



Number: X-KRŽ-05/07

Sarajevo, 15 October 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel of the Appellate Division, Section I for War Crimes, composed of Judge Azra Miletić, as the Presiding Judge, and Judge Almiro Rodrigues and Judge Robert Carolan, as members of the Panel, with the participation of Legal Officer Neira Kožo, as the record-taker, in the criminal case against the Accused Marko Samardžija, for the criminal offense Crimes against Humanity in violation of Article 172(1)a) in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (hereinafter: BiH CC), deciding upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-4/05 dated 8 September 2005, amended in the part pertaining to the description of facts on 17 October 2006, having held a trial which was partly closed for the public, in the presence of Vesna Ilić, Prosecutor of the Prosecutor's Office of BiH, the Accused Marko Samardžija and his Defense Counsel, Attorney Zlatko Knežević from Novi Grad, rendered and on 23 October 2008 publicly announced the following:

VERDICT

ACCUSED MARKO SAMARDŽIJA, son of Miloš and Anđa, née Radulović, born on 1 December 1936 in Gornja Prisjeka (personal identification number: 0112936102398), the Municipality of Ključ, with residence in Prijedor, 38 Vuka Karadžića Street, Serb, citizen of Bosnia and Herzegovina, retired educational worker by profession, married, father of two children of age, no previous convictions, in custody from 18 March 2005 until 1 October 2007 when by the Decision of this Court number X-KRŽ-05/07 dated 1 October 2007 the custody was terminated and prohibiting measures ordered,

HAS BEEN FOUND GUILTY

In as much as he:

During a widespread or systematic attack by the army and police of the so-called Serb Republic of Bosnia and Herzegovina directed against the civilian Bosniak population in the territory of the Municipality of Ključ, in the capacity of Commander of the 3rd Company of the Sanica Battalion, which was within the composition of the 17th Light Infantry Brigade, together with other soldiers from that brigade, reserve and officers in active service of the Police Department in Sanica, headed by the Commander Milan Tomić, and members of the Department of Military Police, upon the order by the Commander of the 17th Light Infantry Brigade, Lt. Col. Drago Samardžija, issued at a Command meeting held in Sanica on 9 July 1992, to carry out a total blockade, search and mopping up of the terrain in the area of the

village of Donji Biljani, i.e. the hamlets of Domazeti, Botonjići, Jabukovac and Brkići, with the determined combat disposition, unit assignments and combat security,

on 10 July 1992, he ordered to soldiers of the 3rd Company, who were under his command, that men – Bosniak civilians from the hamlets of Brkići and Balagića Brdo come out of the houses, then to head toward the Jezerine meadow, where he awaited them with his subordinate soldiers armed with rifles, telling them that they would be taken to the school in Biljani for interrogation, thereafter he escorted those older than 18 and younger than 60 with their hands at the back in a line to the yard of the Primary School in Biljani, where soldiers of a part of the 17th Light Infantry Brigade and members of the police brought in men – Bosniak civilians from the other mentioned hamlets and then, around 50 of them, handed them over to an unknown police sergeant to be detained in the school premises,

Therefore,

as part of a widespread or systematic attack against the civilian population, being aware of such an attack, he perpetrated the act of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,

Whereby

he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)e) of the BiH CC, in conjunction with Article 29 and 180(1) of the BiH CC,

therefore, the Court, applying the aforementioned legal provisions and Articles 39, 42, 48 and 49 b) of the BiH CC, hereby

**SENTENCES HIM
TO IMPRISONMENT FOR A TERM OF 7 (seven) YEARS**

Pursuant to Article 56 of the BiH CC, the time the Accused spent in custody from 18 March 2005 until 1 October 2007 shall be credited towards the pronounced sentence of imprisonment.

Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: BiH CPC), the Accused shall be relieved of the duty to reimburse the costs of the criminal proceedings.

Pursuant to Article 198(2) of the Criminal Procedure Code of Bosnia and Herzegovina, the injured parties shall be referred to take civil action with their claims under property law.

Reasoning

By the Indictment of the Prosecutor's Office Bosnia and Herzegovina, number KT-RZ-4/05 dated 8 September 2005, amended on 17 October 2006, the Accused Marko Samardžija is charged with having committed the criminal offense of Crimes against Humanity in

violation of Article 172(1)a) of the BiH CC in conjunction with Article 180(1) of the BiH CC by the acts described in the Indictment as part of a widespread and systematic attack against the civilian population, knowing of such an attack, he instigated, aided and abetted in depriving other persons of their lives (murder).

By the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/07 dated 3 November 2006 the Accused Marko Samardžija was found guilty of having committed the criminal offense of Crimes against Humanity in violation of Article 172(1)a) of the BiH CC in conjunction with Article 180(1) of the BiH CC by the acts described in the operative part of the Verdict concerned. For the aforementioned criminal offense the first instance panel sentenced him to a long-term imprisonment for a term of 26 years (twenty-six years).

Applying Article 56 of the BiH CC, the time the Accused spent in custody, commencing on 21 March 2005, was credited towards the sentence of imprisonment, while pursuant to Article 188(4) of the BiH CPC the Accused was relieved of the duty to reimburse the costs of the criminal proceedings.

By the Decision of the Appellate Panel of the Court of BiH number X-KRŽ-05/07 dated 27 April 2007 the appeals filed by the Accused Marko Samardžija and his Defense Counsel, Attorney Zlatko Knežević, were partially upheld, hence the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/07 dated 3 November 2006, was revoked and a hearing scheduled before the Appellate Division, Section I for War Crimes of the Court of Bosnia and Herzegovina (Appellate Panel).

Pursuant to Article 317 of the BiH CPC the hearing before the Appellate Panel of the Court of BiH was held and, during the evidentiary procedure, the Appellate Panel again heard the evidence presented in the first instance proceedings by listening to the audio-video recordings of the testimony of the prosecution witnesses – Mujo Čajić, Šemso Džaferagić, Ferid Avdić, Šefika Domazet, Ismet Zukanović, Ziba Hodžić, Nesima Avdić, Šećira Avdić, Munira Avdić, Mile Pešević, Dragan Vukić, Dušan Samardžija, Husein Čajić and the defense witnesses: Petar Despot, Drago Banjac, Nikola Kuridža, Slavko Štrbac, Milenko Tešić and Marko Samardžija. The Accused Marko Samardžija, in the capacity of a witness, as the evidence of the court, testified again before the Court, while Boško Kuridža and Đuro Unčanin were heard as the additional defense evidence.

The defense presented the following documentary evidence before the Appellate Panel: Witness Examination Record of Boško Kuridža dated 5 September 2008, made in the Law Firm “Knežević” in Novi Grad and Witness Examination Record of Đuro Unčanin dated 15 September, also made in the Law Firm “Knežević” in Novi Grad, which were admitted by the Court.

The Appellate Panel decided to accept all the documentary evidence presented and admitted in the first instance proceedings, therefore, the following **prosecution evidence** has been admitted: Records on the examination of the following witnesses: Feriz Dervišević, dated 11 May 2005; Rasema Mujezinović, dated 12 March 2001 and 11 May 2005; Husein Balagić, dated 20 May 2005; Ismet Zukanović, dated 16 July 2005; Munira Avdić, dated 14 July 2005; Husein Čajić, dated 12 March 2001, 15 April 2005 and 11 July 2005; Ziba Hodžić, dated 14 July 2005; Šećira Avdić, dated 13 July 2005; Ferid Avdić, dated 11 July

