he was possibly killed from a fire weapon, namely that a bullet passed through the victim's heart or abdominal cavity, without scratching his ribs or other skeletal parts of his body, due to which no skeletal injuries could be observed during autopsy.

149. In order to determine these persons' violent death, the Prosecution also examined Dr. Rajko Todorčević in the capacity of a witness. Witness Todorčević was a Director of the Health Center Šipovo at the time when the critical event occurred. Apart from providing medical treatment to the injured survived victims of the execution, upon a request by an

investigative judge of the Basic Court in Mrkonjić Grad, this witness went, together with crime-technicians of the SJB Banja Luka, to the site where the civilians had been executed, and attended the crime-scene investigation in the capacity of a medical examiner. According to his estimate, there were around thirty dead persons there. Upon his arrival, they started identifying the corpses on the basis of the information obtained from the villagers. Witness Todorčević thereupon made records of their injuries, and prior to their external examination marked each corpse with a number. As required by the investigative judge, the witness made a written report for each corpse individually, which was signed and verified by the Medical Center Šipovo. These documents were thereupon forwarded to the Basic Court, and tendered as Prosecution exhibits.

150. With respect to the subjective element, that is, the perpetrators' intent (*mens rea*), the Panel has no dilemma that this was a willful act or omission which comprises the infliction of immense suffering. More specifically, the very fact that the perpetrators carried out the referenced crime intending to deprive the captured civilian Muslims of their lives also implies the existence of intent (*dolus directus*) for all that subsequently occurred as a result of the prohibited activity. The intent for more severe consequences encompasses the intent for less severe consequences, which occurred as a result of the realization of criminal-legal act directed toward the onset of the more severe consequences.

151. Supporting the Panel's conclusion are the ICTY conclusions in *Blagojević and Jokić*<sup>9</sup>, namely that the traumas and wounds suffered by those individuals who managed to survive mass executions constitute serious bodily and mental harm. *The men who were killed suffered serious mental harm (...) and who understood what their ultimate fate was.*

152. Therefore, all that the captured, helpless civilians survived on the critical night, walking in a column under threat of weapons, helpless to do anything, knowing what would follow – their inevitable death, extends far beyond any usual human experience and knowledge. For this very reason, the killed persons also suffered mental harm, and based on all the events of the critical night, much before their ultimate execution, they understood and knew what their ultimate fate would be. The survived victims were lying wounded among the corpses of their closest relatives and neighbors, in fear for their lives. Such an atmosphere and the extent of fear and anguish form only a part of the traumatic experience, because their suffering continued after the war as a result of what they had survived. More specifically, not only that these persons suffered severe physical harm due to the sustained injuries, enormous mental harm caused by the traumatic incident itself and their own injuries, but they also lost their most beloved ones in this tragic event, which is certainly an immeasurable loss. Ultimately, the Panel has concluded that these injuries resulted in the long-term and severely impaired capacity of the survived persons-victims of the crime to live a normal life.

153. The Panel has omitted from the factual description the charges concerning violations of bodily integrity, noting that the elements of this individual count are included in

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<sup>9</sup> Trial Chamber Judgment in *Blagojević and Jokić* (January 2005), paras. 647-648.

the established infliction of immense suffering by way of severe bodily injuries caused with fire weapons.

154. In view of all the foregoing, the Panel has concluded beyond a reasonable doubt that, acting in the capacity of a co-perpetrator, the accused Milorad Savić committed the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY.

### C. APPLICATION OF SUBSTANTIVE LAW

155. When it comes to the criminal law to be applied to the referenced crime in the context of the time when the crime was committed, the Appellate Panel has applied the provisions of the adopted CC of SFRY, taking into account both the Decision of the Constitutional Court rendered upon the appeals filed by the Accused persons<sup>10</sup>, and the Prosecution's Indictment amended along this line.

156. More specifically, the Court is under obligation, in these proceedings, to undo a violation established by the decision of the Constitutional Court. More specifically, the Constitutional Court has found that, in the concrete case, the CC of BiH was retroactively applied to the detriment of the first-applicant-accused Milorad Savić, and that there is a realistic possibility that the CC of BiH was retroactively applied to the detriment of the second-applicant-accused Mirko (Špiro) Pekez, all with regard to the sentence imposed in violation of Article 7(1) of the European Convention.

