Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case Number: S1 1 K 007511 11 Kri

Date: **Pronounced:** **13 January 2014**
Written Verdict issued on: **31 March 2014**

Before the Trial Panel composed of:

Judge Ljubomir Kitić, Presiding Judge
Judge Minka Kreho
Judge Željka Marenić

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

the Accused Fikret Planinčić, Rasim Lišančić, Sead Menzil and Mirsad Vatrač

VERDICT

Prosecutor for the Prosecutor's Office of B-H: **Dragan Čorlija**

Defense Counsel for the Accused: **Bekir Ferizović, Attorney from Travnik**
Izet Baždarević, Attorney from Sarajevo
Adil Draganović, Attorney from Sanski Most
Abaz Fadil, Attorney from Sarajevo

Record-taker
Jovana Vidić, Court Officer

Number: S1 1 K 007511 11 Krl
Sarajevo, 13 January 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, sitting on the Panel composed of Judge Ljubomir Kitić, as the Presiding Judge, and Judge Minka Kreho and Judge Željka Marenić, as members of the Panel, with the participation of Court Officer Jovana Vidić as the record-taker, in the criminal case conducted against the Accused Fikret Planinčić, Rasim Lišančić, Sead Menzil and Mirsad Vatrač, for the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (f), and Rasim Lišančić also in violation of Sub-Paragraph (c) as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC B-H) and Article 29 of the CC B-H, under the Indictment by the Prosecutor's Office of Bosnia and Herzegovina No. T 20 0 KT RZ 0000403 07, dated 7 October 2011, and the Indictment No. T20 0 KTRZ 0000403 07, dated 21 November 2011, following the public main trial which was partially closed to the public, in the presence of Dragan Čorlija, Prosecutor for the Prosecutor's Office of B-H, the Accused Fikret Planinčić, Rasim Lišančić, Sead Menzil and Mirsad Vatrač, and the Defense Counsel for the Accused, Attorneys Bekir Ferizović, Izet Baždarević, Adil Draganović and Abaz Fadil, on 13 January 2014 rendered and publicly announced the following:

V E R D I C T

The Accused:

FIKRET PLANINČIĆ, aka *Taci*, son of Abaz and Kada nee Đokić, born on 17 August 1956 in Dabovci, Kotor Varoš Municipality, ethnic …, citizen of …, with completed elementary education, married, with one child, unemployed, indigent, living at …, Personal Identification Number …, no prior conviction, in pre-trial custody from 27 May

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
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2011 to 3 October 2012 pursuant to the Decision of the Court of B-H No. S1 1 K 6006 11 Krn dated 28 May 2011;

RASIM LIŠANČIĆ, son of Mustafa and Derviša nee Jeleč, born on 15 December 1945 in Dabovci, Kotor Varoš Municipality, ethnic …, citizen of …, farmer, with completed elementary education, single, indigent, Personal Identification Number …, no prior conviction, living at …, in pre-trial custody from 27 May 2011 to 9 October 2012 pursuant to the Decision of the Court of B-H No. S1 1 K 6006 11 Krn dated 28 May 2011;

SEAD MENZIL, son of Ismet and Zemka nee Turan, born on 12 June 1964 in Hrvaćani, Kotor Varoš Municipality, ethnic …, citizen of …, construction equipment operator, with completed secondary education, married, with two children, middle income, Personal Identification Number …, no prior conviction, living at …, in pre-trial custody from 27 May 2011 to 3 October 2012 pursuant to the Decision of the Court of B-H No. S1 1 K 6006 11 Krn dated 28 May 2011;

and

MIRSAD VATRAČ, son of Suljo and Zlatka nee Ramić, born on 19 February 1964 in Dabovci, Kotor Varoš Municipality, ethnic …, citizen of …, bricklayer, with completed vocational school, married, with two children, indigent, Personal Identification Number …, living at …, no prior conviction, in extradition custody from 5 September 2011 to 26 October 2011 and in pre-trial custody from 26 October 2011 to 25 October 2012 pursuant to the Decision of the Court of B-H No. S1 1K6006 11 Krn,

HAVE BEEN FOUND GUILTY

Of the following:

In 1992, during the war in Bosnia and Herzegovina and the armed conflict between the Army of Republika Srpska (VRS) and the Territorial Defense (TO) of Kotor Varoš, the latter taking place from June to mid-November 1992 in the territory of the Kotor Varoš Municipality, in contravention of Article 3(1)(a) and Article 147 of the Geneva Convention

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as members of the Kotor Varoš TO organized in several detachments, which later operated as a component of the 7th Corps of the Army of the Republic of Bosnia and Herzegovina (ARB-H), together with other TO members whom they knew, the Accused participated in the manner described below in an attack against the Serb civilian population in the village of Serdari, Kotor Varoš Municipality, the village having been outside the conflict zone, which attack **resulted in death, grave bodily injuries and destruction of property**:

- on 17 September 1992, at around 05.30 hrs, in a group comprising at least 20 members of the Kotor Varoš TO, while the majority of the civilians, the natives of Serdari and the inhabitants of the neighboring villages of Dukići and Bencuzi who used to stay overnight at their relatives' in Serdari because of fear, **were asleep**, the Accused, some dressed in uniforms and some in civilian clothes and armed with rifles, carried out a premeditated infantry attack, firing from firearms from several directions, first against the civilians who happened to be outside their houses and then against the family houses and civilians who were staying in them, throwing explosive ordnance through entrance doors and window openings, as well as inside the houses following forced entry, although they were aware that those people were civilians and that the fired bullets and shrapnel of the activated explosive ordnance could cause lethal and grave injuries to them. The attack resulted in death of **16 civilians of both sexes**, **aged from 4 to 60,** namely, Slavko Bencuz (born in 1937), Slavojka Bencuz (born in 1971), Drago Serdar (born in 1945), Slavko Serdar (born in 1932), Slaviša Serdar (born in 1971), Mirko Serdar (born in 1962), Branko Serdar (born in 1936), Bosiljka Serdar (born in 1939), Danka Serdar (born in 1938), Jelenko Serdar (born in 1961), Radmila Serdar (born in 1971), Nikola Dukić (born in 1953), Spomenka Tepić (born in 1973), Ljubica Tepić (born in 1952), Slobodanka Tepić (born in 1980), and Snježana Tepić (born in 1988). Mileva Bencuz and Radmila Serdar, the latter **five months pregnant** at the time, suffered **grave bodily injuries** from the fired bullets and shrapnel, while Stana Serdar suffered burns to her hands and face. However, despite the intensity of the attack, a number of civilians, chiefly women

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Telefon: 033 707 100, 707 596; Fax: 033 707 155

and children, saved themselves by hiding on certain premises of the family homes and by fleeing the village. The attack also comprised destruction of property and torching of the houses of Drago Serdar, Slavko Serdar and Danka Serdar, in which the bodies of Slaviša Serdar, his wife Spomenka Tepić, and Slavko Serdar burned out, and the torching of the outbuildings in which the locked cattle burned alive. **Rasim Lišančić**, having arrived with other TO members in front of the house of the previously wounded Danka Serdar, **treated inhumanely** her daughter Gina **pressing a knife to her throat** and requesting from her to tell him who had killed his sister Nura, and when the attackers, fearing that VRS members would arrive soon, left Serdari and took Gina along in the direction of Bilice, he again asked for his sister Nura and **hit Gina in the back of her head with his palm**, whereupon she was unlawfully detained on the basement premises in the village of Bilice for four days and three nights, during which time she was interrogated several times, mostly by Besim Čehić.

Therefore, by violating rules of international humanitarian law in time of war and armed conflict, they participated in an attack against the civilian population and buildings, which resulted in deaths and grave bodily injuries of civilians and destruction of property, and Rasim Lišančić also inhumanely treated a civilian person,

whereby,

they committed the criminal offense of War Crimes against Civilians in violation of Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the SFRY, as read with Article 22 thereof,

thereby, in application of the referenced provisions and Articles 38 and 41 of the CC SFRY, for the referenced criminal offense the Court

S E N T E N C E S

the first Accused Fikret Planinčić
TO IMPRISONMENT FOR THE TERM OF
11 (ELEVEN) YEARS and 6 (SIX) MONTHS

Pursuant to Article 50(1) of the CC SFRY, the time the Accused spent in custody in the period from 27 May 2011 to 3 October 2012 shall be credited toward the imprisonment sentence.

In application of the referenced provisions and Articles 38 and 41 of the CC SFRY, for the referenced criminal offense the Court

S E N T E N C E S
the second Accused Rasim Lišančić
TO IMPRISONMENT FOR THE TERM OF
9 (NINE) YEARS and 6 (SIX) MONTHS

Pursuant to Article 50(1) of the CC SFRY, the time the Accused spent in custody in the period from 27 May 2011 to 9 October 2012 shall be credited toward the imprisonment sentence.

In application of the referenced provisions and Articles 38 and 41 of the CC SFRY, for the referenced criminal offense the Court

S E N T E N C E S
the third Accused Sead Menzil
TO IMPRISONMENT FOR THE TERM OF
11 (ELEVEN) YEARS and 6 (SIX) MONTHS

Pursuant to Article 50(1) of the CC SFRY, the time the Accused spent in custody in the period from 27 May 2011 to 3 October 2012 shall be credited toward the imprisonment sentence.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

In application of the referenced provisions and Articles 38 and 41 of the CC SFRY, for the referenced criminal offense the Court

S E N T E N C E S

the fourth Accused Mirsad Vatrač

TO IMPRISONMENT FOR THE TERM OF

10 (TEN) YEARS and 6 (SIX) MONTHS

Pursuant to Article 50(1) of the CC SFRY, the time the Accused spent in custody in the period from 5 September 2011 to 25 October 2012 shall be credited toward the imprisonment sentence.

Pursuant to Article 188(4) of the CPC B-H, the costs of the criminal proceedings referred to in Article 185(2)(a)-(f) of the CPC B-H, and the necessary expenses and remuneration of the Defense Counsel, shall be paid from the budget of the Court.

Pursuant to Article 198(2) of the CPC B-H, the injured parties are instructed to pursue their claims under property law in civil action.

R E A S O N I N G

I INTRODUCTION

A. PROCEDURAL HISTORY

On 7 October 2011, the Prosecutor's Office of B-H filed for confirmation an Indictment No. T20 0 KTRZ 0000403 07, charging the Accused Fikret Planinčić, Rasim Lišančić and Sead Menzil with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (f), and Rasim Lišančić also in violation of Sub-Paragraph (c), as read with Article 180(1), all as read with Article 180(1) and with Article 29 of the CC B-H.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

On 21 November 2011, the Prosecutor's Office filed an Indictment charging Mirsad Vatrač with the commission of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (f), as read with Article 180(1), all as read with Article 180(1) and with Article 29 of the CC B-H.

After the Indictments were confirmed, the Accused Fikret Planinčić, Rasim Lišančić and Sead Menzil pleaded not guilty of the crimes as charged at the guilty plea hearing on 11 November 2011 and Mirsad Vatrač pleaded not guilty on 19 December 2011, whereupon the case was referred to the Trial Panel to schedule the main trial. On 21 December 2011, the Court rendered a Decision No. S1 1 K 007511 11 Kri on the joinder of the proceedings conducted hitherto before the Court against the Accused Fikret Planinčić, Rasim Lišančić and Sead Menzil and the proceedings against the Accused Mirsad Vatrač.

It should be noted that on 15 December 2011 the main trial commenced for the Accused Fikret Planinčić, Rasim Lišančić and Sead Menzil, and on 21 December 2011 for the Accused Mirsad Vatrač as well, with the reading of the Indictment.

II THE EVIDENCE ADDUCED

A) PROSECUTOR'S OFFICE OF B-H

In the evidentiary proceedings the following Prosecution witnesses were examined: Živorad Ganjanin, Nikola Tomašević, Simo Tepić, Dalibor Serdar, Radmila Serdar, Nedeljko Sakan, Mileva Bencuz, Stojanka Serdar, Zora Serdar, Stanka Serdar, Miloš Serdar, Nedeljko Narić, Gina Kukrić, Aleksandar Petrović, Kemal Smajić, Joco Serdar, Muhamed Sadiković, Muris Hadžiselimović, Muharem Huseinović, Suvad Menzil, Semko Lozić, Remzija Šiljak, Pašo Čirkić, Slobodan Župljanin, Ilija Šipura, and expert witnesses Željko Karan, specialist in forensic medicine, and Dragomir Keserović, military expert.

