



Number: X – KR -05/154  
Sarajevo, 8 March 2007

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X - KR/05/154	525
25-04-2007	41 (Str. O.)
	16,30

**IN THE NAME OF BOSNIA AND HERZEGOVINA**

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel composed of judges Zorica Gogala, as President of the Panel, Tore Lindseth and Roland Dekkers, as members of the Panel, with the participation of Legal adviser Amela Skrobo, as the minutes taker, in the criminal case against the Accused Radisav Ljubinac, for the criminal offence of Crimes against Humanity, in violation of Article 172 (1) item h) in relation with items a), d), e) and k) of the Criminal Code of Bosnia and Herzegovina, upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina, number: KT-RZ-174/05 of 8 May 2006, amended on 31 January 2007, following a public main trial, rendered and, in the presence of the Accused Radisav Ljubinac and his Defense Counsel – Attorney Senadin Begtasevic and the Prosecutor of the Prosecutor's Office of BiH Božidarka Dodik, on 8 March 2007 publicly announced the following

**VERDICT**

**THE ACCUSED: LJUBINAC RADISAV**, a.k.a. "Pjano", son of Veselin, and mother Milka, née Rajak, born on 12 January 1958, in the village of Čemanovići, the Municipality of Rogatica, residing in the place of Padinska skela – Nova 48, the Municipality of Palilula – Beograd, State Union of Serbia and Montenegro, Serb, citizen of BiH and State Union of Serbia and Montenegro, PIN: 1201958173260, car mechanic by occupation, unemployed, married, father of two adult children, literate, completed secondary school, served the army in 1978 in Rijeka, registered in the Rogatica military records, is in Detention Unit of the Correctional Establishment "Kula", Istočno Sarajevo, under the Decision ordering the custody rendered by the Court of BiH, number X-KRN/05/154 of 20 December 2005,

**I**

**Is found GUILTY**

**BECAUSE:**

At the time of a widespread or systematic attack of the army and police of the so-called Serb Republic of Bosnia and Herzegovina and paramilitary units under the leadership of the SDS, aimed against the civilian Bosniak population in the area of the Municipality of Rogatica, in the period between May and November 1992, he took part in forcible transfer of the population and other inhumane acts, committed with the intention of inflicting serious physical or mental injury and damage of health,

**By doing the following:**

1. On 3 and 4 August 1992, he took part in the forcible transfer of women, children and a small number of remaining adult men from the villages and settlements of the Local Community Seljani, Municipality of Rogatica, to the camp which was based in the Secondary School Center "Veljko Vlahović" in Rogatica, and on 5 August 1992, after among the civilians detained at the Secondary School Center "Veljko Vlahović" in Rogatica men had been separated from women and children, he took part in the forcible transferring of women and children to Hreša, the Municipality Stari Grad Sarajevo,
2. In the period between the end of June and October 1992, in the Rasadnik camp near Rogatica, on a number of occasions, kicked the detained civilians with his military boots on and punched: Muhamed Pleho, Muhidin Kapo, Šemso Vatreš and Bećir Čutahija, and this all was done with the intention of inflicting great suffering or serious physical or mental injuries on these persons or damaging their health.
3. On 15 August 1992, drove 27 civilians from Rogatica, with four minors among them too, to the village of Duljevac, whereupon they were used as a human shield in front of Serb soldiers during the attack on the elevation of Jačen.

**Therefore,**

As a part of a widespread or systematic attack directed against the Bosniak civilian population, in the territory of the Municipality of Rogatica, knowing of such attack and willingly, taking part in the said attack with his actions, he committed the acts described under Counts 1 through 3 of the convicting part of the operative part of the Verdict,

**Whereby**

he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) of the Criminal Code of Bosnia and Herzegovina as follows:

**In relation to Count 1:** the criminal offence of Crimes against Humanity in violation of Article 172 (1) item d), in conjunction with Article 180 (1) of the Criminal Code of Bosnia and Herzegovina

**In relation to Count 2:** the criminal offence of Crimes against Humanity in violation of Article 172 (1) item k) of the Criminal Code of Bosnia and Herzegovina

**In relation to Count 3:** the criminal offence of Crimes against Humanity in violation of Article 172 (1) item k), in conjunction with Article 180 (1) of the Criminal Code of Bosnia and Herzegovina

**Wherefore the Court, under the quoted legal regulations as read with the provisions of Article 39, 42 and 48 of the Criminal Code of Bosnia and Herzegovina**

**SENTENCES HIM  
TO IMPRISONMENT IN THE DURATION OF 10 (TEN) YEARS**

Based on Article 56 of the Criminal Code of BiH, the time that the Accused spent in pre-trial custody as of 20 December 2005 onwards, shall be credited to the pronounced sentence of imprisonment.

Based on Article 188 (4) of the Criminal Procedure Code of Bosnia and Herzegovina the Accused shall be relived of duty to reimburse the costs of the proceedings.

Based on Article 198 (2) of the Criminal Procedure Code of Bosnia and Herzegovina the injured parties are instructed to pursue their claims under property law in a civil action.

**II**

Contrary to the aforesaid and based on the provision of Article 284 item c) of the Criminal Procedure Code of Bosnia and Herzegovina,

**the Accused Radisav Ljubinac**

**IS ACQUITTED OF CHARGES**

**That he:**

At the time of a widespread or systematic attack of the army and police of the so-called Serb Republic of Bosnia and Herzegovina and paramilitary units under the leadership of the SDS, aimed against the civilian Bosniak population in the area of the Municipality of Rogatica, in the period between May and November 1992, he persecuted the civilian Bosniak population because of their political, national, ethnic, cultural and religious background, committing murders, forcible transfer of the population, detention of civilians, inhumane acts committed intentionally to cause great suffering, or serious injury to body or to physical or mental health, as follows:

1. On 26 May 1992, Zimić Nurija was taken from his house in the settlement of Seljani for the examination by Ljubinac Radisav, whereupon he disappeared without a trace ever since, while his dead body has not been found to date;
2. On 3 June 1992, together with some other persons, upon the attack on the undefended village of Seljani, Municipality of Rogatica, and upon separating men from women and children, took away 15 civilians, including: Ramović Husein, Ramović Hasan, Ramović Sulejman, Ćurevac Emin, Ćurevac Sunija, Zimić Alija, Zimić Salih, Zimić Šaćir, Halilović Omer, Ramić Ago, Begić Amir, Heljić Hamza, Mednolučanin Ćamil, Mednolučanin Ramiz, Jašarević Hasib, who were then killed, and their bodies were exhumed in October 2004 from the mass grave on the location of Dizdareva njiva, in the vicinity of the Ljubinac Radisav's house;

3. On 28 July 1992, together with one Macola, he took away from the camp on the premises of the Secondary School Centre "Veljko Vlahović" dentist Bešlija Mustafa, who disappeared without a trace ever since, while his dead body has not been found to date,

**Whereby**, he would have committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) items a) and h) of the Criminal Code of Bosnia and Herzegovina.

### **R e a s o n i n g**

By the Indictment number: KT-RZ-174/05 the Prosecutor's Office of Bosnia and Herzegovina, Section I for War Crimes, accused Ljubinac Radisav on 8 May 2006 of committing the criminal offence of persecutions as a Crime against Humanity in violation of Article 172 (1) h), in conjunction with Subparagraphs a), d), e), and k) of the Criminal Code of Bosnia and Herzegovina.

The Preliminary Hearing Judge confirmed this Indictment on 15 May 2006, and the accused pled not guilty on 5 June 2006 on a single Count of the Indictment, whereupon the documents were submitted to the Trial Panel.

Having estimated that the presented evidence indicated a changed state of facts, on 31 January 2007 and pursuant to Article 275 of the Criminal Procedure Code of Bosnia and Herzegovina, the BiH Prosecutor's Office submitted the amended Indictment which did not require any additional time for defense.

#### **1. Presented evidence**

During the evidentiary proceedings before the Court, the following evidence was adduced:

The following witnesses were directly examined: Nazif Zimić, Alija Isaković, Mujo Zimić, Armin Baždar, Meho Baždar, Enver Bešlija, Enisa Zimić, Habiba Ramović, Osmana Jašarević, Ramiza Halilović, Muhidin Kapo, Ibro Konaković, Elmedin Konaković, Emina Hodžić, Nihad Čurevac, Šemso Vatreš as well as four protected witnesses under pseudonyms "A", "B", "C" and "D". At the main trial, the Court also examined Dr. Hamza Žujo in the capacity of a forensic expert, as well as Amor Mašović, President of the Federal Commission for Missing Persons.

In addition to this, during the main trial, the Court reviewed the following material evidence which was delivered by the BiH Prosecutor's Office: Witness examination record of Isaković Alija, number KT-RZ-143/05, of 26 December 2005; Witness examination record of Zimić Nazif, number KT-RZ-143/05, of 23 December 2005; Witness examination record of Zimić Mujo, number KT-RZ-143/05, of 28 December 2005; Witness examination record of Baždar Armin, number KT-RZ-174/05 of 13 January 2006; Witness examination record of Baždar Meho, number KT-RZ-174/05, of 13 January 2006; Witness examination record of Bešlija Enver, number KT-RZ-174/05, of 24 January 2006; Witness examination record of Zimić Enisa, number KT-RZ-174/05, of 9 February 2006; Witness examination record of Ramović Habiba, number KT-RZ-174/05, of 9 February 2006; Witness examination record of Jašarević Osmana, number KT-RZ-174/05, of 9 February 2006; Witness examination

record of Halilović Ramiza, number KT-RZ-174/05, of 10 February 2006; Witness examination record of Kapo Muhidin, number KT-RZ-174/05 of 2 March 2006; Witness examination record of Konaković Ibro, number KT-RZ-174/05, of 6 April 2006; Witness examination record of Konaković Elmedin, number KT-RZ-174/05, of 6 April 2006; Witness examination record of Ćurevac Nihad number KT-RZ-174/05 of 18 April 2006; Witness examination record of Vatreš Šemso, number KT-RZ-174/05, of 19 April 2006; Record of examination of the protected witness under pseudonym A number KT-RZ-143/05 of 29 December 2005; Record of examination of the protected witness under pseudonym B, number KT-RZ-174/05, of 6 January 2006; Record of examination of the protected witness under pseudonym C, number KT-RZ-174/05, of 12 January 2006; Record of examination of the protected witness under pseudonym D, number KT-RZ-174/05, of 10 February 2006; Report of the SRY Federal Government filed with the Experts Commission established in accordance with the Security Council Resolution number 780 from 1992, Belgrade 1993; a letter to the Cantonal Prosecutor's Office Sarajevo on the delivery of the Corps Identification Record, Ministry of Interior of Canton Sarajevo (hereinafter: MoI of Canton Sarajevo), number 02/2-2-04-01-14395/05 of 12 January 2006; Corps Identification Record for Ramić Fehim, MoI of Canton Sarajevo, number 02/2-2-460-4/05 of 28 December 2005; Official Note of the identification of 4 bodies by the MoI of Canton Sarajevo, number 02/2-2-460/05 of 28 December 2005; Official Note of the interview with Ramić Munir, MoI of Canton Sarajevo number 02/2-2-464/05 of 28 December 2005; Notice to the MoI of Canton Sarajevo regarding the time of identification of unburied dead bodies, Cantonal Prosecutor's Office Sarajevo, number KTA-150/05-RZ, KTA-147/05-RZ, KTA-148/05-RZ of 21 December 2005; Identification Record for Ramić Fehim, Cantonal Prosecutor's Office Sarajevo, number KTA-150/05-RZ of 28 December 2005; Request for re-exhumation and identification, Federal Commission for Missing Persons, number 01-41-4432/2005 of 6 October 2005; DNA Results for Ramić Fehim, International Commission for Missing Persons, number 5358/05 of 18 March 2005; Autopsy Record Seljani-Rogatica No.7, Forensic Medicine Institute, number KPP 74/03 of 11 June 2004; Exhumation Order, Cantonal Court Sarajevo, number KPP-74/03 of 17 October 2003; Letter to the Cantonal Prosecutor's Office Sarajevo on the delivery of the Corpse Identification Record, MoI of Canton Sarajevo, number 02/2-2-04-01-4126/06 of 3 April 2006; Corps Identification Record for Hodžić Enver, MoI of Canton Sarajevo, number 02/2-2-154-1/06 of 24 March 2006; Corpse Identification Record for Hodžić Edhem, MoI of Canton Sarajevo, number 02/2-2-154-2/06 of 24 March 2006; Official Note of Identification of Mortal Remains of Hodžić Enver and Hodžić Edhem, MoI of Canton Sarajevo, number 02/2-2-154/06 of 24 March 2006; Official Note of the Interview with Hodžić Emin, MoI of Canton Sarajevo, number 02/2-2-158/06 of 24 March 2006; Mortal Remains Identification Record for Hodžić Enver and Hodžić Edhem, Cantonal Prosecutor's Office Sarajevo, number KTA-11/05-RZ of 24 March 2006; Supplement to the Order number KTA-11/05-RZ of 28 March 2005 for forensic identification of mortal remains, Cantonal Prosecutor's Office Sarajevo, number KTA-11/05-RZ of 23 March 2006; Order for Forensic Identification of Mortal Remains of Hodžić Enver, Cantonal Prosecutor's Office Sarajevo, number KTA-11/05-RZ of 28 March 2005; Request to the Cantonal Prosecutor's Office Sarajevo for re-exhumation and identification, Federal Commission for Tracing Missing Persons, number 01-41-360/2005 of 23 February 2005; DNA Results for Hodžić Enver, International Commission for Tracing Missing Persons, number 4518/04 of 21 October 2004; DNA Results for Hodžić Edhem, International Commission for Tracing Missing Persons, number 7368/06P of 16 March 2006; Autopsy Record Seljani-Rogatica No.3, Forensic Medicine Institute, number KPP