157. The issue of retroactive application of the criminal code is of great legal significance and has, as such, already been analyzed and evaluated in a number of decisions rendered by both the Constitutional Court and the European Court of Human Rights (the European Court), with direct implications for the actions of the Court of BiH in war crimes cases, given the binding nature of the domestic and international jurisprudence. The Appellate Panel has, along this line, referred to an analysis provided in the Verdict of the Appellate Panel of the Court of BiH in the case against the Accused *Mirko (Mile) Pekez*, No. S1 1 K 014267 13 Krž of 16 December 2013 (paras. 50-59).

158. Considering that, pursuant to Article VI/5 of the Constitution of Bosnia and Herzegovina, decisions of the Constitutional Court are final and binding, including the Decision in the accused/applicants case at issue, the Appellate Panel has complied with the position of the Constitutional Court taken in the referenced Decision. Thus, regarding the Accused Savić as the first-applicant, the Decision states in para. 36 as follows:

*„...The Constitutional Court has held that, in the concrete case, the CC of SFRY is undoubtedly more lenient to the first-applicant. Considering that, pursuant to the CC*

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<sup>10</sup> Decision of the Constitutional Court on Admissibility and Merits rendered upon the appeals filed by *Milorad Savić and Mirko Pekez* of 22 October 2013.



*of SFRY, it was possible to impose on the first-applicant a maximum sentence of 20 years, but that in the concrete case, applying the CC of BiH, he received a sentence of long-term imprisonment of 21 years, the view of the Constitutional Court is that, regarding the sentence imposed, the CC of BiH was retroactively applied to the detriment of the first-applicant, in violation of Article 7(1) of the European Convention.*

As regards the second-applicant, the same Decision stated in para. 37 the following:

*„...The Constitutional Court has held that, in the concrete case, the CC of SFRY is undoubtedly more lenient to the second-applicant. The Constitutional Court has noted that, considering that the second-applicant received a prison sentence within the magnitude of sentences prescribed by both the CC of SFRY and the CC of BiH, it cannot be stated with certainty that the second-applicant would have received a lower prison sentence had the CC of SFRY been applied in his case. However, independently from this, the Constitutional Court has noted that, in the concrete case, it is of key importance that the second-applicant could have received a lower sentence had the CC of SFRY been applied. Correlating the decision in the second-applicant's case with the decision of the European Court in Maktouf and Damjanović, and the decision of the Constitutional Court in Damjanović, the Constitutional Court has held that there is a realistic possibility that, regarding the sentence imposed, the CC of BiH was retroactively applied to the detriment of the second-applicant, in violation of Article 7(1) of the European Convention.”*

159. Which law is the (most) lenient to the perpetrator depends on the relevant circumstances. The Court should be mindful of all the provisions concerning the punishment: provisions on sentences, their fashioning or commutation (which law is more lenient along this line), precaution measures, possible accessory punishment, new measures as substitute punishment, security measures, legal consequences of the verdict, provisions pertaining to criminal prosecution; whether the new law anticipates any of the circumstance as the ground which, in the concrete case, excludes unlawfulness, criminal liability or punishability, or whether, on the other hand, it extends punishability.

160. In the concrete case, both the law which was in effect at the time when the crime was committed (the CC of SFRY), and the law currently in force (the CC of BiH), prescribe the criminal actions of which the Accused persons were found guilty as the criminal offense of War Crimes against Civilians.

161. Considering the foregoing, clearly there are legal conditions to conduct the criminal proceedings against the perpetrator for the criminal offense of War Crimes against Civilians and his punishment, given that the acts taken by the Accused are criminalized under both the earlier applicable law, that is, the law which was in force when the crime was committed, and the law which is currently in force, that is, the law effective at the time of the trial.