In the evidentiary proceedings the Prosecution presented and tendered into case file the following documentary evidence: T-1 a: Witness Examination Record for Gina Kukrić by

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07, 3 February 2011; T-1 b: Photo-documentation No. T20 0 KTRZ 0000403 07 of 7 October 2010, made by Đorđe Blagojević; T-1 c: Witness Examination Record for Gina Kukrić, made on 26 February 2002 before the investigating judge of the District Court in Banja Luka in the criminal case against Marko Šipura *et al.;* T-2: Witness Examination Record for Kemal Smajić, No. T20 0 KTRZ0000403 07, of 10 November 2010, made before the Prosecutor's Office of B-H; T-3: Witness Examination Record for Stana Serdar, made on 22 February 2002 before the investigating judge of the District Court in Banja Luka in the criminal case against Marko Šipura *et al.;* T-4: Excerpt from the Record of Deaths (Death Certificate) for Stana Serdar, No. 03/6-202-180 of 14 October 2010, entry made for the area of Vrbanjci for 2005; T-5: Crime Scene Investigation Record No. KR 25/92 of 17 September 1992, made at the scene on 17 September 1992 in the village of Gornji Vrbanjci, hamlet of Serdari, Municipality of Kotor Varoš; T-6: Photo-documentation of the scene of the War Crimes against Civilians committed on 17 September 1992 in the place of Serdari, Municipality of Kotor Varoš, made on 30 September 1992; T-7: Record of the crime scene identification No. 08-02/1-362/10 of 2 October 2010 made by the Republika Srpska Ministry of the Interior [RS MUP], Banja Luka CJB [Public Security Center], Crime Police Sector Banja Luka, upon the order of the Prosecutor's Office of B-H No. T20 0 KTRZ 000403 07 of 20 September 2010; T-7 a: Sketch of the crime scene No. UV-1359/10 of 2 October 2010, made by RS MUP, Banja Luka CJB, Crime Police Sector, Forensic Division Banja Luka, sketch made by Saša Ožegović; T-7 b: Photo-documentation of the scene No. UV-1359/10 of 2 October 2010, made by RS MUP, Banja Luka CJB, Crime Police Sector, Forensic Division Banja Luka, photo-documentation made by Saša Ožegović; T-8: Photo-album made by the Prosecutor's Office of B-H No. T20 0 KTRZ 0000403 07 of 7 October 2010; T-9: Request for the recognition of the status of a member of the Army of Republic of B-H, Kotor Varoš TO, and of its legal successor No. 01-347/96 of 28 May 1996; T-10: Request for the recognition of the status of a member of the Army of Republic of B-H, Kotor Varoš TO, and of its legal successor No. 01-348/96 of 28 May 1996; T-11: Memorandum of the Armed Force of the Republic of B-H, 1st HVO Battalion Kotor Varoš, entitled *War Path of the Bosniaks of the 1st HVO Battalion Kotor Varoš;* T-12: List of Reconnaissance-Sabotage Platoon (IDV), Kotor Varoš TO, List of Kotor Varoš TO, Detachment 55, from

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

ordinal number 01 to 400, List of Staff Command of Kotor Varoš TO from the ordinal number 01 to 07; T-13: Request of the Prosecutor's Office of B-H to inspect the documentation possessed by the Ministry of Defense of B-H No. T20 0 KTRZ 0000403 07 of 17 June 2011 and the approval by the Ministry of Defense No. 13-04-1-67-5/11 of 22 June 2011; T-14: Photograph of the village of Serdari from 1992; T-15: Witness Examination Record for Pašo Čirkić, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 28 October 2010; T-16: Witness Examination Record for Nikola Tomašević, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 21 June 2011; T-17: Witness Examination Record for Živorad Gajanin, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 15 July 2011; T-18: Witness Examination Record for Dragiša Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 12 November 2010, T-19: Witness Examination Record for Miloš Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 22 October 2010; T-20: Witness Examination Record for Radmila Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 3 December 2010; T-21: Witness Examination Record for Mileva Bencuz, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 10 December 2010; T-22: Witness Examination Record for Simo Tepić, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 23 June 2011; T-23: Witness Examination Record for Joco Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 2 December 2010; T-24: Witness Examination Record for Stojanka Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 10 December 2010; T-25: Witness Examination Record for Dalibor Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 11 November 2010; T-26: Witness Examination Record for Stanka Serdar, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 11 November 2010; T-27: Witness Examination Record for Nedeljko Sakan, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 2 December 2010; T-28: Witness Examination Record for Zora Dukić, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 12 November 2010; T-29: Witness Examination Record for Muhamed Sadiković, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 4 October 2011; T-30: Record of Statement given by witness Nedeljko Narić, made by

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

RS MUP, Banja Luka CJB, Crime Police Sector, No. 08-02/1-206 /11 of 2 August 2011; T-31: Record of Statement given by witness Aleksandar Petrović, made by RS MUP, Banja Luka CJB, Crime Police Sector, No. 08-02/1-217/11 of 10 August 2011; T-32: Witness Examination Record for Muris Hadžiselimović, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 21 June 2011; T-33: Witness Examination Record for Muharem Huseinović, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 28 July 2011; T-34: Witness Examination Record for Suvad Menzil, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 29 July 2011; T-35: Witness Examination Record for Semko Lozić, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 11 August 2011; T-36: Witness Examination Record for Remzija Šiljak, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 19 August 2011; T-37: Memorandum by the Staff of the Kotor Varoš Municipality TO of 10 May 1196 [year as rendered in the original text; translator's note]; T-38: Photo-documentation of the village of Serdari, Kotor Varoš Municipality, No. 791, photographed on 3 April 1993, printed out on 12 April 1993; T-39: Military Department Personal File for Sead Menzil and Unit Personal File for Sead Menzil; T-40: Unit Personal File for Fikret Planinčić; T-41: Decision of the Court of B-H, No. S1 1 K 006006 11 Krn of 5 October 2011, ordering protection measures for witness M-1; T-42: Death Certificate for Slavko Bencuz, No. 03/6-202-159 of 11 October 2010; T-43: Death Certificate for Drago Serdar, No. 03/6-202-169 of 11 October 2010; T-44: Death Certificate for Slavko Serdar, No. 03/6-202-177 of 11 October 2010; T-45: Death Certificate for Slaviša Serdar, No. 03/6-202-168 of 11 October 2010; T-46: Death Certificate for Spomenka Tepić, No. 03/6-202-175 of 11 October 2010; T-47: Death Certificate for Mirko Serdar, No. 03/6-202-163 of 11 October 2010; T-48: Death Certificate for Branko Serdar, No. 03/6-202-165 of 11 October 2010; T-49: Death Certificate for Slavojko Bencuz, No. 03/6-202-161 of 11 October 2010; T-50: Death Certificate for Bosiljko Serdar, No. 03/6-202-162 of 11 October 2010; T-51: Death Certificate for Danko Serdar, No. 03/6-202-164 of 11 October 2010; T-52: Death Certificate for Nikola Dukić, No. 03/6-202-166 of 11 October 2010; T-53: Death Certificate for Jelenko Serdar, No. 03/6-202-176 of 11 October 2010; T-54: Death Certificate for Radmilo Serdar, No. 03/6-202-174 of 11 October 2010; T-55: Death Certificate for Snježana Tepić, No. 03/6-202-173 of 11 October 2010; T-56: Death

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Certificate for Slobodanka Tepić, No. 03/6-202-172 of 11 October 2010; T-57: Death Certificate for Ljubica Tepić, No. 03/6-202-171 of 11 October 2010; T-58: Death Certificate for Nura Lišančić, No. 03/6-200-552 of 8 September 2011; T-59: Forensic Expertise Finding, Public Institution of Forensic Medicine Institute of Republika Srpska, Banja Luka, of 14 September 2011; T-60: Case History for Milena Bencuz, Clinical Medical Center in Banja Luka (date of admission to hospital 17 September 1992, date of discharge from hospital 25 September 1992); T-61: Case History for Stana Serdar, Clinical Medical Center in Banja Luka (admission date: 17 September 1992, discharge date: 25 September 1992); T-62: Case History for Radmila Serdar, Clinical Medical Center in Banja Luka (admission date: 17 September 1992, discharge date: 24 September 1992); T-63: Request for certification of documentation, No. T20 0 KTRZ 0000403 07 of 10 January 2012 and a part of the protocol of the Health Center in Kotor Varoš; T-64: Suspect Questioning Record for Fikret Planinčić, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 27 May 2011; T-65: Suspect Questioning Record for Rasim Lišančić, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 27 May 2011; T-66: Suspect Questioning Record for Sead Menzil, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 27 May 2011; T-67: Suspect Questioning Record for Mirsad Vatrač, made before the Prosecutor's Office of B-H, No. T20 0 KTRZ 0000403 07 of 9 November 2011; T-68: Decree Law on Amending the Name of the Socialist Republic of Bosnia and Herzegovina published in the *Official Gazette of the Republic of Bosnia and Herzegovina* No. 1, 9 April 1992; T-69: Decision on the Declaration of the State of War, *Official Gazette of the Republic of B-H* No. 7, 20 June 1992; T-70: Decree on the proclamation of the Law on the Amendments to the Law on the Establishment of the Border Crossings of the Republic of B-H, *Official Gazette* No. 50, 28 December 1995; T-71: Criminal Record Excerpts for Sead Menzil, Rasim Lišančić, Fikret Planinčić and Mirsad Vatrač; T-72: Decisions of the Prosecutor's Office of B-H on remuneration for costs for witnesses Nikola Tomašević, Živorad Gajanin, Dragiša Serdar, Miloš Serdar, Radmila Serdar, Simo Tepić, Joco Serdar, Dalibor Serdar, Stanka Serdar, Zora Dukić, Nedeljko Sakan, Pašo Čirkić, Muris Hadžiselimović, Muharem Huseinović, Suvad Menzil, Semko Lozić, Remzija Šiljak; T-73: Order for forensic expertise No. T20 0 KTRZ 0000403 07 of 19 July 2011; T-74: Supplementary Order for Forensic Expertise No. T20

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

0 KTRZ 0000403 07 of 31 August 2011; T-75: Witness Examination Record for Ilija Šipura of 8 June 2012; T-76 Finding and Opinion of Dragomir Keserović; T-77a: Cover Letter of the Official Note of the State Investigation and Protection Agency (SIPA) No. 17-12/3-04-2-65-2/07 of 5 November 2007; T-77b: Official Note of the State Investigation and Protection Agency No. 17-12/3-04-2-65-135/07 of 5 November 2007; T-77c: Letter of the Prosecutor's Office to the State Investigation and Protection Agency No. KTA-RZ-96/07 of 24 May 2007.

B. DEFENSE FOR THE ACCUSED FIKRET PLANINČIĆ

In the evidentiary proceedings the following witnesses were examined upon the motion of the Defense Counsel for the first Accused Fikret Planinčić: Zijad Dulić, Nura Čirkić, Raza Smajić, Zilka Smajlović and Mujo Mujanović. The Accused Fikret Planinčić was also examined as a witness.

The Defense for the first Accused Fikret Planinčić presented to the Court and tendered into the case file the following documentary evidence: O-I-1 Medical report by the Cantonal Hospital in Zenica of 9 July 1998 to the name of Fikret Planinčić; I O-I-2: *The Crime Against the Serbs in Kotor Varoš in 1992,* book written by Mirko A. Marković.

C. DEFENSE FOR THE ACCUSED RASIM LIŠANČIĆ

Salih Čirkić was examined upon the motion of the Defense for the Accused Rasim Lišančić, as was the Accused Lišančić, in the capacity as a witness.

D. DEFENSE FOR THE ACCUSED SEAD MENZIL

In the evidentiary proceedings the following Defense witnesses were examined upon the motion of the Defense Counsel for the Accused Sead Menzil: Zemir Turan, Muris Dugonjić, Aziz Čirkić, Đasim Menzil, Asmir Lišančić, Abid Kovačić, Edib Menzil, Safet

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Telefon: 033 707 100, 707 596; Fax: 033 707 155

Ćehić, Ale Vilić, Diba Menzil, and military expert witness Senad Kljajić. The Accused Sead Menzil was also examined as a witness.

The Defense for the third Accused presented at the main trial and tendered into the case file the following documentary evidence: O-III-1: *Vlašićki vidici* No. 22, Special Supplement, Newsletter of the 22nd Infantry Brigade, Year I, No. 11, dated 19 November 1993; O-III-2: *Official Gazette of Kotor Varoš Municipality* No. 1/92 of 18 December 1992 (Decision on the Organization and the Operation of the Crisis Staff of Kotor Varoš Municipality), and the *Official Gazette of Kotor Varoš Municipality* No. 2/92 of 30 December 1992 (Decision on the Termination of the Mandates of the Municipal Assembly Councilors and the Verification of the New Councilors' Mandates); O-III-3: Order for Conducting Combat Activities by the Command of the Kotor Varoš Light Brigade of 23 July 1992, ICTY No. 00155701; O-III-4: Order for attack by the Command of the 1st Kotor Varoš Light Infantry Brigade, Conf. No. 91/92 of 24 September 1992; O-III-5: Decision on the Organization and the Operation in War of the Executive Board of Kotor Varoš Municipality of 1992, ICTY No. 00416026; O-III-6: Order Imposing Curfew in Kotor Varoš Municipality, No. 01-023-12/92 of 12 June 1992, ICTY No. 00416494; O-III-7: Order to organize defense, Op.No.2/92, by the Command of the 2nd Light Infantry Brigade of 14 June 1992, ICTY No. 00820660; O-III-8: Combat report of the Command of the 1st Krajina Corps of 23 June 1992, Str. Conf. No. 44-1/95 (ICTY No. 00861701) and Combat Report of the Command of the 1st Krajina Corps of 24 June 1992, Str.Conf. 44-1/197 (ICTY No. 00861713) to the Main Staff of the Army of the Serb Republic of B-H; O-III-9: Excerpt from the Minutes of the 83rd session of the War Presidency of Kotor Varoš Municipality held on 21 September 1992; Excerpt from the Minutes of the 40th session of the Crisis Staff of Kotor Varoš Municipality held on 26 June 1992, ICTY No. 00415614; Excerpt from the Minutes of the 26th session of the War Presidency of Kotor Varoš Municipality held on 20 July 1992, ICTY No. 00415772; Conclusions of the session of the War Presidency of Kotor Varoš Municipality No. 01-023-143/92 of 25 July 1992; Excerpt from the Minutes of the 43rd session of the War Presidency of Kotor Varoš Municipality held on 29 July 1992; Excerpt from the Minutes of the 54th session of the War Presidency of Kotor Varoš Municipality held on 15 August 1992; Excerpt from the Minutes of the 67th session of the War Presidency of Kotor Varoš Municipality held on 20 August 1992, ICTY No. 00415727; Excerpt from the Minutes of the 70th session