2005; Mujo Čajić, dated 28 July 2005; Mile Pešević, dated 19 August 2005; Dragan Vukić, dated 11 August 2005; Dušan Samardžija, dated 7 September 2005; Miroslav Samardžija, dated 7 September 2005; Hasiba Mulahmetović, dated 12 March 2001 and 10 May 2005; Šefika Domazet, dated 12 March 2001 and 10 May 2005; Hata Hajdarević, dated 12 May 2005; Zuhra Avdić, dated 12 May 2005; Nesima Avdić, dated 19 May 2005; Ifeta Džaferagić, dated 18 May 2005; Asim Vučkić, dated 15 April 2005; Enisa Čehić, dated 18 May 2005; Asif Medić, dated 16 July 2005; Mustafa Džaferagić, dated 16 July 2005; Mumin Hodžić, dated 15 July 2005; Šemso Džaferagić, dated 15 July 2005; Azemina Mujezinović, dated 14 July 2005; Makbula Mešanović, dated 11 July 2005; Dževad Džaferagić, dated 11 July 2005; Subhija Domazet, dated 12 May 2005; Zlata Pehadžić, dated 12 May 2005; Naja Botonjić, dated 20 May 2005; Šemsudin Omanović, dated 12 March 2001 and 15 April 2005; Zejna Mujezinović, dated 15 July 2005; Ale Mujezinović, dated 14 July 2005; Hatidža Čehić, dated 12 July 2005; Amira Čehić, dated 12 July 2005; Smajil Džaferagić, dated 16 July 2005; Nedim Omanović, dated 13 July 2005; Ema Mujezinović, dated 12 July 2005; Aziz Gromilić, dated 15 July 2005; Ale Mulahmetović, dated 13 July 2005; Džemka Crnolić, dated 15 July 2005, and the record on the examination of the Accused Marko Samardžija in the Prosecutor's Office of BiH on 21 March 2005; letters of Police Administration 3, Crime Police Division, Sanski Most, dated 21 July 2005 and 25 August 2005 respectively, delivering the list of documents, official documents and other materials found in Ključ Public Security Station, in the building of Ključ Municipal Assembly and others, Ref. number 14-18/02-18/9 dated 16 February 1997 made by Ključ Public Security Station, as well as the original documents contained in folders 1 through 3, which documents were found in the offices of the Commander of Ključ Public Security Station, Head of Ključ Public Security Station and in the metal safe of Ključ Public Security Station, the chairman of Ključ Municipal Assembly, commander of the Territorial Defense of Ključ, president of the Municipal Court of Ključ, in offices 16 and 17 in the building of Ključ Public Security Station, in the office of Ključ Crisis Staff, in the office of the Wartime Presidency of Ključ Municipal Assembly, in the office of the Defense of Ključ Municipal Assembly, in the office of the Territorial Defense of Ključ and in the office of the Command of the 17th Light Infantry Brigade; Report from the area of Biljani made on 18 August 1994, which was found in Ključ Public Security Station and delivered as an original document in folder no. 2, entered under ordinal number 8. The folder was delivered along with the others on 21 July 2005 under no. 05-6/03-695/05; Fax – order of the SDS Sarajevo, addressed to the chairman of Ključ Municipal Assembly by the coordinator for the implementation of the decision, Radoslav Brđanin, forwarded to the chairman of the Municipal Assembly on 29 October 1991, found in the office of the chairman of Ključ Municipal Assembly; Decision on accession of Ključ Municipality to the Autonomous Region "Bosanska Krajina", Ref. number 05-023-3/92 dated 16 January 1992; Letter of the chairman of Ključ Municipal Assembly, Omer Filipović, delivered to the Ministry of National Defense of the Republic of BiH, Territorial Defense Staff of BiH, Ref. number 01/1-92 dated 14 April 1992; Excerpt from the Instruction for Operations of Crisis Staffs of the Serb People in Municipalities, dated 26 April 1992; Order of the president of the National Defense Council, Jovo Banjac, Ref. number 05-01-45/92 dated 5 May 1992; Order of the commander of the Territorial Defense Staff, Omer Filipović, Ref. number No. 05-01-45/92 dated 6 May 1992; Press release of the Crisis Staff of Ključ Municipality, dated 8 May 1992; Conclusion of the Wartime Staff of the Autonomous Region of Krajina, Ref. number 03-297/92 dated 8 May 1992 (a list of phone numbers of members of the Wartime Staff of the Autonomous Region of Krajina delivered by the president of the Wartime Staff

Banja Luka to the chairman of the Municipal Assembly on 6 May 1992); Conclusion of the Wartime Staff of the Autonomous Region of Krajina, Ref. number 03-298/92 dated 9 May 1992; Minutes of the meeting of the Crisis Staff of Ključ Municipal Assembly held on 13-14 May 1992; Performance report for the Crisis Staff (Wartime Presidency) of Ključ Municipal Assembly in the period between 15 May 1992 and 29 July 1992; Order of the Crisis Staff of Ključ Municipality, strictly confidential 22/92, dated 25 May 1992; Information on committed criminal offenses in the territory of the municipality since the outbreak of the armed rebellion on 27 May 1992, produced by Ključ Public Security Station; Order of the Crisis Staff of Ključ Municipal Assembly, ref. number 05-01-54/92 dated 27 May 1992; Order of the Crisis Staff of Ključ Municipality dated 28 May 1992; Order of the Command of Defense of Ključ Municipality, dated 28 May 1992; Report on performance and activities of the Command of the Brigade with the note Command of the 17th Light Infantry Brigade – military secret, strictly confidential, dated 28 July 1992; Performance report of the Executive Board in the period between 31 May 1992 and the end of July 1992; Press release of the Crisis Staff and Command of Defense of Ključ Municipality, Ref. number 6/92 dated 2 June 1992; Order on establishment of local boards in the territory of Ključ Municipality, Ref. number 13/92 dated 4 June 1992; Conclusion of the Crisis Staff of Ključ Municipality from the meeting held on 17 June 1992, Ref. number 66/92 dated 18 June 1992; Decision declaring the state of war, adopted by the Presidency of the Republic of BiH at the session held on 20 June 1992 (*Official Gazette of RBiH*, No. 7/92); Order for further activities of the Command of the 17th Light Infantry Brigade, strictly confidential, Ref. number 01-93/92 dated 25 June 1992 with the note "military secret – strictly confidential"; Overview of managing working posts occupied by employees of Muslim ethnicity dated 26 June 1992, issued by the Serb Republic of BiH-Ključ Municipal Assembly; List of persons apprehended during the mopping up of the terrain of Ključ Municipal Assembly, Ref. number SL/92 dated 27 June 1997 (lists of 14 and 89 persons); List of prisoners from the territory of Ključ Municipality at Manjača Concentration Camp – found in the metal safe in office no. 16 in the building of Ključ Public Security Station on 16 February 1997; Official notes made by Ključ Public Security Station on 1 June (2x) , 2 June (2x), 3 June (4x), 26 June, 28 June and 7 July 1992 (12 official notes) and the official note without date, pertaining to possession of weapons by residents of Biljani (documents delivered by the Federation Ministry of Defense, Ref. number 06-03/6-4.4-498-1/05 dated 12 July 2005, confirming that copies of the documents were seized from the archives of the Ministry of Defense of FBiH – Security and Intelligence Affairs Sector); Decisions on removal of Judge of the Minor Offenses Municipal Court of Ključ, Nermin Kapetanović; President of the Basic Court of Ključ, Nedžad Botonjić; Judge of the Basic Court of Ključ, Enisa Dućanović, which were adopted by the Crisis Staff of Ključ Municipal Assembly on 1-2 July 1992 and signed by the President of the Crisis Staff Jovo Banjac; Decisions on removal of chairman of Ključ Municipal Assembly, Omer Filipović; president of the Executive Board of Ključ Municipality, Asim Egrlić; secretary of the Executive Board of Ključ Municipality, Fikret Balagić; secretary of the Municipal Secretariat for General Administration, Merima Filipović; director of the Municipal Authority for Geodesic, Property Affairs and Real Estate Cadastre, Hamdija Dućanović, which decisions were made on 21 July 1992; Map of Ključ Municipality made in the 1:100,000 ratio; List of police members in active service and in reserve, who have wartime assignment in Ključ Public Security Station; Order for further activities of the Command, military postcode 2207, strictly confidential, Ref. number 03-135 dated 9 July 1992, issued by the commander, Lt Col Drago Samardžija with

the note "military secret - strictly confidential"; Original list of persons imprisoned in Biljani Primary School written in Cyrillic and Latin scripts with the inserted date of 10 July 1992 and note "Biljani school" on the list written in Cyrillic script; Official note of the Commander of Wartime Police Station (WPS) of Sanica dated 10 July 1992; Excerpt from the minutes of the session of the Wartime Presidency of Ključ Municipal Assembly held on 10 July 1992; Information of the work and activities of Ključ Public Security Station at the time of combat operations in the territory of Ključ Municipality, strictly confidential 9/92, July 1992; Conclusion of the Wartime Presidency dated 13 July 1992 from the session of the Wartime Presidency held on 10 July 1992; Decision establishing the Wartime Presidency of Ključ Municipal Assembly, Ref. number 05.01-98/92 dated 13 July 1992; Decision on criteria for the opportunity to move out from the territory of Ključ Municipality made by the Wartime Presidency, Ref. number 05-01-136/92 dated 30 July 1992; Order of the Wartime Presidency of Ključ Municipal Assembly dated 7 August 1992; Excerpt from the Minutes of the 6th session of the Wartime Presidency of Ključ Municipal Assembly held on 7 August 1992, which was found in the office of the chairman of Ključ Municipal Assembly and delivered as the original document in folder 1, entered under ordinal number 31; Decision on addendum to the Decision on criteria for the opportunity to move out from the territory of Ključ Municipality dated 7 August 1992; Account for the monograph of the 1st Krajiški Corps, confidential, 2 November 1993; Report of the assistant commander for civil affairs, military postcode 7286, confidential, Ref. number 01-326-22/93, dated 16 February 1993; List of persons moved out and in the territory covered by the SNB Sector Banja Luka dated May 1993; Overview of information regarding number as well as ethnic structure of inhabitants by municipalities in the territory of the Center of State Security Sector Banja Luka for 1991 and 1995; Instruction on Organizing and Activities of Bodies of Serb People in BiH in Extraordinary Circumstances dated 19 December 1991; Letter of the General Staff of the Republika Srpska Army, Ref. number No. 02/3-1-291/4 dated 26 August 2005 delivered to the State Investigation and Protection Agency, pertaining to Marko Samardžija – information on the member of the RS Army (membership in the RS Army, rank of the Captain First Class) ; Report on plundering committed by armed persons in the territory of Biljani, compiled by the commander of the 3rd Company, Marko Samardžija, strictly confidential, Ref. number 37/92 dated 29 June 1992; Notice to the leaders of platoons 1 through 3, signed by Company Commander Marko Samardžija- the troop review shall be carried out next to the command post in Lončari, on 18 June 1992, in the afternoon; Submission of the local board of the Movement for Yugoslavia made by Marko Samardžija; Submission "The Road to a Strong Military Team through Discipline, Concord and Unity", authored and signed by the commander of the 3rd Company, Marko Samardžija – Captain First Class, dated 4 July 1992; Submission "Basic Requirements for Operations of Military Units of the 3rd Company" authored and signed by the commander of the 3rd Company, Marko Samardžija – Captain First Class, dated 22 June 1992; List of the 3rd Company of the Sanica Battalion signed by the Commander of the 3rd Company, Marko Samardžija, dated 30 June 1992; Overview of manpower of the armed guards of the 3rd Company; List – for the area of Gornja Prisjeka Platoon of the 3rd Company – of persons who due to the circumstances have the role of village night guards; List of equipment of the soldiers of the 2nd Platoon Gornja Prisjeka of the 3rd Company dated 1 July 1992 and a list for cigarettes; Overview of manpower, arms and ammunition, 2nd platoon, Gornja Prisjeka; Submission "Elaboration on Specific Assignments in the Activities of the 3rd Company 2nd Platoon – Gornja Prisjeka", made on 2 July 1992 in Sanica by the Commander of the 3rd Company – Marko Samardžija; Daily and night tasks