74/03 of 11 June 2004; Autopsy Record Seljani-Rogatica No.5, Forensic Medicine Institute, number KPP 74/03 of 11 June 2004; Letter to the Cantonal Prosecutor's Office Sarajevo on the delivery of Official Note, Photo-documentation, etc., MoI Canton Sarajevo, number 02/2-2-04-01-10943/03 of 28 June 2004; Official Note of the exhumation carried out on the location of the village of Seljani, MoI Canton Sarajevo, number 02/2-2-178/04 of 7 June 2004; Official Note of Autopsy, MoI Canton Sarajevo, number 02/2-2-189/04 of 11 June 2004; Finding of the expert analysis of fire arms traces, MoI Canton Sarajevo, number 02/2-6-04-7370 of 23 June 2004; Report on the criminal-technical crime scene investigation, MoI Canton Sarajevo, number 2499/04 of 4 June 2004; Exhumation Record, Cantonal Prosecutor's Office Sarajevo, number KTA-33/03-RZ of 3 June 2004; Request for issuing an order for exhumation on the location of the village of Seljani, Cantonal Prosecutor's Office Sarajevo, number KTA-33/03-RZ of 16 October 2003; Letter to the Cantonal Prosecutor's Office Sarajevo on the delivery of the Corpse Identification Record, MoI Canton Sarajevo, number 02/2-2-04-01-10943/03 of 6 June 2005; Corpse Identification Record for Hodžić Amir, MoI Canton Sarajevo, number 02/2-2-144-1/05 of 26 May 2005; Official Note of the identification of mortal remains of Hodžić Amir, MoI Canton Sarajevo, number 02/2-2-144/05 of 26 May 2005; Official Note of the Interview with Hodžić Abid, MoI Canton Sarajevo, number, 02/2-2-145/05 of 26 May 2005; Identification Record for Hodžić Amir, Cantonal Prosecutor's Office Sarajevo, number KTA-33/05-RZ of 26 May 2005; Forensic Identification Order, Cantonal Prosecutor's Office Sarajevo, number KTA-33/05-RZ of 10 May 2005; Request to Cantonal Prosecutor's Office Sarajevo for Identification, Federal Commission for Tracing Missing Persons, number 01-41-1543/2005 of 9 May 2005; DNA Results for Hodžić Amir, International Commission for Tracing Missing Persons, number 5127/05 of 7 February 2005; Autopsy Record Seljani-Rogatica No.4, Forensic Medicine Institute, number KPP 74/03 of 11 June 2004; Letter to the BiH Prosecutor's Office on the delivery of the documentation on exhumation on the location of Seljani, Cantonal Prosecutor's Office Sarajevo, number KT-385/94-RZ of 7 April 2006; Letter to the Cantonal Prosecutor's Office Sarajevo on the delivery of the Corpse Identification Record, MoI Sarajevo, number 02/2-2-04-01-3839/06 of 3 April 2006; Corpse Identification Record for Hodžić Edin, MoI Canton Sarajevo, number 02/2-2-153-1/06 of 24 March 2006; Corpse Identification Record for Džaferović Enes, MoI Canton Sarajevo, number 02/2-2-153-2/06 of 24 March 2006; Corpse Identification Record for Čurevac Sunija, MoI Canton Sarajevo, number 02/2-2-153-3/06 of 24 March 2006; Corpse Identification Record for Halilović Omer, MoI Canton Sarajevo, number 02/2-2-153-4/06 of 24 March 2006; Corpse Identification Record for Jašarević Hasib, MoI Canton Sarajevo, number 02/2-2-153-5/06 of 24 March 2006; Corpse Identification Record for Makaš Nedžad, MoI Canton Sarajevo, number 02/2-2-153-6/06 of 24 March 2006; Corpse Identification Record for Ramović Hasan, MoI Canton Sarajevo, number 02/2-2-153-7/06 of 24 March 2006; Corpse Identification Record for Mednolučanin Ćamil, MoI Canton Sarajevo, number 02/2-2-153-8/06 of 24 March 2006; Corpse Identification Record for Sočivica Rasim, MoI Canton Sarajevo, number 02/2-2-153-9/06 of 24 March 2006; Corpse Identification Record for Sočivica Asim, MoI Canton Sarajevo, number 02/2-2-153-10/06 of 24 March 2006; Corpse Identification Record for Begić Amir, MoI Canton Sarajevo, number 02/2-2-153-11/06 of 24 March 2006; Corpse Identification Record for Čurevac Senad, MoI Canton Sarajevo, number 02/2-2-153-12/06 of 24 March 2006; Corpse Identification Record for Heljić Hamza, MoI Canton Sarajevo, number 02/2-2-153-13/06 of 24 March 2006; Corpse Identification Record for Ramić Ago, MoI Canton Sarajevo, number 02/2-2-153-14/06 of 24 March 2006; Corpse Identification Record for Zimić Alija, MoI

Canton Sarajevo, number 02/2-2-153-15/06 of 24 March 2006; Corpse Identification Record for Zimić Salih, MoI Canton Sarajevo, number 02/2-2-153-16/06 of 24 March 2006; Official Note of the Interview with Džaferović Džemko, MoI Canton Sarajevo, number 02/2-2-159/06 of 24 March 2006; Official Note of the Interview with Velagić Fatima, MoI Canton Sarajevo, number 02/2-2-160/06 of 24 March 2006; Official Note of the Interview with Halilović Ramiza, MoI Canton Sarajevo, number 02/2-2-161/06 of 2 March 2006; Official Note of Interview with Jašarević Osmana, MoI Canton Sarajevo, number 02/2-2-162/06 of 24 March 2006; Official Note of the Interview with Makaš Rasima, MoI Canton Sarajevo, number 02/2-2-163/06 of 24 March 2006; Official Note of the Interview with Pendek Emina, MoI Canton Sarajevo, number 02/2-2-164/06 of 24 March 2006; Official Note of the Interview with Mednolučanin Nedžira, MoI Canton Sarajevo, number 02/2-2-165/06 of 24 March 2006; Official Note of the Interview with Sočivica Hajrija, MoI Canton Sarajevo, number 02/2-2-166/06 of 24 March 2006; Official Note of the Interview with Ćurevac Nihad, MoI Canton Sarajevo, number 02/2-2-167/06 of 24 March 2006; Official Note of the Interview with Heljić Munira, MoI Canton Sarajevo, number 02/2-2-168/06 of 24 March 2006; Official Note of the Interview with Ramić Naza, MoI Canton Sarajevo, number 02/2-2-169/06 of 24 March 2006; Official Note of the Interview with Zimić Nazif, MoI Canton Sarajevo, number 02/2-2-170/06 of 24 March 2006; Official Note of the Interview with Zimić Mujo, MoI Canton Sarajevo, number 02/2-2-330/04 of 4 October 2004; Official Note of the Identification, MoI Canton Sarajevo, number 02/2-2-153/06 of 24 March 2006; Identification Record, Prosecutor's Office Sarajevo, number KTA-2/06-RZ of 24 March 2006; Order Supplement, Cantonal Prosecutor's Office Sarajevo, number KTA-2/06-RZ of 23 March 2006; Forensic Identification Order, Cantonal Prosecutor's Office Sarajevo, number KTA-2/05-RZ of 9 March 2006; Letter of the BiH Prosecutor's Office on the documentation, Cantonal Prosecutor's Office Sarajevo, number KT-385/94-RZ of 1 January 2006; Request for Exhumation Record Delivery, BiH Prosecutor's Office, number KT-RZ-174/05 of 16 January 2006; Letter to the Cantonal Prosecutor's Office Sarajevo on the delivery of the Findings of the expert analysis of fire arms traces, MoI Canton Sarajevo, number 02/2-2-04-01-8285/04 of 21 March 2005; Findings of the expert analysis of fire arms traces, MoI Canton Sarajevo, number 02/2-6-04-09-2690 of 9 March 2005; Letter to the Cantonal Prosecutor's Office Sarajevo on the Official Note Delivery, MoI Canton Sarajevo, number 02/2-2-04-01-8285/04 of 10 January 2005; Official Note of the autopsy of mortal remains of 22 bodies, MoI Canton Sarajevo, number 02/2-2-444/04 of 23 December 2004; Letter to the Cantonal Prosecutor's Office Sarajevo on the Official Note Delivery, MoI Canton Sarajevo, number 02/2-2-04-01-8285/04 of 30 December 2004; Official Note of Exhumation, MoI Canton Sarajevo, number 02/2-2-382/04 of 1 October 2004; Record on Exhumation of the Cantonal Prosecutor's Office in Sarajevo, number: KTA-50/04-RZ (KPP-137/04) of 1 October 2004; Request to the Cantonal Prosecutor's Office Sarajevo for identification, Federal Commission for Tracing Missing Persons, number 01-41-123/2006 of 19 January 2006; DNA Results for Makaš Nedžad, International Commission for Tracing Missing Persons, number 5303/05 of 24 February 2005; Autopsy Record Seljani-Rogatica No.1, Forensic Medicine Institute, number KPP-137/04 of 20 December 2004; DNA Results for Džaferović Enes, International Commission for Tracing Missing Persons, number 5302/05 of 24 February 2005; Autopsy Record Seljani-Rogatica No.2, Forensic Medicine Institute, number KPP-137/04 of 22 December 2004; DNA Report for Hodžić Edin, International Commission for Tracing Missing Persons, number 5300/05 of 24 February 2005; Autopsy Record Seljani-Rogatica No.3, Forensic Medicine Institute, number KPP-137/04 of 9 December 2004; DNA Results for

Sočivica Asim, International Commission for Tracing Missing Persons, number 5298/05 of 24 February 2005; Autopsy Record Seljani-Rogatica No.4, Forensic Medicine Institute, KPP-137/04 of 22 December 2004; DNA Results for Sočivica Rasim, International Commission for Tracing Missing Persons, number 5299/05 of 25 February 2005; Autopsy Record Seljani-Rogatica No.5, Forensic Medicine Institute, number KPP-137/04 of 9 December 2004; DNA Results for Ćurevac Senad, International Commission for Tracing Missing Persons, number 5311/05 of 20 May 2005; Autopsy Record Seljani-Rogatica No.6, Forensic Medicine Institute, number KPP-137/04 of 23 December 2004; DNA Results for Begić Amir, International Commission for Tracing Missing Persons, number 5454/05 of 5 May 2005; Autopsy Record Seljani-Rogatica No.7, Forensic Medicine Institute, number KPP-137/04 of 9 December 2004; DNA Results for Heljić Hamza, International Commission for Tracing Missing Persons, number 5310/05 of 24 February 2005; Autopsy Record Seljani-Rogatica No.8, Forensic Medicine Institute, number KPP-137/04 of 23 December 2004; Autopsy Record Seljani-Rogatica No.9, Forensic Medicine Institute, number KPP-137/04 of 22 December 2004; DNA Results for Ramić Ago, International Commission for Tracing Missing Persons, number 5309/05 of 24 February 2005; Autopsy Record Seljani-Rogatica No.10, Forensic Medicine Institute, number KPP-137/04 of 22 December 2004; DNA Results for Zimić Alija, International Commission for Tracing Missing Persons, number 5306/05 of 3 March 2005; Autopsy Record Seljani-Rogatica No.11, Forensic Medicine Institute, number KPP-137/04 of 23 December 2004; DNA Results for Ramović Hasan, International Commission for Tracing Missing Persons, number 5564/05 of 4 May 2005; Autopsy Record Seljani-Rogatica No.12, Forensic Medicine Institute, number KPP-137/04 of 20 December 2004; DNA Results for Zimić Nurija or Zimić Salih, International Commission for Tracing Missing Persons, number 5305/05 of 25 February 2005; Autopsy Record Seljani-Rogatica No.13, Forensic Medicine Institute, number KPP-137/04 of 21 December 2004; Autopsy Record Seljani-Rogatica No.14, Forensic Medicine Institute, number KPP-137/04 of 20 December 2004; DNA Results for Mednolučanin Ćamil, International Commission for Tracing Missing Persons, number 5453/05 of 4 April 2005; Autopsy Record Seljani-Rogatica No.15, Forensic Medicine Institute, number KPP-137/04 of 20 December 2004; DNA Results for Halilović Omer, International Commission for Tracing Missing Persons, number 5528/05 of 15 April 2005; Autopsy Record Seljani-Rogatica No.16, Forensic Medicine Institute, number KPP-137/04 of 20 December 2004; Autopsy Record Seljani-Rogatica No.17, Forensic Medicine Institute, number KPP-137/04 of 22 December 2004; DNA Results for Ćurevac Sunija, International Commission for Tracing Missing Persons, number 5308/05 of 24 February 2005; Autopsy Report Seljani-Rogatica No.18, Forensic Medicine Institute, number KPP-137/04 of 9 December 2004; Autopsy Record Seljani-Rogatica No.19, Forensic Medicine Institute, number KPP-137/04 of 21 December 2004; DNA Results for Ćurevac Emin, International Commission for Tracing Missing Persons, number 5452/05 of 4 April 2005; Autopsy Report Seljani-Rogatica No.20, Forensic Medicine Institute, number KPP-137/04 of 21 December 2004; Official Note, Cantonal Prosecutor Aida Ćatović, of 24 March 2006; DNA Results for Jašarević Hasib, International Commission for Tracing Missing Persons, number 5340/05 of 17 March 2005; Autopsy Record Seljani-Rogatica No.21, Forensic Medicine Institute, number KPP-137/04 of 21 December 2004; Autopsy Record Seljani-Rogatica No.22, Forensic Medicine Institute, number KPP-137/04 of 21 December 2004; Report on criminal-technical crime scene investigation, MoI Canton Sarajevo, number 4094/04 of 22 September 2004; Crime-scene sketch, MoI Canton Sarajevo, number 4094/04 of 22 September 2004; Order for Exhumation, Autopsy, Forensic Analysis and

