Bosna i Hercegovina **Bosnia and Herzegovina**

Sud Bosne i Hercegovine
Court of Bosnia and Herzegovina

Number: X-KR-09/847
Sarajevo, 21 May 2010

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Panel composed of Judge Staniša Gluhajić as the Presiding Judge, Judges Vesna Jesenković and David Re, as the Panel Members, with the participation of the Legal Officer Stanislava Nuić as the minutes-taker, in the criminal case against the Accused Ćerim Novalić, for the criminal offence of War Crimes against Civilians under Article 173 (1) (e) as read with Article 180 (1) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), deciding on the Indictment of the Prosecutor's Office of Bosnia and Herzegovina, No. KT- RZ-37/09 of 12 January 2010, after a public main trial**,** in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Sanja Jukić, and Defense Counsel for the Accused, Attorney Ismet Mehić, rendered, and the Presiding Judge on 21 May 2010 pronounced the following

V E R D I C T

the Accused ĆERIM NOVALIĆ, son of Jusuf and Hadžira, nee Duranović, born on 24 April 1972 in the village of Vrdolje, Municipality of Konjic, single identification number (JMBG) 2404972151980, residing at 6 Vrdolje Street, Municipality of Konjic, Bosniak by ethnicity, a citizen of BiH, single, no children, worker, finished primary school, with no previous convictions, member of the Army of BiH during the war,

IS GUILTY

Inasmuch as:

During the war in Bosnia and Herzegovina, at the time of the armed conflict between the Army of BiH (ABiH) and the Army of Republika Srpska (VRS), in the territory of the

Municipality of Konjic, as a member of the Army of BiH, he acted in contravention of the rules of international humanitarian law violating the provisions 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, by performing the following actions:

- on an unspecified day of the month of September 1992, in the village of Džepi, Municipality of Konjic, at about 22:00 hrs, together with an unidentified soldier, armed with rifles and wearing multicolored camouflage uniforms and forehead bands, he entered the house owned by Stanko Šaran whom he ordered to come down to the house basement-ground-floor together with his wife Borka Šaran to check if they were hiding one *Daka* and Milan Magazin and, while the unidentified soldier stayed with Stanko Šaran interrogating him about his neighbors of Serb ethnicity, he ordered Borka Šaran to go to the upper floor where her underage children and ill bed-ridden mother-in-law were situated, then Ćerim Novalić forced her to sexual intercourse in one of the rooms, wherein, threatening to kill her if she shouted, he firstly ordered her to take off her clothes and when she disobeyed, he ripped off her clothes, pushed her to a three-seater sofa and raped her, and he afterwards left the house and walked away together with the unidentified soldier,

Therefore, during the war in BiH, at the time of the armed conflict between the Army of the Republic of Bosnia and Herzegovina and the Army of Republika Srpska, in violation of the rules of international law, he forced another person into sexual intercourse by using threat to make a direct assault on her body,

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

Therefore the Panel of the Court of BiH, pursuant to the same legal provision, having applied Articles 39, 42, 48, 49 and 50 of the Criminal Code of Bosnia and Herzegovina, for the mentioned offence

SENTENCED HIM TO

7 (SEVEN) YEARS IN PRISON

Pursuant to Article 188(4) of the CPC of BiH the Accused is relieved of all costs of proceedings thus they shall be covered from the budget appropriations.

Pursuant to Article 198(2) of the CPC of BiH, the aggrieved party Borka Šaran is referred to pursue her claim under property law in a civil action.

R e a s o n i n g

1. Charges

The Indictment of the Prosecutor's Office of Bosnia and Herzegovina, Special Department for War Crimes, No. KT-RZ-37/09 of 12 January 2010, confirmed on 15 January 2010, charges the Accused Ćerim Novalić with having committed the criminal offence of War Crimes against Civilians under 173(1)(e) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH) as read with Article 180 (1) of the CC of BiH.

On 9 February 2010 the Accused pleaded not guilty and subsequently the case file was referred to the Trial Panel on 25 February 2010.

The main trial in this case commenced on 19 March 2010.

2. Adduced evidence

a) Prosecution

The following witnesses were heard in the course of the main trial: Borka Šaran, Stanko Šaran, Smiljana Magazin and Danilo Šaran.

The following documentary evidence was presented: Official Gazette of R BiH**,** No. 1, of 9 April 1992, Decision on the Proclamation of Imminent War Threat (T-1), Official Gazette of RBiH, No.7, of 20 June 1992 (T-2), Official Gazette of RBiH, No. 50, of 28 December 1995 (T-3), Official Gazette of RBiH, No. 4, of 20 May 1992, Decree-law on Armed Forces of RBiH (T-4), Official Gazette of the Serb People in BiH, No. 6, of 12-17 May 1992, Decision on Formation of the Army of Republika Srpska of BiH (T-5), Letter of Conscription Records Section, No. 07-03-29/09-3 of 17 August 2009, and the accompanying document 01/02-41-32/09 of 29 September 2009 (T-6), Document of the Federation Ministry for Issues of Veterans and Disabled Veterans of the Defensive-Liberation War, No. POV.07/6-03/1-23/09-9, of 6 August 2009, with the accompanying documents (T-7), data from the Archives Depot, No. 07-03-29/09-4 of 28 September 2009 (T-8), Official Note of 13 November 1992, of the Security Service Centre (SSC) Trebinje – National Security Council (orig. *SNB*), certified with the Hague Tribunal stamp, (T-9), Letter of the Ministry of the Interior of the Herzegovina-Neretva Canton, No. 02-02/4-2-04-10-22-4/09, of 7 January 2010 (T-10), Excerpts from the final Court Judgments: Prosecutor v. Zejnil Delalić *et al*, Prosecutor v. Duško Tadić, Prosecutor v. Mladen Naletilić and Vinko Martinović and Prosecutor v. Darijo Kordić and Marijo Čerkez (T-11), medical documents for Stanko Šaran, Health Center in Konjic, of 13 May 1992 (T-12), information regarding Bosiljka Šinik, Public Institution General Hospital in Konjic, on 23 May 2007(T-13), Death Certificate for Bosiljka Šinik, issued on 24 March 2010 in Konjic (T-14), Death Certificate for Jovo Šinik, issued on 24 March 2010 (T-15), Death Certificate for Janja Lojpur, issued on 24 March 2010 (T-16), Record on Examination of the Witness Stanko Šaran, No. KT-RZ-37/09 of 18 June 2009

(T-17), Record on Examination of the Witness Smiljana Magazin, No. KT-RZ-37/09, of 27 October 2009 (T-18), Record on Examination of the Witness Danilo Šaran, No. 17-04/2-5-04-2-706/09 of 3 September 2009 (T-19), Record on Examination of the Šaran Witness Borka, No. KT-RZ-37/09 of 18 June 2009 (T-20), Record on Examination of the Witness Borka Šaran, No.17-15/3-1-04-2-166/07 of 11 June 2007 (T-20 A), Record of the Statement taken from Borka Šaran, Public Security Center (PSC) in Trebinje, No. 12-02/1-10/08 of 23 October 2008 (T-20 B), Record of the Statement taken from Borka Šaran, PSC in Bijeljina, No. 10-1-5/02-230-1057/08 of 5 December 2008 (T-20 C), Record of the Statement taken from Borka Šaran, PSC Bijeljina, SJB Zvornik, No.10-1-5/02-230-195/09 of 19 February 2009 (T-20 D); Extract from the criminal records for the Accused issued by the Konjic Police Station, dated 7 January 2010.

b) Defense

The following witnesses for the Defense were heard: Dr. Sead Jusufbegović, Mina Zahirović, Amir Masleša, Osman Novalić and Midhat Pirkić.

The Defense presented the following documentary evidence: copies of the register of the gynecology ward in the Public Institution General Hospital in Konjic, from 5 May to 21 December 1992 (O-1), copies of the gynecology interventions register of the Public Institution General Hospital in Konjic, from 12 May to 30 December 1992 (O-2), copies of the register of ultrasound examinations performed in the gynecology ward from 30 March to 30 December 1992 (O-3), Letter of the Public Institution General Hospital Konjic, No. 1-135/2010 of 13 April 2010 (O-4), Order of the Municipal HQ in Konjic, No. 01/387-1 of 19 August 1992, signed by the Commander Esad Ramić (O-5), Training List of Soldiers and Officers of 24 August 1992, Municipal HQ in Konjic, signed by the Commander DIO A-004, Midhat Pirkić (O-6), Elementary School Certificate for Ćerim Novalić (O-7), Record on Examination of the Witness Amir Masleša, of 12 January 2010 (O-8), Record on Examination of the Witness Mina Zahirović, of 6 October 2009 (O-9).

3. Procedural Decisions

The Court of BiH received the Motion from the Prosecutor's Office of BiH of 12 January 2010 to transfer the conduct of the proceedings in the case No. X-KR-09/847 against the Accused Ćerim Novalić, to the Cantonal Court in Mostar pursuant to Article 27 of the CPC of BiH. The Decision of the Court of BiH of 17 February 2010 No. X-KR-09/847 dismissed the Motion of the Prosecutor's Office of BiH to transfer the conduct of the proceedings to the Cantonal Court in Mostar.

On 20 April 2010 the main trial resumed by the Defense Counsel Ismet Mehić objecting to the presented evidence which included excerpts from the final court judgments No. IT-96-21-T of 16 November 1998 against Zejnil Delalić, Zdravko Mucić, Hazim Delić i Esad Vranić, No. IT-98-34-T of 31 March 2003 in the case against Mladen Naletinić and Vinko Martinović, No. IT-96-21-A in the case against Zejnil Delalić *et al*, the Čelebići case; No. IT-94-1-A of 15 July 1999 against Duško Tadić, No. IT-98-34-T of 31 March 2003 against Mladen Naletilić and Vinko Martinović and Judgment No. IT-95-14/2-A of 17 December 2004 against Darijo Kordić and

Marijo Čerkez, submitting that the Prosecutor should have specified the facts from particular paragraphs of those judgments which should have been accepted as established. The Panel rendered the decision to accept as established the facts from some paragraphs of the mentioned judgments of the Hague Tribunal, while it refused to accept some facts from the said judgments considering them to be irrelevant to this case.

On 4 May 2010 the main trial resumed by the Defense Counsel Ismet Mehić objecting to the presented Prosecution Exhibit T-13, information regarding Bosiljka Šinik, Public Institution General Hospital in Konjic of 23 May 2007, showing that Bosiljka Šinik was admitted to the surgery ward on 11 September 1992, because according to the Defense Counsel the Indictment of the Prosecutor's Office states that the criminal offence happened on 13 September 1992. The same objections were also made regarding the Exhibits T-14 – Death Certificate for Bosiljka Šinik, issued on 24 March 2010 in Konjic; T-15 – Death Certificate for Jovo Šinik, issued on 24 March 2010, T-16 – Death Certificate for Janja Lojpur, issued on 24 March 2010. The Panel decided to admit this evidence into the case file, bearing in mind that during the evaluation of all presented evidence it would decide on the admissibility and authenticity of this documentary evidence. In doing so, the Court warned the Defense Counsel that the Indictment did not indicate that the incident happened on 13 September 1992, but it was September 1992 that was indicated as the time when the offence was committed, which made his objection unfounded.

During the direct examination of the Witness Midhat Pirkić on 4 May 2010, the Defense Counsel presented the Exhibit O-5 – Order of the Municipal HQ in Konjic of 19 August 1992 and the list of 24 August 1992 marked as O-5-1 to whose relevance the Prosecutor objected. The Panel decided to admit these exhibits into the case file with a view to evaluate their relevance together with all presented evidence.

At the same hearing the Defense submitted the documentary evidence – Certificate on Completed Elementary School Konjic, No. 328/86 with reference number O-6. The Prosecution contested the relevance of this evidence. The Panel decided to admit this exhibit, too, into the case file in order to evaluate its relevance together with all other presented evidence.

4. Established Facts

The Prosecutor's Office of BiH pursuant to Article 4 of the Law on the Transfer of Cases from ICTY and use of evidence obtained from the ICTY in the proceedings before the courts in BiH (hereinafter: the Law on Transfer) filed the Motion No. KT-RZ-37/09 of 12 January 2010 to accept the established facts in this criminal case, moving the Court to take judicial notice of the facts established by the final judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Judgment *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998), more specifically the facts under paragraphs 186, 187, 188, 189, 190, 191, 191 and 192, in the Judgment *Prosecutor v. Mladen Naletilić and Vinko Martinović* (case No. IT-98-34-T of 31 March 2003), the fact under paragraph 177, in the Appeals Judgment in the *Čelebići* case (case No. IT-96-21-A of February 2001) the fact under paragraph 33 in the Appeals Judgment in the *Tadić* case (case No. IT-94-AR72 from July 1999) the fact under paragraph 162, in the Appeal Judgment in the *Tuta – Štela*

case (case No. IT-98-34-T) the fact under paragraph 196, in the Appeals Judgment in the *Blaškić – Kordić* case (case No. IT-95-14/2-A of 17 December 2004) the fact under paragraph 321.