of the 3rd Company; Submission by Commander Marko Samardžija delivered to "Dućo" for the meeting on 12 July 1992 in front of the school in Sanica; Minutes of the meeting of the local board of the SDS Sanica dated 24 December 1993; List of members of the Municipal Board of the SDS Ključ dated 24 January 1994, 22 February 1994 and 18 May 1994; Record of the crime scene investigation of the Basic Court of Ključ, Ref. number KRI 38/96 dated 2 August 1996, made in the place called Lanište; Decision of the Basic Court of Ključ, Ref. number KRI 38/96 dated 3 October 1996, ordering exhumation of mass graves on Mt Grmeč, Lanište location, graves at the location of Babina Dolina; Record of exhumation of Lanište I mass grave made by the Basic Court of Ključ, Ref. number KRI 38/96 dated 4 October 1996; Record of autopsy of corpses from Lanište I mass grave made by the Basic Court of Ključ, Ref. number 38/96 dated 12 October 1996; Continuation of the record of autopsy of corpses from Lanište I mass grave made by the Basic Court of Ključ, Ref. number KRI 38/96 dated 7 November 1996; Record of identification of a corpse made by Ključ Public Security Station on 13 November 1996 under identification no. 57, Hilmo Mujezinović; Decision of the Basic Court of Ključ, Ref. number KRI 52/96 dated 4 November 1996, ordering exhumation of a mass grave on the location of the village of Krasulje called Crvena zemlja II, in the area of Ključ Municipality; Record of crime scene investigation and exhumation of Crvena zemlja II mass grave, made by the Basic Court of Ključ, Ref. number KRI 52/96 dated 5 November 1996; Record of autopsy of corpses from the mass grave Crvena zemlja II, made by the Basic Court of Ključ, No. KRI 52/96 dated 6 November 1996; Records of the Public Security Center-Bihać Police Station, dated 11 November 1995, made during the discovery of corpses on 9 November 1995 (15 records); Decision of the Basic Court of Ključ, Ref. number KRI 48/96 dated 14 October 1996, ordering exhumation and autopsy of corpses from a mass grave and an individual grave at the location of the village of Biljani; Record of the crime scene investigation and exhumation of Biljani mass grave, made by the Basic Court of Ključ, Ref. number KRI 48/96 dated 14 October 1996; Record of autopsy of corpses from the mass and individual graves in the village of Biljani made by the Basic Court of Ključ, Ref. number KRI 48/96 dated 14 October 1996; Record of crime scene investigation and exhumation of individual graves in the village of Biljani, hamlet of Domazeti, made by the Basic Court of Ključ, Ref. number KRI 48/96 dated 6 November 1996; Record of autopsy of individual graves from the territory of the village of Biljani made by the Basic Court of Ključ, Ref. number KRI 48/96 dated 7 November 1996; Letter of the Basic Court of Ključ; Ref. numbers 38, 48, 47, 52, 56, 54, 53, 57, 55, 58/96 dated 13 December 1996, delivered to the Registry Offices in Ključ and Sanica indicating that the records of autopsy are delivered for the purpose of entry of deaths into the Registers; Photo documents – the first and second part of Lanište I mass grave, Ključ Municipality, that pertains to the exhumation of 188 bodies of killed Bosniak civilians with 10 October 1996 as the date when the photos were taken; 188 autopsy records, 41 of which are records of unidentified persons, while the others are to the names of persons – bodies exhumed from Lanište I mass grave on 10 October 1996; Sketch of the crime scene with the marked natural pit – Lanište I mass grave wherefrom 188 bodies of killed Bosniak civilians were exhumed, which was made on 10 October 1996; Sketch of the crime scene – Lanište I mass grave – lateral cross-section view of the terrain, which was made on 10 October 1996; Photo documents of Crvena zemlja mass grave with the photographs of exhumation of 16 bodies of killed Bosniak civilians, with 5 November 1996 as the date when the photos were taken; Sketch of the crime scene – Crvena zemlja mass grave from which 16 bodies of killed Bosniak civilians were exhumed, bearing the date of 13 December 1996; Autopsy records for 16 exhumed corpses (eight of them being

unidentified corpses), recovered from Crvena zemlja mass grave; Photo documents – sketch of the crime scene of the exhumation of five bodies of killed Bosniak civilians recovered from Biljani I mass grave, Ključ Municipality, with the indication of the date 15 October 1996; Autopsy records for five exhumed bodies containing the conclusion that they are unidentified males, either middle-aged or younger persons, the records being made on 6 October 1996; Photo documents – sketch of the location of exhumation of two bodies of killed Bosniak civilians recovered from Biljani II grave, Ključ Municipality, with 28 February 1997 as the date when the photos were taken; Autopsy records for two exhumed bodies from Biljani II grave – Ejub Jašarević and Juso Jašarević, the records being made on 6 October 1996; Photo documents and sketch of the scene of exhumation of the body of Smajil Mujezinović found in the place called Domazeti, Ključ Municipality, marked as Biljani III grave, with 6 November 1996 as the date when the photos were taken; Autopsy record made on 6 November 1996 to the name of Smajil Mujezinović, whose body was recovered from Biljani III grave; Photo documents and sketch of the scene of exhumation of the body of Husein Domazet found in the place called Domazeti, Ključ Municipality, marked as Biljani IV grave, with 6 November 1996 as the date the photos were taken; Autopsy record made on 6 November 1996 to the name of Husein Domazet, whose body was recovered from Biljani IV grave; Photo documents and sketch of the scene of exhumation of the bodies of Hamdija Čehić, Hasib Mujezinović and Fajko Domazet, that were found in the place called Domazeti, Mešani cemetery, marked as Biljani V grave, with 6 November 1996 as the date when the photos were taken; Autopsy records made on 6 November 1996 to the names of Hamdija Čehić, Hasib Mujezinović and Fajko Domazet, whose bodies were recovered from Biljani V grave; Photo documents and sketch of the scene of exhumation of the body of Ćazim Botonjić, found in the place called Domazeti, hamlet of Čehići, Ključ Municipality, marked as Biljani VI grave, with 6 November 1996 as the date when the photos were taken; Autopsy record made on 6 November 1996 to the name of Ćazim Botonjić, whose body was recovered from Biljani VI grave; Photo documents and sketch of the scene of exhumation of five bodies of killed Bosniak civilians found in the hamlet of Jabukovac, Mezarje, Ključ Municipality, marked as Biljani VII grave, with the indication of the date of photographing – 6 November 1996; Autopsy Records of Sabit Šljivar, Asim Omanović, Tehvid Omanović, Šefkija Omanović and Paša Omanović dated 6 November 1996, whose bodies were recovered from Biljani VII grave; Photo documents and sketch of the exhumation scene of the body of Bećo Čehić, found in the hamlet of Brkići, Ključ Municipality, marked as Biljani VIII grave, with 9 November 1996 as the date when the photographs were taken; Autopsy Record of Bećo Čehić, dated 10 November 1996, whose body was recovered from Biljani VIII grave; Photo documents and sketch of the exhumation scene of the body of Abid Džaferagić found in the hamlet of Osmanovići, Ključ Municipality, marked as Biljani IX grave, with 9 November 1996 as the date when the photographs were taken; Autopsy Record of Abid Džaferagić, dated 10 November 1996, whose body was recovered from Biljani IX grave; Video recording no. V000-1535 – parts I and II; Video recording no. V000-3102-1-A; Video recording no. V000-3103-1-A; Video recording no. V000-2731; Excerpt from criminal records of Marko Samardžija issued by the Una-Sana Canton Ministry of the Interior, Ref. number 05-6/03-2-1-04-3-426/05 dated 6 July 2005; a photograph of suspect Marko Samardžija; documents of the Republika Srpska Ministry of Defense relating to the changes in the organization and structure of the VRS, Ref. number 8-04-713-20/05 dated 20 September and 17 October 2005 respectively; seal-certified documents referred to in the Indictment under 21, 23, 51,

52, 62 and 64 respectively, and the Butler Report on Command Responsibility compiled in proceedings before the ICTY.