Identification, Cantonal Court in Sarajevo, number: KPP-137/04 of 14 July 2004; DVD from exhumation Rogatica, location of Seljani dated 22 September 2004 and 30 September 2004, Photo-documentation from the exhumation and autopsy of 22 corpses in the place of Seljani, Rogatica, number: 4094/04, of 21 March 2005 (2 binders); Photo-documentation from exhumation and autopsy of 7 corpses in the place of Seljani, Rogatica, number: 2499/04, of 16 June 2004 (1 binder); Instruction on organization and activities of the Serb People Authorities in Bosnia and Herzegovina in Extraordinary Circumstances, SDS BiH – Main Board, strictly confidential 101-3 of 19 December 1991; Decision of the Presidency of the Republic of Bosnia and Herzegovina on Declaring Imminent Danger of War (“Official Gazette of BiH”, No. 1/92); Decision of the Presidency of the Republic of Bosnia and Herzegovina Declaring the State of War (“Official Gazette of BiH”, No. 7/92), Constitution of Republika Srpska (“Official Gazette of Republika Srpska”, No.: 21/1992); Decision of the Constitutional Court of Bosnia and Herzegovina of 18 and 19 February 2000; Decision of the Constitutional Court of Bosnia and Herzegovina of 18 and 19 August 2000; Decision of the Constitutional Court of Bosnia and Herzegovina U-5/98 -III of 30 June and 1 July 2000; Decision of the Constitutional Court of Bosnia and Herzegovina U-5/98 -IV of 28, 29 and 30 January 2000; Decisions of the Constitutional Court of BiH in the case number U-44/01 of 27 February 2004 and 22 September 2004, published in the “Official Gazette of the RBiH”, No. 18/2004 and No. 46/04; Decision on the Return of Displaced Persons in the Territory of Srpska Republika of Bosnia and Herzegovina (“Official Gazette of Republika Srpska”, No. 8/92); Declaration on the Social and Political System of the State (“Official Gazette of Republika Srpska”, No. 14/92); Law on the Serb Citizenship (“Official Gazette of Republika Srpska”, No.: 19/92); Law on Refugees (“Official Gazette of Republika Srpska”, No. 5/93); Decision on Strategic Goals of the Serb People in Bosnia and Herzegovina (“Official Gazette of Republika Srpska”, No. 22/93); Resolution on Providing for the Serb Refugee Population and Their Planned Resettlement (“Official Gazette of Republika Srpska”, No. 5/94); Report on Devastation of the Cultural-Historical and Natural Heritage of Bosnia and Herzegovina (1992 – 1995), Sarajevo 1997, Institute for the Protection of Cultural, Historical, and Natural Heritage of Bosnia and Herzegovina, Center for Heritage BiH; Official Letter attached to the Report on Devastation of the Cultural-Historical and Natural Heritage of Bosnia and Herzegovina (1992 – 1995), Institute for the Protection of Cultural Monuments, number 07-40-4-1445-1/06, of 26 April 2006; Municipality Rogatica Map; National composition of the population in municipalities and inhabited places 1991; Lists of killed Bosniaks in the territory of Municipality Rogatica; Copy of the photography of the Secondary School Center “Veljko Vlahović”; Copy of the photography of Camp “Rasadnik Sladara”; Copy of the photography of the “Arnaudija” mosque; Order of the Commander of the Drina Corps of 28 June 1994 promoting Ljubinac Radisav to the rank of the I class reserve artillery corporal; List of reserve military officials contained in MP 7084, on which Ljubinac Radisav – Pioneer’s Platoon Leader, second lieutenant – lieutenant is indicated under number 12.; Proposal to promote Ljubinac Radisav to the rank of reserve Sergeant I Class, of 30 May 2004; ICTY Judgment (IT-94-1) vs. Duško Tadić; ICTY Judgment MKSJ (IT-98-32) vs. Mitar Vasiljević; ICTY Judgment (IT-95-10) vs. Goran Jelisić; ICTY Judgment (IT-95-9) vs. Zarić Simo, Tadić Miroslav and Simić Blagoje; ICTY Judgment MKSJ (IT-97-4) vs. Stakić Milomir; Letter to the BiH Prosecutor’s Office on the delivery of Records of identification of mortal remains, Cantonal Prosecutor’s Office Sarajevo, number KT-385/94-RZ of 6 November 2006; Request to the Cantonal Prosecutor’s Office Sarajevo for identification of 5 persons, Commission for Missing Persons of the FBiH of 3 October 2006; Order for identification of 5 persons,

Cantonal Prosecutor's Office Sarajevo, number KTA-88/06 of 12 October 2006; Record of identification of 5 persons, Cantonal Prosecutor's Office Sarajevo, number, KTA-88/06 of 12 October 2006; Letter with Official Note and Corpse identification Records for Zimić Šaćir, Ramović Huso, Mednolučanin Ramiz, Ramović Sulejman and Ćurevac Emin, MoI of Canton Sarajevo, of 12 October 2006, ICTY Judgment (IT-94-2-T) Prosecutor v. Dragan Nikolić, First Instance and Second Instance Verdict in the case against Dragoje Paunović; Information of the Presidency of Republika Srpska, No. 01-1578/92 of 25 October 1992 with attachment-monument (constructed in memory of Serb patriots killed on 27 August 1992); Excerpt from the Register of Deaths in the name of Ljubinac Boško, number 202-31/2007 of 6 February 2007

The evidence of the Defense for the Accused which was adduced at the main trial is the following: directly examined witnesses: Perišić Radomir, Rosić Radivoje, Janković Mirko, Čobović Boško, Ljubinac Radojka, Šalić Momir, Forcan Dragoljub, Baždar Meho, as well as the Accused Ljubinac Radisav himself.

The Court also reviewed the following material evidence presented by the Defense: Cardiac examination results for the Accused Ljubinac Radisav of 3 November 2006 carried out upon the Order of the Court of BiH; Report of Specialist Physician, Dr. Vladimir Ivanović from the Institute for Cardiac-Vascular Diseases-Sremska Mitrovica; Certificate of the BiH Ministry of Defense – Former Ministry of Defense of RS, number 18-05-3-01-835-15-3925/06, Sokolac, 15 November 2006, confirming that Ljubinac Radisav was engaged in the war - soldier status, from 17 August 1993 to 6 June 1996; Excerpt from the Register of Deaths to the name of Boško Ljubinac, number 202-13/2006 of 26 July 2006; Newspaper article from the "Oslobođenje" daily of 25 January 2007; Newspaper article from the "Avaz" daily of 8 September 2006; Newspaper clip - ranks in the Republika Srpska Army; Forensic-psychiatric finding for the Accused Ljubinac Radisav of 6 February 2007.

The Court adduced the following evidence: A list of Muslim detainees in the camp located in the building of PD "Borike", the place called Rasadnik, Rogatica Municipality, delivered at the hearing by witness A; a paper containing the name of a dear person written by witness B at the hearing held on 19 December 2006.

## **2. Closing arguments; a summary**

### **a. Prosecution**

After the completion of the evidentiary proceedings, the Prosecutor argued in the first part of the Closing Arguments the existence of all four essential elements of the criminal offense Crimes against Humanity in violation of Article 172 CC of BiH, which include: the existence of a widespread or systematic attack, direction of such attack against the civilian population, knowledge of the perpetrator of the existence of such attack, and that the acts of the perpetrator constitute a part of that attack, or that they are related to that attack. The criminal offense allegedly committed by Ljubinac Radisav was not an isolated case. At the time when the Prosecution alleged that the Accused committed the actions he is charged with, a widespread or systematic attack of the RS army and police was ongoing, supported

by the JNA forces and paramilitary formations that arrived from Serbia and Montenegro, directed against the Bosniak and Croatian civilian population in the territory of Municipality Rogatica and the entire East Bosnia. The Prosecutor's Office draws support for this conclusion both from the evidence adduced before this Court during the main trial and final Judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Verdicts of the Court of BiH, pointing out in particular the Verdict of this Court in the *Paunović Dragoje* case. In that case, this Court found as an indisputable fact, and the Appellate Panel confirmed, the existence of a widespread or systematic attack directed against the non-Serb population in the territory of Municipality Rogatica. Mass killings of civilians, destruction of unprotected Bosniak homes, establishment of camps and killings of camp detainees, rapes of Bosniak women, destruction of cultural-historical facilities as well as other gross violations of the provisions of international humanitarian law also testify to the direction of this attack against the civilian population. The witnesses for the Prosecution spoke in their testimonies about the camps-prisons on the premises of the farming cooperative Rasadnik and Secondary School Center "Veljko Vlahović" in Rogatica, about torture, beatings and daily humiliation in which the Accused actively participated in the manner as described in the Indictment. It can be seen from all the events described in detail that the Bosniak population did not leave their homes of their free will. They were expelled and forced to do so under the threat of arms.

The Prosecution further argued that the Accused Ljubinac Radisav knew about the wider context of the attack in which he took the criminal and illegal actions he is charged with and knew that his actions constituted a part of that attack. At the time in question, the Accused was a member of the Serb army, and he "had joined the organization and participated in the arming of the Serb people long before the beginning of war actions", he moved throughout the entire Municipality Rogatica, and as he himself said, he drove his minibus all over that entire territory and these facts could not have stayed unknown to him. The Prosecution submitted that having acted with a discriminatory intention, the Accused committed persecution of the Bosniak population – as a form of crimes against humanity, only because they were members of a certain group.

In the end of this part of the Closing Arguments, the Prosecutor's Office concluded that the Accused undoubtedly knew about the existence of the attack on the Bosniak civilian population in that period, and not only that he knew of that attack and accepted that his actions become a part of that attack, but he in fact wanted his actions to be a part of it, thus all essential elements of the crimes against humanity have been thereby met.

In the second part of the Closing Arguments, the Prosecutor's Office analysed individual charges through the Indictment Counts, stating the testimonies of the witnesses which confirm each of the 6 Counts of the Indictment. The commission of the criminal offense as described under Count 1 of the Indictment is based on the testimonies of the witnesses Zimić Mujo and Zimić Nazif, while Count 2 of the Indictment, which concerns the separation of men from women in Seljani and abduction and killing of men, is based on the testimonies of the witnesses Zimić Enisa, Jašarević Osmana, Zimić Nazif, Zimić Mujo, and the witness „C“. All these witnesses are direct participants in the events concerned. The commission of the criminal offense described under Count 3 of the Indictment arises from the testimony of witnesses Isaković Alija and Bešlija Enver. Witness Isaković Alija, who was detained in the Camp SSC „Veljko Vlahović“, together with his wife, son and other

civilians, remembers that Ljubinac Radisav together with one more person took dentist Mustafa Bešlija out from the SSC. The witness believes that they killed him as he has never seen him again.

That the Accused Ljubinac Radisav resettled women and children and a smaller number of the remaining adult men in the manner and at the time as described in detail under Count 4 of the Indictment arises from the testimonies of the witnesses „C“, „D“, Jašarević Osmana, Baždar Armin, Baždar Meho and Ramović Habiba. The fact that the Accused was present in front of the SSC supports the fact that he participated in the separation of men from women. Count 5 of the Indictment, which concerns physical abuse of the civilians detained in the camp Rasadnik is based on the testimonies of Isaković Alija, Kapo Muhidin, Vatreš Šemso and the witness „B“. Witnesses Kapo Muhidin and Vatreš Šemso are direct victims of the Accused, who used to beat them up, while witnesses Alija Isaković and the witness „B“ are eye-witnesses of the beating up of disabled Ćutahija Bećir by the Accused. The criminal offense referred to under Count 6 of the Indictment - taking of detainees to forced labor and to a human shield, and their execution after the completion of the action - is confirmed by the testimonies of witness Isaković Alija, whose son was killed on that occasion, and Baždar Armin who is one of three persons who survived and who describes in detail the events of that day and the moment after the execution when he heard the voice of Ljubinac Radisav in the vicinity, and of the witness „A“, who is also one of the survivors in this horrible event.

By analyzing the averments of the Defense, the Prosecutor's Office argued that the Defense of Radisav Ljubinac is based on two averments: that he was an alcoholic and an unreliable person and that during the attack on Seljani he was not present in Seljani, but in Ćemanovići at the funeral of his cousin Ljubinac Boško. The Prosecutor's Office holds that these facts are neither relevant nor founded, and presented the arguments for these assertions by analyzing the individual statements of the witnesses for the Defense. Finally, the Prosecutor's Office concluded that, taking into account all aforementioned and based on numerous material evidence, the Defense of the Accused Radisav Ljubinac is unfounded and calculated to avoid or decrease his criminal responsibility, and therefore the Court should refuse it as such in its entirety.

Finally, after a short reference to the substantive law application, that is, the application of Article 4 a) CC of BiH, which is justified by the fact that the sentence imposed is in any case more lenient than the death sentence which was applicable at the time of the commission of the offense, whereby the application of the principle of validity time of the criminal code, that is „the law which is more lenient to the perpetrator“, the Prosecutor's Office proposed to the Panel to issue a decision finding the Accused guilty under all Counts of the Indictment, and accordingly impose on him a punishment of long term imprisonment.

## **b. Defense**

In his Closing Arguments, the Defense counsel for the Accused opposed the proposal of the Prosecutor's Office to adduce into evidence the ICTY Judgments in the cases: *Prosecutor vs. Plavšić* (BiH), *Prosecutor vs. Tadić* (Prijeđor), *Prosecutor vs. Jelisić* (Brčko), *Prosecutor vs. Stakić* (Prijeđor), *Prosecutor vs. Vasiljević* (Višegrad), *Prosecutor vs. Češić* (Brčko), *Prosecutor vs. Zarić* (Bosanski Šamac) and *Prosecutor vs. D. Nikolić* (Prijeđor), with

regard to the existence of the widespread or systematic attack in the Rogatica territory. He substantiated his opposition by the fact that the indicated Judgments do not refer at all to the Rogatica region, that is, the region where, as asserted under the Indictment, the indicated criminal offenses were committed. The Defense counsel argued that, in case that the Court accepts the indicated facts as proved, it would violate the principles and provisions of criminal procedure and the rights of the Accused, as follows: the principle of independence of the Court, presumption of innocence (Article 3 CPC of BiH), legality of evidence (Article 10 CPC of BiH), equality of arms (Article 14 CPC of BiH), free evaluation of evidence (Article 15 CPC of BiH), exceptions from the imminent presentation of evidence (Article 273 CPC of BiH), evidence on which the verdict is grounded (Article 281 CPC of BiH), and the content of the verdict (Article 290 CPC of BiH). The Defense also held that the acceptance of these facts would be in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in particular Article 6, as well as the case law of the European Court of Human Rights which established several basic principles, namely that all evidence must be adduced in the presence of the Accused at the public hearing for the purpose of counter-argumentation, and that the use of the evidence must be in accordance with the rights of the Defense which implies that the Accused has to be provided an appropriate opportunity to contest and examine the witnesses that testify against him. In a case when the Accused did not have an opportunity to contest the evidence presented by the witnesses, the Defense argued that the national Court cannot base a convicting verdict exclusively or to a decisive extent on such evidence. Finally, with regard to this general essential element, the Defense stated that the formerly passed verdicts are not anticipated to be evidence for applicable legal evidence in BiH. As to the second essential general element – the knowledge of the Accused about the existence of the widespread or systematic attack of the army and police of the so-called Srpska Republika BiH and paramilitary formations under the SDS leadership, directed against the civilian Bosniak population in the territory of Municipality Rogatica - the Defense held that the Prosecutor's Office did not prove the existence of this element either, in particular because of the fact that the Accused was not a member of the Serb army at the time of the commission of the actions concerned, and the fact that he has a marginal social status, that he is an outsider, notorious alcoholic and dismissed worker.