In the reasoning of the Motion, the Prosecutor submitted that the taking of judicial notice of the proposed established facts would efficiently contribute to the efficiency and judicial economy of the court proceedings, in particular with respect to finding of the existence of the armed conflict between the Army of BiH and the VRS at the time relevant to the Indictment, noting that the Court of BiH rendered decisions granting similar motions. These facts are not *presumptio juris et de jure* or undisputable presumptions, because the Accused is allowed to contest the accepted facts at any time pursuant to the principle of free evaluation of evidence under Article 15 of the CPC of BiH and the right to a fair trial pursuant to Article 6 of the European Convention on Human Rights (ECHR).

The Prosecutor's Office of BiH considers this Motion to be well-founded given that the Accused Ćerim Novalić is charged with the commission of the criminal offence of War Crimes against Civilians under Article 173 (1) (e) as read with Article 180 (1) of the CC of BiH, that he was a member of the Armed Forces of BiH, more precisely the Municipal Headquarters of the Territorial Defense in Konjic from 15 April 1992 to 30 November 1992 and that the criminal offence was committed in the territory of the municipality of Konjic whose essential element was an armed conflict, therefore it moves that the proposed facts be accepted as proven in these criminal proceedings.

The Defense Counsel for the Accused Ćerim Novalić did not have any objections to this Motion, submitting that the Defense did not contest that at the material time the state of war and armed conflict existed in the territory of the municipality of Konjic.

The Court of BiH accepted as "proven", pursuant to Article 4 of the Law on Transfer, the following facts which were found by the Trial Chamber and confirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case Prosecutor v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998):

1. Suffice it to say that in Bosnia and Herzegovina as a whole there was continuing armed violence at least from the date of its declaration of independence - 6 March 1992 - until the signing of the Dayton Peace Agreement in November 1995. Certainly involved in this armed violence, and relevant to the present case, were the JNA, the Bosnian Army (consisting of the TO and MUP), the HVO and the VRS.[1]

2. As has been discussed at some length in Section II above, the Konjic municipality was indeed itself the site of some significant armed violence in 1992. In April of that year the municipal TO was mobilized and a War Presidency was formed. The JNA, which had occupied various military facilities and other locations throughout the municipality, was involved in the mobilization of Serb volunteers, in co-operation with the local SDS, and

[1] Para. 186 of *the Judgment Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16. November 1998);

had distributed weapons among them. It also appears that the JNA itself participated in some of the military operations, at least until May 1992.[2]

3. The Trial Chamber has been presented with significant amounts of evidence regarding military attacks on and the shelling of Konjic town itself, as well as many of the villages in the municipality, including Borci, Ljubina, Džajići and Gakići, by these Serb forces. It is further uncontested that military operations were mounted by the forces of the municipal authorities, incorporating the TO, MUP and, within the period of the Joint Command, the HVO, against the villages of, *inter alia,* Donje Selo, Bradina, Bjelovčina, Cerići, and Brđani. It was as a result of these operations that persons were detained in the Celebići prison-camp.[3]

4. The level of the fighting in Bosnia and Herzegovina as a whole, as in Konjic itself, was clearly intense and consequently attracted the concern of the United Nations Security Council and General Assembly, along with other international organizations. Acting under Chapter VII of the United Nations Charter, the Security Council passed numerous resolutions in relation to the conflict and consistently called upon all of the parties involved to put an end to their military operations.[4]

5. In Konjic, the TO and MUP were joined for a short period by the HVO as part of a Joint Command established and organized to fight the Serb forces. At the very least, these forces representing the "governmental authorities" were engaged against the forces of the Bosnian Serbs - the JNA and VRS joined by local volunteers and militias - who themselves constituted "governmental authorities" or "organized armed groups". This finding is without prejudice to the possibility that the conflict may in fact have been international and the parties involved States and their representatives. [5]

6. The Trial Chamber must therefore conclude that there was an "armed conflict" in Bosnia and Herzegovina in the period relevant to the Indictment (May – December 1992) and notes that, regardless of whether or not this conflict is considered internal or international, it incorporated the municipality of Konjic...[6]

Other proposed facts are dismissed in the manner stated in the reasoning of the Decision of the Court of BiH of 4 May 2010 as follows:

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[2] Para. 188 of *the Judgment Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landže* (case No. IT-96-21-T of 16 November 1998);
[3] Para. 189 of *the Judgment Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998);
[4] Para. 190 of *the Judgment Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998).
[5] Para. 191 of the Judgment Prosecutor v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998).
[6] Para. 192 of the Judgment Prosecutor v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998).

The facts in the paragraph No. 177 (the final Judgment of the ICTY Trial Chamber, No. IT-98-34-T of 31 March 2003 against Mladen Naletilić and Vinko Martinović) have not been accepted by the Court because the paragraph indicates legal positions without specified facts.

The facts in the paragraph No. 162 (the final Judgment of the Appeals Chamber in the case *Prosecutor v. Tadić* of July 1999, the Judgment No. IT-94-AR72), in the paragraph No. 196 (the Judgment of the Trial Chamber in the *Prosecutor v. Mladen Naletilić and Vinko Martinović*, No. IT-98-34-T) and in the paragraph No. 321 (the final Judgment of the Appeals Chamber in the *Kordić* case, No. IT-95-14/2-A of 17 December 2004) have not been accepted because they point to the nature of the armed conflict, which is irrelevant to the given criminal offence.

Also, the fact in the paragraph No. 33 (the final Judgment of the Appeals Chamber in the *Čelebići* case, from February 2001, No. IT-96-21-A) has not been accepted by this Court because it refers to the time period outside the time-frame covered by the Indictment, and it also suggests the nature of the armed conflict, which is irrelevant to the offence concerned.

Having in mind all the foregoing, the Court found that only the facts established in paragraphs 188, 189, 190, 191 and 192 in the Judgment *Prosecutor v. Zejnil Delalić et al.* the ICTY case No. IT-96-21-T of 16 November 1998 relative to the existence of the armed conflict between the Army of R BiH and HVO, on the one hand, and the VRS, on the other, in the territory of the Konjic municipality at the relevant time satisfy the objective criteria and do not encroach upon the criminal responsibility of the Accused, which is the reason why the Court accepted them.

5. Closing Arguments

a) Prosecution

In her closing arguments the Prosecutor analyzed the objective and subjective evidence which suggest that the Accused Ćerim Novalić committed the criminal offence he was charged with during the war in BiH, during the armed conflict between Army of R BiH and the Army of the Serb Republic of BiH, that the criminal acts the Accused was charged with in the operative part of the Indictment were grave violations of the Geneva Convention on the Protection of Civilian Persons in Time of War of 12 August 1949, that the witness Borka Šaran was a civilian protected by the Convention, that the criminal offence the Accused was charged with was committed in the territory of Konjic municipality, that the Accused Ćerim Novalić committed the offence charged as a member of the Army of BiH, that the criminal acts committed by the Accused Ćerim Novalić were not justified by the military needs, that it clearly ensued from the evidence that there existed a nexus between the war, that is, the armed conflict and the committed criminal offence, and that the Accused also misused his military position and the position of the aggrieved party to commit the actions as charged. The Prosecutor further analyzed the statement of the aggrieved Borka Šaran, including her recognizing the Accused in the courtroom, the testimony of Prosecution witness Stanko Šaran, the testimony of Prosecution witness Smiljana Magazin, the testimony of Defense witnesses Dr. Sead Jusufbegović, Mina Zahirović, Amir Masleša, Osman Novalić and Mitke Pirkić. Furthermore, the Prosecutor referred to the documentary evidence for the Defense of the Accused Ćerim Novalić, more specifically the Certificate on the

completed elementary school, then the Document of the Municipal HQ in Konjic of 19 August 1992, the training list of soldiers and officers DIO A-004 Konjic, and the registers of the General Hospital in Konjic whose relevance, authenticity and legality she contested. In conclusion, the Prosecutor referred again to the position of the victim and to Article 3 of the 1949 Geneva Convention on the Protection of Civilian Persons and Article 173 (1) (e) of the CC of BiH which is the criminal offence the Accused Ćerim Novalić is charged with. The Prosecution moves the Court to render a fair verdict, finding the Accused guilty as charged, and punish him under the law.

b) Defense

The Defense Counsel for the Accused Ćerim Novalić, Attorney Ismet Mehić, in his closing argument stated that he accepted the facts that the alleged incident happened during the armed conflict of the Army of BiH and Republika Srpska and that the Accused Ćerim Novalić at the time of this incident was a member of the Army of BiH. However, he contested all other facts from the Indictment because he considered them as not proven. In his closing argument the Defense Counsel further presented a summary of testimony of the victim as a witness, and also other witnesses for the Prosecution and for the Defense, and pointed to the relevant contents of the presented documentary evidence.

Thereafter, the Defense Counsel presented the analysis of testimonies of the witnesses for the Prosecution and it confronted it with the analysis of the evidence for the Defense. During the presentation of this analysis the Defense Counsel pointed to a number of inconsistencies in the testimonies of the witnesses for the Prosecution both with respect to the circumstances of importance for finding the existence of the criminal offence and with respect to the identity of the perpetrator. As for the testimony of the witness-victim Borka Šaran, the Defense Counsel pointed to the inconsistency of the testimony of this witness regarding the facts related to the time of the criminal offence, submitting that Borka Šaran in her initial statements stated late May or early June 1992 as the time of the offence, and then in the latest statements she averred that the incident happened in September, and at the main trial she said that it happened on 13 September 1992. In addition, the Defense Counsel in his closing argument also noted the inconsistency of this witness with respect to the identification of the offender and the inconsistency of the presented reasons as to why she kept silent about the identity of the offender, as well as the inconsistency of her statements about the appearance of the soldiers and the facts related to the act of rape, pregnancy and abortion. In the same manner the Defense Counsel in his closing arguments noted the inconsistency about the essential facts in the testimony of the witnesses for the Prosecution Stanko Šaran, Smiljana Magazin and Danilo Šaran.

The Defense noted that on the basis of the testimonies of the witnesses for the Prosecution it is not possible to infer that the criminal offence existed at all, let alone that the Accused Ćerim Novalić was the perpetrator. The Defense Counsel stated that the Accused Novalić completed the elementary school in 1986 and the Prosecution failed to present any evidence to prove that he worked in Konjic before the conflict, and used the bus to Konjic in which he could have met the victim. In the opinion of the Defense Counsel, the witnesses for the Defense Amir Masleša,

Osman Novalić and Midke Pirkić in their testimonies contested the strength of the Prosecution's evidence with respect to the commission of the rape by the Accused and the time of commission of the act of rape.
In conclusion, the Defense submitted that the Court had no grounds to conclude that the Accused Novalić was guilty of the offence charged, which is why the Defense moves that the Accused be acquitted of charges pursuant to Article 284 (1) (c). Apart from that, the Defense stated that, bearing in mind that the given incident happened in 1992, it is not correct to qualify the criminal offence on the basis of the CC of BiH which entered into force no sooner than in 2003. The Defense opines that at the time when the offence was committed the CC of SFRY was in effect, being more lenient to the perpetrator than the CC of BiH.

6. Applicable Law

Article 3 of the CC of BiH regulates the principle of legality, that is, criminal offences and criminal sanctions shall be prescribed only by law. No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law. Apart from that, Article 4 of the Criminal Code of BiH stipulates that the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence, and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Article 7(1) of the European Convention also regulates the principle of legality. Pursuant to Article 2.2. of the Constitution of BiH, the European Convention for Protection of Human Rights and Fundamental Freedoms and its Protocols shall have priority over all other laws in Bosnia and Herzegovina. Furthermore, this provision of the European Convention stipulates a general principle prohibiting the imposing of a heavier penalty than the one that was applicable at the time the criminal offence was committed, but it does not stipulate the application of a more lenient law.

Article 4 a. of the CC of BiH stipulates that *Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.*
Article 7 (2) of the European Convention stipulates the same exemption stating that paragraph 1 of the same Article *shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations."* (See also Article 15(1) and (2) of the International Covenant on Civil and Political Rights contains similar provisions. The state of Bosnia and Herzegovina as a successor of Yugoslavia ratified this Covenant).