The Court has also accepted the following defense documentary evidence: written statements of the witnesses Nikola Kuridža, Drago Banjac and Milenko Tešić dated 3 October 2005, Lazar Radišić and Petar Despot dated 9 October 2005, Đorđo Rađenović dated 12 October 2005, Stanko Raca dated 4 June 2006 and Slavko Štrbac dated 23 June 2006 – all of which were given in the Law Firm of Attorney Zlatko Knežević. Then the following reference books: Rules of infantry (mountain) companies-platoons, published in 1977 by the Federal Secretariat for National Defense; Rules of Battalion, published in 1988 by the same Secretariat; Basics of the Law of War, published by the International Committee of the Red Cross, and the Geneva Conventions for the protection of victims of war of 1949 and Additional Protocols thereto of 1977, published by the Assembly of the Red Cross of Yugoslavia.

The Court has also accepted the documentary evidence obtained by the first instance panel made during the on-site crime scene identification in the territory of the village of Biljani and its surroundings, and both the photo and video documentation made on that occasion, as well as the map of the terrain made by a land surveyor upon the order of the Court.

Having evaluated all the presented evidence, in isolation and in connection with each other, **the Appellate Panel decided as stated in the operative part of the Verdict for the following reasons:**

I General Elements - Article 172(1) of the BiH CC

The legal definition of the criminal offense of Crimes against Humanity referred to in Article 172(1) of the BiH CC, in conjunction with the criminal actions stated in the operative part of the Verdict that the Accused is charged with, results in the following general elements of this criminal offense:

- existence of a widespread or systematic attack,
- that the act of the accused was committed as part of such an attack,
- that the attack was directed against any civilian population,
- that the accused had knowledge of such an attack.

I.1. Existence of a widespread or systematic attack

The Appeals Chamber Judgment of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) (12 June 2002, para 95) in the case against Kunarac, Kovač and Vuković, defines the factors in assessing what constitutes a widespread or systematic attack:

“ In assessment of what constitutes a “widespread” or “systematic” attack the Trial Chamber must first identify the population which is the object of the attack and, in the light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic. The consequences of the attack

upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns or crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a “widespread” or “systematic” attack vis-à-vis this civilian population.”

The term “widespread” is defined in the ICTY Trial Chamber Judgment (26 February 2001, para 179) in the case against Kordić and Čerkez; as well as the Blaškić case, the Trial Chamber Judgment, para 206, so in the aforementioned judgment it is stated that:

“A crime may be widespread or committed on large scale by the cumulative effect or a serious of inhumane acts or singular effect of an inhumane act of extraordinary magnitude”

[The concept of “widespread” may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of “systematic” may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.]¹

Furthermore, the widespread characteristic refers to the scale of the acts perpetrated and to the number of victims.¹

In addition to the aforementioned, it is necessary to define the term “systematic,” which we can find in the ICTY Appeals Chamber Judgment in the case against Kunarac, Kovač, and Vuković (dated 12 June 2002, para 94) reading:

“..patterns of crimes-that is the non-accidental repetition of similar criminal conducts on a regular basis- are common expression of such systematic occurrence”

Taking into consideration the foregoing within the context of the existence of a widespread and systematic attack against the civilian population in Biljani, Ključ municipality, the Appellate Panel finds it indisputable that there was a routine pattern of acts of the army and police of the so-called Serb Republic of Bosnia and Herzegovina within the time and geographical context relevant to the Indictment, which numerous prosecution and defense witnesses testified about. All the witnesses are former, and some of them are current, inhabitants of the territory of Biljani and the surrounding hamlets who, in July 1992, were caught by the events they survived. Thus, it is indisputable that these are crimes of collective nature.

This fact, among other things, was also established based on the testimony of the prosecution witnesses, Biljani inhabitants, who state that as early as May 1992, Bosniak civilians were called to surrender their weapons, which they did, then in the beginning of June the army came to Biljani which resulted in the restricted movement of the locals, people were taken to the Manjača camp while highly-positioned Bosniaks were removed.

¹ **ICTR** Trial Chamber Judgment, Akayesu, para 580

¹ ICTY, Trial Chamber Judgment in the case v. Blaškić dated 3 March 2001, para 206

Among others, the following witnesses testified about these factual circumstances: Mujo Čajić, Munira Avdić, Husein Balagić, Hata Hajdarević, Mustafa Džaferagić, Šemsudin Omanović, Nesima Avdić, Zuhra Avdić, Hasiba Mulahmetović, Asim Vučkić, Rasema Mujezinović, Ale Mujezinović, Dževad Džaferagić, Šefika Domazet, Šemso Džaferagić, Smajil Džaferagić, Enisa Čehić, Amira Čehić, Ismet Zukanović.

The fact that Bosniaks in the Municipality of Ključ first started to lose their jobs, that is, that their economic existence was jeopardized, also follows from the documentary evidence of the Prosecutor's Office, as follows: the Decisions on Removal of a Judge of the Minor Offense Municipal Court of Ključ, Nermin Kapetanović; the President of the Basic Court of Ključ, Nedžad Botonjić; Judge of the Basic Court in Ključ, Enisa Dućanović, which were rendered by the Crisis Staff of the Municipal Assembly of Ključ on 1 and 2 July 1992 and signed by Jovo Banjac, President of the Crisis Staff, and the Decisions on removal of the president of the Municipal Assembly of Ključ, Omer Filipović; president of the Executive Board of Ključ Municipality, Asim Egrlić; secretary of the Executive Board of Ključ Municipality, Fikret Balagić; secretary of the Municipal Secretariat for General Administration, Merima Filipović; director of the Municipal Administration for Geodesic, Property Affairs and Real Estate Cadastre, Hamdija Dućanović, all of which were made on 21 July 1992.

In that context the witness Mujo Čajić testified that he could have only stayed in the Reserve Police of Sanica had he signed a document declaring his loyalty to the so-called Serb Republic of Bosnia and Herzegovina offered to him for signing by Milan Tomić - Commander of the Police Department in Sanica. Furthermore, with regard to the events which took place before 10 July the witness added that on the other side of the Brkići village shots could be heard, stating that the guards consisting of Serb inhabitants were formed in order to prevent them from leaving the village. By 10 July 1992, they noticed the guards on all the hills around Brkići and sometimes they could also hear shooting.

In his statement the witness Husein Balagić testifies credibly that the arrests, apprehensions, daily searches of the houses started in June 1992 and that house searches were also carried out during the night. The Serb Army which, in the opinion of the witness, was composed of the inhabitants of the Serb villages, that is, JNA members and Sanica inhabitants, demanded weapons from the Bosniak civilians. The civilians did not possess weapons except for a few hunting guns that they surrendered at the railway station in Gornja Sanica. All the time, the witness was hiding in the woods but in the second raid he was caught in the house and arrested.

The situation in Biljani before 10 July 1992, as stated by the witness Šemso Džaferagić, was characterized by restricted movement, constant suspense, while checkpoints were set up on the bridge in Sanica. Approximately ten days before 10 July 1992, some army passed through the village and they got the impression that it was the JNA, reserve units, given that it did not consist of the local Serbs.

As stated by the witness Munira Avdić, as early as the end of April, on Thursday, in the wood processing factory, during the break, she went out when a neighbor approached her saying to look above the factory, which she did. At that moment, she saw the army coming and then she turned to the other side and saw the army again. When she came back to work,

the production plant was full of the army in olive drab and camouflage uniforms. The witness heard that it was the army from Jelašinovac, which is a part of Sanski Most. She stated with certainty that Biljani and hamlets were issued the ultimatum demanding that all the citizens surrender weapons on 29 May. On 1 June 1992, she saw the army coming along the road from the direction of Sanica in front of the school. The witness testifies that it was the army from Petrovac with the blue insignia on lapels and in her opinion they could be identified by these insignia. The army took a group of local inhabitants with them including her husband. At 9,00 in the evening, they pushed the inhabitants into the buses and both buses went towards Ključ. Her husband was taken to Ključ where he was interrogated for three days and then to Manjača where he spent six months and fifteen days.