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

of the War Presidency of Kotor Varoš Municipality held on 2 September 1992; Excerpt from the Minutes of the 71st session of the War Presidency of Kotor Varoš Municipality held on 3 September 1992; Excerpt from the Minutes of the 75th session of the War Presidency of Kotor Varoš Municipality held on 7 September 1992; Excerpt from the Minutes of the 76th session of the War Presidency of Kotor Varoš Municipality held on 8 September 1992; Excerpt from the Minutes of the 78th session of the War Presidency of Kotor Varoš Municipality held on 11 September 1992; Excerpt from the Minutes of the 81st session of the War Presidency of Kotor Varoš Municipality held on 17 September 1992, ICTY No. 00415712; Excerpt from the Minutes of the 82nd session of the War Presidency of Kotor Varoš Municipality held on 18 September 1992; O-III-10: Bulletin of the Crisis Staff of Kotor Varoš Municipality, No. 4 of 7 July 1992, ICTY No. 00416466; O-III-11 Order to B. Luka Military Post to surrender arms, No. 4022, Conf.No.18/1-20 of 5 May 1992;O-III-12: Order to B.Luka Military Post to issue arms and equipment, Conf.No. 18/4-21 of 9 May 1992; O-III-13 Regular Combat Report of the Command of the 1st Krajina Corps of 16 July 1992, Str.Conf. No. 44-1/240, ICTY No. 00861933; O-III-14 Order for conducting combat activities by the Command of the group of Brigades, Skender Vakuf, forwarded to the Command of the 1st Krajina Corps of the Bosnian Serb Army of 16 July 1992, ICTY No. 00820690; O-III-15: Request for delivery of arms and ammunition for equipping the Light Infantry Brigade in Kotor Varoš, No. 01-023-124/92 of 20 July 1992, ICTY No. 00416321; O-III-16: Bulletin of the War Presidency of Kotor Varoš Municipality No. 6 of 24 July 1992, ICTY No. 00416470; O-III-17: Combat Report of the Command of the 1st Krajina Corps of 26 July 1992, Op.Str.Conf., No. 44-1/258, ICTY No. 00862001; O-III-18: Combat Report of the Command of the 1st Krajina Corps of 29 August 1992, Op.Str.Conf., No. 44-1/327, ICTY No. 00362920; O-III-19: Briefing by the Command of the 22 Infantry Brigade, village of Vitovlje, to the Commander of the 1st Krajina Corps, Str.Conf. No. 545-1/92 of 6 December 1992, on the strength and armament of the unit, preparation for the wintertime warfare, ICTY No. 01312012; O-III-20: Briefing by the Command of the 1st Kotor Varoš Light Infantry Brigade to the Commander of the 1st Krajina Corps on the situation in the 1st Light Infantry Brigade Kotor Varoš and the Brigade's zone of responsibility, Conf. No. 239/92 of 6 December 1992, ICTY No. 01311938; O-III-21: DVD with the film *Bloody Dawn in Serdari* [*Krvava zora u Serdarima* in the vernacular; translator's note]; O-III-22 Written memorandum by

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

the Ministry of Defense of B-H to Attorney Adil Draganović, No. 13-04-1-127-5/11 of 18 October 2011 with attachments; O-III-23 Topographic map of Serdari and Sakani made upon the identification by witness Dragiša Serdar; O-III-24 Written memorandum by the District Court in Banja Luka, No. 011-0-Su-12-000 227 of 9 March 2012, in the case against Jozo Barić *et al.*; O-III-25 Official Note of the Ministry of the Interior – Security Services Center, Department for Preventing and Discovering Crime Banja Luka, Republika Srpska, on the interview with Joco Serdar, No. SZ/2-8 of 4 February 1993, ICTY No. 00396288; O-III-26 Statement of Joco Serdar of 1 February 1993, hand-written, ICTY No. 00396289; O-III-27 Topographic map of the village of Serdari; O-III-28 Decision on ex officio pardon of convicted persons No. 01-936/95 of 18 May 1995, ICTY No. 00396487; O-III-29 Written memorandum by the District Court in Banja Luka, No. 011-0-Su-11-000 762 of 27 September 2011 with attachments; O-III-30 Memorandum of the Court of B-H No. S1 1 K 007511 11 KrI of 24 October 2012 with a letter by the Administrative Service of Kotor Varoš Municipality; O-III-31 Decision of Kotor Varoš Municipality – Administrative Service, General Administration Department, No. 03/05-562-21/21012 of 14 June 2012, to the name of Radmila Serdar; O-III-32 Decision of Kotor Varoš Municipality – Administrative Service, General Administration Department, No. 03/05-562-2/2012 of 27 January 2010, to the name of Zora Dukić; O-III-33 Decision of Kotor Varoš Municipality – Administrative Service, General Administration Department, No. 03/05-562-234/09 of 10 December 2009, to the name of Stojanka Serdar; O-III-34 Decision of Kotor Varoš Municipality – Administrative Service, General Administration Department, No. 03/05-562-60/09 of 15 July 2009, to the name of Stojanka Serdar; O-III-35 Decision of Kotor Varoš Municipality – Administrative Service, General Administration Department, No. 03/05-562-13/09 of 11 May 2009, to the name of Mileva Bencuz; O-III-36 Memorandum of the Court of B-H No. S1 1 K 007511 11 kro of 31 January 2012 with attachment – Order to surrender arms of Banja Luka Military Post to Kotor Varoš TO 18/1-20 of 5 May 1992; O-III-37 Excerpt from the Minutes of the 80th session of the War Presidency of Kotor Varoš Municipality held on 16 September 1992; O-III-38 Excerpt from the Minutes of the 79th session of the War Presidency of Kotor Varoš Municipality held on 15 September 1992, ICTY No. 00415715; O-III-39 DVD with cover letter by Attorney Adil Draganović (description of the evidentiary material) of 14 January 2013 – List of Recordings; O-III-40 CD with cover letter by Attorney Adil

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Draganović (description of the evidentiary material) of 12 December 2011 - List of Recordings; O-III-41 Finding and opinion of expert witness Senad Kljajić, retired Brigadier of the Armed Force of B-H, of 26 February 2013; O-III-42 – Excerpt from the Minutes of the 35th session of the Crisis Staff of Kotor Varoš Municipality, dated 25 June 1992; O-III-43 – Excerpt from the Minutes of the 42nd session of the Crisis Staff of Kotor Varoš Municipality, dated 27 June 1992; O-III-44 – Decision on general mobilization by the Crisis Staff of Kotor Varoš Municipality of 30 June 1992; O-III-45 – Excerpt from the Minutes of the 54th session of the Crisis Staff of Kotor Varoš Municipality, dated 4 July 1992; O-III-46 – Excerpt from the Minutes of the 63rd session of the Crisis Staff of Kotor Varoš Municipality, dated 7 July 1992; O-III-47 - Excerpt from the Minutes of the 1st session of the War Presidency, dated 7 July 1992; O-III-48 Excerpt from the Minutes of the 2nd session of the War Presidency, dated 8 July 1992; O-III-49 Excerpt from the Minutes of a session of the War Presidency, dated 12 July 1992; O-III-50 - Excerpt from the Minutes of the 15th session of the War Presidency, dated 14 July 1992; O-III-51 - Excerpt from the Minutes of the 16th session of the War Presidency, 15 July 1992; O-III-52 - Excerpt from the Minutes of the 17th session of the War Presidency, dated 15 July 1992; O-III-53 -- Excerpt from the Minutes of the 28th session of the War Presidency, dated 21 July 1992; O-III-54 – Regular Combat Report of the 1st Krajina Corps Command to the VRS Main Staff of 23 July 1992; O-III-55 - Excerpt from the Minutes of the 37th session of the War Presidency, dated 26 July 1992; O-III-56 -- Excerpt from the Minutes of the 38th session of the War Presidency, dated 26 July 1992; O-III-57 - Excerpt from the Minutes of the 39th session of the War Presidency, dated 27 July 1992; O-III-58 - Excerpt from the Minutes of the 42nd session of the War Presidency, dated 29 July 1992; O-III-59 – Combat Report of the 1st Krajina Corps Command to the VRS Main Staff of 30 July 1992; O-III-60 - Excerpt of the Minutes of the 45th session of the War Presidency, dated 31 July 1992; O-III-61 - Excerpt from the Minutes of the 50th session of the War Presidency, dated 7 August 1992; O-III-62 – Excerpt from the Minutes of the 56th session of the War Presidency, dated 18 August 1992; O-III-63 - Excerpt from the Minutes of the 58th session of the War Presidency, dated 20 August 1992; O-III-64 - Excerpt from the Minutes of the 59th session of the War Presidency, dated 21 August 1992; O-III-65 Excerpt from the Minutes of the 60th session of the War Presidency, dated 22 August 1992; O-III-66 - Excerpt from the Minutes of the 74th

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

session of the War Presidency, dated 28 August 1992; O-III-67 - Excerpt from the Minutes of the session of the War Presidency, dated 8 September 1992; O-III-68 – Intelligence report entitled *Miloš* dated 7 September 1992, No. 370/92; O-III-69 – Letter by the Chief of Banja Luka CSB (Security Services Center) to Public Security Stations of 23 September 1992; O-III-70 – Excerpt from the Minutes of the 85th session of the War Presidency, dated 23 September 1992; O-III-71 - Excerpt from the Minutes of the 86th session of the War Presidency, dated 24 September 1992; O-III-72 - Excerpt from the Minutes of the 110th session of the War Presidency, dated 28 October 1992; O-III-73 -- Memorandum of the Ministry of Labor and War Veterans' and Disabled Persons' Welfare, Republika Srpska Government, No. 16-03/3.2-1-835-838/13 of 10 June 2013.

D. DEFENSE FOR THE ACCUSED MIRSAD VATRAČ

Upon the motion of the Defense for the fourth Accused Mirsad Vatrač, the following witnesses were examined at the main trial: Šefik Čirkić, Adis Bečić, Zlatka Alekić, Ćamil Vatrač and Mirzet Botić.

III CLOSING ARGUMENTS

1. PROSECUTOR'S OFFICE OF B-H

Following the presentation of evidence and the completion of the evidentiary proceedings, on 12 November 2013 the Prosecutor's Office presented its closing argument, which was also tendered into the case file in writing.

In the closing argument the Prosecutor commented in detail on the statements of the examined witnesses and the documentary evidence tendered into the case file. The Prosecutor stated that he proved beyond doubt that the Accused carried out the criminal acts they were charged with in the manner, at the time and in the place, and under the circumstances referred to in the Indictment.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The Prosecutor stated that he proved the existence of war and armed conflict in the Kotor Varoš Municipality during the relevant period, which stems from the respective decisions of the Presidency of the Republic of B-H declaring and terminating the state of war and from the witnesses' statements.

In the closing argument the Prosecutor stated that at the time of the perpetration the Accused were members of the Kotor Varoš TO, organized in several detachments, which follows from the list of the Kotor Varoš TO and from the respective Unit Personal Files for the Accused Fikret Planinčić and Sead Menzil.

The Prosecutor also argued that it was established on the basis of the examined Prosecution witnesses' statements that the Accused, together with other members of the Kotor Varoš TO, carried out an attack against the civilian population of the village of Serdari, operating from the direction of the village of Hanifići and the hamlets of Dukići and Bencuzi.

The Prosecutor added that owing to the surviving witnesses' statements he proved that the attack was carried out in the early morning hours on 17 September 1992 from several directions, namely, the hamlets of Bencuzi and Dukići.

The Prosecutor emphasized that he fully proved the participation of the four Accused with the witnesses' statements and the adduced documentary evidence.

In the closing argument the Prosecutor also commented on the status of the victims, stating that all persons who had been there on that morning had the status of civilians. The Prosecutor based such an assertion on the ICTY Judgment number IT94-1-A, which took the view that international humanitarian law accepts and provides a broader interpretation of "civilian persons" so as to include all persons taking no active part in the hostilities, including even members of armed forces who have laid down their arms and those placed *hors d'combat*. The Prosecutor particularly referred to the report of the Commission of Experts Established Pursuant to Security Council Resolution 780 that concluded with regard to the situation in the former Yugoslavia: "A Head of a family who under such circumstances tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

defence guard doing the same, even if they joined hands to try to prevent the cataclysm."

2. Defense

A. The Accused Fikret Planinčić

The Defense Counsel for the first Accused Fikret Planinčić did not deny in his closing argument that on 17 September 1992 there existed a state of war in Bosnia and Herzegovina and an armed conflict between the Army of Republika Srpska and the Bosniak and the Croat armed population of the Kotor Varoš Municipality.

The Defense did not contest that an attack on the village of Serdari took place and that 16 persons aged from 4 to 60 were killed and two wounded in the attack.

However, the Defense claimed that not all persons who were in the village of Serdari on 17 September 1992 were civilians, that is, enjoying the protection belonging to civilians, and that for this reason Serdari should be regarded as a settlement defended by military. The Defense also claimed that the objective was not to attack the civilian population, but to neutralize and seize the artillery at certain locations that had shelled the soldiers and civilians who lived in the villages of Večići and Bilice.

Finally, the Defense contested the Accused Fikret Planinčić's participation in the relevant events.

The Accused Fikret Planinčić stressed that he was pleased that he had not participated in the relevant events and that he had to express sympathy with the injured parties.

B. The Accused Rasim Lišančić

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The Defense Counsel for the second Accused Rasim Lišančić stressed in his closing argument that with the adduced evidence the Defense contested the allegations in the Indictment that Rasim Lišančić participated in the relevant events, claiming that he was not a member of either a military or a police formation or the Kotor Varoš TO. The Defense Counsel stressed that it was not contestable that the event that Rasim Lišančić was accused of indeed happened, or that witness Gina Serdar Kukrić was abused, but he stated that it was done by Rasim's brother Muharem Lišančić, and that the witness erred about the identity of the perpetrator (*error in persona*).

The Accused Rasim Lišančić stated: "May justice win even if the world should perish!"

C. THE ACCUSED SEAD MENZIL

The Defense Counsel for the Accused Sead Menzil denied in his closing argument the Prosecution's averment that it was an attack against the civilian population, but claimed that in the early morning of 17 September 1992 there was an armed combat between the warring parties – the VRS and the Kotor Varoš TO and the HVO, as part of the conflict that lasted from June 1992 to November 1992 in the greater area of the Kotor Varoš Municipality.

The Defense Counsel also stressed that he proved in the course of the proceedings that the Accused Sead Menzil did not undertake a single action referred to in the Indictment or give a significant contribution to the undertaking of those actions.