In the given circumstances this provides for the opportunity to depart from the principle under Article 3 and 4 of the CC of BiH (and Article 7(1) of the European Convention) and from the application of the criminal code in force at the time of the commission of the offence.

The Court holds that the criminal offence of which the Accused is found guilty is a criminal offence as defined by the customary international law and therefore if falls under *"the general principles of international law"* stipulated under Article 4a. of the Law on Amendments to the Criminal Procedure Code of BiH, and "*the general principles of law recognized by civilized nations"* stipulated under Article 7 (2) of the European Convention, thus the CC of BiH can be applied in this case on the basis of these provisions.

Furthermore, the fact that the criminal acts listed under Article 173 of the CC of BiH may be found also in the law which was in effect at the material time-at the time of commission of the criminal offence, more precisely under Article 142 of the CC of SFRY, means that those offences were punishable also under the law effective at the time, which supports the conclusion of the court with regard to the principle of legality.

Finally, the application of the CC of BiH is additionally justified by the fact that the stipulated penalty is in any case more lenient than the death penalty which was in force at the time of commission of the criminal offence, which satisfies the principle of time constraints regarding the applicability of the criminal code, that is, the application of a more lenient law to the perpetrator.

The foregoing is in line with the position taken by Section I of the Appellate Division of the Court of BiH in its Verdict against Abduladhim Maktouf No. KPŽ 32/05 of 4 April 2006 and the Verdict against Dragoje Paunović, No. KPŽ 05/16 of 27 October 2006. The Constitutional Court of Bosnia and Herzegovina considered this issue in the Appeal by A. Maktouf (AP 1785/06), and in its Ruling of 30 March 2007 it states: "*In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstic, Galic, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law. 69. In this context, the Constitutional Court holds that it is simply not possible to "eliminate" the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned..*"

The Court finds that those are trials for the criminal offences that were, at the time of perpetration, absolutely predictable and generally known as being in violation of the general rules of international law. In the case at hand, it is considered established that the accused must have known that during the state of war the application of international rules is a priority and that the violation of the internationally protected values has severe consequences. The analysis of Article 173 of the CC of BiH shows that it is evident that the essential elements of this criminal offence include, among other things, the elements of violation of international rules. That makes this group of criminal offences special, as it is not sufficient to commit such criminal offences by some physical acts but it is necessary to know that by the commission of that crime international rules are violated, and the assumption that the Accused has to be aware that periods of wars or conflicts or hostilities are particularly sensitive and protected by the generally recognized rules

of international law, thus as such the criminal offence becomes even more significant and its commission causes even more severe consequences than the criminal offence committed in any other time period.

Also, at the time when the criminal offences were committed, Bosnia and Herzegovina, as a successor of the SFRY, was a signatory of all relevant international conventions on human rights and international humanitarian or criminal law.[7]

Similarly, the customary status of criminal responsibility for war crimes against civilians and individual responsibility for war crimes committed in 1992 was confirmed also by the UN Secretary General[8], International Law Commission[9], as well as the ICTY jurisprudence and the International Criminal Tribunal for Rwanda (ICTR)[10]. These institutions have established that criminal responsibility for war crimes against civilians is an imperative standard of international law, or *ius cogens*.[11] This is why it seems indisputable that war crimes against civilians in 1992 were part of customary international law. This conclusion was also confirmed by the Study on Customary International Humanitarian Law[12] done by the International Committee of the Red Cross. According to that Study „Serious violations of international humanitarian law constitute war crimes" (Rule 156), „Individuals are criminally responsible for war crimes they commit" (Rule 151) and „States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." (Rule 158).

Following the principle of universal jurisdiction, customary international humanitarian law mandates every state in the world whether or not it ratified the appropriate international legal instruments. In this regard every state is obliged to prosecute or extradite (*aut dedere aut judicare*) all persons suspected of the violation of customary international humanitarian law.

The principles of international law recognized by the Resolution No. 95 (I) of the UN General Assembly (1946) as well as the International Law Commission (1950) are related to the Nurnberg Charter and the Judgments of the Court and accordingly to the war crimes in general. „Principles of international law recognized by the Charter of the Nurnberg Court and the judgments of the Tribunal" and adopted by the International Law Commission in 1950 and

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[7] This in particular includes*: Convention on Genocide (1948); Geneva Conventions (1949) and their Additional Protocols (1977.); Convention on Slavery amended in 1956.; Convention on Racial Discrimination (1966.); International Covenant on Civil and Political Rights (1966)); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,1968; Convention on Apartheid (1973); Convention on the Elimination of All Forms of Discrimination against Women (1979.), UN Convention on Torture (1984);*

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

[9] *International Law Commission , Commentary to the draft law on crimes against peace and security of the mankind (1996)*

[10] *ICTY, Appeals Chamber, Tadić case, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 1995, para.151.; ICTY, Trial Chamber, Tadić Judgment of 7 May 1997; para. 618-623;*

[11] *International Law Commission, Commentary to the draft provisions on responsibility of the State for offences unlawful on the basis of the international law (2001),Article 26.*

[12] Jean-Marie Henchaerts and Luise Doswald-beck; Customary International Humanitarian law; ICRC, Cambrigde University Press 2005, pg.568 onward.

delivered to the General Assembly stipulate under Principle I: "*Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment"*. Principle II also stipulates: "*The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.*"

This is why the criminal offence of War Crimes against Civilians should be in any case classified under the „general principles of international law " under Article 3 and 4 (a) of the CC of BiH. This is why, regardless of whether it is viewed from the aspect of customary international law, international treaty law or "principles of international law", it is incontestable that war crimes against civilians constituted criminal offences at the relevant time, more specifically, that the principle of legality was satisfied in terms of *nullum crimen sine lege* and *nulla poena sine lege*.

7. General elements of the criminal offence of war crimes against civilians

According to the Indictment of the Prosecutor's Office, the Accused is charged with the criminal offence of War Crimes against Civilians under Article 173 (1) (e) of the CC of BiH which reads:

" Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

e) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape…

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

General elements of the criminal offence of Crimes against Civilians, which should be proven by the Prosecution, follow from its legal definition:

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

- **The offence must be committed in violation of international law.**

The Indictment charges the Accused Ćerim Novalić with the Crimes against Civilians under Article 173 (1) (e) as read with Article 180 (1) of the CC of BiH, namely, that at the material time he acted in violation of Article 3 (1) (a) and (c) and Article 27 (2) of the Geneva Convention on Protection of Civilian Persons in Time of War from 1949 (hereinafter: the Geneva Convention).

Article 3 (1) (a) and c) of the Geneva Convention reads:

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

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

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

Common Article 3 of the 1949 Geneva Convention is generally considered to be a provision of customary law and is obligatory to all sides in the conflict, be it internal or international, thus the same provision was applicable at the time and place where the incident happened with which the Accused is charged.

To establish the violation of rules of international law, it is necessary to establish against whom the offence was directed, more precisely whether the offence was directed against a special category of the population protected under Article 3 (1) of the Geneva Convention.

According to the definition of the term of the protected category under Article 3 (1) of the Geneva Convention, civilians are persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*.[13]

Apart from that, Protocol I Additional to the Geneva Conventions defines civilians in the negation, stating that *the civilians are the persons who are not members of armed forces*".[14]

Article 43 (1) of the Protocol I, stipulates that:[15]

"The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse

[13] Prosecutor v. *Blagojević and Jokić*, case No. IT-02-60-T, Judgment of 17 January 2005, para. 544.
[14] J. Pictet and others, Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949 on protection of victims of the international armed conflicts (Protocol I), dated 8 June 1977, page 610;
[15] Apart from the reference to Article 43 of the Additional Protocol, Article 50 (*Definition of the term of a civilian and civilian population*) of the same protocol, it also explicitly refers to Article 4(A) of the Third Geneva Convention with regard to those who are included in the definition of armed forces. Commentary to Article 50 of Additional Protocol I, indicates that Article 43 of Additional Protocol I contains a new definition which includes provisions under Article 4(A) of the Third Geneva Convention; See *supra* note 4, page 611.

Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."

Accordingly, apart from the members of armed forces, any person present in the territory is a civilian.[16] Article 50 of the Protocol I further states that the civilian population comprises all persons who are civilians and that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. Article 50 also reads that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Accordingly, having in mind the definition of the term "civilian", which explicitly states that civilians are all persons who do not participate in hostilities and who are not members of armed forces, it is clear that the witness Borka Šaran, who is aggrieved by the improper conduct of the Accused described in the operative part of this Verdict, was a civilian, a person who did not take part in any way in the armed forces and who was protected by international law. The evidence adduced shows that the aggrieved party is a person of Serb ethnicity who lived in the village of Džepi (Konjic municipality) during the war. The aggrieved party remained in the house with her husband, who was ill, two minor children who were of pre-school age and her bed-ridden mother-in-law. Also, neither witness Borka Šaran nor other civilians who were with her at the time in the house were armed or in uniform, nor did they take part in any combat activities. Accordingly, it unquestionably follows that the aggrieved party Borka Šaran was a person protected under the Geneva Convention at the time relevant to the Indictment. Rules of international law, violations committed against life, limb or personal dignity, and particularly insulting and humiliating acts are particularly prohibited against this category of persons. It is evident that the criminal act indicated in the Indictment, which was committed by the Accused as explained below, violated the rules of international law, more precisely Article 3 (1) (a) and (c) of the Geneva Convention.

- **Violation must be committed in time of war, armed conflict or occupation.**

Article 173 of the CC of BiH stipulates that the criminal offence must be related to the violation of rules of international law during the war, armed conflict or occupation. Given that the Panel established that the acts of the Accused satisfied the elements of the violation of rules of international law, more specifically Article 3 (1) (a) and (c) of the Geneva Convention, which stipulates that Article is applied to the armed conflict which does not have the nature of an international conflict, in that regard the Panel notes that many courts concluded that this Article is applied not only to the internal but also to the international conflicts.[17] However, the Court did not deal with establishing the nature of the armed conflict which was found to have happened in BiH at the time relevant to the Indictment in this case, because Article 173 of the CC of BiH does not require that the nature of the armed conflict, be it internal or international, should be determined.

[16] See *supra* note 4, page. 611.
[17] *Prosecutor v. Delalić et al*, case No. IT-96-21-A, Judgment of 20 February 2001, paras 140-152, in particular para. 147.

The armed conflict exists whenever armed forces are engaged between states or it is a continued armed violence between the state authorities and organized armed groups or between such groups inside a state. In terms of common Article 3, the nature of this armed conflict is not relevant. Namely, it is irrelevant whether the serious violation happened within the context of an international or internal armed conflict, if the following requirements are satisfied: the violation must be a violation of international humanitarian law; the provision must be customary or, if it falls under the treaty law, the requirements must be satisfied; the violation must be serious, or it has to be a violation of a provision which protects important values, and the violation must include severe consequences to the victim, and the violation of the provisions must include the individual responsibility of the persons who violate the provision.

During the proceedings, it was indisputably found that there existed a state of war and an armed conflict at the relevant time and in the area concerned, which undoubtedly ensues from the Decision of the Presidency of the Republic of Bosnia and Herzegovina on the Declaration of Imminent War Threat (*Official Gazette of R BiH, No. 1*) dated 9 April 1992, as well as from the Decision of the Presidency of the R BiH on Proclamation of the State of War in the Territory of BiH, made on 20 June 1992 (*Official Gazette of R BiH, No. 7/92)* which lasted until 22 December 1995 when the Presidency of BiH rendered the Decision on Cessation of the State of War, and the consistent testimonies of the witnesses heard for both the Prosecution and for the Defense. Having evaluated all presented evidence, the Court found beyond reasonable doubt that at the relevant time in addition to the state of war there existed an armed conflict between the Army of BiH on the one hand and the Army of Republika Srpska (VRS) BiH on the other, which was incontestably confirmed by the testimonies of the witnesses for the Prosecution as well as the witnesses for the Defense. The facts found by the Trial Chamber and upheld by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case Prosecutor v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (case No. IT-96-21-T of 16 November 1998) which were accepted as "proven" pursuant to Article 4 of the Law on Transfer of Cases, unequivocally suggest that at the material time in the territory of the municipality of Konjic there was an armed conflict between the Army of BiH and the Army of Republika Srpska.

All witnesses who have been heard testified about this circumstance: Stanko Šaran, Borka Šaran, Danilo Šaran, Smiljana Magazin, Mina Zahirović, Amir Masleša, Pirkić Midko, Novalić Osman and Sead Jusufbegović, whose consistent testimonies suggest that at the time of war in Bosnia and Herzegovina, in the Konjic municipality, an armed conflict existed between the mentioned armed forces.