Mile Pešević also testified about these circumstances, particularly about the restriction of movement of Bosniaks, and said that on 27 May 1992 the police closed checkpoints around Sanica and Ključ so that it was not possible to enter or exit Sanica or Ključ without a pass, which was a situation caused by the murder of one Serb police officer. Furthermore, he adds that “in the meantime” (that is, in May 1992) weapons were seized from Muslims and it “*was understood that we were safe now*”.

The war in Ključ, as stated by the witness Dušan Samardžija, started on 27 May 1992 when the state of war was declared, which was preceded by the murder of the traffic police commander. After that event he spent four days in Ključ because one could not leave the town and then he headed for Biljani on which occasion he saw the burning Muslim houses up to the village of Velagići.

The witness Dragan Vukić was mobilized on 26 June 1992 to the reserve police force, so while he was on duty in front of the police station in Sanica, he states that people were brought in. In the Records number KT-RZ-4/05 dated 11 August 2005 he stated the following: “as far as I know, it was predominantly Bosniak men who were brought in” while at the main trial he stated “probably Bosniaks.”

On 10 July 1992, on his way to work, he dropped by the house of Miro Samardžija who used to live in the hamlet of Domazeti or Mešani, on which occasion Miro’s mother warned him that there would be “mopping up” and because of that she gave him red scarf to put on his arm as a sign of identification. Then he headed for home and on his way home Milan Tomić, from the Golf vehicle, addressed him saying that he should join the reserve units of the police force in the house of Mirko Branković. In the house he came across Slobodan Lazić, Ranko Samardžija who were in the police and there were also some men in military uniforms and on that occasion somebody told him that the terrain would be mopped up.

Also, before the event which took place on 10 July 1992, the inhabitants of Biljani were in fear of their lives. In the course of both raids Bosniak civilians were killed. The prosecution witnesses Husein Balagić, Nedim Omanović, Asim Vučkić, Zuhra Avdić, Nesima Avdić, Šefika Domazet, Ferid Avdić, Asif Medić, Zuhra Avdić testified that civilians were killed even before 10 July 1992, including Hamdo Čehić, Asim Omanović, Tehvid Omanović, Pašo Omanović, Abid Džaferagić, Muhamed Talić, Hasib Mujezinović, Sabit Šljivar, Abid Džaferagić.

The witness Husein Balagić testified about the circumstances pertaining to killings of civilians during raids and described everything that he had seen in details and credibly. In his testimony he indicates that he knows that the civilians, inhabitants of Biljani, were killed, and he personally saw the murdered Abid Džaferagić and Tehvid Omanović from Biljani. Further, he describes that he saw them next to the mill in Jabukovac, that is, that he saw their bodies, prostrated, and both bodies were covered with swarming flies. On their temples both of them had big holes, filled with flies. The witness claims that he is positive about the identity of the aforementioned persons.

All the foregoing is also confirmed by the ample documentary evidence including in particular the following: Order of the SDS Sarajevo, addressed to the chairman of Ključ Municipal Assembly by the coordinator for the implementation of the decision, Radoslav Brđanin, forwarded to the chairman of the Municipal Assembly on 29 October 1991; Letter of the chairman of Ključ Municipal Assembly, Omer Filipović, delivered to the Ministry of National Defense of the Republic of BiH, Territorial Defense Staff of BiH, Ref. number 01/1-92 dated 14 April 1992; Excerpt from the Instruction for Operations of Crisis Staffs of the Serb People in Municipalities, dated 26 April 1992; Order of the president of the National Defense Council, Jovo Banjac, Ref. number 05-01-45/92 dated 5 May 1992; Order of the commander of the Territorial Defense Staff, Omer Filipović, Ref. number No. 05-01-45/92 dated 6 May 1992; Press release of the Crisis Staff of Ključ Municipality, dated 8 May 1992; Conclusion of the Wartime Staff of the Autonomous Region of Krajina, Ref. number 03-297/92 dated 8 May 1992; Conclusion of the Wartime Staff of the Autonomous Region of Krajina, Ref. number 03-298/92 dated 9 May 1992; Minutes of the meeting of the Crisis Staff of Ključ Municipal Assembly held on 13-14 May 1992; Performance report for the Crisis Staff (Wartime Presidency) of Ključ Municipal Assembly in the period between 15 May 1992 and 29 July 1992; Order of the Crisis Staff of Ključ Municipality, strictly confidential 22/92, dated 25 May 1992; Instruction on Organizing and Activities of Bodies of Serb People in BiH in Extraordinary Circumstances dated 19 December 1991 based on which the maps were made for taking over the power by Bosnian Serbs, then the Order for further activities dated 25 June 1992, signed by the Commander of the 17th Light Infantry Brigade, Lt. Col. Drago Samardžija – to carry out a total blockade, search and mopping up of the terrain in the area of the village of Ramići, Krasulje, Hripavci and Ošiljak.

Also, the Court took into the consideration the fact that the Autonomous Region of Krajina was established as early as September 1991 and that the Municipality of Ključ joined on 16 January 1992, crisis staffs were also established, while the army of the so-called Serb Republic of BiH was formed on 12 May 1992.

The fact that the attack was directed against the Muslim population, in addition to numerous statements of witnesses, is also confirmed by the following documents, in particular:

The Order of the Ključ Municipality Crisis Staff dated 27 and 28 May 1992, ordering Muslims to surrender the illegally obtained weapons; Overview of managing working posts occupied by employees of Muslim ethnicity dated 26 June 1992, issued by the Serb Republic of BiH-Ključ Municipal Assembly; the removal decisions mentioned above.

The majority of the prosecution witnesses, inhabitants of Biljani and the surrounding hamlets, stated that they had to surrender weapons as early as April-May 1992 in a manner

that their Serb neighbors were coming to their village in civilian clothes, sometimes the Accused himself would come, requesting the inhabitants to surrender weapons.

The witness Šećira Avdić, in that context, as mentioned previously, states that on 29 May 1992, the ultimatum to surrender weapons was issued to the inhabitants of Biljani and the hamlets.

The described events took place all over the territory of the Municipality of Ključ including the neighboring villages and hamlets, so considering the aforementioned as well as the patterns of the crime (taking the men aged between 18 and 60 to the Manjača camp, disarmament of the Muslim population, restriction of freedom of movement - part of which was the distribution of passes for movement, etc.) the Appellate Panel concludes that the attack was widespread and systematic. The pattern of treatment of civilians cannot be taken as an isolated incident but as a carefully instructed and guided sequence of strategic acts directed against the civilian population.

The conclusion pertaining to the circumstances of taking Bosniaks to the Manjača camp prior to 10 July 1992, in addition to the aforementioned witnesses, is also corroborated by the documentary evidence: List of the detainees from the territory of the Municipality of Ključ in the Manjača concentration camp.

The Panel finds the testimonies of the above mentioned witnesses credible and authentic. Not only that the testimonies of the witnesses are essentially consistent but they can also be supported by the aforementioned documents.

Therefore, the Appellate Panel established the existence of both elements of the attack (widespread and systematic) although the requirement is of alternative and not of cumulative nature, meaning that the attack would have existed even with just one of the requirements being met.

Given that the testimonies of the aforementioned witnesses are essentially consistent and given that they clearly testified about all the details which, considering the circumstances under which the event took place, they were objectively able to memorize, the Court, based on this evidence, beyond any reasonable doubt, concludes that at the time relevant to the Indictment there was a widespread and systematic attack and that it was directed against the civilian population, which will be decided by the Panel hereinafter.

I.2. Status of persons against whom the attack was directed – civilians

As regards the status of persons against whom the acts indicated in the Indictment were committed, the Appellate Panel refers primarily to the general provision based on which the category of **civilians** is defined as “*persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause*”³. This Article stipulates that this category of population shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

³ Article 3 (1) of the Geneva Convention relative to the Protection of Civilian Persons (common Article 3) International Criminal Tribunal for Rwanda, Trial Chamber Judgment, Akayesu, para 582

All the prosecution witnesses stated that they, that is, their neighbors, were arrested as civilians in a manner that they first were taken out of their houses. The detained persons did not participate in fights, hostilities, they were not armed and not active in the context of combat.

All the witnesses-victims as well as the eyewitness to the event of 10 July 1992 (as well as the eyewitnesses to the events in the village of Biljani and the surrounding hamlets before 10 July 1992), confirmed it was exclusively the Bosniak population that was deprived of liberty, and then that they were civilians, with no arms. Not even the discrepancy in the testimony of the witness Dragan Vukić (records taken during the investigation and at the main trial) swayed the position of this Panel regarding the certainty of the conclusion on the ethnicity of persons who were brought in at the relevant occasion. During the investigation the witness stated for the record in the Prosecutor's Office that "predominantly Muslims, Bosniaks were brought in" while at the main trial he stated "they were probably Bosniaks." The testimony of this witness, as deemed by the Panel, regardless of the noticed difference, is consistent with the testimony of the witnesses who described in detail the event of 10 July 1992 both in respect to the ethnicity of the persons who were taken away as well as in respect to the ethnicity of the persons who had been taken away before 10 July 1992, during the attack which, as already explained, was widespread and systematic. The testimony of this witness is definitely also corroborated by the relevant documents.