As to the individual criminal-illegal actions that the Accused is charged with under Counts 1 through 6 of the Amended Indictment, the Defense analyzed in detail all the evidence of the Prosecution as well as of the Defense, and concluded that the Prosecutor failed to prove beyond any reasonable doubt any Count of the Indictment. Therefore the defence proposed to acquit the Accused Ljubinac Radisav of all charges.

As regards the applicable substantive law, the Defense objected to the application of CC of BiH, arguing that the CC of SFRY, which was applicable at the time of the events concerned, should be applied. According to the Defense, application of any other Law than the CC of SFRY, amounts to a violation of the principle of legality. The Defense referred to Article 7 (1) ECHR and Article 15 (1) of the International Covenant on Civil and Political Rights.

In the Closing Arguments, the Accused supported entirely the Closing Arguments of his Defense counsel.

### **3. Procedural decisions**

#### **a. Manner of examination of witnesses who were ordered the measures of identity protection**

Among 22 witnesses proffered by the Indictment, the Prosecutor's Office proposed the examination of 4 witnesses who were ordered the measures of identity protection.

These measures were decided in the preliminary proceedings as follows: for the witness A the measures were decided by the Decision of the Court number: X -KRN - 05/154, 9 January 2006, for the witnesses B and C by the Decision bearing the same number, dated 16 January 2006 and for the witness D by the Decision of 13 February 2006.

The manner of the examination of these witnesses was left to the Trial Panel for its decision.

As this concerns vulnerable witnesses who even today feel the consequences of the traumatic events about which they testified, on 5 September 2006, pursuant to the provisions of Articles 9 and 13 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, the Prosecutor's Office submitted the Motion that the examination of the referenced witnesses during the main trial be conducted from another room and with the help of technical equipment for transmitting the voice and image of the witnesses.

Being in receipt of this Motion and, primarily, having in mind the right to a public hearing, as well as the right of the accused to examine the witnesses whose testimonies contained criminal charges against him, in addition to the CPC, this right being stipulated by the provision of Article 6 (3) d) of the European Convention, the Court, using the possibility provided in the provision of Article 13 (2) of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, proposed that the identity of the witnesses under pseudonyms A, B, C and D be additionally protected by their being seated behind a screen during the testimony, which would prevent the public from seeing their image.

The Parties and the Defense Counsel agreed with such a manner of the examination of the witnesses, and thereafter the Court enacted the proposal.

However, on 19 December 2006, prior to the testimony of the witness B, the Court was notified by the Witness Support Section that the woman witness was suffering from a very difficult emotional disturbance and that a repeated meeting with the accused could provoke an additional trauma. Due to these newly-arisen circumstances, the Prosecutor moved that the woman witness be heard only in the presence of the Defence Counsel for the accused, and that the accused be removed from a court-room, or, if technically feasible, that the accused be kept in the court-room in a position from which he could not see the woman witness.

Although the accused objected as to why the woman witness could not look in his eyes if she was telling the truth, the Defence Counsel for the accused showed understanding of the state in which the woman witness was.

Evaluating the best manner of the examination and protection of this woman witness, the Court rendered the Decision that the accused would be kept in the courtroom, but that he would change the place of his seat, and would be seated behind the Prosecutor, at his side,

in such a way that the screen covering the woman witness from the public represents, at the same time, a physical barrier between the accused and the woman witness. The Court also decided that, following the cross-examination of the woman witness by the Defence Counsel for the accused, it would give additional time to the accused and his Defence Counsel in order for them to consult with regard to questions which the accused wished his Defence Counsel to ask, and which he was unable to convey direct to his Defence Counsel because of the position of his seat.

The Court thus ensured the protection of the witnesses who remained unknown to the public, although they testified in a court-room and at the main trial.

**b. The Order of the Court for an expert evaluation of the state of health of the accused during the main trial and the Order for neuropsychiatrist's evaluation of the state of the accused in *temporae criminis***

The Defence Counsel for the Accused pointed out in the status conference already that the accused Ljubinac Radisav was in a poor state of health, in other words, that he suffered from a heart disease, and also that in *temporae criminis* he was a person that was under the influence of alcohol every day. Consequently, the Defence Counsel for the Accused proposed that an expert evaluation of the state of health of the accused be made as follows: in respect of the heart disease – the possibility of attending and monitoring the main trial, and, in respect of the state of mind in *temporae criminis*, the neuropsychiatrist's evaluation.

Deciding on this Motion, the Court issued an Order on 3 October 2006 to the Clinical Center of the University in Sarajevo (CCUS) for making an expert evaluation of the state of health of the accused in respect of his capability to attend and monitor the main trial, with special reference to the Findings of a cardiologist, bearing in mind the heart disease of the accused.

Furthermore, on 24 January 2007, the Court issued an Order to the same Clinical Center to make an expert evaluation of the neuropsychiatric state of the accused in respect of his capability to comprehend in *temporae criminis* the importance of his action and to govern his conducts, all the above being in connection with the averments of the Defense that, at that very time, the accused was a person who was constantly under the influence of alcohol.

Acting under the Order for the expert evaluation of the state of health, a Clinical Center of the University in Sarajevo expert team carried out all the necessary investigations and, on 14 December 2006, forwarded to the Court the Finding reading: "according to the clinical examination and conducted tests, we deem that Mr. Ljubinac Radisav is, at this point, capable for an active participation in the court proceedings."

The Court had in mind such Finding and Conclusion of the Clinical Center of University of Sarajevo expert team particularly at planning the volume of evidence scheduled for one day of hearing, and it satisfied the Motion of the Defence Counsel for the accused that only two witnesses be examined during one day of the hearing. The Prosecutor's Office supported this Motion of the Defence Counsel.

The neuropsychiatrist's evaluation, which was made after the interview with the accused, resulted in the opinion that the accused in *temporae criminis* was in a state of diminished responsibility, but not remarkably.

Although the Defence, underlining the permanent state of intoxication of the accused in *temporae criminis*, attempted to indicate his mental incapacity, this Finding, as well as the whole of the evidentiary procedure, including the testimony of the accused given at the main trial, confirmed the mental capacity of the accused, which will be expounded in the further part of the Reasoning.

**c. The Decision of the Court that the main hearing be held without the presence of the accused**

Although this procedural decision was made in writing in addition to the public announcement during the trial itself, the Court has to refer to it, even at this point, because of the importance of the subject at issue.

In particular, although he had been timely notified and called to attend, escorted by the court police, the main trial scheduled for 17 January 2007, the accused Ljubinac Radisav did not appear. The Court was only then notified that, due to the newly-arisen situation of the hunger strike, he was not capable of attending the trial.

The accused did not provide any particular details for his incapability to be present at the hearing. He did not prove it with any medical document, and even the Defence Counsel for the accused was unable to comment on the state of his defendant because, as he said, he had not visited him since the last hearing which was held on 19 December 2006.

Nevertheless, commenting on the refusal of his client to be present at the hearing, the Defence Counsel for the accused argued that it was not legally possible to hold the trial without the presence of the accused, whereas the Prosecutor proposed holding the main trial without the presence of the accused.

Considering this unequalled and unusual situation, the Court proceeded on the basis of the fact that the accused was ordered in custody for the purpose of ensuring his presence in the proceedings which were conducted against him, and by that very fact, the accused was denied the possibility to choose whether he would respond to the summons for the main trial or not. By the Order for placing the accused in custody, the accused became available for the Court at any time, and therefore, in this case one cannot talk trial *in absentia*. The accused was not present, which was, according to the estimate of the Court, the result of his free choice to join the other prisoners who were on strike and who thus attempted to influence, according to them, the decision on the application of a more lenient law. The accused, however, did not comment if he himself was on strike and if that potential strike had consequences for his health. The Court, having inspected the case file, found that the health state of the accused was stable.

The Court submits that the accused was capable to attend the main hearing, which is also demonstrated by the referenced CCUS Finding.

It is, therefore, clear that in this case the accused consciously waived the right to participate in the proceedings which were conducted against him, and therefore the Court, without any wish to delay the proceedings, decided to hold the main trial even without the presence of the accused, and particularly warned the Defence Counsel for the accused of his duty to warn his client, who is a layman, about the detrimental consequences of such a conduct.

#### **d. Adjudicated Facts**

##### Motion of the Prosecutor's Office

On 17 January 2007 the Prosecutor's Office filed, pursuant to Article 4 of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina (Law on Transfer) and to Article 261 (1) and Article 15 CPC of BiH, the motion no. KT-RZ-174/05 (with attachment Annex A), for taking judicial notice of facts established by legally binding decision at the ICTY in its judgments in the cases *Prosecutor vs. Duško Tadić* (IT-94-1-T); *Prosecutor vs. Mitar Vasiljević* (IT-98-32-T); *Prosecutor vs. Dragan Nikolic* (IT-94-2-T); *Prosecutor vs. Goran Jelisić* (IT-95-10-T); *Prosecutor vs. Zarić Simo, Tadić Miroslav and Simić Blagoje* (IT-95-9-T); and *Prosecutor vs. Stakić Milomir* (IT-97-4-T), in which the Prosecutor's Office requests the Panel to accept as proven 14 facts established by the above mentioned judgments.

The Prosecutor moves the Court to accept as established by the ICTY in the aforementioned judgements, and to include these judgements into evidence, the existence of a "widespread or systematic attack" of the army and police of the so-called Serb Republic of Bosnia and Herzegovina and paramilitary units of the SDS, directed against the civilian Bosniak population in the area of the Municipality of Rogatica during the period mentioned in the Indictment.

In support of this motion, the Prosecution moves that Article 4 of the Law on Transfer should be interpreted as *lex specialis*, and therefore of controlling importance, with reference to Article 15 of the Criminal Procedure Code of Bosnia and Herzegovina, even to the extent of this restricted measure, thus the Court may accept as proved those facts which are established by the ICTY final judgments. The Prosecution submits that the criteria for the acceptance of established facts as proved are met. All the proposed facts are contained in the judgments of the first-instance chambers and were not contested in the appellate proceedings nor were they denied by the second-instance judgments. Furthermore, the proposed facts are relevant; they do not incriminate the accused directly for the criminal offenses stated in the Indictment; and they are not the subject of a reasonable doubt.

At the hearing held on 5 February 2007, the Prosecutor maintained the reasons presented in his written motion, while the Defense argued that the motion was unfounded.

##### Applicable law

Article 4 of the Law on Transfer reads as follows:

*At the request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions*

*in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.*

The formal requirement of Article 4, requiring that the parties be granted a hearing, has been met.

Article 4 leaves to the discretion of the Court the decision as to whether to accept the facts proposed. Neither the Law on Transfer, nor the Criminal Procedure Code of Bosnia and Herzegovina, provide for the criteria upon which the Court might exercise its discretion.

Article 4 of the Law on Transfer is drafted in terms similar to those of Rule 94(B) of the ICTY Rules of Procedure and Evidence, and the ICTY jurisprudence related to that provision may provide persuasive guidance in the interpretation and application of Article 4 of the Law on Transfer.

The ICTY decision in *Prosecutor v. Momcilo Krajisnik*, lists the criteria for a fact to be adjudicated as follows:

- (i) it is distinct, concrete and identifiable;
- (ii) it is restricted to factual findings and does not include legal characterizations;
- (iii) it was contested at the trial and forms part of a judgment which has either not been appealed or has been finally settled on appeal;
- (iv) it was contested at the trial and now forms part of a judgment which is under appeal, but falls within issues which are not in dispute during the appeal;
- (v) it does not attest to the criminal responsibility of the Accused;
- (vi) it is not the subject of (reasonable) dispute between the Parties in the present case;
- (vii) it is not based on plea agreements in previous cases; and
- (viii) it does not impact on the right of the Accused to a fair trial.<sup>1</sup>

The Prosecutor's Office implicitly submits that all the facts enumerated in its motion meet all of the above mentioned criteria, and that taking judicial notice of these facts is justified by judicial economy, in accordance with the defendant's right to be tried within reasonable time. It is alleged that the case against the Accused concerns acts amounting to Crimes against humanity which have been committed in the context of large scale military operations already uncovered in other cases tried before the ICTY.

To the *Krajisnik* criteria, we would add that for a fact to be an appropriate subject for adjudication, it may not be a conclusion, opinion, or verbal testimony; must contain essential findings of the ICTY that have not been significantly changed; and must have been found in a proceeding where the Accused was in privity of interest with the Accused in this case and where the Accused was afforded the right to counsel and the right and opportunity to defend himself against the charges against him.

In applying Article 4, this Court must also balance the needs of judicial economy with the Accused's right to a fair trial and the presumption of innocence set out in Article 6 of the

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<sup>1</sup> See *Prosecutor v. Momcilo Krajisnik*, IT-00-38-T, Decision on third and fourth Prosecution Motions for Judicial Notice of adjudicated facts.

ECHR as well as the procedural safeguards afforded him by Article 6 of the CPC of BiH. For this reason, we reiterate that the acceptance of adjudicated facts as 'proven' under the *Krajisnik* criteria does not relieve the Prosecutor of his burden of proof or detract in any way from the presumption of innocence. The acceptance of a particular fact as proven means only that the Prosecutor has met his burden of persuasion as to that particular fact and does not have to prove it further in his case in chief. The Accused maintains the right to challenge any of the accepted facts in defending himself from the charges against him,<sup>2</sup> as with any other factual proposition offered to support the charges and on which the Prosecutor had presented evidence. If the Accused does challenge any adjudicated fact, the Prosecutor may then present additional evidence to rebut the defense challenge. Likewise, this Court is not bound to base its verdict on any adjudicated fact. Instead, adjudicated facts are admitted and considered in light of the totality of the circumstances and in light of all the evidence produced from all sources.

### The Facts in Question

In total the Prosecutor's Office moved the Court to accept as proven unless rebutted fourteen facts related to the establishment and functioning of crisis staffs and the existence of a widespread or systematic attack. The Court hereby accepts these facts as established by admitting the Prosecution's Motion and rejecting the oral objection registered by the Defense on the ground that the Defense failed to adduce legitimate reasons to contest the Prosecution's Motion. The Court finds hereby that the Defense's objections were too general to support disallowing the Prosecution's motion.