Having evaluated the consistent testimonies of the witnesses for the Prosecution and for the Defense, then the documentary evidence admitted into the case file related to the existence of the state of war and armed conflict, and on the basis of the findings from the ICTY judgments, the Court established beyond reasonable doubt that at the material time an armed conflict existed between Army of BiH and VRS.

The Defense for the Accused did not contest this fact.

The specific area where the fighting takes place does not necessarily correspond with the geographic zone to which the law on war applies. It applies to the entire territory of the warring states, more precisely, in case of internal armed conflicts in the entire territory controlled by one of the sides, regardless of whether fighting is actually taking place there, until peace is established, or in case of internal conflicts, until a peaceful solution is found. In other words, the violation of the laws and customs of war may be committed at the time and in the place where no fighting takes place. Namely, there might be a close nexus between the offence of the Accused and an armed conflict, even if the crimes were not committed at the time of actual fighting or in the very place where they are taking place. In order to satisfy this requirement it is sufficient, for example, that the crimes are closely related to the hostilities which were taking place elsewhere in the territory controlled by the warring sides.

The element which differs war crimes from common criminal offences that are subject to national laws is that war crimes are defined by the context in which they are committed –the armed conflict – or on which they depend. The war crime is not necessarily a planed offence or a result of some policy. The cause–effect relation is not required between the armed conflict and the commission of the crime, but the minimum requirement is that the existence of the armed conflict significantly influenced the ability of the perpetrator to commit the crime, his decision to commit it, the manner of commission and the goal for which it is committed. Therefore, to draw the conclusion that the criminal offences are closely related to the armed conflict it is sufficient to establish, as is the case here, that the perpetrator acted for the purpose of the armed conflict or within the armed conflict. The conclusion of the Court in that regard is not disputable.

To establish if an offence was sufficiently related to the armed conflict, the Court, among other things, took into account the following factors: the fact that the perpetrator of the crime was a combatant, that the victim was not a combatant and that the victim belongs to the adversary side. It is undisputable that the laws of war may often refer to the offences which were not committed where the operations were conducted, but are in essence related to the conflict. The war law may be applied on two types of criminal offences. The war law does not necessarily replace the laws in force at the time of peace: it may add necessary elements of protection which has to be given to the victims in time of war.

- **The offence of the perpetrator must be related to the war, armed conflict or occupation**

The third requirement allows to make a distinction and not to consider all crimes committed during the armed conflict as war crimes by automatism. The international case law firmly established that for the offence to be considered a war crime there has to be a sufficient nexus with the armed conflict; that is, the offences of the Accused must be "*closely related to the armed conflict"*.[18]

This close relation does not necessarily imply that fighting must actually take place in the territory where the offences are committed. The ICTY Appeals Panel in the T*adić* case held

[18] See , *inter alia, Prosecutor v. Kunarac, case No.* IT-96-23 & IT-96-23/1-A, Verdict 12 June 2002, para. 55; *Prosecutor v. Vasiljević*, case No. IT-98-32-T, Verdict 29 November 2002, para 24; Decision on the Court Jurisdiction in the *Tadić case, para* 70.

that: "The international humanitarian law apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved."[19]

Furthermore, "The 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.[20]

Taking into account the presented evidence, the Court finds that the offence of the Accused was sufficiently related to the armed conflict. The Court in particular took into account the position of the Accused within the military structure – that is, that he was a member of the Armed Forces of the Army of BiH, his presence in the place where the crime was committed and his treatment of the victim who was a civilian of Serb ethnicity. It ensues from the consistent testimonies of the witnesses heard for the Prosecution Borka Šaran, Stanko Šaran, Smiljana Magazin, Danilo Šaran, and the witnesses for the Defense Amir Masleša and Osman Novalić, that at the same evening when the given criminal offence happened three Serb civilians were murdered in the same village, and one woman-civilian of Serb ethnicity was wounded, who succumbed to the injuries a few days later. In addition, having in mind the engagement of the Accused at the relevant time as a soldier in the *Akrep* Sabotage and Reconnaissance Unit, which was a unit of the Army of BiH, the knowledge of the Accused of the armed conflict and the fact that he participated in it cannot be questioned.

Throughout the proceedings, the Defense did not contest the fact that the Accused at the material time was a member of the Army of BiH.

The Court found reliably and beyond doubt that the Accused at the relevant time was engaged as a soldier, more precisely, that he was a member of the Armed Forces of BiH, and this fact undoubtedly follows from the material evidence for the Prosecution, in particular from the following: Certificate of the Federation Ministry for Veterans and Disabled Veterans of the Defensive-Liberation War –, Federation Ministry for Veterans and Disabled Veterans of the Defensive War No. 07-03-29/09-3 of 17 August 2009 (Exhibit T-6), then among other documents the Form Vob 1 and Vob 2 and Unit Card delivered by the Federation Ministry for Veterans and Disabled Veterans of the Defense War – Conscription Records Section No. POV.07/6-03/1-23/09-9 of 6 August 2009 (Exhibit T-7) and the information about Ćerim Novalić from the Archives of the Army of R BiH, No. 16-14-14-04-34-1-609 of 16 September 2009 (Exhibit T-8). The above-mentioned documents show beyond doubt that the accused was engaged in the military from 15 April 1992 to 2 December 1995. This fact is corroborated also by the testimony of the witness for the Defense, Midke Pirkić, who was the Commander of the Sabotage and Reconnaissance Unit A-004, based in Konjic, which had the code name of *Akrepi*, and who testified that Ćerim Novalić was a member of his unit as of May 1992, and that he was in the fire support section, and that he stayed in this unit until the end of 1992. The fact that the

[19] Decision on the Court Jurisdiction in the Tadić case, para 70.
[20] Prosecutor v. *Kunarac et al., case No.* IT-96-23 & IT-96-23/1-A, Judgment of 12 June 2002, para. 58;

Accused at the relevant time was a member of the *Akrepi* Unit which was based in Konjic and which was a part of the structure of the Armed Forces of the Army of BiH was consistently stated in their testimonies by the witnesses for the Defense Amir Masleša and Osman Novalić. Based on the aforementioned evidence it has been established beyond doubt that the accused Ćerim Novalić was a member of one of the belligerent parties at the time of the perpetration of the criminal offence.

Furthermore, on the basis of the consistent testimonies of the witnesses for the Prosecution Borka Šaran, Stanko Šaran, Smiljana Magazin and Danilo Šaran, as well as the witnesses for the Defense Amir Masleša and Osman Novalić, the Court found incontestably that the victim Borka Šaran was a civilian not a member of any armed forces or groups in the incident with which the Accused is charged. Namely, it ensues from the testimonies of the mentioned witnesses that victim Borka was living in her house as a resident of the village of Džepi, Municipality of Konjic, which was mainly populated by Bosniaks. Apart from her, also living in the house were her husband who was very ill, two minor children of pre-school age and her bed-ridden mother-in-law. In this regard, the Court takes into account Article 51 (3) of the Additional Protocol I, stating that the civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities. The Court inferred that the members of armed forces, more specifically Army of BiH, HVO-a, as well as the members of the Territorial Defense, remain combatants all time, even when they are resting in their homes, or for the time being armed.[21]

- **Perpetrator must order or commit the offence**

On the basis of testimonies of witnesses and analysis of the material evidence, individually or mutually connected, the Court found that during the war in Bosnia and Herzegovina, at the time of the armed conflict between the Army of the Republic of Bosnia and Herzegovina and armed forces of the Army of Serb Republic of Bosnia and Herzegovina on the other hand, in September 1992 the Accused, as a member of the Army of BiH, as a soldier in the Sabotage and Reconnaissance Unit A-004, in the village of Džepi, the Municipality of Konjic, together with another unidentified soldier, entered the house owned by Stanko Šaran, and ordered him to go downstairs with his wife Borka Šaran to the basement-ground floor of the house, to check if they were hiding one *Daka* and Milan Magazin and, while the unidentified soldier stayed with Stanko Šaran, he ordered Borka Šaran to go to the upper floor where her underage children and ill bed-ridden mother-in-law were situated, where, threatening her, Ćerim Novalić forced her to sexual intercourse in one of the rooms. He afterwards left the house and walked away together with the unidentified soldier.

Having analyzed the testimonies of the witnesses for the Prosecution, who consistently stated that the victim Borka Šaran was raped on the occasion, and particularly having in mind the account of the victim with regard to the manner of commission of the rape, on that occasion the Accused entered her room armed, ordered her to take off her clothes or he would have killed her if she had not done so, and then ripped off her clothes and pushed her to the bed and raped her, the Court finds that through his acts the Accused Ćerim Novalić raped the victim–witness Borka Šaran using the force and threats. Accordingly, the Accused used force in order to have a sexual

[21] Prosecutor *v. Kordić and Čerkez*, case No. IT-95-14/2-A, Judgment of 17 December 2004, para. 51;

intercourse with the witness Borka Šaran. The circumstances surrounding such relationship between the Accused and the victim Borka Šaran incontestably suggest that the victim did not voluntarily consent to sexual intercourse. The position which the Accused had at the time of commission of the offence as an armed soldier of the Armed Forces of the Army of BiH, the fact that he entered the house of the victim with another armed soldier, that the offence was committed during the night when the power supply was off, and that he also threatened to kill her during the commission of the offence, caused justified and reasonable fear on the part of the victim that the threat would be carried out, while the force he used clearly suggests that he committed the act of rape unquestionably without consent of the victim. The Court holds that the Accused Ćerim Novalić committed the criminal offence by coercing another person to a sexual intercourse *using force and the threat of force intending to violate her personal dignity*. The Accused was aware that the witness Borka Šaran was of a Serb ethnicity, living in her house with ill husband and bed-ridden mother-in-law and minor children, unarmed and in no position to put up any resistance, therefore he treated her accordingly, based on which the discriminatory intent of the Accused is evident against the aggrieved person, against whom he committed this crime. As a member of the military he was aware that his act was forbidden, that is, it must have been known to him that any abuse or coercion to sexual intercourse under any circumstances constitutes a crime, in particular during the state of war when done by force or the threat of force in the situation where he had supremacy in every way.

Thus the Panel infers that the Accused committed the criminal offence of War Crimes against Civilians with a direct intent, being aware of the offence he committed and with intent to commit it.

The Accused committed the offence with a view to deprive another person of fundamental human rights, such as the right to body integrity, personal dignity and security, which is in violation of the international law, and which, pursuant to the above cited provision under Article 3 (1) of the Fourth Geneva Convention, is not allowed against unarmed persons or those who are not members of armed forces, and by doing so he violated international law beyond doubt. The offence was committed during the armed conflict of which the Accused was aware and in which he undoubtedly took part.

It unquestionably ensues from the statement of the witness Borka Šaran, who is a direct victim of the prohibited conduct of the Accused, whose testimony was accepted by the Court as convincing and reliable, that the Accused committed the act which was the criminal offence of War Crimes against Civilians, which resulted in the attack on her physical and mental integrity, her personal dignity, due to which she suffered and is still suffering great mental trauma and pains.

Based on the foregoing and taking into account all presented evidence, the Panel infers beyond any reasonable doubt that the offence of the Accused satisfies the elements of the criminal offence of War Crime against Civilians under Article 173 (1) (e) of the CC of BiH and that he is individually responsible for the commission of the offence as stated under Article 180 (1) of the CC of BiH.

8. Article 27 (2) of the Geneva Convention on Protection of Civil Persons dated 12 August 1949

In the given case the Trial Panel omitted from the Indictment Article 27 (2) of the IV Geneva Convention on the Protection of Civilian Persons of 12 August 1949 (IV Geneva Convention) for the following reasons:

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

The Trial Panel Verdict found the Accused guilty of the criminal offence of Rape pursuant to Article 3 of the Geneva Convention, which is applied to all armed conflicts, and pursuant to Article 173 (1) (e) of the CC of BiH, which does not refer at all to the nature of the conflict. Article 3 of the 1949 Geneva Convention is generally considered to be a provision of customary law and binding on all parties in the conflict, either internal or international. The Indictment states that it was "an armed conflict", but it does not further specify whether or not it was an international conflict or not.

Therefore, the Panel did not choose to establish if in the case concerned it was an internal or international conflict, more specifically it did not establish the nature of the conflict.

Furthermore, Article 76 (1) of the Protocol I Additional to the Geneva Convention of 12 August 1949 (Additional Protocol I), which is applied to international armed conflicts ,is identical to Article 27 (2) of the IV Geneva Convention, which is also applied in international armed conflicts. Article 76 (1) is mostly a repetition of Article 75 (2) (b) (Fundamental Guarantees) of the Additional Protocol I, except that the term "rape" is used only in Article 76, not in Article 75.