In other words, these differences are not such that they could essentially challenge the state of the facts nor could they challenge the authenticity of the testimony based on which it is obvious that this witness was not saying something that he had learned but what he had actually heard and seen.

The defense witness Milenko Tešić was in a group of soldiers who were going from door to door rounding up Bosniaks-Muslims aged between 18 and 60 to come to Jezerine. They found some of them at home and woke them up while they informed some indirectly through other Muslims neighbors.

[...] the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as civilian.⁴

Therefore, all the aforementioned confirms the conclusion of the Panel, beyond any reasonable doubt, that the attack was directed against the civilian, Bosniak, population. Not a single detained civilian was armed, in a military uniform or at the frontline, while there was also no doubt as regards the ethnicity of the persons who were deprived of liberty.

1.3. Actions of the Accused as part of the attack – *nexus*

Primarily, the decisive fact pertaining to the above mentioned circumstance is the membership of the Accused in the Army of Republika Srpska at the time relevant to the Indictment, in the capacity of the Commander of the 3rd Company of the Sanica Battalion, as part of the 17th Light Infantry Brigade, to which position he was appointed on 18 June 1992 as the Accused himself testified about and which could also be supported by the following documentary evidence: Letter of the General Staff of the Republika Srpska Army,

⁴ ICTY, Trial Chamber Judgment, Blaškić, para 214

Ref. number No. 02/3-1-291/4 dated 26 August 2005 delivered to the State Investigation and Protection Agency, pertaining to Marko Samardžija – information on the member of the RS Army (membership in the Army, captain 1st class); List of the 3rd Company of the Sanica Battalion signed by the Commander of the 3rd Company, Marko Samardžija, dated 30 June 1992.

Further, the submission dubbed “The Road to a Strong Military Team through Discipline, Concord and Unity”, authored and signed by the commander of the 3rd Company, Marko Samardžija – Captain First Class, dated 4 July 1992; Submission "Basic Requirements for Operations of Military Units of the 3rd Company" authored and signed by the commander of the 3rd Company, Marko Samardžija – Captain First Class, dated 22 June 1992; Notice to the leaders of platoons 1 through 3, signed by Company Commander Marko Samardžija – the troop review of the company shall be carried out next to the command post in Lončari, 18 June 1992, in the afternoon; Submission "Elaboration on Specific Assignments in the Activities of the 3rd Company 2nd Platoon – Gornja Prisjeka", made on 2 July 1992 in Sanica by the Commander of the 3rd Company – Marko Samardžija; Notice to the leaders of platoons 1 through 3, signed by Company Commander Marko Samardžija, are just the additional support to the conclusion of the capacity of the Accused at the time of the attack, his actions during the attack, that is, to the decisive fact that his actions constituted part of the attack described above.

Also, the information provided by the majority of the witnesses as regards the capacity of the Accused as the Company Commander is essentially consistent. The witnesses-eyewitness to the relevant event conclude that the Accused was the Company Commander judging by his conduct at the time relevant to the Indictment (Ferid Avdić, Nesima Avdić) while the others, given the particular place at which they found themselves following their arrival in Jezerine could, on the uniform of the Accused, see the insignia of a Commander – 3 stars and one stripe (Husein Čajić, Šemsudin Omanović, Asim Vučkić). Furthermore, the prosecution witness Mile Pešević stated that the Battalion, commanded by Marko, was part of the 17th Light Infantry Brigade. His company comprised inhabitants of the villages of Lončari, Gornja and Donja Prisjeka.

The defense witnesses Petar Despot and Milenko Tešić stated that Marko was the Commander of the 3rd Company of the Sanica Battalion.

Moreover, the events at the time relevant to the Indictment, which will be analyzed later as part of the specific acts of the Accused, clearly result in the participation of the Accused in taking away the Muslims, Bosniak men aged between 18 and 60 to Jezerine, escorting them to the school in Biljani and then handing them over to an unknown police sergeant.

In the above mentioned context it is also necessary to point out that the witnesses, who knew the Accused from before as a neighbor and teacher, were seeing him in July and before July 1992, armed, while as regards the uniform that he wore they state that sometimes he was in civilian clothes and sometimes in a multicolored uniform. On 10 July 1992, at Jezerine, he was armed and in multicolored clothes.

The Accused took part in the aforementioned acts having the knowledge and will to commit them. The acts taken by the Accused can in no way be isolated from the context of the

attack, which, as found earlier, was widespread and systematic. What is more, they fit into the criminal pattern which existed at the time and geographical context concerned. Thus, detention and severe deprivation of physical liberty in violation of fundamental rules of international law are the acts which, as stated by the witness, took place during the attack. The fact that these acts were undertaken exclusively against Bosniaks undoubtedly stems from the statements of both prosecution and defense witnesses and are corroborated by the documentation as well. In particular, it refers to the evidence from which one can see the rhetoric directed against Bosniaks from the extended area of the Municipality of Ključ, primarily from the area of Biljani and surrounding hamlets, and which finally is related to the aforementioned acts, that is, the attack. So for example: Information on the operations and activities of the Ključ Public Security Station at the time of combat operations in the territory of Ključ Municipality, strictly confidential 9/92, July 1992; Submission "Basic Requirements for Operations of Military Units of the 3rd Company" authored and signed by the commander of the 3rd Company, Marko Samardžija – Captain First Class, dated 22 June 1992; List of the 3rd Company of the Sanica Battalion signed by the Commander of the 3rd Company, Marko Samardžija, dated 30 June 1992.

It is necessary to stress that the “*the accused need not know the details of the attack or approve of the context in which his or her acts occur*”⁵ “*the accused merely needs to understand the overall context in which his or her acts occur*”⁶

Taking into consideration the aforementioned the Panel found that not a single act of the Accused can be seen isolated from the widespread and systematic attack against the Bosniak population, therefore it is the conclusion of this Panel that the Accused committed the incriminating acts as part of the attack against Bosniak civilians and in the capacity corresponding to the *actus reus* referred to in Article 172(1)e) of the BiH CC, which the Panel shall elaborate on below.

1.4. Knowledge of the attack

This circumstance is best described by the fact, which we have already concluded is indisputable, and it is that the Accused, during the entire attack, was a member of the Army of Republika Srpska in the capacity of the Commander of the 3rd Company of the Sanica Battalion. Given his capacity, the Accused, unlike a common citizen or a low ranking private, was surely in a position to know the sequence of events in the territory of Biljani at the time relevant to the Indictment. Also, it is indisputable that during the attack he was staying in the area of Biljani. As it arises from the consistent statements of the prosecution witnesses, before the events in Biljani, the Accused moved freely around the sites where, as part of the attack, houses were looted, population forced to move out, weapons seized and movement passes issued. In reference to the aforementioned circumstance the following documents are also significant: Order for further activities of the Command, military postcode 2207, strictly confidential, Ref. number 03-135 dated 9 July 1992, issued by the commander, Lt. Col. Drago Samardžija with the note "military secret - strictly confidential"; Official note of the Commander of Wartime Police Station (WPS) of Sanica dated 10 July

⁵ ICTY, Trial Chamber Judgment, Limaj, para 190

⁶ Ibidem; reference to the Trial Chamber Judgment in the Kordić case, para 185

1992. The Accused himself stated that as early as 27 May 1992 there was looting and conflicts in the area of Biljani and that in his Report on plundering dated 29 June 1992 he drew the attention to the fact concerned.

Further, the Accused himself stated that the headquarters of the Command was in the restaurant/premises Lovac in Sanica and that he attended the meeting of the Command held on 9 July 1992. Then, he stated that, exercising his office, he was visiting and making rounds of the villages and hamlets in the territory of the Municipality of Ključ which were exposed to/under attack. Also, numerous prosecution witnesses, inhabitants of Biljani and the surrounding hamlets, confirmed the statement of the Accused about his visits to the villages and hamlets aimed at collection of weapons from Bosniak neighbors and issuance of movement passes.

Given that the Accused Marko Samardžija comes from the area of Biljani, where all the above mentioned events happened, that he was an educated and respectable person in that area, educational worker and engaged in politics, that the mistreatments and killings of Muslim civilians were taking place in front of everybody, this Panel finds that the Accused had knowledge of the widespread and systematic attack against Muslim civilians. Also, in his testimony before this Court, the Accused confirmed that he had some information about the events which happened before 10 July 1992. Moreover, his written works, such as "Appeal for Common Sense," "Basic Requirements for the Operations of the 3rd Company Military Units" dated 22 June 1992 and "Elaboration on Specific Assignments in the Activities of the 3rd Company 2nd Platoon – Gornja Prisjeka", made on 2 July 1992, indisputably point to the fact that the Accused was aware of the attack, thus the actions he undertook inevitably constitute part of the attack.