The facts the prosecution sought to introduce under Article 4 were:

- (i) The Crisis Staffs were formed in the Serb autonomous regions in order to take over the power as well as general administration in the municipalities. Members of the crisis staff were the SDS leaders, YNA commanders in these regions, heads of the Serb Military Forces as well as the commanders of the Serb Territorial Defense.
- (ii) When Prijedor and the surrounding areas were taken over, Serb forces detained thousands of civilians of Muslim and Croat ethnicity in the camps in Omarska, Keraterm and Trnopolje. The foundation of these camps was part of the plan of the Greater Serbia to expel non-Serbs from the municipality of Prijedor. The camps were set up and headed either under the instructions by the Serb Crisis Staffs or in cooperation with them, armed forces and police forces. During their detention, male and female detainees were subject to severe maltreatment, beatings, sexual abuse, torture and execution.
- (iii) On the grounds of the evidence presented, the Trial Panel was satisfied that at the time referred to in the Indictment, there was a widespread or systematic attack to non-Serb civilians in the Municipality of Višegrad. The attack was of several types, including taking over the city by the Serbs as well as systematic criminal campaigns of murder, rape and abuse against the residents of the Municipality of non-Serb ethnicity and Muslims, in particular, culminating with

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<sup>2</sup> See *Prosecutor v. Slobodan Miloslevic*, IT-02-54-AR73.5, Decision on the Prosecution's interlocutory appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of adjudicated facts.

one of the most widespread and brutal ethnic cleansing campaigns in the Bosnian conflict. In the period of only a few weeks, the Municipality of Višegrad was ethnically cleansed of nearly all of the non-Serb inhabitants and the Municipality was annexed to the present Republika Srpska.

- (iv) Approximately around 21 April 1992, Serb forces comprising of Yugoslav National Army (hereinafter YNA), paramilitary forces and armed locals, seized the power in the town of Vlasenica.
- (v) Immediately after the Serbs seized control over the municipality of Vlasenica, the Crisis Staff took over the administration of the city and appointed the Serbs to all of the important positions. The local Serbs were mobilized taking over the military responsibilities from the YNA forces. Their duties included safeguarding the important buildings as well as looking for the armed Muslims in the nearby forests.
- (vi) Many Muslims and other non-Serbs fled from the Vlasenica region, and those who stayed, in the period from May 1992 to September 1992, were either forced to leave or arrested.
- (vii) The events described in the factual ground point out very clearly that the Serb offensive was directed against Brčko citizens of non-Serb ethnicity. The statements also give the account of the organized evacuation of the citizens of Brčko, from each of the neighborhoods in the city, to the collection centers where the Serbs were separated from Muslims and Croats. According to the witnesses, Serb men were immediately recruited into Serb forces, whilst women and children and men over 60 were evacuated to the nearby areas by buses. The men of Muslim and Croat ethnicity, aged between 16 and 60, were held captive in the collective centers.
- (viii) Elements in support of the guilty plea, as summarized in the section 'Historical background of the events,' do not bring into doubt the widespread and systematic nature of the attacks against civilians of Muslim and Croatian ethnicity in the Municipality of Brčko.
- (ix) The Trial Panel holds that the events in Bosanski Šamac and Odžak in the period from 17 April 1992 to 31 December 1992 represent attack against civilians. The attack encompassed the forced seizure of power in Bosanski Šamac as well as the subsequent persecution and deportation of non-Serb civilians.
- (x) Regarding the provisions under Article 5 classifying an attack as widespread or systematic, the Trial Panel has come to the conclusion that the attack to the civilians of non-Serb ethnicity in the Municipalities of Bosanski Šamac and Odžak was both systematic and widespread.
- (xi) The Trial Panel is satisfied that there was an armed conflict in the area of the Municipality of Prijedor in the period from 30 April to 30 September 1992.
- (xii) The Trial Panel is satisfied that the events that took place in the Municipality of Prijedor in the period from 30 April to 30 September 1992, correspond to the attack against civilians. Because of the scope of the attack, it cannot be characterized as an attack against only a certain and randomly selected group of individuals. On the contrary, majority of the non-Serb population from the Municipality of Prijedor was targeted.
- (xiii) The Trial Panel is satisfied that the attack against civilians was prepared from 7 January 1992, when the Serb Assembly in Prijedor was established. The plan for elimination of non-Serbs and others who were not loyal to the Serb authorities in

the Municipality of Prijedor went into action on 30 April 1992, when the Serb authorities seized the power.

- (xiv) Since it was confirmed that the attack was systematic it is not necessary to consider, strictly speaking, the requirement that the attack be widespread. However, the Trial Panel finds that the attack on non-Serb population in Prijedor was widespread as well.

In support of facts i and ii, the Prosecution cited *Tadić*. For fact iii, the Prosecution cited *Vasiljević*. In support of facts iv, v, and vi, the Prosecution cited *Nikolić*. In support of facts vii and viii, the Prosecution cited *Jelisić*. In support of facts ix and x, the Prosecution cited *Zarić, Simić and Tadić*. In support of facts xi, xii, xiii, and xiv, the Prosecution cited *Stakić*.

Having considered the motion of the Prosecutor's Office as well as the objections raised by the Defense, the Panel decided as stated in the operative part of this decision for the following reasons.

### Reasoning

As a general matter, the practice of establishing facts in this manner does not violate Article 6 ECHR or Article 6 CPC of BiH, because establishing facts is permitted by a law which applies directly to the issue at hand. Under the traditional rule *lex specialis derogate generali* (the law which applies specifically takes precedence over one which states a general principle), Article Four of the Law on Transfer controls the issue. In addition, this Court applies the rule set out by the ICTY in the *Krajisnik* case, which provides for disallowing a motion to adjudicate facts if allowing the motion 'would impact on the right of the Accused to a fair trial.' By offering the party opposing the motion, i.e. the Defense, a hearing to challenge the motion and an opportunity to file a responsive pleading, the Court took measures to ensure the fairness and integrity of the criminal proceedings concerned.

Having provided the necessary procedural rights to the Defense, this Court may then decide to accept as proven those facts that are established by legally binding decisions in ICTY proceedings under Article 4. In this case, the Motion refers to ICTY judgments that pertain to the existence of the elements of a widespread or systematic attack and the role of the JNA, the VRS in BiH and the crisis staffs. The existence of a widespread or systematic attack against the non-Serb civilian population of BiH as well as the roles of various military and paramilitary organizations in the attack are discrete, identifiable, and relevant but do not directly attest to the guilt of the Accused. Having been contested at a variety of other trials, they are not a subject of reasonable dispute in this case. As a result, the Court hereby accepts the Motion after hearing the parties and considering their respective arguments. It is taken as established fact that there was a widespread or systematic attack against the non-Serb populations in the Prijedor, Višegrad, Vlasenica, Brčko, Bosanski Šamac, and Odžak regions; that Crisis Staffs were formed to facilitate the takeover of administrative authority by, in significant part, the military and Serbian paramilitary groups; and that the Crisis staff had some administrative control over prison camps intended to facilitate the expulsion of non-Serbs from certain areas in BiH.

As this Court did in *Paunović*, we also find that it is beyond dispute that a widespread or systematic attack against the non-Serbian civilian population of Rogatica was occurring

during the period in question. The *Vasiljević* judgment of the ICTY (IT-98-32-A) is particularly instructive on this point. In that case, the ICTY established that there was a widespread or systematic attack against the non-Serbian civilian population of Višegrad, a municipality neighboring Rogatica, during the period in question. As in *Paunović*, this panel made a comprehensive assessment of the evidence and determined that, due to the proximity of Višegrad and Rogatica and the evidence offered by the prosecution about violence, mass detention, and the forcible transfer of non-Serbian civilians of Rogatica itself, a widespread or systematic attack against the non-Serbian civilian population of Rogatica within the meaning of Article 172 (1) CC of BiH has also been demonstrated in Rogatica. That is, that a ‘course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’ was perpetrated by the SDS Rogatica, SDS Rogatica Crisis Staff, and Army of the Serb Republic of BiH. The evidence demonstrates conclusively that the actions of the SDS, Crisis Staff, and Army of the Serb Republic of BiH in Rogatica were consistent with their actions in other municipalities around Bosnia. This is demonstrated clearly in *Paunović* as well as the ICTY judgment against Momcilo Krajisnik (IT-00-39 & 40-1S).<sup>3</sup>

#### **4. Applicable law**

As regards the applicable substantive law, the Defense objected to the application of CC of BiH, arguing that the CC of SFRY, which was applicable at the time of the events concerned, should be applied. According to the Defense, application of any Law other than the CC of SFRY amounts to a violation of the principle of legality. The Defense referred to Article 7 (1) ECHR and Article 15 (1) of the International Covenant on Civil and Political Rights.

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

Also in Article 7 (1) ECHR the principle of legality is laid down. The ECHR supersedes all national legislation of BiH pursuant to Article 2 (2) of the BiH Constitution. This provision of the ECHR furthermore contains the general principle prohibiting imposing a heavier

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<sup>3</sup> This Court's reasoning in *Paunović* was upheld by the Appeals Chamber, which wrote in pertinent part:

*The existence of systematic and widespread attack on non-Serb civilians in the said territory represents precisely such general fact which is clear, concrete and as such does not confirm criminal liability of the Accused.*

penalty than the one that was applicable at the time when the criminal offense was committed, but does not prescribe the imposition of the most lenient law.

Article 4a CC of BiH states that Articles 3 and 4 CC of BiH 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.*"

Also paragraph 2 of Article 7 ECHR gives the same exemption, providing that paragraph 1 of the same Article "*...shall not prejudice the trial and punishment of any person of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations*". See also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, Article 15, paragraphs 1 and 2.<sup>4</sup>

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

While considering the objection raised by the Defense, it has to be noted that in the CC of the SFRY, which was applicable in the period relevant to this case, no provision explicitly dealt with crimes against humanity as provided for in Article 172 CC of BiH. However, taking into consideration other provisions of the valid substantive law as well as the general principles of international law, this objection of the Defense could not be accepted as well-founded.

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

The customary international law status of Crimes against humanity and the attribution of individual criminal responsibility in the period relevant to the Indictment was established among others by the Report of the Secretary General of the United Nations pursuant to paragraph 2 of Security Council Resolution 808, dated 3 May 1993. See International Law Commission, *Comments on the Draft Code of Crimes against the Peace and Security of Mankind* (1996). This is also made clear in the jurisprudence of the ICTY and ICTR. These institutions found that the punishability of crimes against humanity represents an imperative standard of international law or *jus cogens*. See, e.g., International Law Commission, *Commentary on Draft Articles on State Responsibility for Internationally Wrongful Acts* (2001), Article 26. Therefore, it appears to be beyond dispute that in 1992 Crimes against Humanity were part of international customary law.

Furthermore, the fact that the criminal acts set forth in Article 172 CC of BiH can also be found in the law which was in effect at the critical time period – at the time of the

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<sup>4</sup> The State of Bosnia and Herzegovina, as a successor of Yugoslavia, ratified this Covenant.

perpetration of the offense, specifically under Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186 of the CC of SFRY - or, in other words, that the criminal acts were punishable under the criminal code then in effect, additionally supports the conclusion of the Court regarding the principle of legality.

Finally, the application of the CC of BiH is additionally justified by the fact that the imposed sentence is in any event more lenient than the death penalty that was applicable at the time of perpetration of the offense, thereby satisfying the principle of time constraints regarding applicability of the criminal code, i.e. application of a law that is more lenient to the perpetrator.

The above is in line with the Appellate Division of Section I of the Court of BiH in its Verdict against Abduladhim Maktouf, no. KPŽ 32/05, dated 4 April 2006 and Verdict against Dragoje Paunović, no KPŽ 05/16, dated 27 October 2006.

## **5. Findings of the Court**

### **a. General considerations regarding the evaluation of evidence**

The Court has assessed the evidence in this case in accordance with the applicable procedural Code, i.e. the Criminal Procedure Code of Bosnia and Herzegovina. The Court has applied to the Accused the presumption of innocence stated in Article 3 CPC of BiH, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the Accused and the Prosecution must do so beyond reasonable doubt.

In evaluating the evidence of the witnesses that testified before the Court, the Court has considered their demeanor, conduct and character as far as this was possible. With regard to all the witnesses it has also considered the probability, consistency and other evidence and the circumstances of the case. Furthermore, the Court has been conscious throughout that the credibility of witnesses depends upon their knowledge of the facts upon which they gave evidence, their integrity, their veracity and the fact that they are bound to speak the truth in terms of the solemn declaration taken by them.

It is insufficient that the evidence given by a witness has been given honestly. The true issue in relation to identification evidence is not whether it has been honestly given, but also whether it is reliable. The Trial Panel has been conscious, throughout, that evidence about facts that occurred sometimes many years prior to giving evidence, involves inherent uncertainties due to the vagaries of human perception and recollection of traumatic events.

As regards hearsay evidence, the Court underlines that it is well settled in the practice and jurisprudence of the Court that hearsay evidence is admissible. Furthermore, pursuant to Article 15 CPC of BiH the Court is free in its evaluation of evidence. The approach taken by the Court has been that it ought to be satisfied that such evidence is reliable in the sense of being voluntary, truthful and trustworthy. Furthermore, the probative value of a hearsay statement will depend upon the context and character of the evidence in question and/or if the evidence has been corroborated by other pieces of evidence.

The Court considered circumstantial evidence as being such evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred. Since the crime seems to be committed when many witnesses were not present at the crime scene itself, and since the possibility of establishing the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is problematic or unavailable, circumstantial evidence may become a critical ingredient not only for the Prosecution but also for the Accused. The individual items of such evidence may by themselves be insufficient to establish a fact, but, taken together, their collective and cumulative effect may be revealing and sometimes decisive.