Article 4(2)(e) (Fundamental Guarantees) of the Protocol II Additional to the Geneva Convention of 12 August 1949 (Additional Protocol II), which is applied to the conflicts which do not have an international character, is identical to Article 75(1)(b) of the Additional Protocol I, adding the term "rape", which in essence is a merger of Articles 75 and 76 of the Additional Protocol I.

With regard to the foregoing provisions, rape is strictly forbidden in international conflicts and conflicts which are not of that nature, only different provisions are concerned. The only difference is the source of prohibition, that is, the appropriate source of international humanitarian law on which the charges will be based for the criminal offence under Article 173(1)(e) of the CC of BiH.

Therefore, the Panel concluded that Article 27(2) of the Geneva Convention cannot be exclusively applied in the given case, because if it were an international conflict then Article 27 of the Geneva Convention would be applied or Article 75 or 76 of the Additional Protocol I; or if it was a conflict which is not an international conflict then Article 4(2)(e) of the Additional

Protocol II would be applied. Given that the Prosecutor's Office of BiH in its Indictment did not specify whether or not it was an internal or international conflict, the Panel chose not to establish the foregoing.

9. Rape and other serious sex crimes in international law

With respect to the term “rape “ in the international humanitarian law, rape at the time of war is prohibited by treaty law: the 1949 Geneva Convention, the 1977 Additional Protocol I and the 1977 Additional Protocol II. Other severe sex crimes are explicitly or implicitly prohibited by various other provisions of the same conventions.

At least the common Article 3 of the 1949 Geneva Conventions, which implicitly includes rape, and Article 4 of Additional Protocol II, which explicitly mentions rape, are applied to this case as a treaty law because on 31 December 1992 Bosnia and Herzegovina ratified the Geneva Conventions and both Additional Protocols. Furthermore, on 22 May 1992 the warring parties pledged to respect the most important provisions of the Geneva Conventions and ensure protection which those guarantee. The prohibition of rape and serious sexual assault during an armed conflict was raised to the level of customary international law. This prohibition has gradually crystallized from the explicit ban on rape under Article 44 of the Lieber Code and general provisions under Article 46 of the Rules in Annex IV of the Hague Convention, which should be interpreted together with “the Martens Clause“ stated in the preamble of the Convention. Although the Nurnberg Court did not prosecute separately for rape and sexual assault, rape has been qualified as a crime against humanity pursuant to Article II (1)(c) of the Law No. 10 of the Control Council. (10). It cannot be contested that rape and other serious sex crimes committed in an armed conflict entail the criminal responsibility of the perpetrators.

Furthermore, within the international human rights law no international human rights instrument explicitly prohibits rape and other serious sex crimes. However, those criminal offences are implicitly banned under provisions protecting the bodily integrity, included in all relevant international agreements. The right to the bodily integrity is a fundamental right which is reflected in national laws, consequently it undoubtedly constitutes a part of customary international law. In some circumstances, however, rape can be qualified as torture and, based on the opinion of international judicial bodies, it may constitute a violation of the norm which prohibits torture. Criminal prosecution of rape as a crime against humanity is explicitly defined under Article 5 of the Statute of the International Court. If the necessary elements are satisfied, rape can be qualified as a serious violation of the Geneva Conventions, violation of the laws and customs of warfare or an act of genocide, and as such it may be a subject of criminal prosecution.

10. Definition of Rape

The Court holds that rape is a forcible act: this means that the act is "followed by force or threat that force will be used against the victim or a third person, and such threats are explicit or implicit and they must cause a reasonable fear on the part of the victim that he/she or a third person will be subjected to violence, imprisonment, coercion or mental oppression. That act is described as the penetration into vagina, anus or mouth by penis, or penetration into vagina or anus by another object. This context includes penetration, irrespective of how slight it is, into

vulva, anus or mouth by penis, while sexual penetration into vulva or anus is not limited to the penis only."

There is no definition of rape in international law. However, some general indications can be discerned from the provisions of international agreements. Particular attention should be paid also to Article 27 of the IV Geneva Convention, Article 76(1) of Additional Protocol I and Article 4 (2)(e) of Additional Protocol II prohibit rape or "*any form or indecent assault"* on women. It is reasonable to conclude that international law, by explicitly prohibiting rape and, generally, other forms of sexual abuse, considers rape as the most serious form of sex crime. It is *inter alia* confirmed by Article 5 of the Statute of the International Court, which explicitly refers to rape, while other, less severe forms of sex crimes, are implied in the term of "other inhumane acts" under Article 5(i).

Just like torture, rape is used for the purposes such as intimidation, degradation, humiliation, discrimination, punishment, control and destruction of personality. Just like torture, rape is a disgrace to the personality, and rape actually constitutes torture when it is committed by or incited by, or consented by a state official or by other official persons. The Panel defines rape as a bodily invasion of the sexual nature, which is committed over a person under the circumstances which include duress." (11)

The Court notes that no other elements can be taken from international conventional law or customary law except for those mentioned above, while resorting to the general principles of international criminal law or general principles of international law has proven to be of no use. The Trial Panel therefore finds that, in order to formulate a proper definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, *nullum crimen sine lege stricta*), one should recall the principles of criminal law that are common to all relevant legal systems in the world. Those principles may be drawn, with due caution, from the national laws.

Whenever a term from criminal law is not defined by international criminal rules, it is reasonable to rely on national laws, and in doing so the following conditions have to be satisfied: (i) unless it is otherwise defined by an international rule, it is not appropriate to refer only to one national legal system, for example to common law only or to civil law only. On the contrary, international courts have to rely on general notions and legal instruments common to all large legal systems in the world. This includes the process of identification of all common denominators in those legal systems in order to establish the common fundamental terms; (ii) as "the international trials show numerous characteristics which make them different from national criminal trials". In using terms from the national law one has to take into account the specificity of international criminal proceedings. In that manner a mechanical replication or transposition from national law to international criminal trials is being avoided.

At the very onset the Court wishes to underline that the tendency of broadening the definition of rape can be noted in the national laws of many states, thus the definition now includes the acts which by then had been qualified as a relatively less severe crime, that is, the crime of sexual or improper assault. The trend shows that at the national level the states strive to take a more strict position toward the severe forms of sex crimes: an ever growing number of sex crimes are now

being stigmatized by the same shame as rape, provided, however, that certain criteria have been satisfied, primarily the forcible body penetration criterion.

The laws of several jurisdictions state that the *actus reus* of rape comprises penetration into the female sexual organ by the male sexual organ regardless of how slight it is. However, there are jurisdictions which broadly interpret the *actus reus* of rape. The provisions of civil law jurisdiction often contain formulations which the courts may interpret on their own accord. Furthermore, all jurisdictions require the existence of element of force, duress, threat or acting without the consent of the victim: the use of force has a broad interpretation and includes the bringing of the victim to the state of helplessness. Some jurisdictions state that force or intimidation may be directed toward a third person. The aggravating factors usually include the killing of the victim, participation of more than one perpetrators, the young age of victim and the fact that the victim suffers from a condition that makes her/him particularly vulnerable, for example, from a mental disease. Rape is almost always punished by a prison sentence, even by the life sentence, but the length of the sentences that may be imposed by different jurisdictions varies significantly.

From this review of national laws it is evident that, despite the unavoidable differences, the majority of legal systems in common law and in civil law define rape as a forcible sexual penetration into the human body by a penis, or a forcible putting of any other object into the vagina or anus. (10) However, a significant difference can be noted with respect to the criminalization of forcible oral penetration: some states consider it an act of sexual assault, while others qualify it as rape. Faced with such differences, the Court should establish if a suitable solution can be found by resorting to the general principles of international criminal law or, if those principles are not applicable, then to the general principles of international law. The essence of the entire corps of international humanitarian law, as well as international human rights law, is the protection of the human dignity of any person, regardless of the gender. The general principle of respect for human dignity is the backbone and the *raison d'ętre* of international humanitarian law including the human rights law; indeed, in modern times it has gained such an exceptional importance that it pervades the entire corps of international law. The purpose of that principle is to protect humans from the violation of their personal dignity, regardless of whether the violation was committed by an unlawful assault on the body or by humiliation, disgrace or assault on one's self respect or a mental wellbeing of the person.

Accordingly, the Court finds the following elements to be acceptable as objective elements of rape:

(i) sexual penetration, regardless of how slight,

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

   (b) into the mouth of the victim by the perpetrator's penis;

(ii) using the duress or force or the threat of force against the victim or a third person. (11)

As we have already stated, international criminal rules punish not just rape but any serious sexual assault that may not result in actual penetration. One would say that the ban includes any serious maltreatment of a sexual nature inflicted on the bodily and moral integrity of the person by the use of force, threat or intimidation by degrading or humiliating the victim's dignity. As both offences are qualified as crimes under international law, the difference between them is significant primarily because of the punishment.

It is evident from the testimonies of all witnesses that the victim of the rape is a woman of Serb ethnicity. It clearly ensues from the evidence presented that ordering the victim Borka Šaran to go to another room of the house, where she was raped, while the other persons were in other rooms, was a discriminatory measure directed against the person of Serb ethnicity, who was not a member of the Bosniak ethnic group. The Army of BIH controlled the village of Džepi where the aggrieved party and her family lived. Based on the testimony of the witnesses for the Prosecution, and the documentary evidence, which the Court finds credible and authentic, it is clear that the victim Borka Šaran, as a person of Serb ethnicity, was a victim of the acts by the Accused. The same witness clearly stated that this act involved sexual penetration and bearing in mind that the accused used force and threat against the aggrieved party, the Court finds that the act undertaken by the accused has met all the elements of the act of rape.

11. Findings and Reasoning of the Court

a) General Considerations

In this case the Court evaluated the evidence pursuant to the Criminal Procedure Code of Bosnia and Herzegovina, primarily applying the presumption of innocence under Article 3 of the CPC of BiH, which is the general principle of law based on which the Prosecution bears the burden of proof of the guilt of the Accused, and the guilt must be found beyond a reasonable doubt.

In addition, under Article 15 of the CPC of BiH, the Court has the right to freely evaluate all presented evidence. The Court was of the opinion that it was necessary for the Court to be convinced that such evidence was reliable, meaning that it was given voluntarily, and that it was true and authentic.

Pursuant to Article 14(2) of the CPC of BiH, the Court evaluated with equal attention both facts that are exculpatory as well as inculpatory for the Accused.

In this case the Court has analyzed all presented evidence both individually and collectively, and in doing so it particularly considered its, credibility, reliability and probative value. In this reasoning the Court will not equally consider each piece of evidence in the Court record, which is the discretion of the Trial Panel, but it will only reason those conclusions concerning the facts relevant to the rendering of the decision.

b) Evidence and Evaluation of the Evidence

Having evaluated all presented evidence, individually and collectively, the Court found beyond any reasonable doubt that the Accused committed the criminal offence of War Crime against Civilians under Article 173(1)(e) as read with Article 180(1) of the CC of BiH, in the manner as stated in the operative part of the Verdict.

The Court has already stated and explained the evidence concerning the facts linked to the existence of the war and armed conflict in Bosnia and Herzegovina at the relevant time in the previous chapters of the Reasoning part of this Verdict. In addition, in the previous paragraphs of the Verdict's reasoning it was indisputably found that at the time the Accused Ćerim Novalić was a member of the Armed Forces of the Army of BiH. The Court reiterates that these facts have not been disputed by the parties.

Based on the presented evidence the Trial Panel found that the criminal offence occurred in the village of Džepi, Municipality of Konjic, around 22:00 hours, on an unspecified date in September 1992. That fact was found on the basis of the consistent statements of a number of witnesses, both for the Prosecution and for the Defense, as well as the statement of the victim Borka Šaran herself, who said in all the statements she gave that she was raped in her house in the village of Džepi, Municipality of Konjic, around 22:00 hours, when four persons of Serb ethnicity were killed in the same village (Đuro Lojpur, Janja Lojpur, Bosiljka Šinik and Jovo

Šinik).[22] These facts have also been found on the basis of the documentary evidence reviewed by the Court, which corroborates the testimony of the witnesses in that regard.

The witnesses Stanko Šaran, Smiljana Magazin, Danilo Šaran, as well as the witness for the Defense Amir Masleša have consistently stated that the rape of Borka Šaran happened in the village of Džepi, municipality of Konjic, on the same evening when the four mentioned persons of Serb ethnicity, who lived in the same village, were killed.