Considering the foregoing, the Appellate Panel could not accept the defense argument that the men were deprived of liberty in order to be issued passes for movement, having in mind in particular the fact that the term "mopping up", mentioned by the prosecution witnesses a couple of times (the most convincing one is definitely the testimony of the witness Dragan Vukić who was given a red scarf to wear as the sign of identification by the mother of Miro Samardžija) and defense witness Drago Banjac who heard that there would be mopping up and his superior commander – Miloš Dević told him on 10 July 1992 not to prepare lunch for the soldiers because they would go to carry out a task. This is also corroborated by the documentary evidence and in the first place by: Order for further activities of the Command, military postcode 2207, strictly confidential, Ref. number 03-135 dated 9 July 1992, issued by the commander, Lt. Col. Drago Samardžija with the note "military secret - strictly confidential"; Original list of persons imprisoned in the Biljani Primary School written in Cyrillic and Latin scripts with the inserted date of 10 July 1992 and the note "Biljani school" on the list written in Cyrillic script; Official note of the Commander of Wartime Police Station (WPS) of Sanica dated 10 July 1992; The terms *mopping up of a terrain and issuance of passes* are not synonyms nor, in the specific situation, could they be.

Thus, the conclusion of this Panel is that the Accused had knowledge of the attack and by his actions contributed to it.

Therefore, all the general elements of the Crimes against Humanity have been met.

II Crimes against Humanity - Imprisonment or Other Severe Deprivation of Physical Liberty in Violation of Fundamental Rules of International Law

Article 172(1)e) of the BiH CC

Article 172(1)e) of the BiH CC implies that this criminal offense, in addition to mandatory existence of a widespread and systematic attack, as the general element of the criminal offense, is specifically committed by imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law which is going to be explained in detail through the criminal actions of the Accused.

The Trial Chamber Judgment, in the Krnojelac case (15 March 2002, para. 115), defined the term “imprisonment”, thus it is stated:

“To establish the crime of imprisonment as a crime against humanity under Article 5(e) of the Tribunal’s Statute, the Trial Chamber accordingly finds that the following elements must be established in the circumstances of the present case: i) An individual is deprived of his or her liberty; ii) The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty; iii) The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.”

[...] The Trial Chamber concludes that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population.⁷

[...] the imprisonment of civilians will be unlawful where:

- civilians have been detained in contravention of Article 42 of Geneva Convention IV, i.e. they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;*
- the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified;*
- they occur as part of a widespread or systematic attack directed against a civilian population.⁸*

⁷ ICTY, Kordić and Čerkez, Trial Chamber Judgment, para 302

⁸ Ibidem, para 303

The International Law Commission (hereinafter: ILC) in its 1996 Report, page 101, refers to the prohibited act of “arbitrary imprisonment” in line h).

*The term **imprisonment** includes deprivation of liberty of the individual and the term **arbitrary** that it was carried out without due process of law.*

Also, the ILC indicates that arbitrary imprisonment is contrary to Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights.

“No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Specifically, this offense is committed where the perpetrator imprisoned one or several persons or in some other way deprived of physical liberty and where the gravity of the committed offense is such that it violates fundamental rules of international law and the perpetrator was aware of the actual circumstances which caused the gravity of the act. The conduct was part of a widespread or systematic attack directed against civilian population, while the perpetrator was aware of the nature of his conduct.

II. 1. Objective Elements - Criminal Actions of the Accused

With regard to the criminal actions that the Accused was found guilty of, it is not disputable that the Accused Marko Samardžija, as the Commander of the 3rd Company, which was within the composition of the 17th Light Infantry Brigade, attended the meeting held in the restaurant Lovac on 9 July 1992. It is not disputable that the Accused and other attendees were presented the content of the Order for further activities of the Command, military postcode 2207, strictly confidential, Ref. number 03-135 dated 9 July 1992, but there is no evidence that the Accused had received the written order as well. However, even if the Accused did not receive the written order, the Court finds that the accused knew that his task was to search, with his company, the houses in the hamlets of Brkići and Balagića Brdo and take Bosniak able-bodied men to the Primary School in Biljani, primarily for identification and interrogation and not to issue movement passes to the able-bodied Muslim men, as persistently stated by the defense. Anyway, in his statement, the Accused himself confirmed that he was supposed to search the Muslim houses in order to find weapons and ammunition and that some of these villagers were to be taken for further interrogations. The witness Mile Pešević also confirmed this, indicating that the meeting in the Lovac restaurant dated 9 July 1992 was the meeting of the company commanders, attended by all the three company commanders. The witness subsequently joined the meeting because he had one medical intervention the same night but after he had arrived he was told that Jovan Kevac, the Commander of the Brigade, sent the message to have some of the Medical Corps staff be ready at 7:15 a.m. to go to Biljani given that there would be "cleansing" in Biljani that morning. With regard to the real meaning of the term "cleansing" the witness stated that it meant that the houses of Bosniak civilians would be searched, possibly the discovered weapons seized, and able-bodied men apprehended for interrogation, as it was done previously, as well as taken to the camp in Manjača, while his presence was required in case some of the civilians would not feel well. Therefore, if the witness as the Medical Corps technician knew that the aim of the operation was the so-

called cleansing of the terrain then by all means the Accused, as the company commander, knew that, too.

The magnitude of the operation in which all three companies of the Sanica Battalion participated, as well as the civilian and military police and other formations within the composition of the 17th Light Infantry Brigade, the stretch of the area and simultaneous apprehension of all able-bodied Bosniak men, additionally confirm the views of this Panel that it is quite clear that the aim of the operation was not the distribution of movement passes which the civilians would have come to pick up voluntarily and which would not have posed risk of any incidents, and that the Accused was aware of that.

All the aforementioned is also corroborated by documentary evidence as well:

Order for further activities of the Command, military postcode 2207, strictly confidential, Ref. number 03-135, dated 9 July 1992, issued by the commander, Lt Col Drago Samardžija with the note "military secret - strictly confidential", Official note of the Commander of Wartime Police Station (WPS) of Sanica, dated 10 July 1992, indicating all the details of the cleansing operation in the area of D. Biljani, Domazeti, Botonjići, Jabukovac and Brkići.

The prosecution witnesses, primarily the survived victims and members of their families and families of the victims, were consistent with regard to the fact that the Accused participated in the event relevant to the Indictment, that he deprived of their liberty the Bosniak men from the hamlets of Brkići and Balagića Brdo aged between 18 and 60 and rounded them up at Jezerine, that these persons were not informed about the real reasons for the arrest, that no administrative or judicial proceedings had ever been conducted against them, nor had they been sent to the police station upon some written order.

The witness Husein Čajić, Mujo Čajić, and Feriz Dervišević testified about the aforementioned circumstances.

In this context, the witness **Mujo Čajić** states that on 10 July 1992 some of the villagers came and told them to gather at the Jezerine meadow. The Bosniak men started from Brkići and nobody escorted them to Jezerine. Upon the arrival he found soldiers who were all armed and Marko Samardžija met them at the meadow itself - he was in a uniform, does not know whether he was armed, but he had a leather bag on his belt. The witness states that it was the second time they were taken to Jezerine (the first time it happened a month before). The Accused told them that they would be taken to the school for interrogation and the witness explains that it was the school he attended the first four grades. He told them to put their hands at the back, which was the second order that he gave, while the first one he gave following the arrival to Jezerine was to empty their pockets, to take out penknives, weapons and similar. Around 25-30 armed soldiers, locals from the hamlets, escorted them to the school and, given that he was moving in a column with 56 Bosniak neighbors, more soldiers from all sides were gathering in front of the school. Shouting started and somebody said "look, Alija's army" and he never saw Marko again. He saw Husein Čajić at Jezerine.

In respect to the aforementioned circumstance, **Husein Čajić** states that around 6 o'clock in the morning Enes Jašarević came to his place and told him that all men aged between 18 and 60 had to go to the meadow near the village of Jezerine. At Jezerine he saw the Accused for the first time in a uniform. He addressed them saying that they would stay at Jezerine meadow for some time until he gets the signal via radio communication for all to go to the

school in Biljani. Following the information that he got from Nikola, the signal man, he informed the villagers that they had to proceed to the school in column, in pairs of two, hands behind their back and that soldiers would escort them.

As stated by the witness **Feriz Dervišević**, first thing in the morning the army came. They ordered them to gather at the Jezerine meadow. At the location they found the villagers from the hamlets of Muhadžeri and Balagića Brdo. There were 80 men of various age. Marko Samardžija addressed them saying: "Gentlemen, I am the Captain, you are all my students and I want those older than 60 and younger than 18 to come out". When they came out, 54 men aged between 18 and 60 remained and he ordered them to put their hands behind the head and in pairs to proceed to the school in Biljani. Then Marko added that the army called them for interrogation and those who were guilty would be held accountable and those who were not, would return home.