#### **b. Chapeau elements of Crimes against Humanity and knowledge of the Accused**

The Accused has been charged with the criminal offense of Crimes against Humanity under Article 172 paragraph 1 items a), d), e), h) and k) of the CC of BiH. For a criminal act to qualify as a Crime against Humanity, the law requires, besides the specific elements of the individual act, for the Prosecution to prove the general or chapeau elements of crimes against humanity, namely:

1. *That there was a widespread or systematic attack directed against any civilian population;*
2. *That the Accused knew of the existence of such an attack;*
3. *That the acts of the Accused were part of the attack and that he knew that his acts were part of the attack.*

The prosecution must prove all three beyond a reasonable doubt.<sup>5</sup>

As stated above, the Court finds indisputably that there was a widespread or systematic attack against the civilian population in the Rogatica area during the period in question in this case directed by the Army of the Serb Republic of Bosnia and Herzegovina, members of the Police and paramilitary formation targeting the non-Serbian civilian population. The attack, in the context of Crimes against Humanity, pursuant to international customary law, was not limited exclusively to the existence of the “armed conflict”.

As to the other necessary key elements of Crimes against Humanity, by evaluation of all the presented evidence individually and holistically, the Court established beyond any reasonable doubt that in the incriminated period the Accused was staying in the area of the Rogatica municipality, was a member of the Army of the Serb Republic in BiH, and

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<sup>5</sup> This is effectively the same as the ICTY's version of the elements of crimes against humanity, which the Tribunal articulates as having five prongs:

- A. There has to be an attack;
- B. The attack must be widespread and systematic;
- C. The attack must be directed against a civilian population;
- D. The individual defendant's action must be part of that attack; and
- E. The individual defendant must know of the widespread attack and know his action is part of the attack

*See Krajisnik, supra* at para. 705.

traveled around Rogatica freely including spending time at the prison camp at the secondary school Veljko Vlahović. Moreover, the Accused testified from his personal knowledge that the Army of the Serb Republic in BiH collected individuals at Veljko Vlahović, a camp he knew to have a gate manned by armed guards, and forcibly transferred them out of the Rogatica region. He also stated that he, by order of the Head of the Prison Vojinović Miloš, transported women and children from Seljani to the aforementioned secondary school center, that he was driving detainees of the Camp "Rasadnik", which was called a collective centre, when asked for and that the captives were guarded by armed guards. Furthermore, he stated that the Serb armed forces seized control over the Rogatiča municipality and that there were road blocks or control points at the entrance to the city by the military police. Thus, it can be concluded that he was fully aware of the existence of the widespread or systematic attack against the non-Serbian civilian population. As detailed in Section I of this Verdict, this Court finds there is sufficient evidence to determine beyond a reasonable doubt that the acts of the Accused included participating in the forcible transfer of civilians, committing acts of violence against detainees, and driving civilians to the front lines to be used as human shields. These acts of violence against the non-Serbian civilian community of Rogatica were plainly part of the widespread or systematic attack against that community. The Accused was a member of the Army of the Serb Republic in BiH, and in the commission of his criminal acts he was either obeying direct orders or, at least, acting consistently with the policies of the Army of the Serb Republic, SDS, and Crisis Staffs throughout BiH. Consequently, his criminal acts were part of the widespread or systematic attack and given his position it is clear he must have known his acts were part of the widespread or systematic attack. Thus, all the essential elements of Crimes against Humanity are met.

### **c. Charges against the Accused**

**In relation to Item 1** of the sentencing part of the Verdict (count 4 of the amended indictment), the Accused was pronounced guilty because on 3 and 4 August 1992, he took part in the forcible transfer of women, children and the small number of remaining adult men from the villages and settlements of the Local Community Seljani, Municipality of Rogatica, to the camp which was based in the Secondary School Center "Veljko Vlahović" in Rogatica, and on 5 August 1992, after among the civilians detained at the Secondary School Center "Veljko Vlahović" in Rogatica men had been separated from women and children, he took part in the forcible transfer of women and children to Hreša, in the Municipality Stari Grad Sarajevo.

So, as part of a systematic or widespread attack against Bosniak civilians, knowing about such attack, he aided and abetted in the forcible transfer of population thus violating the fundamental rules of international law whereby he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) item d), in conjunction with Article 180 (1) CC of BiH.

The Court finds that it is indisputable that on 3 and 4 August 1992 the above mentioned group of civilians was forcibly transferred from the territory of the village of Seljani in a way that they were first taken to the Secondary School Center in Rogatica and then on 5 August 1992 together with other civilians who were detained in the same center and

following separation of men from women and children they were transferred to the territory of Sarajevo, to be precise to the locality of Hreša.

The participation of the Accused in this forcible transfer proved to be disputable.

However, evaluating the statements of the witnesses Meho Baždar, Enisa Zimić, Armin Baždar, Habiba Ramović, Osman Jašarević, Armin Baždar and witnesses under pseudonyms C and D, who were also the victims of this forcible transfer the Court found beyond any reasonable doubt that the Accused participated in the said forcible transfer of population. Based on the statements of all the witnesses who had lived in Seljani until the war it clearly arises that Bosniaks in Seljani were afraid and insecure. Their intimidation had started as early as spring 1992 when they were presented with the ultimatum to surrender all weapons. The events which followed, including the abduction of men fit for military service in June 1992 resulted in the fact that the inhabitants of Seljani had to concentrate only in a couple of houses, so, many families were accommodated in the houses of Meho Baždar, Fehim Begić and Sulejman Ćurevac. So, on 3 and 4 August 1992 they were gathered as mentioned above when, under the excuse that they should be transferred in order to be protected from shelling soon to come, they were addressed by the soldiers and ordered to get onto the bus which belonged to their neighbor Radisav Ljubinac, the Accused. That bus took them to the Secondary School Center “Veljko Vlahović” in Rogatica.

All the witnesses who identified Radisav Ljubinac as the driver of the bus by which they were transferred to the Secondary School Center “Veljko Vlahović” in Rogatica had no doubts about the identity of this driver. As it arises from their statements the driver was their neighbor, therefore, the inhabitant of Seljani.

All the above mentioned witnesses agree that their forcible transfer commenced with arrival of a group of soldiers, including also some soldiers familiar to them, who informed them that due to a great attack being prepared on Seljani they all had to be transferred to a safe place. That transfer took place in the manner that they were loaded on the bus driven by their neighbor Radisav Ljubinac who also took them to the Secondary School Center “Veljko Vlahović” in Rogatica. There, as they were informed, they should stay two days, until the shelling was over.

The fact is that in the Secondary School Center they stayed for one or two days, that is, until 5 August 1992 when, instead of being returned to their homes, because the “shelling” should have been over at the time, they were separated. A number of them were loaded on buses and trucks and transferred to Hreša locality in the territory of Sarajevo, and others, including men, and not only adult men, were kept in the Secondary School Center.

Therefore, the separation of men from women and children took place before departure from the Secondary School Center “Veljko Vlahović” in Rogatica. The Accused was also present during the separation.

The witness Meho Baždar, due to disability, was accommodated with women and children while his then 14-year-old son Armin was separated. The witness Meho Baždar addressed the Accused Radisav Ljubinac for help, asking him whether he could do anything for his

son Armin, to which the Accused answered that he did not dare to do it because he himself would have been killed.

The witness D also testified about the act of separation of men from women and children. She asked him to let her husband to go with her to which the Accused answered that it was not safe and the departure to Hreša was only “transfer to a safe place.” From the statements of the witnesses C and D it clearly arises that the Accused also took part in the transfer. The witness D asked the Accused where he was going, to which he pointed in the direction of the territory which at that time was under the control of the Army of BiH.

The Accused himself, who gave a statement on 5 February 2007 before this Court, also testified about the events which led to the forcible transfer.

The Accused stated that upon the order of a certain Zoran Cvijetić, in August 1992, to be precise on 5 August, he transported civilians to Hreša. The aim of this order, as stated by the Accused, was to save these civilians from retaliation for the crimes committed by Bosniaks against Serb civilians who were moving from Goražde to Rogatica. All the civilians had to be transferred, including those, as the Accused himself stated “*that I transported from Seljani.*” However, the defense contested the character of participation of the Accused in the acts as charged.

In the first place, the defense argued that the Accused in *temporae criminis* was under the constant influence of alcohol, thus intending to point out his mental incapacity and social unacceptability, and pursuant to the above mentioned, that the Accused was not a soldier, that is, a member of the Army, but just a person who “did not want to abandon” his bus. The bus concerned was actually the result of alterations and finishing carried out by the Accused during several years and when the war started the Army wanted to mobilize it for their needs. However, the Accused did not allow that and he accepted the mobilization under the condition that he would be the only one to drive the bus. The defense stated that this explains the presence of the Accused Radisav Ljubinac during the forcible transfer of civilian population.

To confirm these arguments and in particular the position of the Accused in society as a person called Pjano by everyone due to his constant intoxicated state the defense proposed hearing of the following witnesses: Radimir Perišić, Mirko Janković, Boško Čobović, Radojka Ljubinac, Momir Šalić and Dragan Forcan who really spoke about the Accused as a drunkard and person who “was not consulted about anything”.

However, the Court deemed such arguments of the defense unconvincing and illogical.

The Accused Radisav Ljubinac was a member of the Army of the Serb Republic of BiH as of 20 May 1992 which indisputably results from the following material evidence of the Prosecutor’s Office: Order of the commander of the Drina Corps of 28 June 1994 by which Ljubinac Radisav was promoted to the rank of the Reserve Artillery Sergeant 1<sup>st</sup> Class; List of reserve military officers, deployed at the Military Post 7084, with Ljubinac Radisav listed under number 12 as the Commander of the Sapper Platoon, 2nd Lieutenant – Lieutenant and Proposal for the promotion of Ljubinac Radisav into the rank of Reserve Sergeant 1<sup>st</sup> Class, of 30 May 1994., in which proposal is clearly stated that the Accused Ljubinac Radisav, by

the order of commander of military post 1524 no.13-66, dated on 22th of December 1991., was promoted into the rank of Sergeant and also, that he gave great contribution to the organization of Serb population, even before the war officially had broken out in BiH.

Furthermore, as already mentioned in the part referring to the procedural decisions of the Court, the neuropsychiatric evaluation of the Accused was conducted in order to determine his condition in terms of mental capacity in *temporae criminis*. The Accused, according to the findings and opinion of a team of doctors from the Clinical Center of University of Sarajevo, had diminished mental capacity in *temporae criminis* but not to a significant extent.

The fact is that such a degree of accountability cannot serve as the ground either for reduction or aggravation of sentence of a criminally responsible person which is clearly stipulated by the provision of Article 34 of the Criminal Code of Bosnia and Herzegovina.

Based on the foregoing the responsibility of the Accused is indisputable. The Accused had knowledge that what was going around him constituted a widespread or systematic attack directed against the civilian Bosniak population, in which attack he, in the above mentioned manner, took part whereby he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) item d), in conjunction with Article 180 (1) of the Criminal Code of Bosnia and Herzegovina.

**In relation to Item 2** of the convicting part of the Verdict (count 5 of the amended indictment), the Accused is found guilty of doing the following: in the period from the last days of June to October 1992, at the "Rasadnik" Camp near Rogatica, on a number of occasions, wearing military boots he kicked the detained civilians Pleho Muhamed, Kapo Muhidin, Vatreš Šemso and Ćutahija Bećir, and punched them, intentionally causing great suffering, or serious injury to body or to physical or mental health of those persons.

Therefore, as a part of the systematic or widespread attack on Bosniak civilians with which he was acquainted, intentionally causing great suffering, or serious injury to body or to physical or mental health of those persons, and violating the basic rules of the International Law, he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) item k) CC of BiH.

In relation to the existence of the "Rasadnik" Camp in which many Bosniaks and Croats from the area of the Rogatica Municipality and from the other municipalities were detained only because of their ethnic background testified the former detainees Alija Isaković, Šemso Vatreš, Muhidin Kapo and the witness under the pseudonym B, who themselves were the victims of many tortures, whereas Vatreš Šemso and Kapo Muhidin were direct victims of the Accused Ljubinac Radisav.

The witness Kapo Muhidin did not have any doubts about the identity of the person who, he remembers well the date of 27 July 1992, first beat up Pleho Muhamed and then him personally. He was beaten up by Ljubinac Radisav aka Pjano, son of Veso who worked as a receptionist at the Sjemeć. He remembers well the Accused approaching Pleho Muhamed first and asking him "*Pleho, why did you fire me from the company?*". Although Muhamed tried to explain that he had been only a member of the Workers' Council, an ordinary

worker who had no authority, the Accused approached Muhamed and started giving him blows. According to the memory of the witness Kapo Muhidin, he wore military boots of the former JNA and started kicking Pleho Muhamed with the toes of those boots. The Accused beat up Pleho Muhamed so much, the witness Kapo recalls, that everyone thought that he "*beat him to death*". Muhamed was only moaning, and he lay down on the ground.

However, it was not only then that the Accused beat up Pleho Muhamed. The witness Kapo remembers well Pleho Muhamed telling him that the Accused beat him up on one more occasion accusing him of *having made*, as a lathe operator, some barrels for rifles, long-barreled pistols, which shot some policeman in Višegrad dead.

The Accused then turned to the witness Kapo with the words: "*Why did you, Midan, sentence me to imprisonment for 6 months?*"

Although the witness thought that the Accused would not beat him, given that they knew each other and that the Accused gave him even a cigarette on some occasion before, the Accused, first with a blow on his supraorbital arch which broke, started beating even Kapo Muhidin. He kicked him with a toe of his boots both at his head and shoulders, and then, the witness says, "He began to tread on my ribs as heavily as he could". The culmination was, the witness recalls, when the Accused hit at his injured arm for which reason he began to bleed badly.

Explaining to the Court why the Accused spoke to him using the abovementioned words, the witness Kapo, attorney by occupation, which included the accused, which had been charged with the criminal offence of robbery. They did know each other therefore from a court-room, but were on the same side.

The witness Vatreš Šemso was also a direct victim of the Accused Ljubinac Radisav. Although he did not know the Accused from the pre-war period, he recalls well the date of 20 October 1992, when he was expelled by a group of 6 or 7 soldiers from his house, and then, together with other men, transported by bus to the Rasadnik Camp. Among them was the Accused, the person who beat him on the same night and who did that again in some ten days.

On arriving at Rasadnik, the Accused pulled the witness out of the bus, leant him against the wall, slapped his face and kicked him. There were about ten soldiers and some, the witness says, were beating him and some were pouring water on him. Two of the witness's ribs broke on that occasion.