Finally, the Accused Sead Menzil stated that he agreed with his Counsel's arguments and added that he had never been in Serdari, except for the site visit in the course of the current proceedings. The Accused also stated that he had not been in Slavko's house ever in his life, that he was a target of blackmail when he became a councilor, and that, failing to heed the blackmail requests he was told he would be accused of war crimes. Finally, he stated that he had never known Gina Serdar.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

D. THE ACCUSED MIRSAD VATRAČ

The Defense Counsel for the fourth Accused **Mirsad Vatrač** also contested in his closing argument that the village of Serdari was undefended and that the Accused Mirsad Vatrač participated in the events of 17 September 1992. The Defense Counsel claimed, corroborating the claim with the adduced evidence, that the Accused had been wounded just before the event concerned and that he walked with cane, for which reason he could not have participated in the events he was charged with.

The Accused Mirsad Vatrač stated that he completely agreed with his Defense Counsel's statement and added that certain witnesses who had testified under oath had not told the truth and afterward boasted that they profited from it.

IV PROCEDURAL DECISIONS

A. DECISION TO REVOKE PROTECTION MEASURES FOR WITNESS M-1

At the hearing for the resumption of the main trial held on 25 September 2012 upon the motion of the Prosecutor and after the examination of a witness, the Court rendered a decision revoking protection measures for witness (M-1) Pašo Čirkić ordered pursuant to the Decision of the Court of B-H No. S1 1 K 006006 11 Krn of 5 October 2011.

The Court had in mind the statement of witness Pašo Čirkić that he wanted to testify as Pašo Čirkić, that he wanted the previously ordered measures to be terminated since nobody had exerted pressure on him, that he wanted to testify publicly and that he had consulted with his family about this matter.

B. EXCLUSION OF THE PUBLIC

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

At the hearing for the resumption of the main trial held on 9 April 2013, the Defense Counsel for the fourth Accused Mirsad Vatrač, Attorney Fadil Abaz, informed the Court that Defense witness Šefik Čirkić was afraid to testify and that he requested to be granted protection measures. Pursuant to Article 235 of the CPC B-H, the Court rendered a decision to exclude the public from a part of the main trial in the interest of the witness. After the Court examined the witness, who explained why he feared to testify publicly, the Court rendered a decision that further hearings would be open to public as it did not find the exclusion of the public to be justified.

Also, for the purpose of preserving confidentiality of the personal information of the witnesses who had been granted protection measures by the ICTY, the public was partially excluded from the main trial hearings on 8 October and 22 October 2013.

C. ELAPSE OF PERIOD OF 30 (THIRTY) DAYS

Article 251(2) of the CPC B-H sets forth that: “The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has changed or if the adjournment lasted longer than 30 days but with consent of the parties and the defense attorney, the Panel may decide that in such a case the witnesses and experts shall not be examined again and that the new crime scene investigation shall not be conducted but the minutes of the crime scene investigation and testimony of the witnesses and experts given at the prior main trial shall be used.”

Given that more than 30 days elapsed between successive main trial hearings of 10 April 2012 and 5 June 2012, as well as 25 June 2013 and 20 August 2013, in application of the referenced statutory provision and with prior consent of the parties and the Defense Counsel, the Panel decided not to recommence the main trial from the beginning, but to resume it and use the evidence adduced earlier in the trial.

D. DECISION DISMISSING THE MOTION TO ADDUCE CERTAIN EVIDENCE

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

At the resumption of the main trial held on 22 October 2013, the Court dismissed the motion of the Defense Counsel for the Accused Sead Menzil of 2 October 2012 in the part relative to the examination of the witness referred to under number 15.

In the Motion of 2 October 2012, the Counsel notified the Court about the evidence he planned to adduce in favor of the Accused Menzil.

Under number 15 the Defense proposed the examination of the witness who was to testify about the manner and the location where a statement was taken from Jozo Barić and about the other undertaken investigating actions, that is, the manner in which the evidence was collected, and about the legality of the proceedings that were conducted during the war before the District Military Court in Banja Luka against Jozo Barić and others regarding the events in Serdari on 17 September 1992.

With respect to the motion for the examination of the referenced witness, it should first be stressed that it was observed only afterward that this person had been granted protection measures by the ICTY.

There exists ample correspondence with the Defense Counsel for the Accused Menzil about the conditions and measures that should be applied to enable the examination of the referenced witness, of which there is relevant documentation in the case file. In the letter dated 10 October 2013, the Defense Counsel concluded: "*The mechanism for the international criminal tribunals of the UN does not function and there is no coordination as it is yet to be set up* …." due to which "*at the request of the witness, [he] had to give up the application under the mechanism for the ICTY"*.

In the quoted document the Defense Counsel noted that this witness was relevant for the reasons referred to in an earlier motion.

It needs to be stressed at this point that over a considerably long period of time significant efforts were made to eliminate the procedural obstacles in order for the witness who had been granted protection measures by the ICTY to be able to attend the main trial in the case at hand.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

However, notwithstanding potential procedural obstacles and deficiencies, it should be stressed that pursuant to Articles 239 and 263 of the CPC B-H the Court has discretion to eliminate everything that prolongs the proceedings and to refuse presentation of the evidence that is unnecessary.

In this context, the Panel considered the issue of examination of the witness proposed by the Defense Counsel for the Accused Menzil and concluded that the Counsel did not offer sufficient argument about the importance of this witness' testimony.

With respect to the legality of certain pieces of evidence, it should be noted that the record of examination of Jozo Barić was not tendered into the case file, so the witness' potential challenging of the legality of this record would have no significance for these criminal proceedings.

Also, in the similar vein the Panel analyzed the issue of legality of and adherence to procedural guarantees in the proceedings conducted before the District Military Court in Banja Luka.

It should also be pointed out that certain documentary evidence from the case file of the District Military Court was tendered into this case file (Crime Scene Investigation Record, Exhibit T-5, to which the respective Defense Counsel did not have any objection; Photo-documentation, Exhibit T-6; Photograph of Serdari made in 1992, Exhibit T-14; Photo-documentation of the village of Serdari, T-38; Medical History for Milena Bencuz, Stana Serdar and Radmila Serdar, T60, T-61 and T-62 respectively), in which context the Defense did not provide arguments why the examination of the contested witness would be important.

Therefore, given that the Defense Counsel did not offer a more comprehensive argument that would have indicated the need to examine the contestable witness in these proceedings, and that after several-month-long proceedings the Counsel gave up the request for obtaining consent from the ICTY and the Mechanism, which would have implied additional prolonging of the proceedings, pursuant to the referenced provisions, the Court dismissed the Defense motion for the examination of the witness listed under number 15 in the Defense motion dated 2 October 2012.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

At the hearing held on 30 October 2012, the Court dismissed the Prosecution motion that the statement of Draženko Dukić be read out, given that the motion was not in line with Article 273(2) of the CPC B-H since this witness simply did not want to testify and did not fall in the category of persons whose presence the Court was not able to secure.

At the same hearing the Panel also refused the motion for the examination of Prosecution witness Jozo Barić and witness Drago Bandal, given that they were in the Republic of Croatia and that the Court was not able to secure their presence.

It should be added here that the Court has made some efforts to organize testifying via video link, but it turned out impossible due to technical problems.

Finally, on 8 October 2013, the Panel dismissed the motion of the Defense Counsel for the fourth Accused for re-examination of witness Nedeljko Sakan, who was to comment on the arguments of expert witness Dragomir Keserović.

As stated in Attorney Fadil Abaz's Motion of 7 October 2013, potential discrepancies constitute the circumstances that are addressed in the closing arguments and that the Court should give its final stance on when evaluating each piece of evidence and its correspondence with the rest of the evidence.

E. DECISION OF THE COURT TO DISMISS THE PROSECUTION MOTION TO AMEND THE INDICTMENT PURSUANT TO ARTICLE 275 OF THE CPC B-H

On 11 November 2013, pursuant to Article 275 of the CPC B-H, the Prosecution submitted to the Court amended and specified operative parts of the Indictment No. T20 0 KTRZ0000403 07 of 21 November 2011 and the Indictment No. T20 0 KTRZ0000403 07 of 7 October 2011.

With respect to the submitted amended operative parts, it should primarily be stressed that it is beyond dispute that a Prosecutor has discretion to amend the Indictment at the main trial in line with the quoted provision of Article 275 of the CPC B-H.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Also, this discretion is restricted only to the amendments of the Indictment in accordance with the adduced evidence, whereas in case when new criminal acts, that is, new criminal offenses of the Accused are added in an Indictment, the Court must refer such Indictment to a Preliminary Hearing Judge, given that the current CPC B-H does not stipulate the institution of supplementary Indictment.[1]

However, in the case at hand one should bear in mind the context in which the legislator formulated the provision of Article 275 of the CPC B-H, as well as the commentary on Article 276 of the CPC B-H.

It is obvious that the legislator envisaged a possibility that amended Indictment is related to the state of the facts established in the course of the main trial, in line with the adduced evidence. However, one should also have in mind the provision of Article 276 of the CPC B-H stipulating that after the presentation of evidence, the Court shall ask the parties and Defense Counsel if they have additional evidentiary motions, whereupon the Court shall declare the evidentiary proceedings to be completed, that is, that under the chronology from the CPC B-H the Prosecutor shall have an opportunity to amend the Indictment before the completion of the evidentiary proceedings.

In the case at hand it should be noted that the evidentiary proceedings were declared completed at the hearing held on 22 October 2013, when, following the Court's question if he had any additional evidentiary motions pursuant to Article 276 of the CPC B-H, the Defense Counsel for the third Accused tendered Exhibit O-III-73, whereupon the Presiding Judge declared the evidentiary proceedings to be completed and scheduled the closing arguments. The presentation of closing arguments commenced on 13 November 2013, when the Prosecutor presented his view of the proceedings conducted before the Court.

Therefore, given that the Prosecutor submitted the amended Indictment after 22 October 2013, that is, that he did not move the Court to postpone the main trial and its decision on the completion of the evidentiary proceedings, and that the CPC B-H does not

[1] *Commentary on the Criminal Procedure Codes in Bosnia and Herzegovina*, Council of Europe/European Commission 2005; p. 699.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

stipulate that presentation of new evidence may be proposed to the Court following the completion of evidentiary proceedings, which is a possibility that is inseparably linked with the rights of the Accused related to the procedural institution of amended Indictment, the Court dismissed the Prosecution motion that the operative part of the previous Indictments be amended.

F. DECISION ON THE MOTION TO ADMIT PROVEN FACTS ESTABLISHED BY ICTY

On 5 March 2012, the Panel rendered a decision partially granting the motion by the Defense Counsel for the Accused Sead Menzil, Attorney Adil Draganović, submitted to the Court on 4 January 2012.

Thereby, the following facts established in the ICTY Trial Chamber Judgment in *Prosecutor v. Radoslav Brđanin (IT-99-36-T)* were admitted as established facts:

In the Kotor Varoš Municipality, the take-over of power by the SDS was achieved in June 1992 through attacks by Bosnian Serb armed forces on the town of Kotor Varoš and the villages of Večići, Hrvaćani, Ravne, Hanifići … In the village of Večići, the Bosnian Serb forces faced considerable Bosnian Muslim armed resistance and fighting continued for months. Bosnian Serb forces shelled Večići on a regular basis until October 1992 …

The remainder of the motion by Counsel Adil Draganović was refused as unfounded.

Referring to Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of B-H and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in B-H (Law on Transfer), in his motion of 4 January 2012 the Defense Counsel moved the Court to accept as proven the facts established in the ICTY Judgments in *Prosecutor v. Radoslav Brđanin (IT-99-36-T)* and *Prosecutor v. Momčilo Krajišnik (IT-00-39-A)*.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The motion concerned the admission of 103 paragraphs from the ICTY Judgments in *Prosecutor v. Radoslav Brđanin (IT-99-36-T)* and 89 paragraphs from the ICTY Judgments in *Prosecutor v. Momčilo Krajišnik (IT-00-39-A)*.

It is important to note that the proposed facts concern the events in Bosnia and Herzegovina from 1991, the decision on the establishment of the Assembly of the Serb People in Bosnia and Herzegovina, and the establishment and the functioning of the Autonomous Region of Krajina, and that they only partially concern Kotor Varoš Municipality.

Finally, none of the proposed facts concerns the very event that the Accused Sead Menzil is charged with -- the tribulations of the people in the village of Serdari.

Article 4 of the Law on Transfer and Rule 94 of the Rules of Procedure and Evidence (RoPE) stipulate that, at the request of a party or *proprio motu*, the Court, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.

The Court gave an opportunity to the other Accused, their Defense Counsel and the Prosecutor, to file with the Court their written submissions regarding the motion of the Defense Counsel for the Sead Menzil.

When deciding about the motion the Court was guided by the criteria established by the ICTY in *Prosecutor v Momčilo Krajišnik (IT-00-39-T)*.

For the established criteria to be satisfied, a fact must be:

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

1. A fact must be pertinent to the case: Based on this criterion, the Court established that the proposed facts primarily concern the chronology of events in the whole of Bosnia and Herzegovina, which is logical considering the fact that the relevant ICTY cases pertained to very large areas and only marginally addressed the events in the Municipality of Kotor Varoš. Mindful of the fact that the case before the Court concerned one event in the Kotor Varoš Municipality, which happened in the morning of 17 September 1992 and lasted for less than an hour, the Panel found that the general events in B-H, especially those of political nature, are not of importance for the criminal proceedings at hand. As noted earlier, none of the proposed facts concerns the events in Serdari, therefore, in application of the referenced criterion, the Panel refused all proposed facts except the facts in paragraph 111 of the ICTY Trial Panel Judgment in *Prosecutor v Radoslav Brđanin (IT-99-36-T)*.

2. A fact must be distinct, concrete and identifiable: In order for a fact to be distinct, concrete and identifiable, it must be taken from specific paragraphs of a trial or appeal judgment.[2] Moreover, if taken out of its context, a fact must be comprehensible and have the same, or at least a similar, form as the one that was adjudicated in the trial or appeal judgments from which it has been taken.
In application of this criterion, and mindful of the need for an accepted fact to be as clear and precise as possible, when admitting the fact from paragraph 111 of the ICTY Judgment in *Prosecutor v Radoslav Brđanin (IT-99-36-T)* the Panel omitted a part of the text.