The witness Stanko Šaran said that the rape was committed on 13 September 1992, in the evening hours and that in the morning following the incident he heard that Jovo and Bosa Šinik, and Đuro and Janja Lojpur were killed in the village of Džepi that same evening.
The witness Smiljana Magazin, testifying about the time and place of the rape, said that it happened on 13 September 1992 in her opinion, the same night when the Army of BiH attacked the Serb houses in the village of Džepi, and on that occasion Jovo and Bosa Šinik and Đuro and Janja Lojpur were killed. The witness testified that on that evening she was in her house in the village of Džepi and that she heard the shooting around 23:00 hours.
The witness Šaran Danilo testified that, based on the seasonal farmwork, it seemed to him that the killing of those persons in the village of Džepi happened in the second half of August 1992, and that on the following day he left the village of Hum, where he resided, and arrived in the village of Džepi, intending to bury the dead bodies. The witness noted that he heard the rumors that some army had killed them, presumably the Army of BiH, although people were roaming around and everyone had their own army. Upon his arrival at the village of Džepi, he saw the dead body of Đuro Lojpur, lying faced down in the house, with a wound in his head, and in the same house he saw also the dead body of Janja Lojpur. He buried these two bodies in the village cemetery in the village of Džepi, and during the funeral at the graveyard someone told him that the same evening Borka Šaran had been raped, whom he knew but was not related to. The witness said that, immediately after the funeral, he went to the house of Borka Šaran where he saw her husband Stanko Šaran, who was very, very ill. He was depressed and he kept silent because he felt very bad. The witness Danilo Šaran stated that silence prevailed in the house, and nobody was speaking. He recalled that Borka was crying and also her children were crying too, who asked her: "What is wrong, mother?" Borka did not say anything. The same witness stated that the following day, or the day after, all Serb residents left the village of Džepi for Zagorica.

The witness Amir Masleša, who, at the relevant time, was a company commander in the village of Džepi, and the company was a part of the BiH Army, testified that in early September 1992, the same night when the alleged rape of Borka Šaran was committed, four Serb residents were killed in the village of Džepi. The witness Masleša testified that on that evening he came home and after it got dark, that is, between 21:00 and 22:00 hours, he heard bursts of fire. The Accused Ćerim Novalić was then engaged in the unit *Akrepi* in Konjic, under the command of Midke Pirkić. The witness Masleša said that in April 1992 a part of the Serb population moved out of the village of Džepi. Borka Šaran's family was among those Serb residents who stayed in the village. He knew her husband who was ill and her two underage children. He learned of the rape of Borka Šaran the following day, and Borka Šaran told him that in person close to her house, in the presence of Smiljana Magazin.

[22] Transcript of the testimony of the witness Borka Šaran, 23 March 2010, Case No. X-KR-09/847, page.14

The witness for the Defense Osman Novalić, who was the Vrdolje Platoon Commander at the relevant time, which was part of the Džepi Company, also testified that in mid-September he heard from Amir Masleša that Borka Šaran had been raped, and that at the time in the same month the murder of several persons happened in the village of Džepi, including Đuro Lojpur and his wife.

Based on the testimonies of the mentioned witnesses, it undoubtedly ensues that the rape of Borka Šaran took place on the same evening when four Serb civilians in the village of Džepi were killed, more specifically that these incidents are closely linked regarding the time of perpetration.

The time of the murder of Serb civilians in the village of Džepi was established on the basis of the documentary evidence submitted into the case record by the Prosecution of BiH, more precisely, based on the death certificates for those persons.[23] All death certificates indicate the time of death to be between 12-14 September 1992. Having that in mind, during the proceedings it was proven beyond doubt that the incident of rape happened on an unspecified date in September 1992, as indicated in the factual description of the Indictment. Based on the consistent testimonies of the mentioned witnesses, it undoubtedly ensues that the offence was committed in the village of Džepi, in the area of the municipality in Konjic, and it can be seen from the review of the death certificates for the aforementioned persons of Serb ethnicity that they were killed in the village of Džepi, Municipality of Konjic.

While establishing the time of commission of the criminal offence, the Court had in mind the inconsistencies between the statements by the victim Borka Šaran. Specifically, during the investigation she averred that the incident happened in late May 1992, and then claimed that it happened in June of the same year, while afterwards she said that it happened in September and in her last statement claimed that the incident took place on 13 September 1992. In evaluating these statements separately, the Court specifically was mindful of the fact that from the beginning the aggrieved party linked the rape with the murder of four Serbs, more specifically that she constantly and consistently averred that Đuro and Janja Lojpur as well as Jovo and Bosa Šinik were killed in the village on the same evening, which was confirmed by the above mentioned witnesses in their testimonies. In view of the death certificates for the persons of Serb ethnicity who were killed in the village of Džepi, the Court finds that it was established beyond doubt in the proceedings that the offence was committed on an unspecified date in September 1992. The Court accepted the explanation of the victim Borka that she was very confused, scared and that she had a blockade while giving her initial statements, as it can be clearly seen from the subjective and objective evidence that the incident did happen in September 1992.

The Court established the mode of commission of the criminal offence on the basis of the testimony of the witness – the victim Borka Šaran, as well as the testimony of the witness Stanko Šaran, who gave consistent and mutually complementary statements in this regard, which the Court accepted as being authentic. In so doing, the Court had in mind that those are the only witnesses who had direct knowledge of the circumstances surrounding the offence. Taking into account that the victim and her husband are the only persons who witnessed the mode of rape,

[23] Death Certificates for Bosiljka Šinik (T-14), Death Certificate for Jovo Šinik (T-15) and Death Certificate for Janja Lojpur (T-16).

the Court paid special attention to their testimonies, and the testimony of other witnesses with regard to this circumstance of the incident.

The witness Borka Šaran stated that on the relevant evening the power supply was cut, the children and the bed-ridden mother-in-law had already went asleep and that she and her husband were awake. Then someone knocked at the door, and when she asked who it was, someone responded that it was the military police. She opened the door and two persons armed with rifles entered the house, wearing camouflage uniforms and head bands over their foreheads. They asked who else was in the house in the rooms, and when they heard the answer, they told Stanko to stand up and follow them together with the witness. Stanko, who was severely ill, got out of the bed, and the witness together with him went in front of the soldiers. They went downstairs, to the room which was used as a storage for potatoes, and they asked if they hid there Zdravko a.k.a. *Daka* and Milan Magazin, who were brothers, and their neighbors in the village of Džepi. Then one of the two soldiers told her: "Borka go upstairs to the kids", and then she started climbing the stairs. The Accused followed her and entered the sitting room. He told her to take her clothes off, and when she asked him why, he told her to take her clothes off, not to shout or else he would kill her. He pushed her to the three-seater sofa and raped her there. She did not dare put up any resistance out of fear. During that time the children were sleeping in one and her mother-in-law in the other room. After the rape the Accused left the house, and she soon heard shooting in the frontyard. Stanko came to the sitting room. She was crying and she immediately told him that she was raped. The witness said that Slavko consoled her, and that he told her that he was not beaten but the soldier who stayed with him put the pistol on his forehead. Then on the following morning she went to her neighbor Goja together with her husband, where they found Smiljana Magazin, to whom she told that she had been raped. The witness Borka Šaran stated that she did not go to the command to report the rape, but somebody told Amir Masleša, who was in charge of the army in the village of Džepi, about her rape. On that occasion Amir Masleša came in front of her house and asked her what happened the previous night, and she responded crying that he and Osman Novalić have to know where their soldiers were and that one of their soldiers raped her.

The witness Stanko Šaran, victim's husband, testified that at the material time he was living with his wife Borka, two minor children and the bed-ridden mother in their house in the village of Džepi, Municipality of Konjic, that he was not a conscript, and that at the time he was very ill. On the material evening he was lying in bed in the sitting room when someone knocked at the door. The children were sleeping in one and the bed-ridden mother in the other room. His wife Borka asked: "Who is it"? And someone replied – the police, and then he told his wife to open the door. Then two persons in the military uniforms with rifles in their hands entered the house with headbands. They forced them to the cellar accusing them of hiding Daka and Milan Magazin, who were their neighbors from Džepi. One of these two forced him into the room where potato was stored, and put the pistol against his temple, while the other went upstairs with his wife. He heard this soldier telling Borka to go upstairs to her children, and then he followed her. That soldier returned to the cellar approximately 10 to 15 minutes later and asked the other soldier if he admitted anything, and when he replied that he did not, they let him go inside the house, and then they went away. Having entered the house he saw Borka in the sitting room crying, and on that occasion his wife told him that the soldier pushed her on the couch and raped her in the sitting room.

The testimonies of the witnesses Borka Šaran and Stanko Šaran with regard to the mode of rape of Borka Šaran were given convincingly and, having in mind that these witnesses gave their statements in the investigation proceedings consistently and described the events in all essential elements with respect to these circumstances, the Court accepted their testimonies in their entirety as truthful.

The witness Smiljana Magazin in her testimony confirmed that immediately on the following morning she heard from the victim Borka Šaran, that she had been raped and that on that occasion Borka with her husband Stanko came in front of her house. The witness pointed out that there were several persons in her house at the time, including Kojo and Goja, and that Borka and Stanko came to them to tell them what had happened and to decide if they would flee. On that occasion the victim Borka said that Stanko was taken to the cellar where he was beaten and that one uniformed soldier stayed with her and raped her.

The witness Amir Masleša testified, with regard to the mode of rape, that the next afternoon he heard from Borka Šaran that she had been raped. On that occasion she told him that there were three of them, and that two soldiers took her husband and children to the cellar of their house and detained them there, and that one of them stayed with her in the house, and thereafter the other two returned and that all three of them raped her there. The witness noted that Borka told him all that in front of her house in the presence of Smiljana Magazin when he was passing by there, he could not remember why exactly.

The witness Osman Novalić stated that it was Amir Masleša from whom he learned that Borka had been raped, stating that Amir told him that he had heard so from Borka and Smiljana Magazin who told his so together when he was on his way to ask Borka if it was true that she had been raped. The same witness testified that in October 1992 he personally asked Borka if it was possible, and then Borka told him that she was not raped, but God forbid anyone to go through it again. The witness Novalić said that he continued asking her husband where he was at the time, and he said that they forced him together with the kids to the brook near the graveyard, where they threatened that they would kill him unless he told them where his weapon was.

The Court did not accept the statements of the witness Amir Masleša and Osman Novalić regarding the mode of commission of the incident, given that their testimonies are mutually opposite and in complete contradiction with the testimonies given by Borka Šaran and Stanko Šaran regarding the same circumstances. The testimony of the witness Masleša that the victim Borka, together with Smiljana Magazin, told him that on that occasion she was raped by three men is not acceptable to the Court, as the victim from the very beginning averred that it was one person only, and this fact was also stated by her husband Stanko and the witness Magazin Smiljana. Also, the witness Danilo Šaran, who learned immediately next morning that Borka had been raped, did not state that there were more than one person. In the end, the document which was admitted into the case record, the Official Note of the Ministry of the Interior of the Public Security Center in Trebinje of 13 November 1992, reads that the National Security Service learned that the victim Borka Šaran was raped by only one person. The analysis of the testimony of the witnesses Amir Masleša and Osman Novalić shows that they asked victim Borka: ”Do you know who it was?“, and that Borka responded that she knew who it was, using, in both the

question and in the answer always the singular, which clearly shows that they knew that it was one person. Also the statements of these witnesses are mutually contradictory, as the witness Masleša said that he happened to be in front of Borka's house when he learned that she was raped, while the witness Novalić said that Masleša said that he had gone to Borka's house to ask her if she had been raped.
The Court also did not accept the testimony of the witness Masleša that he subsequently learned from one Radovan Šaran from Hum that Borka made up the rape as she got pregnant with somebody else, since this statement was solely based on the story told by a third party and has not been corroborated by anything and it is in contravention of all other pieces of evidence presented during the proceedings from which it ensues beyond doubt that the rape was actually committed. Also, the person named by witness Masleša as the source of the information, according to this very witness did not live in the place where the aggrieved party did at the material time, which also attests to the unreliability of this assertion.

The Court did not accept the allegations by witness Novalić that the aggrieved party Borka told him that she had not been raped and that her husband told him that the soldiers took him to the brook together with their children during that time. This is because these allegations are contradictory to the evidence of the Prosecution witnesses as well as to the testimony of the Defense witness Amir Masleša, all of whom were consistent in saying that Borka told them that she had been raped, and witness Danilo Šaran stated that he heard that she had been.