The person that was beating him he saw again in about ten days when Krsman Brano took him out of the camp to wash his truck. He took him to a gasoline station where the Accused was. The witness stated that he was being beaten there, even with chains, not only by the Accused but also by Krsman Brano, whereupon the Accused grabbed his "Seiko" watch from his wrist. The name of the Accused he learnt from people who were detained together with him, and he also recognized the Accused in a court-room when he was testifying.

The woman witness B also testified about the beatings that took place at the Rasadnik Camp. During three months that she spent there, she often watched the beatings of men

which were performed in a room next to hers, and even when the door that separated them was closed, one could nevertheless hear and realize what was going on in there. That room was only with plywood separated from hers – the room where women and children were interned, so that everything could have been heard, and also she often had to clean the blood in a corridor that remained after the beatings.

This woman witness is not from Rogatica, so that she did not know the names of people that were detained together with her, but she got to know the names of many of them during the three-month stay at the Rasadnik Camp.

Until her arrival at the Rasadnik Camp she did not know even the Accused Ljubinac. However, she is confident of the identity of the person whom she saw on a number of occasions driving a truck that carried detainees from the Camp, probably to perform forced labor.

Thus, this woman witness also saw the Accused Ljubinac Radisav, in a room next to hers and in a small corridor between them, beating many detainees whose names she cannot recall because she did not know them. However, the woman witness distinctly remembers when the Accused was beating Vatreš Šemso and a man without a leg. That was Ćutahija Bećir. She remembers that he was kicking them, punching them and striking at them with some object. The names of these two men she learnt the next day when they, together with other detainees, were queuing for food in a corridor. Both were, the woman witness testified, deformed. It is clear, therefore, how the woman witness learnt the names of these two men. They were the topic of conversation that morning. The woman witness also often had the opportunity to hear the cries for help from an adjacent room: *“Don't do that, Pjano. We know each other, don't do that!”*.

Isaković Alija also testified that the Accused Ljubinac Radisav was a person who often took detainees for forced labor. Although this witness also did not know the Accused from the pre-war period, he is confident of the identity of the person who he first saw in July 1992 when the dentist Bešlija was taken away. The wife of the dentist Bešlija, who was captured together with him, told him his name. He kept on seeing the same person after he had arrived at the Rasadnik Camp.

In addition to his personal golgotha which commenced on 9 June 1992 when he was expelled from his house in Rogatica together with his wife and the only son and was detained at the SŠC “Veljko Vlahović“, only to be detained at the Rasadnik Camp upon the separation of women from children who, as was proved, were transported to Hreša, this witness personally saw many beatings, including the scene when the Accused beat for some 10 minutes Ćutahija Bećir whom all the witnesses remembered as ‘the man without the leg’.

The witness Isaković was also personally taken for the forced labor in the first days, but, later on, due to his poor state of health, he was kept at the Camp. On one occasion, Ćutahija, “the man without the leg“ as he is remembered by all the witnesses, stayed with him. That evening, the Accused Ljubinac came in and he first beat Ćutahija before the witness for about 10 minutes, and then he kept on beating him in a separate room which alternatively served for that purpose. The witness Isaković was beaten up that evening, too. His pupil Mišo Vojinović beat him again.

This witness has no doubts about the identity of the Accused Ljubinac, and he pointed at him even in a court-room saying that it was the same person, only a bit fatter than in 1992.

Although the Defense did not contest the existence of the Rasadnik Camp and that the examined witnesses were detained just at that Camp, it attempted to convince the Court that the Accused Ljubinac Radisav had not had any access to that Camp.

However, in his testimony, the Accused went even further maintaining that a camp did not exist in Rasadnik at all, but that the two offices, in which people were brought in turn for examination, made up Rasadnik. In the further course of his testimony the Accused, however, said that the people who were placed in the Rasadnik had everything, and thus he listed water melons, bananas and peaches, and stated that those who were taken for forced labor actually gathered out of boredom and applied for the voluntary work units. The Accused further stated that he remembered well one occasion when he had taken one detainee out of the Rasadanik with whom he had gone to a field where they stayed all day long having a barbecue and consuming alcohol. Talking about the beatings with which he is charged, the Accused said that he knew only Kapo Muhidin who, out of revenge for not living in Rogatica any more, falsely testified against him, and that he did not even know Vatreš Šemso and Ćutahija Bećir, pointing out on that occasion that Vatreš Šemso was "Kapo's player".

Such a position of the Accused additionally strengthened the persuasion of the Court that the Accused, acting with direct intent in causing great suffering or serious injury to body or physical or mental health of Kapo Muhidin, Pleho Muhamed, Vatreš Šemso and Ćutahija Bećir, committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) item k) CC of BiH

**In relation to Item 3** of the convicting part of the Verdict (count 6 of the amended indictment), the Accused was found guilty because on 15 August 1992 he drove 27 civilians from Rogatica, with four minors among them, to the village of Duljevac, whereupon they were used as human shields in front of Serb soldiers during the attack on the elevation of Jačen.

Thus, as a part of a widespread or systematic attack directed against Bosniak civilians, with knowledge of such an attack and intending to cause great suffering, or serious injury to body or to physical or mental health, in violation of the fundamental rules of international law, he abetted in the commission of the criminal offence of Crimes against Humanity in violation of Article 172 (1) item k) CC of BiH, in conjunction with Article 180 (1) CC of BiH.

It is indisputable from the testimonies of the witnesses who testified with regard the circumstances referred to under this Section, namely from the testimonies of Armin Baždar, Alija Isaković, Meho Baždar, the witness "A" and the witness "D", as well as of the Accused Radisav Ljubinac himself, that on the critical day, the Accused drove the group of 27 civilians, with 4 minors among them, to the village of Duljevac.

Thus, the witness "A", while speaking about the Accused Ljubinac as a person who was frequently coming with a minibus and taking out the detainees from Rasadnik for forced labor, and subsequently returning them again, says that on that critical day of 15 August 1992, the Accused Radisav Ljubinac came to pick up a group of around 30 men detained in the Rasadnik camp and drove them to a meadow in the direction of the village of Duljevac. The witness points out that the Accused Radisav Ljubinac only drove this group of detainees to that meadow and that he did not see him thereafter.

After the arrival at that meadow, the detainees were tied up two by two by one Špiro and two more unknown soldiers and thereafter taken to be used as human shields. After the completion of the action in which they were used as a human shield, the detainees were executed, and only the witness "A", witness Armin Baždar and Ago Kapo survived. This witness has no doubt whatsoever regarding the identity of the Accused since they had previously worked in the same company.

Witness Armin Baždar, who was 14 years old at the relevant time, also testified about the Accused Ljubinac as the driver of the minibus by which he, together with around 30 detainees, was driven on 15 August 1992 in the direction of the village of Duljevac. He also clearly remembers the action on the elevation Jačen, in which they were used as human shields, and after which all detainees were executed. Despite being wounded in both his hands, witness Baždar survived this execution covered by the bodies of the killed men.

Witness Alija Isaković, who was also a detainee in the Rasadnik camp, as described earlier, testified too about the taking away of this group of around 30 men on 15 August 1992. Although he was of able-bodied age for military service, this witness was not taken out for forced labor, considering his poor health condition which was worsened even more due to the beatings he was subjected to in Rasadnik. His son was also in the group of men taken away and driven by the Accused Radisav Ljubinac himself. Witness Isaković learned about the destiny of his son only subsequently, when he was exchanged, from the survived detainees, who were taken in the direction of the village of Duljevac on that critical day. His son did not survive the execution.

Witnesses Meho Baždar, father of witness Armin Baždar, and the witness "D" whose husband was also taken away in the group of detainees testify indirectly about the events of 15 August 1992.

Witness Meho Baždar, who as formerly indicated escaped the further detention due to his disability, confirmed in its entirety the testimony of his son Armin, who was as a boy of age 14 separated on 5 August 1992 from his family and taken to the Rasadnik camp. When they saw each other again 6 months after the separation, Armin spoke, as his father Meho remembers well, about what he had experienced in the camp Rasadnik. He spoke about the execution which he had fortunately survived.

Witness "B" found out from the detainee who had survived the execution that her husband was earlier also taken to forced labor and that on that critical day of 15 August 1992, together with the group of other detainees, the Accused Radisav Ljubinac drove him in the direction of the village of Duljevac. She found out that the detainees had been used as a human shield and executed thereafter.

Accused Ljubinac confirmed that on 15 August 1992 he drove a group of around 30 detainees to the village of Duljevac where wheat had to be collected. He stayed in Duljevac as long as it took him to turn the bus back, as he had to be back by 20:00 hrs in order to return the detainees to Rasadnik again. However, after he had started off from Rogatica toward Duljevac around 19:30 hrs, he met two guards who were in charge of these detainees who told him that one fool apparently had killed them all. Therefore the Accused did not return to Duljevac.

In evaluating this evidence, the Court acted within the legal qualification of the actions that the Accused is charged with, that is the qualification of the offense as Crimes against Humanity in violation of Article 172 (1) item k) of CC of BiH, thus, in deciding about the responsibility of the Accused for the actions referred to under Count 6 of the Amended Indictment, the Court primarily started from the factual description.

Although all witnesses spoke about the Accused as the person who drove them to forced labor, the Court deleted *forced labor* from the factual description of Section 3 of the *convicting part* of the Verdict, considering that this action may be committed within the criminal offense of War Crimes against Civilian Population referred to in Article 173 CC of BiH, and not the criminal offense of Crimes against Humanity whose essential elements the Court indisputably established.

Furthermore, although Radisav Ljubinac was charged under Count 6 of the Amended Indictment with abetting in the killing of 24 civilians, the evidence adduced did not prove the *contribution of the Accused* in the action of killing of those 24 persons.

Although witness Armin Baždar said that after being wounded and while laying under the bodies of the killed detainees, he had heard the voice of the Accused, the Court had to evaluate this part of his testimony in relation to the testimony of the witness "A" who was explicit when he said that the Accused had only driven the detainees to the meadow in the village of Duljevac and that he had not seen him thereafter. Also, witness Armin Baždar and the witness "A" had an opportunity to see and recognize the persons who had shot at them. However, they did not see the Accused Radisav Ljubinac.

They saw Dragoje Paunović a.k.a. Špiro, the person who was convicted for this murder by the final Verdict of this Court number: X –KR -05/16.

Taking into account such testimonies of the witnesses, the Court could not conclude beyond any doubt that the Accused abetted in the killing of these detainees.

Furthermore, although the Accused in the opinion of the Court knew that he was taking the detainees to a place where they were supposed to be used as human shields, none of them was killed as such, but afterwards by Serb soldiers.

In deciding about the remaining part of the factual description of Count 6 of the Amended Indictment, the Court evaluated the action of the Accused within the context of the overall *circumstances, that is the fact that there was a widespread or systematic attack* directed against the non-Serb civilian population, that the Rasadnik camp existed within the scope of

that attack from which the Accused drove the detainees to the village of Duljevac, where they were used as human shields during the attack on the elevation of Jađen.

The Accused had knowledge of this attack and he knew and at least had to be aware that the taking away of a group of detainees toward the combat line under the present circumstances could only mean that they were supposed to be used as human shields. According to the statement of witness Armin Baždar, when the accused came that day to pick them up, he said he had the order to take them to actions. He provided practical assistance to the transfer by using his bus to transport the detainees mentioned from Rogatica to the village of Duljevac, whereupon they were used as human shields in front of Serb soldiers. The Court accepts that the acts of using civilians as human shields in life threatening circumstances where they could be exposed to physical and mental suffering fail to meet the obligation for humane treatment of civilians enshrined in the Geneva Conventions and amount to cruel and inhumane treatment. The Court is also satisfied that these assignments were made on discriminatory basis.

For all the above presented reasons, the Court found indisputable the responsibility of the Accused in the commission of the criminal offense of Crimes against Humanity in violation of Article 172 (1) item h) CC of BiH, in conjunction with Article 180 CC of BiH, which the Accused committed while abetting in the transport of the detainees to be used as human shields, which beyond any doubt constituted the causing of great suffering.

**d. Acquitting part**

**In relation to the acquitting part of the Verdict, the Court established the following:**

**Under item 1** (count 1 of the amended Indictment) the Accused is charged that during the widespread or systematic attack of the army and police of the so called Serb Republic of Bosnia and Herzegovina led by the SDS and directed against the civilian Bosniak population in the territory of Municipality Rogatica, in the period from May to November 1992, he persecuted civilian Bosniak population on political, ethnic, cultural and religious basis, including: killings, forcible transfer of the population, detention of civilians, inhumane acts committed with the intention of inflicting serious physical or mental injury and damage of health, in the manner that:

On 26 May 1992, Zimić Nurija was taken from his house in the settlement of Seljani for examination by Radisav Ljubinac, whereupon he disappeared without a trace ever since, while his dead body has not been found to date.

The Court did not find the Accused guilty under this Count of the Indictment because the Prosecutor failed to prove beyond a reasonable doubt the facts concerning the event of examination of Nurija Zimić by the Accused, or his participation in the capacity of co-perpetrator or accomplice in the disappearance of the victim, that is, most probably in his killing.

It is undisputed that on the critical day Nurija Zimić was taken by two soldiers for examination by Radisav Ljubinac, whereupon he disappeared without a trace ever since,

while his dead body has not been found to date. This arises from the testimonies of witnesses Mujo Zimić and Nazif Zimić.

Witness Nazif Zimić eye-witnessed the entire event and testified that his brother Nurija Zimić, after Ramiz Mednolučanin had told him: "*Pjano ordered you to go for a questioning*", went by himself to the garage of Motka Milorad and entered it.

Zimić Mujo, a son of the victim, testified as an indirect witness about what he had heard from Ramiz Mednolučanin as the eye-witness of the taking away of Nurija Zimić, how two men in uniforms took him away for consultations. The witness learned soon thereafter from Omer Halilović that two more soldiers came a half an hour after his father had been taken away and drove away his car, having explained that the victim had been taken for examination by Radisav Ljubinac and that the car should also be searched.

Although the Court gave credence to these witnesses with regard to what they had indirectly and directly heard or seen, it could not draw a conclusion beyond any reasonable doubt that the victim was in fact present at the examination by Radisav Ljubinac, because none of the witnesses actually saw that the Accused participated in any manner in the action he is charged with, or that the victim had at least entered the house of Radisav Ljubinac, neither the examination of Nurija nor in his disappearance.

On the basis of the foregoing, and for the above reasons, the Court could not establish either the criminal responsibility of the Accused for the further destiny of Nurija Zimić, or, most probably, for his murder.