The fact thus accepted retained its original meaning, but is also considerably more distinct and precise.

3. A fact must be restricted to factual findings and must not include legal characterizations: While the ICTY jurisprudence tends to exclude every fact that includes legal formulations and primarily leads to legal conclusions[3], the Court of B-H

[2] *Prosecutor v. Prlić*, IT-04-74-T of 7 September 2006.
[3] ICTY Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B) in *Prosecutor v. Željko Mejakić et al.*, case No. IT-02-65-PT, of 1 April 2004, p. 6, excluding the facts on the existence of "a policy

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

has taken a somewhat different stance that the facts indirectly containing elements of a criminal offense may be acceptable to a certain extent[4].

This Panel has retained the restrictive approach and excluded all proposed facts that contained any legal conclusions or legal qualifications related to the manner of perpetration of the criminal offense, as in that way a specific act of commission is placed in a wider context of war events.

4-5. A fact must not be subject of an appeal or ongoing dispute: Only the facts established in final and legally binding decisions may be admitted[5], that is, the Court cannot admit adjudicated facts if they are contested in an appeal.

6. A fact cannot relate to the acts, conduct or mental state of the Accused: The Court may admit as established the facts concerning the responsibility of the Accused provided that they do not relate to the acts, conduct or mental state of the Accused.[6] This concerns the facts related to the conduct of other persons who participated in a specific act (in addition to the accused), or the facts related to the acts and conduct of the persons subordinated to the accused.

7. A fact is not the subject of (reasonable) dispute between the parties in the present case: Only the facts that are not the subject of (reasonable) dispute between the parties in the case at hand may be admitted as established.

8. A fact cannot be based on plea agreements in previous cases: For a fact to be capable of admission it should be truly adjudicated and not based upon an agreement

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of perpetration of inhumane acts against civilian population", and "acts committed on the widespread and systematic framework basis."

[4] See decisions on established facts in the cases of *Radovan Stanković,* No. X-KR-05/70, 13 July 2006; *Gojko Janković,* case No. X-KR-05/161, 4 August 2006; *Momčilo Mandić,* case No. X-KR-05/58, 5 February 2007; *Krešo Lučić,* case No. X-KR-06/298, 27 March 2007.
See also decisions of the Court of B-H in the *Neđo Samardžić* Trial Verdict, case No. X-KR-05/49, 7 April 2006; *Dragoje Paunović* Trial Verdict, case No. X-KR-05/16, 26 May 2006; *Boban Šimšić* Trial Verdict, case No. X-KR-05/04, 11 July 2006, para. 49; *Marko Samardžija* Trial Verdict, case No. X-KR-05/07, 3 November 2006; *Radislav Ljubinac Trial Verdict*, case No. X-KR-05/154, 8 March 2007.

[5] *Prosecutor v. Ljubičić*, IT-00-41-PT, Decision of 23 January 2003.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

between parties to previous proceedings, such as agreed facts underpinning a plea agreement.[7] Truly adjudicated facts are the facts extracted from cases for which the Appeals Chamber has ruled on the merits or has not been called upon to do so.[8]

9. A fact does not impact on the right of the Accused to a fair trial: The principle of judicial economy is more likely to be frustrated in this manner where the judicially noticed adjudicated facts are unduly broad, vague, tendentious, or conclusory.[9] In the final analysis of the facts, a Panel shall retain its discretion to refuse even those facts that fulfill all referenced conditions if the facts, as a whole, violate the right of the Accused to a fair trial.

The objective of the legislator when giving discretion to the Court to admit adjudicated facts "as proven" involves judicial economy and the advocacy of the accused's right to trial within a reasonable time, but also consideration for the interest of witnesses in order to reduce the number of courts before which they must repeat their testimonies that are often traumatic for them.

Such objective is also in line with the rights of the accused person to be tried without delay, as stipulated in Article 13 of the CPC B-H and Article 6(1) of the European Convention on Human Rights (ECHR). However, this objective must follow the principle of presumption of innocence; otherwise it would not be possible to avoid a situation of evidentiary proceedings d*e facto* ending to the detriment of the accused even before all evidence in a case has been adduced directly. The admission of adjudicated facts "as proven" does not rule out compliance with the presumption of innocence.

The Panel considers that the facts admitted in the case at hand are sufficient to give a starting point to the defense of the Accused Sead Menzil.

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[6] *Prosecutor v. Prlić*, IT-04-74-T, 7 September 2006.
[7] *Prosecutor v. Slobodan Milošević*, IT-02-54-T, 5 June 2002, p.3.
[8] Ibid, 5.
[9] ICTY Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex in *Vujadin Popović et al.*, case No. IT-05-88-T, 26 September 2006, para. 16.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The ICTY has similar objectives for the introduction and application of Rule 94 of the RoPE. However, this Court must be mindful of the fact that the rights of the Accused in this case must be secured in line with the statute of B-H and the ECHR. The Panel was mindful of Article 6 of the ECHR and Articles 13 and 15 of the CPC when exercising its discretion referred to in Article 4 of the Law on Transfer.

Also, admission as proven of the facts established in final ICTY judgments constitutes a reasonable presumption that a certain fact is accurate and that it does not need to be proven by the defense. Admission of each fact in no way affects the rights of the Prosecutor and the Defense Counsel for the other Accused to contest any admitted fact when presenting their case in the same manner as they would do with any other proposed fact about which a Defense Counsel has presented evidence. Likewise, the Court does not have to found its verdict on any fact that was admitted as adjudicated. The adjudicated facts admitted in this case shall be evaluated together with all the other evidence adduced at the main trial, and the decision on the importance attached to every single piece of evidence shall be rendered at the final deliberation of the Panel and referred to in the Verdict.

With respect to the facts in the remainder of the motion by the Defense Counsel for the Accused Menzil, the Panel notes that certain facts did not meet the above referenced criteria, primarily the criterion of relevance for the specific case as they pertained to the events not referred to in the Indictment, so the Panel did not analyze whether they met the other defined criteria.

Based on the foregoing, the Court rendered a decision pursuant to Article 4 of the Law on Transfer.

V APPLICABLE LAW

At the time of the commission the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) was in effect. The Assembly of the SFRY adopted it at a session

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

of its Federal Chamber held on 28 September 1976 and published it in the *Official Gazette of the SFRY* No. 44 of 8 October 1976.

After the declaration of independence, pursuant to the Decree Law of 22 May 1992, the CC SFRY was adopted as the law of the Republic of Bosnia and Herzegovina (with some minor amendments), and it came into effect on the day of its publishing. The CC SFRY was in effect in the Federation of B-H until 20 November 1998, in Republika Srpska until 31 July 2000, and in the Brčko District until 2001. The new Criminal Code of Bosnia and Herzegovina (CC B-H) came into effect on 1 March 2003, the new Criminal Code of the Federation of B-H came into effect on 1 August 2003, and the new Criminal Code of Republika Srpska on 1 July 2001.

One of the fundamental principles of criminal law, the principle of legality, is laid down in Article 3 of the CC B-H:

> "(1) Criminal offenses and criminal sanctions shall be prescribed only by law.
>
> (2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law."

Also, Article 4 stipulates:

> "(1) The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense.
>
> (2) If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied."

The exception to the referenced provisions is stipulated in Article 4a):

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

> “Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.“

In view of the referenced provisions, it follows that, as a rule, the law that was in effect at the time of the commission shall apply to the perpetrator (*tempus regit actum*).

The referenced provision of Article 4(2) of the CC B-H provides an opportunity to depart from this fundamental rule of criminal law only when it is in the interest of the accused person, that is, when it is established that the Criminal Code that came into effect after the perpetration is more lenient to the accused.

Also, the issue of evaluation of a more lenient law is the one that must be solved in each specific case and for whose proper solving it is necessary to analyze several criteria when comparing the old and the new law and their application *in concreto*, that is, in a concrete case.

However, with respect to the provision of Article 4(2), it should be noted that it is a provision in principle, that is, that the Criminal Code has not defined the standards for eliminating potential unclear issues regarding its application in practice.

When it comes to the need of application of a more lenient law, it should primarily be noted that the legislator did not define which criteria and in which order should be taken into account.

Law theory and practice offer certain answers regarding this issue.

In other words, except in a situation when a new law does not define as a criminal offense an act that the previous law did define as a criminal offense, for which reason the new law is obviously more lenient, in all other situations when we have an identical criminal offense with practically identical essential elements, incriminated by both laws, as is the case with the specific criminal offense of War Crimes against Civilians, it is necessary to analyze all circumstances that may be of importance in evaluation and conclusion on which law is more lenient to the accused in a specific case.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

These circumstances primarily concern the provisions on sentencing, that is, reduction of punishment (which law is more lenient in that respect), warning measures, potential accessory punishments, new measures that are applied as substitute for stricter punishments (for example, community service), security measures, legal consequences of conviction, and the issue of whether a new law envisages the basis for exclusion of unlawfulness, criminal responsibility or punishability.

Given that the acts of the Accused constitute a criminal offense under both the old and the new code, as noted earlier, in order to determine which law is more lenient on the perpetrator it is necessary to compare the sentence for the offense under the code at the time of the commission with the sentence under the code that is now in effect.

It should also be added that the legislator did not provide a precise definition as to the level of concretization required when evaluating the position of the accused, that is, whether evaluation of the application of the Criminal Code should be restricted to the criminal sanctions that a specific offense carries or whether a more comprehensive approach is required.

Such interpretation implies an analysis of the position of the specific accused regarding all legally relevant facts, whereby the code with the more stringent prescribed punishment, when applied in its entirety, may lead to a more favorable position of the perpetrator.[10]

Article 142 of the CC SFRY defined War Crimes against Civilians as a criminal offense punishable with imprisonment of not less than five years or death penalty. The Criminal Code of B-H defined in Article 173 that War Crimes against Civilians carried a sentence of imprisonment of not less than 10 years or long-term imprisonment.

In view of the previous comparison of the respective stipulated sentences, it is clear that different questions and dilemmas may arise when determining which law is more favorable to the perpetrator, moreover given the fact that Bosnia and Herzegovina is obliged to comply with different international treaties, especially the ECHR, which makes

[10] See *Commentary on the CC SFRY*, Savremena administracija, 1982, p 21.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

a component part of the Constitution and which, together with its protocols, has priority over all other laws.

The obvious legal complexity of the problem of determining the law that is more lenient to the perpetrator resulted in differences in jurisprudence. The view taken initially was that Article 4 of the CC B-H did not constitute an obstacle to the application of this Code[11], but afterward, having exhaustively analyzed the position of the accused in certain cases, the Court of B-H took a stance that the CC SFRY was the more lenient law. Finally, following the Judgment of the European Court of Human Rights in *Maktouf and Damjanović v. B-H*, the Constitutional Court of B-H concluded that, with respect to the maximum prescribed punishment, the CC SFRY is generally more favorable to the perpetrator, as it lays down the strictest punishment more leniently.[12]

For the foregoing reasons and pursuant to Article 4 of the CC B-H, the Court concludes that in the case at hand the CC SFRY should be applied as the law in effect at the time of the perpetration, given that the later law is stricter, in the opinion of the Constitutional Court of B-H whose views are binding for this Court.

Based on the foregoing, the Court has applied the CC SFRY.

GENERAL EVALUATION OF EVIDENCE

In this case the Court evaluated the evidence in accordance with the CPC B-H primarily applying the presumption of innocence referred to in its Article 3, which embodies the general principle of law according to which the burden of establishing criminal responsibility of the accused person rests with the Prosecution, which must do so beyond a reasonable doubt.

Article 15 of the CPC B-H lays down the principle of free evaluation of evidence as one

[11] Decision of the Constitutional Court of B-H in the case No. AP 1785/09 of 30 March 2007.
[12] Decision of the Constitutional Court of B-H in the case No. AP 4126/09 of 22 October 2013, para 57.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

of the fundamental principles. According to this Article, an evaluation of the existence or non-existence of facts “shall not be related or limited to special formal evidentiary rules”, hence the value of evidence is not determined in advance either quality- or quantity-wise. The Court must evaluate every piece of evidence individually as well as its correspondence with the rest of the evidence, and based on those results draw a conclusion whether or not a fact has been proven. The evaluation of evidence includes its logical and psychological evaluation. However, free evaluation of evidence is restricted by the principle of legality (Article 10 of the CPC B-H).

In the course of the main trial the Court considered submissions objecting to the relevance, legality and authenticity of the evidence. The decision on the probative value was rendered at the end of the proceedings. The Court considered it necessary to be satisfied that the evidence was reliable in the sense that it was given voluntarily and that it was truthful and authentic. In this case the Court inspected every document in order to render a decision on its reliability and probative value. Article 10 of the CPC B-H (Legality of Evidence) reads: “The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.“

The Panel evaluated all adduced evidence, but in this Verdict it will comment only on the evidence relevant to its decision, and will elaborate on and present only the conclusions on the facts that are of essential importance for the decision.

Under Article 281 of the CPC B-H, the Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, conclude whether or not a fact has been proved. However, there is no statutory obligation to present every single piece of evidence in a verdict. Statutory obligation is to consider all presented evidence when rendering a decision. It would be inadequate to impose on any trial panel an obligation to elaborate in a verdict on every single piece of evidence presented at the main trial, that is, every testimony and every piece of documentary evidence.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

A Trial Panel has discretion to choose which legal arguments to consider. With respect to the conclusions on the facts, a Trial Panel is obliged to draw only those conclusions about the facts that are of essential importance for establishing the criminal liability under a particular count of an Indictment. It is not necessary to touch on every witness statement or every exhibit in the case file. This view was also presented by the ICTY Appeals Chamber in *Mucić et al.*: "The Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial."

Article 281 of the CPC B-H reads that the Court shall reach a verdict solely based on the facts and evidence presented at the main trial.

CREDIBILITY OF WITNESSES

The Panel had an opportunity to directly observe the witnesses, their demeanor, voice, position, bodily and emotional reactions to the questions, and non-verbal behavior toward the parties and the Attorneys. When evaluating the statements of witnesses who testified before the Court, the Panel took into account to the utmost degree their demeanor and character.