The Court particularly notes that the victim Borka Šaran said that she believed that witnesses Amir Masleša and Osman Novalić, who at the time were commanding officers of the military units in the local community of Džepi, were the persons who should have known who committed the offences charged. Bearing in mind that the Defense witnesses Amir Masleša and Osman Novalić were commanding officers of the military units in Džepi which was within their Company AOR, the Court is of the opinion that their evidence concerning the existence of the criminal offence and the manner of perpetration were given in order to reduce and/or eliminate criminal responsibility of the accused.
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During the proceedings, particularly contestable was the issue if the victim Borka Šaran knew who the person who raped her in her house on the material night really was, or if the Accused Ćerim Novalić was the perpetrator of the rape.

The testimony [24] of the witness, the victim Borka Šaran, shows that she moved with her family to the village of Džepi in autumn 1989, and that since then she saw the accused Ćerim Novalić on several occasions, most frequently on the bus which she took to work, and she also met him in passing when he would walk and on other occasions since they were neighbors and they lived in the neighboring villages. The witness said that she remembered the Accused Ćerim Novalić from those meetings.

[24] Transcript of the testimony of the witness Borka Šaran, 23 March 2010, Case No.X-KR-09/847.

Based on the witness testimonies, the Accused Ćerim Novalić was also known by the witnesses Stanko Šaran and Smiljana Magazin. The witness for the Defense Osman Novalić, who lived in the village of Vrdolje where the Accused lived too, stated that the residents of the villages Vrdolje and Džepi knew each other well. In that regard the witness said that the residents of these villages first went to school together, and then they worked together, commuted by bus together which means that they contacted each other on a daily basis. In addition, the witness Novalić said that they had coffee together, went to the same shops where they drank or sit together or did other similar things. The victim said that her bus commuted from Konjic to Vrdolje on a daily basis, and that the village of Džepi was on that road communication, two kilometers before the village of Vrdolje.
The fact that the victim moved to the village of Džepi where she built a house in which she was living with her husband, bed-ridden mother-in-law and two minor children was corroborated by the statements of other witnesses heard, as well as the testimonies of the witnesses for the Prosecution Stanko Šaran, Smiljana Magazin and Danilo Šaran, and the statements of the witnesses for the Defense Amir Masleša and Osman Novalić.
It has also been established in the proceedings beyond doubt, both based on the testimony of the witnesses Borka Šaran, Stanko Šaran, Smiljana Magazin, Amir Masleša and Osman Novalić and based on the documentary evidence, specifically the VOB-1 and VOB-2 forms and the unit file, that at the relevant time the Accused Ćerim Novalić lived in the village of Vrdolje, which belongs to the local community of Džepi and that the village was around two to three kilometers away from the village of the victim. The witness Osman Novalić submitted that the Accused Ćerim Novalić was permanently living in the village of Vrdolje, and that he still lives there.
Based on the consistent statements of the witnesses Borka Šaran, Stanko Šaran, Smiljana Magazin and Osman Novalić, the Court established beyond doubt that the residents from both villages used the same buses on their way to Konjic. It is entirely logical for the Court that due to all these circumstances and the vicinity of the mentioned villages the residents knew each other, by their names and by the appearance. Also, the Court considers it totally logical that the victim, while she was living in the village of Džepi, had an opportunity to meet the accused Ćerim Novalić and remember him through these meetings, particularly because the Accused commuted by bus to work on a daily basis to Konjic, and also other residents of the village in Vrdolje, where the accused lives, used the same bus. The fact accepted by the Court that the Accused completed the primary school in Konjic long before the armed conflict, which is based on the review of his certificate on completed elementary school, does not mean that he did not go by bus to Konjic sometimes, or that he could never met the victim in the bus.

The victim Borka Šaran testified that she recognized the Accused on the material evening immediately after his arrival in front of her house, pointing out that the night was clear, thus she was able to clearly saw the face of the Accused under the moonlight, whom she immediately recognized. The witness Borka Šaran also said that at the time of rape she was looking the Accused in his face, and that it was the face of Ćerim Novalić. The Court gave credence to the testimony of the victim that on the given evening she was able to recognize the perpetrator of the offence, having in mind that the witnesses Smiljana Magazin, Danilo Šaran, and the witness for the Defense Amir Masleša, were also consistent in stating that there was moonlight on the critical evening and that visibility was good. Bearing in mind the fact that the victim looked in the face of the Accused Ćerim Novalić for a long time while this incident was ongoing from a

very close distance, it is entirely logical that she had an opportunity to clearly see the person in question.

On the other hand, the Court submits that the assailants on the Serb population in the village of Džepi, when the rape happened, knew the local circumstances in the village and knew where the Serb houses were and who occupied them, which is evident from the fact that on the same night when the rape was committed, exclusively Serb residents were attacked, although only a small number of Serbs stayed in the village at the time. In support of this conclusion is also the fact, which was stated consistently by the witnesses Borka Šaran and Stanko Šaran, that the attackers on the house of the victim were looking for one Daka and Milan Magazin in the cellar of her house, who left the village of Džepi in the very beginning of the conflict, according the testimony of the witness for the Defence Amir Masleša. The testimony of the victim Borka Šaran shows that one of the attackers called the victim by her name, which clearly suggests that they knew her, they knew her ethnicity, her family situation and the situation she was in.
From the description of the persons who on the given evening arrived at the house of the victim in the village of Džepi, and this description was given by the victim Borka, including her husband Stanko Šaran, it ensues that those soldiers were armed with rifles, wearing military camouflage uniforms and head bands.
From the testimony of the witnesses Amir Masleša and Osman Novalić, which is also stated by the witness Mitke Pirkić, it incontestably follows that at the material time the Džepi village was under the control of the BiH Army forces. The witness Amir Masleša said that he personally was the Commander of the Džepi Company, which was composed of three platoons including the one relocated to the village of Vrdolje, where the Commander was witness Osman Novalić, while the other two platoons were based in Džepi. The witness Masleša said that his company was exclusively composed of the residents of the village of Džepi and Vrdolje, no Croats lived in these villages, but in the territory of the local community of Džepi they lived only in the village of Dubravice, near Hum, approximately 40 to 50 Croat inhabitants.
Witness Osman Novalić confirmed that he was the Platoon Commander in the village of Vrdolje, which was within the structure of the Džepi Company, and that all members of the platoon were residents of the village of Vrdolje. Both of these witnesses said that the Accused Ćerim Novalić at the material time was a member of the Akrepi Unit from Konjic, under the command of Midke Pirkić.
The witness Mitke Pirkić confirmed that at the material time he was the commander of the A-004 Sabotage-Reconnaissance Unit, which was within the Territorial Defense HQ, which had the code Akrepi. The witness said that within this unit there were three to four soldiers from the area of the local community of Džepi, including the accused Ćerim Novalić, who was in the fire support section issued with the light machine gun. In 1992 the unit was based on the premises of the Motel Konjic, but at the time the Accused Ćerim Novalić was engaged on the security of the motel in Konjic, as of late August 1992, the majority of the unit underwent a 45 day training outside the territory of Konjic. This security was provided in shifts. In support of this averment, witness Pirkić stated that he found a document that he himself authored, titled List of Soldiers and Commanding Officers dated 24 August 1992, wherein the accused Ćerim Novalić is listed as a person who provided security. The witness said that he did not have any knowledge if the accused Ćerim was at the motel all the time. He also stated that all soldiers of his unit wore military camouflage uniforms, and that they did not have any other visible insignia. Asked if they wore any head bands or bandanas, the witness first stated that they could have worn them,

but that it was optional to determine what they would wear while attacking the enemy territory, and then he stated that camouflaging was done upon the orders. The witness Pirkić said that his unit was entitled to operate in the entire area of the municipality of Konjic, and that members of the unit were mostly armed with automatic weapons of various types: from the rifles Zastava M-72 and M-16, hecklers, and 9 mm pistol, automatic rifles with folding butts, and imported MGV sub machine guns, and all this depended on the manner of operation. Most of the soldiers were issued with two to three types of weapons. The weapons were kept in the rifle stands at the entrance in the Motel, and the task of the persons who secured the Hotel building, including the accused Ćerim Novalić, was to safeguard the material means It ensues from the testimony of the witness Pirkić that the accused Ćerim Novalić wore a multi-colored camouflage uniform as a soldier, and that he could put on a headband during the combat operations and that his unit was equipped with various weapons including different types of rifles. It also follows from this witness' testimony that the village of Džepi was within the AOR where his unit could undertake combat operations. Witness Pirkić did not know whether the accused was at the Motel in Konjic throughout the material time.
The Court accepted as credible the List of Soldiers and Commanding Officers for the Training dated 24 August 1992, as it corresponds with the Order by the Army of BiH, Konjic Municipal Staff, dated 19 August 1992. It is, however, not evident from these documents until when the training took place, on what specific days and at what time it would end. Witness Pirkić himself stated that the soldiers would return from the training every day around 21:00, 22:00 hours, which is the time when the relevant incident took place. The Court opines that the aforementioned documents and witness Pirkić's testimony do not show that the accused Novalić was not the perpetrator of the criminal offence.

On the other hand, the victim submitted in the proceedings that from the beginning she knew the person who raped her, but because of fear for her safety, the safety of her husband and children she did not want to tell anybody that it was the Accused who had raped her. During the direct examination of the witness Borka Šaran, asked if she recognized the two soldiers who were standing on the doorstep of her house, she responded that the moonlight was shining that night, and that she recognized their faces, and that one of the soldiers was Ćerim Novalić, and she did not know the name of the other and she did not ever see him again. Asked by the prosecutor if the witness immediately knew that it was Ćerim Novalić, she responded that she did, but she kept it for herself. She did not dare tell anyone.[25]
The Court accepted this testimony of the Accused as true as from the testimony of the witness for the Defense Amir Masleša as well as the witness for the Defense Osman Novalić it ensues that shortly after the incident the victim told them that she knew who had raped her, but she did not want to disclose it.

Specifically, witness Amir Masleša testified that he had contacted the aggrieved party concerning the incident in question on the following day and asked her: "Borka, do you know the person who raped you?", and that she told him: "Yes, I do, but I dare not tell who he is, he'll kill me". This very witness, who in the opinion of this Court assumed that Borka knew who had raped her, went to see her again five days after and begged her "For the love of God, to tell him who raped her". This is because he himself purportedly encountered problems with some persons

[25] Transcript of the testimony of the witness Borka Šaran, 23 March 2010, Case No.X-KR-09/847.

unknown to him who shot at his child. Witness Osman Novalić, who at the material time was the Platoon Commander in the village of Vrdolje, which was part of the Džepi Company, stated in his testimony that he asked the aggrieved party in October 1992 whether she knew who it was, but that she told him: "Yes, I do, but I would not like to discuss it now". Witness Osman Novalić mentioned this point on three occasions in his testimony, that is, he specified that Borka would always reply positively when he would ask her whether she knew who had raped her. Bearing in mind that such consistent testimonies by the Defense witnesses corroborate the aggrieved party's testimony in the part that she had known from the very begging the person who had raped her, the Court has found, beyond any reasonable doubt, that the aggrieved party knew the perpetrator whose name she subsequently stated was Ćerim Novalić.

In the course of her testimony, the aggrieved party Borka Šaran recognized the accused Ćerim Novalić as the person who had raped her by pointing to him in the courtroom. Her recognition was very convincing and utterly confident.

The testimony of the aggrieved party pertaining to the identification of the accused as the perpetrator of the criminal offence was corroborated by a piece of documentary evidence admitted into the case-file, specifically, the Official Note by the Ministry of the Interior of the Trebinje Security Services Center – National Security Service Sector dated 13 November 1992, certified by the ICTY stamp, wherein it is stated that it had come to their knowledge that Ćerim Novalić raped the aggrieved party Borka Šaran, Stanko Šaran's spouse. The Court hereby notes that Borka Šaran was very convincing in cross-examination that she did not know how the Service obtained the information about the incident in question. Bearing in mind that the afore-mentioned Official Note dates back to mid November 1992, that is, the time when the aggrieved party and her family were still in the Konjic municipality, that is, in the village of Hum, which belongs to the Džepi local community, the point on which all of the Prosecution witnesses have agreed upon, as well the Defense witnesses Amir Masleša and Osman Novalić, the Court has decided to accept as truthful the statement of the aggrieved party that she had not been the source of the information.

However, in the course of evaluation of the entire body of evidence adduced, the Court was mindful of the fact that in the first statement she gave to SIPA during the investigation in June 2007 Borka stated that the soldiers who knocked on her door had balaclavas on their heads, which is why she was unable to recognize them; then she stated in her second statement that the assailants had headbands, without revealing the identity of the person who raped her; in the third statement she repeated what she said before and it was only when she gave a Supplement to her third statement that she could recall the name of the person who raped her and that it was Ćerim Novalić.