162. Considering such a state of facts, the Panel has accepted the conclusion that, in a situation when, in the Constitutional Court's view,<sup>11</sup> it is no longer possible to impose the death penalty, a maximum sentence for the referenced offense is the sentence of imprisonment for a term of 20 years for the accused Savić, and that the accused Pekez could receive a lower sentence by applying the CC of SFRY, considering that, pursuant to this law, a minimum punishment for the crime at issue is 5 years in prison.

163. In view of all the foregoing, the Appellate Panel has applied, to the already established state of facts, the CC of SFRY which was in force at the time when the referenced crime was committed. Along these lines, the Appellate Panel has established, with regard to the legal evaluation and qualification of the crime, that the Accused persons committed, in a way as stated in the enacting clause of the Verdict, the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY, namely the accused Pekez as read with Article 24 (Aiding and Abetting), and the accused Savić as read with Article 22 (Complicity) of the same Code.

#### **D. SENTENCING**

164. Deciding on the criminal sanction, the Panel has relied on the general rules for fixing punishment under Article 41 of the CC of SFRY, and on the purpose of punishment set forth in Article 33 of the CC of SFRY. Pursuant to Article 41(1) of the CC of SFRY, the Panel has first determined the limits of sentence prescribed for the crime at issue, particularly the special maximum, considering that the revoked Verdict imposed on the accused Milorad Savić a sentence of long-term imprisonment. The referenced Decision of the Constitutional Court, in para. 36, clearly concluded the following:

*„Considering the impossibility to impose the death penalty on the first-applicant, an issue arises as to which maximum punishment could have been imposed pursuant to the CC of SFRY. The Constitutional Court has, in this respect, noted that Article 38(2) of the CC of SFRY provides that „The Court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty“. According to the Constitutional Court, it is clear from the quoted statutory provision that, in the situation when the death penalty can no longer be imposed, the maximum punishment for this offense is a punishment of imprisonment for a term of 20 years.“*

165. Such a view is also supported with the decision of the Constitutional Court of BiH in *Miroslav Vujanović* (Decision No. AP 656/04 of 13 September 2005). The Decision stated that the RS Supreme Court did not arbitrarily apply the law when concluding that the

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<sup>11</sup>*Milorad Savić and Mirko Pekez*, Decision on Admissibility and Merits, para. 35 „...The Constitutional Court has noted that the foregoing clearly demonstrated that, at the time the appealed decisions were rendered, in 2008, the First-applicant could have in no way received the death penalty for the criminal offense at issue.“

punishment of imprisonment for a term of 20 years was prescribed as a special punishment, and that it was not a substitute for the death penalty.

166. In view of the foregoing, in a situation when the Constitutional Court's view is that the death penalty was abolished and replaced with an alternative prison sentence, the sentence prescribed for the criminal offense of War Crimes against Civilians under Article 142 of the CC of SFRY may not be shorter than 5 years in prison, or not lengthier than 20 years in prison, as a special maximum. Also, pursuant to Article 38 of the CC of SFRY, a criminal sanction may not be imposed for a term from 15 to 20 years.

167. The Appellate Panel was further mindful of the general rules pertaining to the selection of type and length of sentence, that is, the purpose of punishment, particularly the degree of the criminal liability of the Accused persons, the circumstances under which the crime was committed, the degree of damage incurred on the protected value, the perpetrators' previous lives, their family situation, their conduct after the perpetration of the crime and their motives to commit the crime.

168. Considering the established state of facts in relation to the criminal liability of the accused Mirko (Špiro) Pekez, the Panel has imposed on him a sentence of imprisonment for a term of 10 (ten) years. This is so because it was established beyond a doubt that, as an aider and abettor, this Accused acted intentionally (with the direct intent) in the commission of this crime, having participated in rounding up the Bosniak civilians, whereby he aided and abetted the direct perpetrators in the realization of the crime of killing. According to the factual findings, the accused Milorad Savić participated with the direct intent, as a co-perpetrator, in all stages of the referenced crime realization, and the Panel has therefore imposed on him a sentence of imprisonment for a term of 15 (fifteen) years.