The Panel in this case examined 24 witnesses and two expert witnesses proposed by the Prosecution, three witnesses proposed by the Defense Counsel for the first Accused Fikret Planinčić, the Accused Planinčić himself in the capacity as a witness, one witness of the Defense for the Accused Rasim Lišančić, and the Accused Lišančić as a witness. The Accused Sead Menzil also testified in his own favor, and 10 witnesses and one expert witness were examined at the proposal of his Defense Counsel, while four witnesses were examined at the proposal of the Defense Counsel for the fourth Accused.

The Panel evaluated the credibility of the witnesses starting from the presumption that every witness wanted to tell the truth. Whenever possible, the Panel tried to harmonize

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

the statements of the witnesses, and in the cases where it was not possible, the Panel evaluated individual testimonies, first with respect to a probability that the differences were a result of honest mistakes in memory or perception, and then with respect to a probability that a witness tried to mislead the Panel.

SUBSTANTIVE LAW

The Prosecutor's Office of B-H filed an Indictment against the Accused Fikret Planinčić, Rasim Lišančić, Sead Menzil and Mirsad Vatrač charging them that with the acts referred to in the factual description of the Indictment they committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (f) of the CC B-H, and Rasim Lišančić also in violation of Sub-Paragraph (c) as read with Article 180(1), all as read with Article 29 of the CC B-H.

However, the Court of B-H found the Accused guilty of commission of the criminal offense of War Crimes against Civilians under Article 142(1) of the CC SFRY, for the reasons explained by the Panel in the section on the applicable law.

War Crimes against Civilians in violation of Article 142 of the CC SFRY

Article 142(1) reads: “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 placed *hors de combat*, 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, torture, inhuman treatment, ……”.

Therefore, Article 142(1) of the CC SFRY stipulates that certain elements must be satisfied for the conduct of the Accused to qualify as War Crimes against Civilians. In its jurisprudence the Court of B-H took the position that all war crimes must fulfill the following criteria:

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

- the act must be committed in violation of rules of international law effective at the time of war, armed conflict or occupation,
- the violation must be committed at the time of war, armed conflict or occupation,
- the act of the perpetrator must be related to war, armed conflict or occupation,
- the accused must order or commit the act.

Article 142(1) of the CC SFRY also stipulates that the accused must act in violation of rules of international law.

The Panel, therefore, must also base its decision on special rules of international law, of either conventional or customary nature, that applied in the period defined in the Indictment.

In that context the Trial Panel notes that in the other war crimes cases tried before the Court of B-H the Panels also referred to the application of Common Article 3 of the Geneva Conventions. According to the reasonings of the Verdicts by the Court of B-H, the *ratio legis* for it is that Common Article 3 has become a part of customary law, and that, therefore, it is necessary and sufficient for the Court to determine the violations referred to in this Article, which essentially constitutes "the Convention in a nutshell", instead of conducting the procedure of establishing whether an armed conflict is international or non-international by its nature and, depending on the result, applying the relevant Geneva Convention and the adequate Additional Protocol.[13]

After an analysis with respect to the criminal offense that the Accused were charged with the Panel established a violation of Common Article 3(a) and (c) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

With respect to the mental state, the Panel emphasizes that it is not necessary for a person to know that these international norms exist. It suffices that the person acted

[13] See more in: Ahmed Mešić*, Primjena ženvskih konvencija na unutrašnje oružane sukobe [Application of Geneva Conventions to Non-International Armed Conflicts*], OKO (2011) 13., p. 36.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

contrary to them. It is never a requirement that the accused person should be able to define the legal qualifications of the criminal offense that he committed, but should only be aware that his acts and intentions are criminal. It is up to the Panel to establish what crime was committed at that time.

However, for a person to be found guilty, either as a perpetrator or an order-issuing authority, he must possess a specific *mens rea* that is applicable to the criminal offense he is charged with.

With respect to the second criterion that the violation must be committed at the time of war or armed conflict, the Panel is of the opinion that *"an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".*

The Panel has found that there existed an armed conflict in the territory of the Kotor Varoš Municipality from early June 1992 to November 1992, which was also established on the basis of the Prosecution documentary evidence, primarily Exhibit T-69 (Decision of the Presidency of the Republic of B-H on the Declaration of the State of War of 20 June 1992), and Exhibit T-70 (Decision of the Presidency of the Republic of B-H on the Termination of the State of War of 28 December 1995), and the statements of the witnesses. The parties to these proceedings did not challenge these facts, either.

The Panel has concluded that this element was proven beyond any reasonable doubt.

The third criterion is that there has to be a nexus between the acts of the Accused and the armed conflict. Actually, "[T]he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, 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." This requirement has been met if the alleged crime was committed in the furtherance or under the guise of an armed conflict. ICTY Trial Chamber in *Prosecutor v.*

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Dragoljub Kunarac et al. states: “Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting. …”

Based on the evidence adduced in this case, the Panel concluded that the criminal offense referred to in the Indictment is closely related to the armed conflict. This conclusion will be reasoned in more detail further below.

Finally, the last criterion sets forth that the perpetrator must either directly perpetrate the criminal offense or order another to perpetrate it. The Panel notes that this concerns the mode of liability of the Accused and that it does not constitute an element of the criminal offense. The Indictment reads that the Accused committed the criminal offense in violation of Article 180(1) and Article 29 of the CC B-H. This will be elaborated on in the section of the Verdict entitled *Individual Criminal Responsibility*.

FACTUAL FINDINGS

Having evaluated every adduced piece of evidence and its correspondence with the rest of the evidence, the Court established beyond a reasonable doubt that the Accused committed the criminal offense of War Crimes against Civilians in violation of Article 142(1) of the CC SFRY.

During the evidentiary proceedings the Court evaluated the existence of the essential elements of the referenced offense, and the burden of proof lay with the Prosecution.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

First of all, the Court has found that the village of Serdari and the neighboring hamlets were outside the combat zone, which was specific in that area and set along the Teslić–Kotor Varoš road between the village of Večići and the local community of Vrbanjci, while the other areas were non-homogenous enclaves populated by the local civilian inhabitants and civilian refugees who had fled from the neighboring villages and hamlets, which the troops of the parties to the conflict would enter as required in order to protect them.

It was established beyond a doubt that the inhabitants, mostly the elderly and the underage unfit for military service, used to keep night guards armed with small arms, which does not change the character of that place or call into question the Court's conclusion that it was not a legitimate military target, that is, a location defended by military.

The Court also established beyond a doubt that there did not exist a fixed combat line between the warring parties in that area, there were no military units staying in the village, while the village guards kept only at nighttime were customary for all populated settlements close to the areas of armed conflicts, and this holds true for all warring parties in B-H. The Court established the foregoing on the basis of the statements of Prosecution witnesses Nedeljko Narić, Aleksandar Petrović and Slobodan Župljanin.

Prosecution witness Nedeljko Narić stated in his evidence that a mortar platoon had been deployed on the Orića Brdo [Orića Hill; translator's note], some 800 meters away from the village of Serdari, and that it was relocated to Sakani, some 2 kilometers away from Serdari, in September 1992, prior to the events concerned. According to this witness, there were no troops in the village except villagers organized into guards, and everyone kept some kind of guard at that time. The witness said that he did not see trenches or guard posts when he would come to Serdari.

Consistently with witness Narić, Prosecution witness Aleksandar Petrović also said that there were no troops in the village of Serdari, that is, members of any of the companies that covered the area of some 3 kilometers stretching from the village of Dabovci to

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Donji Vrbanjci on the Banja Luka–Teslić road. If there had been any military formation in the village of Serdari, it would have belonged to his unit. The witness stated that his unit covered only the Banja Luka-Teslić road and that they could not engage in any other activity because the terrain was not compact, and that they intervened occasionally when individual incidents occurred.

Prosecution witness Slobodan Župljanin, who was also a member of the 22nd Infantry Brigade at that time, that is, a Battalion Commander, described in his evidence the position of the Serb forces that were deployed along the Banja Luka–Teslić road that ran through the settlement of Vrbanjci, the seat of the Battalion and the company. The witness explained that the unit's task was to secure the road and disarm paramilitary formations, and that one company was deployed for that task, while the other company was on the left bank of the Vrbanja River in the village of Vasiljevići.

Witness Župljanin stated that the mortar platoon, which had previously been deployed on the Orića Brdo, was relocated in early September to Sakani, even more farther from the village of Serdari.

Answering the questions, the witness explained as a military person the use of this military formation, that is, that a mortar platoon's task is to provide support to infantry units. To the Prosecutor's question, he explicitly said that the mortar platoon had not been connected in any way to the defense of Serdari. Explaining the position of the mortar platoon, the witness stated that the platoon was below the village of Sakani, oriented toward Večići, whereby he emphasized once again that it did not play any role in the defense of Serdari.

The fact that the village was not defended also follows from the Excerpt from the Minutes of the 82nd session of the War Presidency of Kotor Varoš Municipality held on 18 September 1992 (O-III-9), at which Battalion Commander Slobodan Župljanin reported about the attack and the torching of the village of Serdari. The Minutes read that the village of Serdari was attacked and that no troops provided security to it.

Based on the foregoing, the Court concludes that the resistance that some of the villagers offered does not inherently give the village of Serdari the status of a legitimate military target and does not contest the civilian status of its inhabitants, either. It is a common knowledge that, at that time, while the war was raging, people who lived in the areas close to the conflict acquired weapons in various ways and kept village guards, thus trying to protect themselves from potential attacks by the opposite party, about which the Accused Fikret Planinčić testified as well. The Court drew the conclusion on the existence of village guards primarily based on the testimony of witness Dalibor Serdar, underage at that time, who also took part in the guards. Witness Dalibor Serdar stated that the persons who kept guards wore civilian clothes and patrolled around their own houses and outbuildings, and that there were no special fortifications for the defense of the village.

Prosecutor witness Joco Serdar, who participated in the guards, also testified about the referenced circumstances. This witness also stated that guards were kept by the underage and the elderly, and, consistently with witness Dalibor Serdar's statement, he said that there were no fortifications in the village.

Also, with respect to the consequences of the attack, that is, the number of those killed and wounded in the village and the torching of the buildings, it should be stressed that there was no major dispute among the parties. However, when establishing the relevant facts, the Court primarily took into account the documentary evidence T-42 through T-58 (Death Certificates), the finding of expert witness Željko Karan (T-59), medical documentation (Medical History for Radmila Serdar, Stana Serdar and Milena Bencuz, Exhibits T-60 -- T-62), Crime Scene Investigation Record (T-5), and Photo-documentation (T-6). Therefore, it has been established beyond a doubt that in the attack on the village of Serdari the following persons were killed: Slavko Bencuz (born in 1937), Slavojka Bencuz (born in 1971), Drago Serdar (born in 1945), Slavko Serdar (born in 1932), Slaviša Serdar (born in 1971), Mirko Serdar (born in 1962), Branko Serdar (born in 1936), Bosiljka Serdar (born in 1939), Danka Serdar (born in 1938), Jelenko Serdar (born in 1961), Radmila Serdar (born in 1971), Nikola Dukić (born in 1953), Spomenka Tepić (born in 1973), Ljubica Tepić (born in 1952), Slobodanka Tepić

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

(born in 1980), and Snježana Tepić (born in 1988). The following persons were wounded: Mileva Bencuz; Radmila Serdar, **five months pregnant** at that time; Stana Serdar, who suffered burns to her hands and face. Property was destroyed in the attack by torching the houses of Drago Serdar, Slavko Serdar and Danka Serdar, in which the bodies of Slaviša Serdar, his wife Spomenka Tepić, and Slavko Serdar burned down, as well as by torching the outbuildings in which the cattle locked inside burned down.

The Panel drew the conclusion that all four Accused participated in the attack on the civilian population of the Serdari village in the early morning on 17 September 1992 on the basis of the surviving eyewitnesses' statements, additionally corroborated by the statements of other witnesses, the Prosecution and the Defense ones alike.

Mileva Bencuz, Gina Kukrić, Dalibor Serdar, Radmila Serdar and Stojanka Serdar testified about it in detail.

Witness Gina Kukrić (nee Serdar) is a key witness in this case for a good reason, as she was an eyewitness from the beginning to the end of the attack on the village, whereupon she was taken by the attackers to the village of Bilice.

Her statement is consistent, precise and logical, especially given the fact that she testified about these events in an almost identical manner both before the District Court in Banja Luka in another criminal case and in the investigation in this criminal case. She described convincingly everything she saw in the course of the attack and its consequences, and also identified some of the attackers.

She also identified some persons who are not the subject of arraignment. She immediately identified some of the attackers, such as Rasim Lišančić, Sead Menzil and Mirsad Vatrač, providing convincing reasons for it. She identified Fikret Planinčić having been presented a photo-documentation that was tendered into the case file.

All of this indicates that she did not have any reason to groundlessly charge any of the Accused with something that he had not really done. Her statement about the identity of

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

the Accused Lišančić, Menzil and Vatrač abounds in details on the basis of which the Court concluded beyond a doubt that the said Accused were indeed in Serdari on the referenced occasion, armed, and, as such, active participants of the attack.

Planinčić was identified on the basis of the photo-documentation presented to the witness by the Prosecutor during the examination, because the witness had previously said that, in addition to the persons she had identified immediately, she could also identify some other attackers whose faces she remembered but whose first and last names she could not remember. On that occasion, in addition to Planinčić, she also recognized on the photographs some other participants who were not charged in these criminal proceedings. This statement of witness Gina Kukrić identifying the attackers on the civilians in Serdari was also corroborated by statements of other witnesses who indirectly identified some of the attackers, namely the witness – injured party Joco Serdar and witnesses Radmila Serdar, Raza Smajić, Muhamed Sadiković, Ilija Šipura, Pašo Čirkić, Kemal Smajić, that is, both the Prosecution and the Defense witnesses.

In her testimony at the hearing held on 26 January 2012, witness Radmila Serdar described the course of the attack on her village and confirmed in particular that the attackers entered the house where she was, on which occasion she recognized Besim Čehić and also recognized the Accused Fikret Planinčić by his voice.