At the main trial, the aggrieved party Borka Šaran accounted for these differences by stating that she gave her first statement in her house in Zvornik and that she was very surprised and frightened when contacted by the relevant persons from SIPA who came to her house to take her statement in relation to the rape. She said: "I thought they would never ask me about it, that it would never become known, but so it happened, that everything eventually becomes known". Investigators did not tell her how they learned about the incident. The witness underlined that her mind went blank, that she could not talk because she was crying and was in pain, that she was

confused, that she did not know what to say. She does not know what she stated on that occasion and she did not remember saying that on the critical night the armed men wore balaclavas on their heads. She is certain that she was consistent in saying that they had headbands so she does not know how those words about the caps ended up in the statement. She stated that the investigator read out the statement to her after the first interview, but that she did not follow it because she was in tears while he was doing it. The aggrieved party noted that she was afraid and that her mind went blank during the interview and that she would allow that some things may have been said which were not true; she also added that she was in fear every time she was giving a statement and that she was not familiar with the procedure itself. When asked to explain why she had failed to inform the investigators about the name of the person who raped her, the aggrieved party stated that she did not do it for the sake of her own and her husband's safety, and because they own some property in the Federation which they go to see occasionally, her husband in particular, so she feared that someone might tell him something or that he might say something to someone. When asked by the Prosecutor to explain, the aggrieved party stated that it was not in 2009 that she remembered who raped her, but that she had known that from the beginning and kept it a secret from everyone. They put different kind of questions but she could not tell it. She told them that because they kept questioning her about it and she saw that it was the end of it and that she had to tell it, for her health's sake too, for her husband's and her children's sake, and for all that mattered. When she told the inspector who had raped her she told her husband as well. Asked by the Defense Counsel, the aggrieved party stated that it was quite normal for safety reasons not to discuss it right after the commission of the crime because she stayed there until October 1993. For the same reason she did not want to reveal his name to Amir Masleša either, or to any official authority. When she was finally called by the MoI to give her statement for the fourth time she stated that she found some inner strength: "I said it, the time had come for me to talk about it, I had to share it, it kept haunting me, I was so mentally devastated and I came to the point from where I couldn't go any further. Everybody kept asking me something". When asked by the Defense Counsel why she said that she recalled the man who raped her only in the fourth statement when she claimed that she had known this from the very start, aggrieved party Borka stated: "Well, this man who questioned me, he asked me whether I knew who it was? I said I knew. How did you remember? I remembered because I knew him and I knew the man". The aggrieved party also maintained her claim that she had known from the start who had raped her and that she only wanted to get confirmation of what she had already known from a woman in Hum.

Witness Stanko Šaran, who was also there when two armed soldiers entered into the house, stated that he could not recognize them and that he had known the accused Ćerim Novalić from before the war, as well as that he had known his name before the outbreak of the armed conflicts. This witness confirmed that it was only in 2009 that he learned the name of the perpetrator from his wife Borka.

In the course of the evaluation of evidence concerning the identification of the accused, the Court took into consideration statements of witnesses Borka Šaran, Smiljana Magazin, Danilo Šaran, Amir Masleša and Ismet Novalić, who were congruent in saying that Stanko Šaran, was extremely ill during the time relevant to the Indictment and he barely managed to stay alive. That the witness Stanko Šaran was indeed ill ensues from the medical documents issued at the Health Center in Konjic on 13 May 1992, which show that this witness health condition was very poor

and that he was a seriously ill patient who needed long term hospital care at an adequate pulmonary institute. The facts pertaining to Stanko Šaran's illness and the fact that Borka was the one who opened the house door and saw the defendant's face in the moonlight, and the facts that follow from the congruent testimonies of Borka and Stanko that at the moment when the two soldiers entered Stanko was lying on the sofa in a dark room, and that they were marched in front of the soldiers to the basement, clearly shows that Stanko, the aggrieved party's husband, was not in the same position as the aggrieved party was to observe the accused and, given his poor health condition, it is quite logical that he could not recognize the accused under those circumstances.

The Court accepted the explanation by the aggrieved party that she was very confused and frightened when she gave her initial statements, that her mind went blank and she was not aware of all the things she said. In the reasoning of the Verdict the Court has already noted that it was indisputably established that the aggrieved party was raped on an unspecified date in September 1992, although in her first three statements the aggrieved party stated that it was in late May, that is, in early June 1992 that it happened. Having analyzed all the statements that the aggrieved party gave, the Court is of the opinion that her statement in which she stated that the two soldiers wore balaclavas was also given while she was in a special mental state and under the circumstances as described by the injured party, as well as that this was contradicted by all of her subsequent statements, both those given during the investigation and those at the main trial, where she never mentioned the balaclavas again, and where she claimed that the soldiers only had headbands. Also, the first statement of the aggrieved party in the part where she mentioned that they had balaclavas on their heads was contradicted by Stanko Šaran's testimony, the witness who was present when the soldiers got inside of his house, and who did not see balaclavas on their heads. Witnesses Amir Masleša, Osman Novalić and Smiljana Magazin, who have indirect knowledge about the rape, did not mention that they had ever heard from the aggrieved party that the assailants wore balaclavas on their heads. At any rate, witnesses Amir Masleša and Osman Novalić were consistent in saying that Borka told them that she knew who had raped her, and she would not have said this had the assailant really had a balaclava on his head, particularly if known that the aggrieved party had known the Accused by sight only but never spoke to him before.

The Court also submits that the explanation given by the aggrieved party is quite logical that for her own and her family safety she did not want to reveal to anyone the identity of the person who raped her. Given the fact that she concealed this from her own husband as well, her unwillingness to share it with anyone else is quite understandable, including her neighbor Smiljana Magazin, with whom she was on good and friendly terms. Witness Borka Šaran testified that she felt pain, sadness, humiliation and disgust when she was raped. The rape in question was committed during the armed conflict, by members of the military police and the victim was a civilian person of Serb ethnicity, and the fact that immediately thereafter the aggrieved party left for Hum together with her family and other locals of Serb ethnicity, a place which is part of the Džepi local community and where she stayed until the end of 1993, indicates that she was rightfully afraid and concerned to reveal to anyone the identity of the person who had raped her.

In the course of the evidentiary proceedings, several witnesses testified about the issue of pregnancy of the aggrieved party following the act of rape, and about the abortion that was

performed upon her in the Konjic Hospital. Several documentary pieces of evidence were introduced by the Defense in relation to this point, in particular the protocol records kept by the Health Center. However, bearing in mind that pregnancy, as the consequence of the act of rape, is not part of the factual description of the Indictment, the Court has found that this fact is not a relevant fact which needs to be separately established or reasoned in the course of the issuance of the decision, which is why there is no mentioning of the weight given to the evidence pertaining to the specified circumstance. At any rate, the evidence adduced, taken individually and as a whole, does not question the finding of the Court that the aggrieved party Borka Šaran was raped by the accused Ćerim Novalić in September 1992 and in the manner as described in the factual description given in the Verdict.

In the course of the evaluation of evidence, the Court bore in mind that the testimonies of the witnesses should be evaluated in the manner that would account for the fact that due to stressful and traumatic circumstances they cannot be reasonably precise and identical in every tiny detail, and that slight discrepancies and imprecision do not necessarily have to result in dismissing their testimonies as unreliable and false. The Court finds that the testimonies of Borka Šaran, Stanko Šaran, Smiljana Magazin and Danilo Šaran are consistent in their fundamental and important parts, while a few differently described facts do not raise doubts as to their accuracy and reliability, given the fact that such discrepancies are typical for mental processes that a witness is experiencing in such situations and do not pertain to any key facts.

a) Conclusion

The Court has found that the acts of the accused fully qualify as the criminal offence of rape in the context of War Crimes against Civilians in violation of Article 173(1)(e) of the CC of BiH in conjunction with Article 180(1) of the CC of BiH. Specifically, as it has already been specified, during the armed conflict between the Army of BiH and the Army of the Republika Srpska in the Konjic municipality, in September 1992, the accused forced the aggrieved party Borka Šaran to sexual intercourse by using force and threatening to kill her if she shouted; he first ordered her to take off her clothes and when she disobeyed, he ripped her clothes off, pushed her to a three-seater sofa and raped her.

The Court has accepted as indisputable the fact that the aggrieved party, due to of the applied force as well as out of fear for her own and the life of her family, was not in a position to offer any resistance to the accused. At the moment of the rape she was in the house with her ill husband, her ill mother-in-law and two children. The aggrieved party, Borka Šaran, as well as her family were just ordinary civilians who were at their home whereas the accused was a soldier armed with a rifle.

The Court has found that the accused committed the criminal offence he was found guilty of with direct intent, consciously and willingly, with unquestionable knowledge of the character of the actions undertaken and of the consequences resulting from those actions. By these actions the accused acted contrary to the rules of international humanitarian law, violating the provisions of Article 3(1)(a) and (c) of the Geneva Convention relative to the Protection of Civilian Persons of

12 August 1949. Accordingly, the accused possessed the *mens rea* and *actus reus* required to hold him criminally liable as a direct perpetrator of the crime of sexual violence.

12. Fashioning the sentence

In ruling on the sentence, the Court took into consideration all the circumstances that bore on the type and range of the sentence as provided for under Article 48 of the CC of BiH, and in particular the degree of the defendant's liability, motive behind the criminal offence, the degree of danger or injury to the protected object, and the circumstances in which the offence was perpetrated. In ruling on the sentence, the Court has also considered past conduct of the defendant, his personal situation and his conduct during the case. In doing so, the Court has considered the existence of both aggravating and extenuating circumstances on the part of the accused.

In ruling on the sentence to be imposed on the accused Ćerim Novalić, the Court has firstly evaluated the gravity of the crime committed and the degree of the defendant's criminal liability.

The gravity of the crime that the accused is charged with has always been determined by reference to the effect it bears on the victim or the persons linked to the crime and the closest relatives. The gravity is determined *in personam* and not in terms of universal consequences. The Court finds that the consequences of the crime were grave, bearing in mind that the crime in question is a crime that is humiliating for the victim at the very moment of its perpetration, and leaves the victim in a state of trauma over an extensive period of time. The aggrieved party has herself stated that she had felt humiliated and filled with disgust in the course of the perpetration of the offence and that she still suffers from the consequences of the crime. The Court was also mindful of the fact that in the case at hand, the accused raped one person and undertook one act of perpetration with respect to that person. As regards the degree of criminal liability the Court has found that the accused acted with direct intent, that is, that he was aware that by his actions he was committing a criminal offence, yet still he intended its commission.

Conversely, the Court was mindful of the fact that the accused was a very young person at the time of the commission, that he was barely 20 years old, which means that he was a young adult. This constitutes an extenuating circumstance. To the same effect, the Court found as an extenuating circumstance the defendant's lack of criminal record in the past, that is, that he did not commit any other offence prior to or following the criminal offence at issue, that he behaved with decorum before the Court, as well as his personal situation. All of these extenuating circumstances in their entirety can be understood as particularly mitigating circumstances, which led the Court to make a downward adjustment of the legally prescribed maximum sentence of at least 10 years imprisonment and impose upon the defendant a sentence of seven (7) years of imprisonment. The Court finds that the sanction imposed on the accused is commensurate with the gravity of the crime committed, degree of his criminal liability, circumstances and motives surrounding the crime as well as the consequences that resulted from it. The Court also finds that the purpose of punishment will be achieved both in terms of individual as well as general deterrence, meaning that this will raise awareness both on the part of the defendant as well as all

other individuals that crimes are forbidden, sanctioned and socially condemned and deter them from committing crimes in the future.

13. Decision relative to the costs of the proceedings and property law claims filed by the aggrieved parties

Bearing in mind that the accused is unemployed and his poor financial standing the Court concluded that the payment of the costs of the proceedings would jeopardize his subsistence, wherefore the Panel decided to relieve the accused of the duty to cover the costs of the proceedings under Article 188(4) of the CPC of BiH and they shall be covered from the Court of BiH budget.

In ruling on the property law claim filed by the aggrieved party, pursuant to Article 198(2) of the Criminal Procedure Code of Bosnia and Herzegovina, the Court has decided to refer the injured party Borka Šaran to pursue her property claim by taking civil action, given the fact that the criminal proceedings data do not offer a sound base either for a complete or partial adjudication on the claim.

MINUTES-TAKER	PRESIDING JUDGE
Stanislava Nuić	**Staniša Gluhajić**

LEGAL REMEDY: This Verdict may be appealed within 15 days as of the receipt of the written copy hereof.