169. The aggravating circumstances in relation to both these Accused were the circumstances under which the crime was committed – in the late night hours, when a group of armed and drunk persons forced the helpless civilians out of their homes, threatening and abusing them, not informing them of the reasons for their abduction, or of the place where they were taken, for which they certainly suffered a great fear.

170. As to the protected value violation, the Panel has taken into account the capacity and number of victims, namely that the victims were civilians, women, children and men, who had made no contribution whatsoever to the commission of the crime in which 23 persons were killed, while 4 of the 5 survived victims sustained severe bodily injuries caused with fire weapons. In evaluating these circumstances, it was necessary to show a special sensibility, given the fact that children were among the victims too, as the most vulnerable population among civilians.

171. These persons were killed only because they were Muslims, and in order to satisfy the perpetrators' retaliation motives. Using their domination and power, on the one hand, and the victims' helplessness on the other hand, the perpetrators committed a crime whose protected subject comprises universal human values, and as such, enjoys an absolute protection. These values are not only the requisite and the foundation, but also a positive obligation which implies human treatment. During their entire life time, the

injured parties-survived victims will certainly feel deep and continued consequences of the survived suffering, in the form of traumatization, mental and physical harm and the loss of their most beloved ones.

172. The motive or impulse for which the crime at issue was committed has, as an aggravating circumstance, particularly affected the duration of the sentence imposed. More specifically, retaliation is one of the lowest motives due to which a crime can be committed, and this very motive on the part of the Accused was crucial in creating and realizing the criminal design.

173. Among the extenuating circumstances, the Appellate Panel took into account the fact that the accused Mirko (Špiro) Pekez is father of two children, and that the accused Milorad Savić is father of one child. This fact, *in concreto* implies certain responsibilities and duties in supporting and bringing up the children. The Appellate Panel has also taken into account the fact that both these Accused had no prior criminal records, and that their conduct before the Court was proper. Along these lines, the Appellate Panel was mindful of the tendered documentary exhibit – Convict Conduct Report for Milorad Savić, concluding, however, that it cannot be considered within the context of either extenuating or aggravating circumstances.

174. Considering all the foregoing, the degree of individual participation of each Accused, and their contribution to the commission of the crime of which they were found guilty, the Appellate Panel has concluded that the sentences imposed for the committed crime are adequate to all these circumstances and to the Accused's personality as the perpetrators, and that they will fully achieve the purpose of punishment, both special and general deterrence.

175. Pursuant to Article 50 of the CC of SFRY, the time these two Accused spent in custody, running from 30 October 2007 through 11 September 2009, as well as the time they spent serving their respective prison sentences pursuant to the Verdict of the Court of Bosnia and Herzegovina, No. X-KRŽ-05/96-1 of 5 May 2009, running from 11 September 2009 through 18 November 2013, shall be credited towards the imposed sentence of imprisonment.

#### **E. DECISION ON THE COSTS OF PROCEEDINGS**

176. Regarding the decision relieving the Accused of the duty to reimburse the costs of proceedings, the Appellate Panel has held that the financial situation of the Accused is such that they could not bear the costs of criminal proceedings, namely that their payment would jeopardize the support of the persons whom the Accused are required to support financially. Therefore, pursuant to Article 188(4) of the CPC of BiH, the Court has relieved the Accused of this duty.

**F. DECISION ON THE CLAIMS UNDER PROPERTY LAW**

177. Pursuant to Article 198(2) of the CPC of BiH, the Court has instructed the injured parties-survived victims of the crime, Nurija Zobić, Zejna Bajramović, Omer Karahodžić, Fahrija Mutić and Subhudin Zobić, that they may pursue their claims under property law in a civil action, considering that during the first instance proceedings they could not specify the amount of their claim, and considering that establishing the facts regarding the amount of claim under property law would considerably prolong these proceedings.

178. In view of all the foregoing, the Verdict was rendered pursuant to Article 285 of the CPC of BiH, as stated in the enacting clause herein.

**Record-taker:**

Legal Advisor

Medina Džerahović

**PANEL PRESIDENT**

**J U D G E**

Dragomir Vukoje, LL.M

**NOTE ON LEGAL REMEDY:** No appeal lies from this Verdict.