Therefore, within the scope of the evidence adduced, the Court could not establish beyond any reasonable doubt the criminal responsibility of the accused for the actions he has been charged with, thus on the basis of Article 284 (3) of the CPC BiH the Court acquits him of the charges under this Count of the Indictment, that is of the commission of the criminal offense of persecution as the Crime against Humanity in violation of Article 172 (1) item h) in conjunction with the criminal offense of murder referred to in item a) of the same Article, all under the Criminal Code of Bosnia and Herzegovina.

**In relation to Item 2** (count 2 of the amended indictment) the Accused is charged that on 3 June 1992 he, together with other persons, after the attack on the undefended village of Seljani, the Rogatica Municipality, and after the separation of men from women and children, took away 15 civilians including Ramović Huso, Ramović Hasan, Ramović Sulejman, Ćurevac Emin, Ćurevac Sunija, Zimić Alija, Zimić Salih, Zimić Šaćir, Halilović Omer, Ramić Ago, Begić Amir, Heljić Hamza, Mednolučanin Ćamil, Mednolučanin Ramiz, Jašarević Hasib, who were murdered thereafter, and in the period between 28 September and 1 October 2004, their bodies were exhumed from a mass grave at the locality of Dizdareva njiva, in the vicinity of Ljubinac Radisav's house.

Witnesses of the Prosecutor's Office who testified about these circumstances, i.e., who were direct participants in the described event are Zimić Mujo, Zimić Enisa, Ramović Habiba, Jašarević Osmana, the protected witness under the pseudonym C, and Halilović Ramiza who heard about occurrences of that day from other witnesses, the witness Zimić Nazif and Amor Mašović from the Institute for Missing Persons and the expert witness Hamza Žujo.

All the aforementioned witnesses, except for the witness C and the witness Zimić Nazif, stated that they had not seen the Accused Ljubinac Radisav on that day, nor had they seen him at capturing or separating the men from women and children near the house of Ćurevac Sulejman or at taking 15 of them away. The witnesses are consistent in their testimonies that, on that day, they were captured in Ovlagije by Ranko Arbinja, Rajko Ljubinac and Zoran Karišik, and that in separating and taking the men away participated, in addition to those three persons, Rajko Ljubinac, Simo Ćarkić, Sekula Ćarkić, Slavko Vasiljević, etc., whom they knew as their Serb neighbors, so that there could not have been any confusion in respect of the identity of the referenced persons. The witness Zimić Nazif stated that, on the critical day, he was hiding himself in a wood in the close vicinity of the place where the civilians were captured, and that for the first time he saw the Accused with a rifle coming into the house of Ćurevac Sulejman and participating, together with the others, in the separation and taking the men to tent settlement. The woman witness C maintained in her testimony that the Accused participated in the separation of men from women. In her opinion, the Accused oversaw everything, whereas the others carried out the separation under his order.

On the other hand, in their capacity as the witnesses of the Defence, Perišić Radomir, Rosić Radivoje, Ljubinac Radojka and Forcan Dragoljub, the close friends and relatives of the Accused, were heard. In their testimonies, they provided an alibi for the Accused on 3 June 1992. All the witnesses confirmed that the day before, that is, on 2 June 1992, Ljubinac Boško, the cousin of Ljubinac Radisav, was killed, and that, on the relevant day, together with the Accused, they were burying the killed man from the morning hours until noon when lunch was served at the house of Ljubinac Radojka, Boško's mother, who was mourning for the death of her son.

Testimonies of the witnesses are consistent in almost all the details regarding the funeral and the participation of the Accused in it on the date of 3 June 1992. When asked by the Prosecutor's Office and the Court how they remember that the funeral was on that very day, each of the witnesses gave his or her reason; thus, Ljubinac Radojka recalled the day as the day after the murder of her son and the date of his burial; Rosić Radivoje recalled that Boško was the first victim in their Municipality and that he was killed on 2 June 1992 and his funeral was the next day; and Forcan Dragoljub pointed out that on 3 June 1992 he, as a driver of a medical corps, transported the body of the killed man as far as the place of his burial and that he remembers the very day by virtue of the order issued and dated on that day.

On the basis of testimonies of all the witnesses of the Prosecutor's Office and material evidence, that is, the Official Note on the autopsy carried out on mortal remains of 22 bodies, the MUP of the Sarajevo Canton, number 02/2-2-444/04 of 23 December 2004, the Seljani-Rogatica Autopsy Reports and the Record on the identification of the corpse for 15 civilian men killed, has concluded that there exists no doubt that the event described in this Count of the Indictment did happen, in other words, that on 3 June 1992 the civilians were captured by Serb soldiers – their neighbors, that the men were separated from women and children, and that 15 of them were taken away, whereupon they were murdered, but it cannot conclude beyond all reasonable doubt that the Accused participated in it, whether as a direct perpetrator, co-perpetrator or an accessory. In particular, although the witness Zimić

Nazif and the witness C stated that they had seen the Accused on the critical day, the Court could not place trust in them because Zimić Nazif in the whole of his testimony described events which, as he said, he had seen while he was hiding himself in the wood, and in the end of his testifying, when asked by the Court how he gained particular pieces of information, he said that he conducted his own investigation in order to obtain certain data about the death of his brother Zimić Nurija, so that the Court cannot precisely establish what he really saw, and what he learnt subsequently. Even if he saw the taking away of the captured civilians from Ovlagija, as he states in his testimony, the Court cannot establish with certainty at what distance he was from the house in front of which the separation took place, given that the witness was hiding himself in the woods, and whether he was able with certainty to see the Accused from his hiding place.

The witness C maintains that the Accused personally ordered the separation of men from women and children, and the others acted under his order. However, taking into account the testimonies of the remaining four witnesses who were also direct participants in the event, as well as the general chaos which broke out at those moments as described by the witnesses, it can be hardly concluded that it was only the woman witness C who with certainty saw the Accused, even more, heard him ordering the separation, and that the other witnesses present did not even see the Accused, let alone hear him issuing such striking orders.

From all the aforementioned reasons, the Court cannot conclude beyond any reasonable doubt that the accused participated in any manner in the actions he has been charged with under this Count of the Indictment, therefore, on the basis of article 284 (3) of the CPC BiH the Court acquits him of the charges for the commission of the criminal offense of persecution as the Crime against Humanity in violation of Article 172 (1) item h) in conjunction with the criminal offense of murder referred to under item a) of the same Article, all under the Criminal Code of Bosnia and Herzegovina.

**Under Item 3** (count 3 of the amended Indictment) the Accused is charged that on 28 July 1992, together with a certain Macola, he took away from the camp at the SŠC "Veljko Vlahović" premises the dentist Bešlija Mustafa, who has been unaccounted for ever since, and his mortal remains have not been found until today.

As evidence corroborating this Count, the Prosecutor's Office summoned the witnesses Alija Isaković and Enver Bešlija.

The witness Isaković Alija described consistently and convincingly the event in respect of taking away the dentist Mustafa Bešlija from the referenced camp. From the distance of about 30 meters, while in the corridor of the School, the witness watched Macola and one more man coming to the camp to pick up the dentist and take him away, and they came to pick him up at lunchtime, when he and his wife were supposed to have lunch. Later on, the witness learnt from Mustafa's wife that the other man, who accompanied Macola, was Ljubinac Radisav.

However, the Panel cannot conclude beyond any reasonable doubt on the basis of the described evidence that the Accused is responsible for taking away the dentist in terms of the criminal offence of persecution as a crime against humanity, in connection with the

criminal offence of murder. The fact that he was accompanied by a certain Macola at the time of taking the dentist out of the Camp, that is, the School, does not imply automatically the establishment of the correlation between the fact of the taking of the victim out by the Accused and the fact of his disappearance, that is, a presumable murder.

Information obtained by the only direct witness about the actions of the Accused is rounded off at the time of his exit from the room, that is, the corridor of the School, while none of the evidence, whether direct or indirect, tells about his further participation in the commission of the referenced criminal offence.

In support of this conclusion is the testimony of Enver Bešlija, brother of the killed man, who presented his information about the destiny of his brother. He testified that he heard that he had been taken away from the camp and murdered, and that Macola's men had done that, but that he does not know if Ljubinac Radisav was among them or if he took part in the murder.

The witness Alija Isaković also stated that, after some time, he heard one guard at the Camp saying, "*Don't be playing with us, you could finish up as Mujo Bešlija*", which made him conclude that the dentist had been murdered.

In his capacity as a witness for the Defence in respect of circumstances from this Count only the Accused Ljubinac Radisav was heard. He said that he had known the dentist and that, on the relevant day, he brought some 20 women by his bus to the School from the town and that he did that by the order of Vojinović Miloš, the warden of the "Rasadnik" prison. The name of one of the women was Amira and she had a small child, so that the Accused brought certain things and some milk from her mother, and at the time when he was handing them over to her in the corridor, he saw Macola taking the dentist out and telling him that he should cast "Macola" in gold at the hospital, and they got into a Niva-Lada vehicle and went to the hospital.

The Defense did not offer the aforementioned woman Amira as a witness to corroborate the averments of the Accused, nor did the Prosecutor's Office do that in order to contest them or possibly prove the non-existence of this woman witness.

On the basis of all the aforementioned, the Court concludes that the dentist Mustafa Bešlija was taken away from the SŠC "Veljko Vlahović" Camp on the referenced date, ever since he has been unaccounted for, and was most likely murdered afterwards. However, the Court cannot beyond any reasonable doubt conclude on the basis of the presented evidence that the Accused directly committed or at least participated in the action of committing the described criminal offence and, consequently, in compliance with the *in dubio pro reo* principle and Article 284 (3) CPC of BiH, the Court acquits him of the charges under this Count of the Indictment, that is, the charges related to the commission of the criminal offence of persecution as the Crimes against Humanity referred to in Article 172 (1) item h) CC of BiH in conjunction with item a) of the same Article.

## 6. Sentencing

As regards the convicting part of the Verdict, the Court found the Accused guilty of the mentioned criminal acts, i.e. the offence perpetrated and, with the application of the legal provisions cited, it established a punishment of 10 years imprisonment.

The Accused has been found guilty as an aider and abettor of the forcible transfer of non-Serb civilians. This crime is serious in view of the fact that forcible transfer was a critical component of the policy of ethnically reconstituting large areas of Bosnia and Herzegovina. In support of this policy, large numbers of people were illegally moved against their will or without a genuine choice from the area in which they were lawfully present. As a result of the policy of forcible transfer, citizens in Rogatica as well as throughout Bosnia and Herzegovina were detained against their will and in violation of international law. Those who did not comply, and many of those who did, were killed.

Furthermore, inhumane acts like severe beatings of defenseless prisoners and using civilians as human shields at the front line, so that they were exposed to dangerous conditions and are under a high risk of being injured or killed, are very serious crimes. When these assignments are made on a discriminatory basis in the context of a widespread or systematic attack on a civilian population, they become even more serious.

The Defense Attorney has described his client as a socially marginal person, outsider, notorious alcoholic and repeatedly dismissed worker. According to the forensic-psychiatric expert report issued on the order of the presiding judge, although the accused stated that he consumed large quantities of alcohol on a daily basis for years on end, no significant organic (toxic) damage to his mental functions has been identified. However, in the view of the experts, the capacity of the accused to understand the gravity of his acts and to control his actions, *temporae criminis*, was reduced but not substantially.

The Court is satisfied that the Accused before the war consumed alcohol more frequently and in larger quantities than socially acceptable, which implied that his fellow villagers didn't pay much attention to him as a person. When the war broke out, everyone was needed, including the Accused. He intentionally and voluntarily became part of a wider operation, but without a high level of intent and participation. In the view of the Court, it was also of importance for him that he felt included by others. The Court has regarded these circumstances as the only relevant mitigating factor.

The Court holds that the imposed punishment is proportionate to the severity of the committed criminal offense, the degree of criminal liability of the Accused, the circumstances under which the crime was perpetrated and the motives of the Accused for perpetrating the criminal acts concerned. The sentence imposed will meet the purpose of punishment under Article 39 CC of BiH, both in terms of special and general prevention.

Pursuant to Article 56 CC of BiH, the time the Accused spent in custody from 20 December 2005 onwards shall be counted as part of the punishment of imprisonment.

## 7. Decision on costs of proceedings and property claims of injured parties

Although the provision of Article 188 (1) of CPC of BiH prescribes that the accused who has been found guilty must reimburse the costs of criminal proceedings, that is, as prescribed by the next paragraph, he shall not be ordered to reimburse costs related to criminal offenses of which he has been acquitted if those costs can be determined separately from the total costs, the Court has evaluated special circumstances in the case of the Accused Radisav Ljubinac which indicated to the application of paragraph 4 of this Article.

Generally, in the Ljubinac family, which is in addition to the Accused comprised of his wife, daughter and son, only the wife has been employed. However, she has not been employed on the full time basis, thus the entire family, including the daughter who is studying in Bijeljina, lives on her salary, which amounts to 250 KM, and the occasional daily income which his son manages to earn.

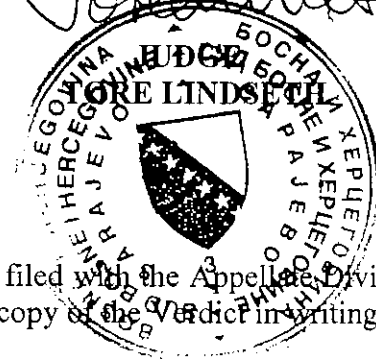
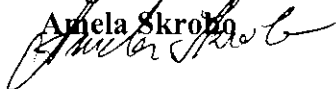
Taking into account such circumstances, namely that the support of this family would be jeopardized if the accused is ordered to pay the costs, the Court decided to relieve the accused of the duty to reimburse the costs of criminal proceedings.

Furthermore, due to a large number of injured parties and due to the lack of data based on which the amount of claims under property law filed by the injured parties in these proceedings could be determined, and since the determination thereof would significantly make more complex and delayed the completion of the criminal proceedings, the Court decided, pursuant to the provision of Article 198 (2) of the CPC BiH, to instruct the parties to that they may pursue their claims under property law in a civil action.

Minutes taker

Legal advisor

Amela Skrobo



**Legal remedy:** An Appeal against this Verdict may be filed with the Appellate Division of the Court within 15 days from the date of receipt of the copy of the Verdict in writing.