The witness also confirmed that only she and Slavko's wife survived of all the women and children who had hidden underneath the staircase, and that it was most probably en route to Vrbanjci after the attack that she commented on the identity of the attackers stressing that those were their neighbors.

In the context of witness Radmila Serdar's statement related to the identification of the Accused Fikret Planinčić, particular attention should be paid to Raza Smajić, witness for the Defense of the Accused Planinčić. Answering the questions during her examination on 30 October 2012, this witness recognized the Accused by his voice only, that is, she stated that she could not recognize him in the courtroom but that she recognized him

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

when she heard his voice, which, in her opinion, was the same as before the war, that is, very distinctive.

The statement of witness Joco Serdar should also be pointed out. At the hearing held on 10 April 2012, he confirmed that on the occasion concerned he could recognize the Accused Fikret Planinčić by his voice, as a participant of the attack.

Also deserving attention are the statement of witness Muhamed Sadiković, who had indirect and general information about the events of 17 September 1992, the statement of witness Kemal Smajić, who also presented his information about the relevant event, and finally the statement of witness Pašo Čirkić, who noted that at least two days prior to the event he had been aware of an imminent operation, of which he had learned while keeping guard at guard post number six, and that he also had an opportunity to see the Accused Fikret Planinčić and Mirsad Vatrač when they returned from the operation.

The Defense Counsel for the Accused Fikret Planinčić tried to contest the statements of Prosecution witnesses Radmila Serdar and Joco Serdar, who, as noted earlier, stated that they recognized the Accused by his distinctive voice, explaining that the Accused's voice meanwhile changed because of an injury to his lungs. The Court did not accept this assertion since Defense witness Raza Smajlović recognized the Accused by his voice in the courtroom, long time after his wounding, and not by his physical appearance, which beyond doubt leads to the conclusion that at the time concerned the Accused also had the same distinctive voice as nowadays.

The Court established that Fikret Planinčić and Sead Menzil were members of the units of the Kotor Varoš TO, which follows from the documentary evidence, primarily the Military Department Personal File for Sead Menzil and Unit Personal File for Sead Menzil (T-39), Unit Personal File for Fikret Planinčić (T-40), and the statements of the Accused. Although the Accused Lišančić and Vatrač had not been engaged militarily before the attack, by joining the attackers and actively participating in the attack, while armed, they *de facto* became members of a military unit and participated in the attack as such.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The Court did not accept the arguments of the Accused Fikret Planinčić during his testimony because it was in collision with the statements of the witnesses whose testimonies the Court fully trusted. When testifying in his own favor, the Accused Fikret Planinčić stated that, following the task given to him by Besim Čehić, he came to the Čirkino Brdo the evening before the attack, whereupon Čehić sent him to the elevation called Podbrdalje and gave him a task to fire a clip of tracer bullets the moment he heard noise. The Accused stated that he did not know what kind of operation it was, but that his only task was to warn Besim's group in the above-described manner if he heard noise. The Court did not give credence to this statement of the Accused because it was completely contrary to the statement of the key witness, Gina Kukrić, who recognized the Accused as one of the attackers, and also contrary to the statements of witnesses Joco Serdar and Radmila Serdar, who recognized the Accused by his distinctive voice. In addition, witness Raza Smajić also confirmed in her testimony that the Accused had a distinctive voice by which he was identifiable. Also, having in mind the fact that the Accused was a member of the intervention platoon which, as a rule, is made up of the fittest fighters, and that Besim was not his superior and could not command him, as the Accused himself also claims, the Accused's participation in the relevant event as described by the Defense is unacceptable for the Court and obviously aimed at avoiding criminal responsibility.

The defense of the Accused Planinčić may be divided into two segments. The first concerns the general events in the area around the village of Serdari, which circumstances made this village a legitimate military target, according to the Defense. The other segment concerns the role of the Accused. According to the Defense, the Accused did not have a direct role in the referenced operation, but his role was to fire tracer bullets as a warning sign should tanks start moving.

In the second part of the Verdict, the Panel will provide the reasoning why it did not accept the arguments of all Defense Counsel about the alleged guard posts and that the village of Serdari was on the line of defense and fortified, that is, that it was a legitimate military target.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The second segment of the Accused Planinčić's defense is linked to the statements of witnesses Muhamed Sadiković, Ilija Šipura, Sead Menzil and Pašo Čirkić, according to the Defense Counsel.

However, it should be stressed that when testifying at the main trial these witnesses were not sufficiently precise so as to confirm or deny the allegations of the Defense Counsel for the Accused Planinčić.

These witnesses referred in general terms to the existence of certain plans to take over the artillery mounted on Orića Brdo or to liberate their villages, but they were not precise when referring to the tasks of the Accused Planinčić.

The Defense Counsel for the Accused Rasim Lišančić presented the evidence aimed to contest that the Accused Lišančić participated in the events concerned, claiming that he was not a member of any military or police formation or the Kotor Varoš TO. The Defense did not contest that the event that Rasim Lišančić was accused of had happened, or that witness Gina Serdar Kukrić had been abused, but claimed that it was done by Rasim's brother Muharem Lišančić and that the witness was confused about the perpetrator's identity. However, the Court did not accept this explanation by the Defense, since witness Gina Kukrić was clear and consistent in her statement when identifying the Accused Rasim Lišančić. The witness stated clearly and with certainty that she was sure about the participation of the Accused Lišančić and explained that of his family she knew only him and that he had come to her father's funeral, which the Accused Lišančić confirmed in his own testimony. Due to the foregoing the Court did not accept the defense of the Accused Lišančić and considered it to be aimed solely at avoiding criminal liability. Witness Gina Kukrić's statement, in the part that concerns Rasim Lišančić's participation in the event as charged, was also confirmed by witnesses Pašo Čirkić and Kemal Smajić in their respective evidence, as well as by witness Miloš Serdar's indirect information.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

These witnesses stated that they had certain information about the events in Serdari and that they discussed it with witness Miloš Serdar.

The statements of these three witnesses are mutually consistent in all key parts, except with respect to the Accused Rasim Lišančić's participation.

According to witness Pašo Čirkić, Muharem Lišančić, who was drunk, also joined the attackers afterward. On the other hand, witness Miloš Serdar noted that he knew the Accused Rasim Lišančić very well, who Pašo Čirkić confirmed participated in the attack.

Having in mind the consistent statements of witness Gina Kukrić and witness Miloš Serdar, and that witness Pašo Čirkić requested protection measures out of fear, the Court gave full credence to the statements of witnesses Gina Kukrić and Miloš Serdar.

It should be noted that during these criminal proceedings witness Salih Čirkić testified at the proposal of the Defense Counsel for the Accused Lišančić.

In his testimony, this witness offered general information about the activities of the Accused Rasim Lišančić, that is, that the Accused had not participated in combat activities and that his primary task was to watch over the cattle. Finally, this witness stressed that the Accused Lišančić did not leave Bilice at all in the period from August to November 1992.

However, in the context of the alibi theory and with respect to the adduced evidence, the Court did not accept that witness Salih Čirkić's averments were of major importance for these criminal proceedings. In the case at hand, one can perhaps conclude from the witness' statement that he did not have information that Lišančić had not left Bilice, but in no way his position that the Accused had stayed in Bilice all the time without occasional departures. [translator's note: sentence as rendered in the original text]

The Court did not accept the arguments the Accused Sead Menzil presented in his testimony either, as they were contrary to the statements of those witnesses to whom

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

the Court gave full credence -- Gina Kukrić, Mileva Bencuz and Ilija Šipura. The Accused Menzil stated that he was not in Serdari at all at the time concerned. Witness Gina Kukrić stated to the contrary, claiming that she saw and recognized the Accused Menzil in her courtyard and that on that occasion he wondered how come Slavko Bencuz had a TV set in each room. The witness recognized the Accused both in the courtroom and the photo-documentation shown to her during the investigation, when she stated, just as she did at the main trial, that she had seen the Accused during the attack. The witness' statement that the Accused commented on the number of TV sets in Slavko Bencuz's house is particularly important since, taken together with the statement of witness Mileva Bencuz, it constitutes an absolutely logical explanation. Witness Mileva Bencuz, a survivor of the attack, stated that together with her husband, Slavko Bencuz, she set off early in the morning from Serdari, where she had stayed the night of 16/17 September 1992, and that at the exit from Serdari she saw houses burning in the hamlets of Bencuzi and Dukići and a group of soldiers moving toward her and that her husband Slavko was killed and she was wounded on that occasion. The witness stated that, although wounded, she managed to return to Serdari, to Branko Serdar's house, where she hid underneath the staircase with another group of people and remained there until the attack started.

Therefore, contrary to the averment of the Defense that witness Gina Kukrić's statement was illogical -- and she claims that at the time of the attack she saw the Accused Sead Menzil on the scene in Serdari and that he commented on the number of TV sets in Slavko Bencuz's house -- the Court concluded that exactly that was logical, having in mind the statement of Mileva Bencuz, who confirmed that a number of attackers came from the direction of Bencuzi, which they had previously torched. The Court, therefore, concludes that the group with Sead Menzil actually came from the direction of the hamlets of Bencuzi and Dukići, which they had previously torched, and that he could notice on that occasion that there were several TV sets in Slavko Bencuz's house, which he later commented on and which witness Gina Kukrić heard when she saw him in Serdari.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Finally, it should be noted that witness Gina Kukrić confirmed that the Accused Planinčić and Menzil were armed with automatic rifles on the relevant occasion.

Due to the foregoing, such defense of the Accused Menzil was aimed solely at avoiding, that is, diminishing personal responsibility in the relevant event, so the Court did not give credence to it.

It should also be added that the defense for the Accused Menzil was based on the theory that the village of Serdari was in the combat operations zone and that it was fortified, and, as such, a legitimate military target.

Also, the Defense for the Accused Menzil argued that he did not participate in the attack on Serdari, but was in a group of Hrvaćani villagers who had a plan to liberate their village. As stated, it was difficult for the Hrvaćani villagers to organize food and accommodation in other villages, so they regarded the retaking of Hrvaćani as the only way out of their situation.

The argument that it was a legitimate military target will be reasoned separately, as noted earlier.

On the other hand, Muriz Dugonjić, Zemir Turan, Edib Menzil and Đasim Menzil testified as witnesses for the Defense with respect to the argument that the Accused Sead Menzil did not take part in the attack on Serdari.

These witnesses confirmed consistently that the initiative to participate in the operation of liberating the Orića Brdo came from Besim Ćehić and that they did not agree with that proposal, but decided to carry out the operation of liberating Hrvaćani on their own.

According to these witnesses, the Accused Sead Menzil participated in the operation together with them, but the operation failed because they were discovered when they were in the region of Briza, some 2 kilometers away from Serdari and 700-800 meters from Dukići.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

However, the Court did not accept these witnesses' statements as reliable, convincing, logical and corroborated by facts.

It is a fact that the witnesses agree that the Accused Sead Menzil did not participate in the attack on the village of Serdari. Answering the questions, the witnesses stated that there was an initiative to carry out an attack on Orića Brdo, but that they opted for an independent operation of liberating Hrvaćani.

With respect to this decision, the witnesses did not provide any additional and credible reasoning and information that would have made their averments logical and based on facts.

Even if the Court accepted these witnesses' averments, an obvious question would arise as to whether a group of 10-15 people was objectively capable of carrying out such a task.

Another, more important, issue is that these witnesses did not explain how were they to liberate the village, what were the concrete plans and tasks for each individual, from which directions were they to attack, who was to guard the line of retreat, how reinforcements to the enemy were to be prevented, where certain VRS positions were located and how were they to be taken, how coordination was to be maintained, and how the effects of fire from the artillery they allegedly knew was deployed on Orića Brdo were to be minimized.

Additionally, these witnesses did not provide an adequate explanation about the intent to deploy in Hrvaćani after its taking and establish a new line of separation given that it was a rather large area whose defense could not be organized by such a small number of people.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Therefore, this Court did not accept as reliable the averments of the Defense witnesses according to which, in brief, less than 12 [word missing in the original text; translator's note] had elapsed from the moment they started considering the attack to its realization. Additionally, in the context of evaluation of credibility of these witnesses' statements, it should be noted that there is a substantial contradiction in the Defense's theory.

On the one hand, the Defense tried to present certain evidence testifying to the sequence of events in the Kotor Varoš Municipality and the military supremacy of the VRS, which focused its activities on the Banja Luka - Teslić road and the village of Večići so that the separation line went through the village of Serdari, and, on the other hand, it argued that a small uncoordinated group of people tried to carry out such an operation without a plan and knowledge of the overall troop deployment.

Given that the quoted Defense witnesses' averments are unconvincing and uncorroborated by appropriate facts and military or life logic, the Panel decided not to give credence to them.

With respect to **Mirsad Vatrač's** participation in the event as charged, the Court established beyond any doubt that he, too, was one of the protagonists of the attack. The Court was primarily guided by the statements of witnesses Gina Kukrić, Nedeljko Sakan and Pašo Čirkić. Witness Miloš Serdar also testified about the Accused Vatrač's participation on the basis of indirect information. In other words, witness Gina Kukrić identified the Accused Vatrač as one of the attackers both in the courtroom and in the photo-documentation presented to her during the examination at the Prosecutor's Office in the investigation stage. The witness explained in detail that she knew the Accused from before and that she was absolutely certain about his identity.

The witness confirmed that on that occasion the Accused Mirsad Vatrač and Rasim Lišančić were armed with semi-automatic rifles.

Witnesses Šefik Čirkić and Zlata Alekić testified upon the motion of the Defense Counsel for the Accused Vatrač during the proceedings.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

These witnesses were examined in the context of an alibi for the Accused, that is, concerning the averment that in the period concerned the Accused Vatrač had an injury that prevented him from taking part in the attack on the village of Serdari.
Witness Šefik Čirkić stated that in August or September 1992 he saw the Accused in Bilice walking with a cane and with his lower leg, that is, foot bandaged.

