



Accordingly, the Panel correctly concluded that the facts indicating the acts, the behavior or the mental state of the accused cannot be accepted as established facts. However, the facts indicating the criminal responsibility of the accused in other ways (for example, the existence of a widespread and systematic attack in the criminal prosecution upon the charges for the crimes against humanity) can be accepted as established facts.⁷

The Court upholds such perception, and only adds that the traditional rule against excess excludes the interpretation of Article 4 of the Law on Transfer by which this Article would be made a dead letter. Instead, the courts are led by this traditional rule to conclude that the intention of the authors of the Law on Transfer is to give a meaning to Article 4, and to the extent in which the foregoing interpretation of the fifth principle referred to in the *Krajišnik* case would make Article 4 irrelevant, the Court is prevented from adopting it. Indeed, the rule prohibiting excess would primarily prevent the Panel in the *Krajišnik* case to include such factor in its test, had they really intended to prevent the adjudication of any relevant fact.

In applying Article 4, the Court must also establish a balance between the judicial economy and the right of the accused to a fair trial and the presumption of innocence referred to in Article 6 of the ECHR, and the procedural guarantees referred to in Article 6 of the CPC BiH. Due to these reasons, the Court of BiH reiterates that the acceptance of established facts as "proven" pursuant to the criteria referred to in the *Krajišnik* case does not release the Prosecutor from his burden to prove, nor does it in any way decrease the presumption of innocence⁸. The acceptance of a certain fact as proven only means that the Prosecutor has satisfied his burden of convincing with regard to a certain fact, and that he does not have to prove it any further during the presentation of the Defense evidence. The accused withholds the right to contest any of the accepted facts in his defense from the charges pressed against him⁹, and also any factual assertion offered in support of the charges and with regard to which the Prosecutor adduced the evidence. If the accused actually contests any established fact, the Prosecutor must then adduce additional evidence so as to dispute the contests of the

⁷ *Ibid.*, par. 50, see the Decision in the *Popović* case, par. 12-13, and particularly footnote 45 (stating that the proposed fact concerning the existence of a terror campaign against refugees, Bosnian Muslims which does not fit into the narrow exemption prohibiting the acceptance of adjudicated facts concerning the acts, behavior or mental state of the accused). See also the *Prosecutor v. Galić*, case number IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 bis (C), 7 June 2002, par. 8-9 (in which it is concluded that it is allowed to accept as adjudicated the facts concerning the acts and behavior of those whose superior was the accused, even when the prosecution continued in part with the theory of responsibility of the superior); the *Prosecutor v. Dragoje Pamović* case No. X-KRŽ/03/16, Judgment upon the Appeal, par. 5.

(27 October 2006). (The existence of a widespread and systematic attack against non-Serb civilians in the stated territory constitutes just such general fact which is clear, precise and as such does not confirm the criminal responsibility of the accused). But, see also the *Prosecutor v. Željko Mejakčić et al.* Case, IT-02-65, Decision upon the Prosecution Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94 (B), 1 April 2004, when the Panel refused to accept as adjudicated facts in relation to the existence of an armed conflict based on the consideration of the facts as "too wide, tendentious and that they contain a legal characterization of the facts."

⁸ See, for example, the *Salabiaku v. France* case, European Court of Human Rights (7 October 1998) (who presented his view in the relevant part that the transfer of the burden to prove on the accused in certain circumstances does not constitute a violation of the presumption of innocence as guaranteed by the European Convention when it is restricted to "reasonable boundaries which take into account the importance of the matter at issue and the protection of the right of the accused", *id.*, par. 28, and that the accused is not left "entirely without the means for defense", or to interfere with the capacity of the court to freely evaluate the evidence tendered by the parties to the proceedings, *id.*, par. 29).

⁹ See the *Prosecutor v. Slobodan Milošević* case, number IT-02-54-AR73.5, Decision on the Interlocutory Appeal of the Office of the Prosecutor against the Decision of the Trial Chamber (of 10 April 2003) upon the Prosecution Motion for Judicial Notice of Adjudicated Facts (28 October 2003).



Furthermore, the evidentiary value of the indirect evidence will depend on the context and the character of the statement concerned and/or on whether the statement is also supported by other evidence.

The Court finds that the indirect evidence constitutes the evidence on the facts concerning the event or the criminal offense from which the fact concerned logically arises. Since the criminal offense was committed, by all indications, at the time when there were not many witnesses at the crime scene, and since the possibility to determine the incriminating issues by direct and explicit statements of the eye-witnesses or the irrefutable documents is problematic or impossible, the indirect evidence can become a key element not only for the Prosecutor's Office but also for the Accused. Taken individually, such evidence can itself be insufficient for a certain fact establishment, but if considered in its entirety, then its collective and cumulative character can be a disclosing one, and sometimes a decisive one.

The documentary evidence adduced during the main trial was not extensive. Bearing in mind its character of an indirect or a corroborating evidence, that is, the fact that it mostly concerns the evidence of objective nature confirming certain conditions, for example, the death of a certain person, a membership in the army, prior convictions, which constitute public documents, and also the fact that the Defense did not contest these "confirmations", the Court will not now separately explain the manner of evaluation and the use of this evidence, because its application will be strictly stated within the context of the final evaluation of the decisive evidence related to the charges against the Accused.

Evaluation of the evidentiary material admissibility which the Defense explicitly contested, namely the Witness Examination Record made by the SIPA investigator, is presented in Section 4c of the Verdict, while the evidentiary strength of this evidence will be explained in the text below, namely in Section 6.c herein.

The evaluation of the evidentiary strength of the documentary evidence used before the ICTY, and accepted as already explained at the Prosecutor's proposal, will also be provided in the text below, specifically in Section 6c.

h. General elements of the criminal offense of Crimes against Humanity and the awareness of the Accused

The Accused are charged with the criminal offense of Crimes against Humanity in violation of Article 172 (1) item h), in conjunction with items a) and f) of the CC BiH.

In order to qualify a certain offense as a crime against humanity, the law prescribes that in addition to concrete elements of individual offenses, the Prosecutor's Office must prove general or *chapeau* elements of crimes against humanity, more precisely:

1. *the existence of a widespread or systematic attack against civilian population;*
2. *the awareness of the accused about the existence of such attack;*
3. *that the actions of the accused constituted a part of that attack and that he was aware that his actions constituted the part of that attack.*

The existence of a widespread or systematic attack in the territory of the Municipality of Bratunac, directed against the civilian Bosniak population, during which the incriminating event occurred, was indisputably established from all the testimonies of the witnesses, not