On the other hand, witness Zlatka Alekić stated at the hearing held on 25 June 2013 that she saw the Accused Vatrač in Bilice some time in September collecting food. Asked specifically if she could see anything unusual on him, the witness stated that she saw him from afar and that she could not see whether his leg was bandaged, and added that the rumor had it that he had cut himself but she did not see anything.

Finally, witness Adisa Bečić stressed when testifying at the main trial that she knew that the Accused Mirsad Vatrač had suffered an injury, that he walked around with a cane, and that in Tepići he did chores in the kitchen, drove a tractor and threshed wheat.

However, the witness could not state precisely the timing of the Accused Vatrač's injury.

Therefore, having in mind the statements of the aforementioned witnesses, who all mentioned the Accused Vatrač in the context in which he was not bed-ridden, that is, referred to him as a physically active person, the Court did not accept the Accused's averment that on 17 September 1992 he was sick and unfit for military service and that, thus, he could not participate in the attack on Serdari.

In the course of the proceedings the Court examined two military expert witnesses, namely, Senad Kljajić, upon the motion of the Defense Counsel for the third Accused Sead Menzil, and Dragomir Keserović, as a rebutting evidence of the Prosecution.

However, the referenced findings of the expert witnesses may be analyzed in terms of two segments. The first concerns the general events and general facts, while the second concerns the concrete micro-location and the related facts.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Also, with respect to the manner of drafting these findings, it needs to be stressed that the expert witnesses used the evidence that was tendered into the case file.

It may be noted that general views of both expert witnesses on the VRS military supremacy in the referenced locality (Kotor Varoš Municipality) do not differ considerably. It should be added that those findings are not of major importance for the case at hand.

On the other hand, when it comes to the micro-location of the village of Serdari, it should be emphasized that both expert witnesses relied to a great extent on the exhibits in the case file, but offered completely divergent views on the status of the village.

While expert witness Kljajić stresses that the village was located in the zone of conflict between the warring parties, expert witness Keserović is of the opinion that the village of Serdari was not defended (p. 42) and concludes that all four Accused were in Serdari on the occasion concerned.

Under such circumstances, Article 95 of the CPC B-H should be referred to as it stipulates that expert evaluation shall be ordered when the findings and opinion of a person possessing the necessary specialized knowledge are required to establish or evaluate some important facts.

Expert evaluation by a military expert witness is specific not only for the subject of expert evaluation, but also for the military/civilian position of the accused persons.

Logically, the higher the rank of the accused, the more important the evaluation by a military expert witness is, as it helps the court to get a broader picture of all relevant facts.

On the other hand, in the circumstances when concrete acts and roles of individual accused in individual events at a certain micro-location can be established on the basis

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

of adduced evidence, evaluation by military expert witness is most often not of any substantial help.

In accordance with the previous averments, when establishing all relevant facts the Court primarily used the witnesses' statements and other documentary evidence that was sufficient to establish all decisive facts.

In light of the aforesaid, when evaluating the facts related to the objective of the attack on Serdari, the Court considered the statements of certain witnesses and arguments of certain Defense Counsel that the objective was to collect food or that the idea was to seize the artillery on Orića Brdo and alike. With respect to the referenced arguments, it should be noted that the adduced evidence does not lead to the conclusion that a considerable quantity of food was collected in the attack on the civilians who were in Serdari. Moreover, the adduced evidence does not indicate that any activities were undertaken to this end. None of the witnesses or any of the adduced evidence offers reliable information about any efforts to procure considerable quantities of food or fortify positions in the freshly taken area.

Exhibits T-5 and T-6 most directly contest the referenced theory. These exhibits clearly show that the outbuildings with cattle were set ablaze in the event concerned, although the cattle could have been used as food.

The event concerned could perhaps be analyzed from the point of view that something else but the suffering of civilians had been intended, and that it was simply a mistake and an operation that did not yield the expected results.

However, such a theory cannot stand the test of witness Gina Kukrić's statement.

This witness confirmed that the attackers were singing when returning from the operation in Serdari, clearly emphasizing their satisfaction with its outcome.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Therefore, based on the foregoing, the Court established all relevant facts in the manner described in the enacting clause of the Verdict.

STANDARDS AND FACTUAL FINDINGS RELATIVE TO THE STATUS OF PROTECTED VALUE

In the course of the proceedings, the respective Defense Counsel for all Accused emphasized the issue of the status of the Serdari village, that is, that the case at hand cannot be regarded as an unlawful attack on civilians and civilian facilities. More precisely, according to the Defense, there were several fortified positions in Serdari which made a component part of the VRS troops' deployment in the Kotor Varoš Municipality.

However, in the case at hand the Court established, based on the adduced evidence that has been referred to, that it is not contestable that guards were kept at night-time in Serdari, that is, that out of fear the Serdari inhabitants undertook certain activities to protect themselves.

This conclusion of the Panel is corroborated by the statements of the majority of the witnesses – villagers who said that they had felt safer in Serdari because it had been a comparatively larger settlement in that area (compared with Dukići and Bencuzi). For example, witness Mileva Bencuz stated that she had taken refuge in Serdari at night because she had felt safer there.

Also, as stated earlier, it is obvious that at the time concerned there was a feeling of insecurity in the territory of Kotor Varoš Municipality, and that everybody undertook certain activities in order to protect themselves.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

The Court is of the opinion that such a state of facts, that is, the situation when Jelenko and Slaviša[14], who were on service leave, were in Serdari among others, does not change the village's civilian character.

In other words, the fact that during the night the Serdari inhabitants kept guards in order to protect themselves in the village that was not guarded by military (Excerpt from the Minutes of the War Presidency of 18 September 1992, Exhibit O-III-9) cannot serve as a basis to deprive the village of its civilian character.

It is clear in the case at hand that this was an attack directed at the civilian population and civilian facilities, particularly having in mind the consequences, that is, the torching of the buildings after the resistance offered from certain buildings in Serdari was quashed and the prior torching of empty houses in Dukići, as stated by witness Mileva Bencuz.

In the very specific circumstances of the case at hand, that is, in an obviously clear situation when protected values do not enjoy protection under any other Geneva Convention, this Panel considers that all conditions have been satisfied to fit the negative definition of civilians (persons who are not members of the armed forces or an organized military group belonging to a party to the conflict[15]), that is, that there cannot be any doubt about the civilian status of the victims and facilities.

Finally, with respect to Exhibits O-III-30 through to O-III-35 concerning the recognition of certain rights relative to the military status of the victims, it should be stressed that this Panel adhered to the referenced standards that are included in international law.

In the opinion of this Panel, the fact that certain authorities recognized certain rights related to the status of soldiers does not automatically imply a change of their status when evaluating whether they fall into the category of persons entitled to protection under Common Article 3 of the Geneva Conventions.

[14] See *Stanislav Galić* Trial Judgement of 5 December 2003, para. 50.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED

Having in mind the referenced established state of the facts, the Panel concludes that all four Accused, together with others who participated in the attack, were aware of the common action and the common purpose, and that they were attacking the civilian population of the village of Serdari that was not defended militarily or occupied by any hostile military unit and that, as such, could not constitute a legitimate military target or any kind of military threat to the attackers.

They were aware what the objective of the armed attack was and they wanted its realization with their participation in it. Given the circumstances, they were aware that some resistance might be put up and weapons used, and that it might result in prohibited consequences, such as the infliction of lethal injuries, grave wounding of civilians and destruction of property, which they also willed with their active participation in the attack. Therefore, having in mind the awareness and the will of the Accused, the Court concludes that they acted with direct intent in the execution of the referenced offense pursuant to Article 13 of the CC SFRY.

Admittedly, on the basis of the adduced evidence the Court could not precisely establish who of the Accused or the other co-perpetrators committed the specific acts of killing the villagers and destroying the property, which is anyway not decisive for the relevant criminal offense. In order to satisfy the essential elements of the criminal offense concerned, which is an attack on the civilian population in violation of international law in time of war, it is necessary to establish the existence of the attack, its time and place and consequences, based on the evidence adduced during the proceedings, which the Court did.

Based on the foregoing, the Court has concluded that all four Accused acted in the referenced acts as co-perpetrators, pursuant to Article 22 of the CC SFRY. With the

[15] Ibid, para. 47.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

prior reconnaissance, the preparations for the attack and division into groups that were to conduct the attack from different directions, the Accused were aware that, together with other persons, they were participating in the attack, which was their common purpose and in which way they agreed with the other persons' perpetration of the acts and the ensuing consequences, that is, the Accused accepted these persons' acts as their own, therefore, they acted with single intent. For that reason it is irrelevant which of the co-perpetrators directly participated in the killings of the Serdari inhabitants and the destruction of their property.

The Court also established beyond a doubt, primarily based on the statement of witness – injured party Gina Kukrić, nee Serdar, that the Accused Lišančić treated her inhumanely, in the manner described in the facts of the Indictment and the enacting clause of the Verdict, that is, that, motivated by the death of his sister Nura, he threatened the witness pressing a knife against her throat and twice requesting from her to tell him who had killed his sister. The second time he asked the same question he hit her in her head with his fist, not using the knife.

The Court finds that these acts of the Accused satisfy all elements of the criminal offense, and that they constitute a violation of Article 3(1)(a) and (c) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, which, as a blanket regulation, emphasizes and attaches particular importance to the protection of civilians in armed conflicts. When committing this act the Accused Lišančić acted with direct intent, as he was aware that with such treatment of the injured party, Gina Kukrić, under the referenced circumstances he deliberately caused her serious suffering and fear for her life, which constitute inhumane treatment by their intensity.

Based on the foregoing, having in mind that while committing the acts as charged the Accused acted with direct intent, pursuant to Article 13 of the CC SFRY, and that the Court did not doubt the mental capacity of the Accused for a single moment and that nobody contested it, either, pursuant to Article 11(1) of the CC SFRY, the Court found

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

the Accused guilty of the commission of the criminal offense of War Crimes against Civilians in violation of Article 142(1), as read with Article 22 of the CC SFRY.

SENTENCING THAT IS NECESSARY AND PROPORTIONATE TO THE GRAVITY OF THE CRIME

Having analyzed all relevant facts in the case at hand, the Court considered the sentence that is necessary and that meets the statutory goals, that is, the Court had in mind the fact that the sentence must be proportionate to the degree of suffering and that it must reflect community condemnation of the conduct of the Accused.

The Court finds that the acts of the Accused are of such nature that, having in mind the need for community condemnation, they require strict punishment, which is absolutely logical given the sentence that the criminal offense of War Crimes against Civilians carries. Therefore, the Court considers that the sentence pronounced in the case at hand is of such nature as to sufficiently educate other persons to the danger of crime, that is, that justice is achieved with the punishing of crime. The trial and punishment of these acts must demonstrate that crimes committed in time of war will not be tolerated and that criminal justice process is the appropriate way to expose them, due to which the Court concludes that the pronounced sentence of imprisonment constitutes the punishment that is necessary and proportionate to the gravity of the criminal offense.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

AGGRAVATING AND EXTENUATING FACTORS FOR THE ACCUSED

Having in mind the purpose of sentencing, pursuant to Article 41(1) of the CC SFRY the Court took into account all circumstances bearing on the magnitude of punishment, that is, all aggravating and extenuating factors it found for the Accused.
Thus an aggravating factor that the Court found for all four Accused is the fact that among the civilian casualties two children got killed and one heavily-pregnant woman was heavily wounded. Also, with respect to the killed persons, the Court had to take into account the fact that their families still suffer the consequences of the loss of their loved ones.

The fact that the Accused had no prior conviction was one of the extenuating factors along with their personal and family circumstances, health and age of the Accused Lišančić, and their individual degrees of responsibility.
The Court found that the Accused's conduct during the case was appropriate and met the Court's expectations, and is therefore neither an aggravating nor an extenuating factor.

In addition to the objective circumstances, the need to express community condemnation of the Accused's conduct plays a particularly important role in sentencing.

When meting out the punishment to the Accused, the Court took into account the fact that Planinčić and Menzil had previously been militarily engaged without interruption, with Menzil having led his group and Planinčić having operated as a member of a reconnaissance-sabotage platoon, and that at the time of the attack both were armed with automatic weapons, whereas the Accused Lišančić was a civilian who volunteered to participate in the attack since his sister had previously been killed. He and the Accused Vatrač were armed with semi-automatic rifles. Based on the foregoing, the Court concludes that the contribution of these two Accused to the perpetration of the offense is lesser than the contribution of the Accused Menzil and Planinčić.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

Based on the foregoing, the Court pronounced sentences of imprisonment against the Accused as follows: 11 years and six months to Planinčić, nine years and six months to Lišančić, 11 years and six months to Menzil, and 10 years and six months to Vatrač. The Court believed that such punishments would serve as deterrence to the Accused from committing criminal offenses in the future, as well as to other potential perpetrators, whereby the purpose of punishment stipulated in Article 33 of the CC SFRY would be fully achieved.

Pursuant to Article 50(1) of the CC SFRY, the time the Accused spent in custody shall be credited toward the pronounced sentences, in accordance with the procedural decisions ordering, extending or terminating the custody, as contained in the case file.

DECISION ON THE COSTS OF THE PROCEEDINGS
AND CLAIMS UNDER PROPERTY LAW

Pursuant to Article 188(4) of the CPC B-H, the costs of the criminal proceedings referred to in Article 185(2)(a)–(f) of the CPC B-H, as well as the remuneration and necessary expenses of the Defense Counsel, shall be paid from within the Court budget appropriations, since, in the opinion of the Panel, their payment by the Accused would jeopardize the support of the Accused or the sustenance of the persons the Accused are required to support.

Pursuant to Article 198(2) of the CPC B-H, the injured parties are instructed to pursue their claims under property law in civil action, since during the criminal proceedings the Court did not find information that would have provided solid ground for either a complete or partial award.

RECORD TAKER – COURT OFFICER	**PRESIDING JUDGE**
Jovana Vidić	**LJUBOMIR KITIĆ**

Legal remedy: An appeal from this Verdict may be filed with the Appellate Panel of the Court of B-H within 15 days as of receipt of the written copy thereof.

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
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