Taking into consideration the testimonies of the aforementioned witnesses, that are essentially consistent and complementary, the Panel came to believe that they are authentic and truthful. The witnesses clearly explained all the details that, considering the circumstances pertaining to the event, they could objectively notice and remember.

The statements of these witnesses, viewed within the context of the overall events of 10 July 1992 in Biljani, are a convincing and consistent testimony to the presence of the Accused and his connection with these events.

Being of the opinion that the aforementioned testimonies of the witnesses complement each other in all important facts, that they are objective and credible, the Panel had no reason but to believe the testimonies of these witnesses, holding that they constitute reliable grounds to establish the criminal actions of the Accused as stated in the operative part of the Verdict.

Starting from these, almost indisputable findings, the Accused was found guilty of Crimes against Humanity, which includes severe deprivation of physical liberty of an individual or a group, which is arbitrary, since no lawful proceedings had been conducted against such persons, around 50 able-bodied men – Bosniak civilians in the case at hand. That is, the rounding up at Jezerine in order to be escorted further to the school in Biljani, was not voluntary, although the Accused carried out this operation in a more thoughtful manner than it was common, which, on the other hand, makes it unique. The villagers had confidence in the Accused and no force was required, in which context the witness Mujo Čajić states that this time he felt safer at Jezerine because there he found his neighbors that he trusted, therefore he had no doubts that something could happen to him, while the witness Miroslav Samardžija stated that "the villagers trusted him, therefore they went with him" and it only sealed the conclusion of this Panel that the Accused knowingly directed the reputation that he enjoyed as a teacher to the end of the commission of the criminal offense concerned, in which process he was aware of the fact that he was unlawfully depriving these persons of their physical liberty, for the simple reason that they had no choice, they did not dare to refuse the order. The soldiers carried out the invitation and they did not have to use force and arms, but they were armed, and thus armed they met the civilians and then escorted them to the school. It is of no importance whatsoever whether the weapons were pointed at them or not because the very presence of weapons is a sufficient threat. This conclusion is

also corroborated by the fact that he let some of them go home, meaning that they could not do so without his approval. The fact that the Accused really had some authority and possibility of choice is also supported by the fact that the command gave him freedom of action to take the civilians as he deemed best, thus he did not search the houses looking for weapons and ammunition because he knew the people and considered it unnecessary.

Based on both the testimonies of the aforementioned witnesses and confession of the Accused it is indisputable that the Accused unlawfully deprived around 50 persons of their liberty. Pursuant to the consistent statements of the prosecution witnesses, primarily direct victims, among those apprehended on 10 July 1992 there were the following persons: Šemso Džaferagić, Šemso Omanović, Smail Avdić, Ale Čajić, Omer Dervišević, Smail Mujezinović, Habir Avdić, Husein Domazet, Osman Avdić, Salko Omeradžić, Hamdo Čehić, Ejub Jašarević, Senad Avdić, Šerif Domazet and others.

Therefore, the Accused was found guilty as a co-perpetrator in imprisonment of at least 50 civilians, able-bodied Bosniak men. The objective effect of the action is not disputed by the Accused himself, but he denies that he had been aware of the fact that they would be imprisoned. However, from the statements of the aforementioned witnesses to whom the Court gave credence, it follows that already at Jezerine the Accused knew that they would be escorted to the school and interrogated there and those not guilty would go back home. Based on the aforementioned, as well as on the previous findings of the Court referring to the purpose of the operation known to the Accused, it is clear that during the surrender of the captured civilians the Accused was aware that a number of them, and possibly all of them, would be imprisoned, whereby he undertook the *actus reus* constituting this criminal offense.

II.2. Subjective Elements – Guilt of the Accused

Regarding his intent, the Accused, primarily as an active military officer, had the knowledge that the civilians were deprived of liberty arbitrarily and unlawfully (that is, without any legal procedure) and that the deprivation of physical liberty was not an incident outside the time and geographical context of the attack, as well as that it was not justified on the grounds of military, combat or other legitimate goals.

The Court has also found that the Accused Marko Samardžija took this group of people to the primary school in Biljani, where he was rudely met by the police sergeant. Then, the civilians were taken over by the soldiers and police officers who were in the schoolyard. By the act of surrender of these persons the Accused carried out his task that he had been given at the meeting in the Lovac restaurant, being aware of the fact that they were imprisoned although not charged with any criminal offense, that they were imprisoned because they were Muslims, Bosniaks, and that in the school in Biljani, given the context of the overall events, there would be no prescribed procedure based on the law against them. However, by the surrender of the aforementioned persons, the Accused also became a co-perpetrator in their imprisonment. He was aware that the civilians who had been brought there, the majority or all of them, would remain imprisoned, which shows that the Accused acted with the direct intent, that he was aware of his action and wanted its commission.

III Arguments of the Indictment which have not been Proved

Accomplice in Instigation, Incitement and Aiding and Abetting in Murder

Article 180(1) of the BiH CC regulates that “A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be personally responsible for the criminal offence”

The cited provision defines different forms of complicity in commission of the aforementioned criminal offenses, while the Accused, in the specific case, is charged that, as part of a widespread and systematic attack, with knowledge of such an attack, **he instigated, incited and aided and abetted** depriving another person of his life (murder).

The Panel analyzed every form of the participation in the commission of the criminal offense which was subject of Indictment, and found the following:

III.1 a) Instigation

Article 21 of the BiH CC regulates that a criminal offence can be perpetrated by an act or an omission to act, and it is also defined that a criminal offence is perpetrated by omission when the perpetrator, who is legally obliged to avert the consequence of a criminal offence defined by law, fails to do so, and such failure to act is tantamount in its effect and significance to the perpetration of such an offence by action.

Given that several persons may participate in the perpetration of a criminal offence, depending on the manner of participation of these persons in the perpetration of the specific criminal offence, the law stipulates several types of complicity. So, pursuant to Article 29 of the BiH CC if several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, shall each be punished as prescribed for the criminal offence. These persons are referred to as accomplices.

Article 30 and 31 of the Criminal Code of BiH give the definition of incitement to and accessory in the perpetration of a criminal offence (which is going to be elaborated hereinafter), however, the term of **instigation** of the criminal offence is not defined by any provision of the BiH CC.

Analyzing the factual description of this Count of the Indictment, the Appellate Panel is of the opinion that the Prosecutor's Office has in no way defined what would constitute instigation of the criminal offence, nor has it describe exactly which actions of the Accused would constitute instigation to the criminal offence of murder as a Crime against Humanity. Besides, pursuant to the provisions of BiH CC, regarding crimes against humanity and values protected by international law, they are punishable as the attempted criminal offence (Article 26 of the BiH CC), Conspiracy to Perpetrate a Criminal Offence (Article 247 of the BiH CC), Preparation of a Criminal Offence (Article 248 of the BiH CC) and Organizing a Group of People and Instigating the Perpetration of Genocide, Crimes against Humanity and

War Crimes (Article 176 of the BiH CC) resulting in the fact that all the stages of commission of the aforementioned criminal offenses are incriminated.

The term instigation, in the opinion of this Panel, depending on the specific actions undertaken by the Accused and his intent, could be included in one of the aforementioned manners of commission of the criminal offense (conspiracy, preparation, attempt, organizing a group of people to perpetrate the criminal offense, aiding and abetting, incitement or perpetration), however, the Panel does not hold that the Prosecutor's Office proved that the Accused, by his actions, constituted the elements of any of the above mentioned manners of commission of the criminal offense concerned.

III 1.b) Incitement

This form of criminal responsibility is prescribed by Article 30 of the BiH CC and the aforementioned Article 180(1) of the same Law. Paragraph 1 of Article 30 reads:

Whoever intentionally incites another to perpetrate a criminal offence, shall be punished as if he has perpetrated such offence.

Therefore, the following elements have to be satisfied:

- a) an inciter has to act with an intent; an inciter must be aware that by his actions he incites another person to perpetrate a criminal offense;
- b) as regards the culpability an inciter is equalized with the perpetrator,

Therefore, an inciter does not participate in the commission of a criminal offense but the offense is committed by another person(s), that is, the person incited. According to the international jurisprudence "The *actus reus* required for instigating a crime is any conduct by the accused prompting another person to act in a particular manner."⁹ This element is satisfied if it is shown that the conduct of the accused was a clear contributing factor to the conduct of the other person(s)."¹⁰ It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement".¹¹ The required *mens rea* is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts."¹²

In this specific situation, the incitement would be leading, urging, convincing and similar acts of the Accused directed to the perpetration of the criminal offense of Crimes against Humanity by the act of murder, in which process the inciter has to be aware that by his actions he is leading another person to perpetrate the murder, that is, that his conduct is directed towards the perpetration of the criminal offense concerned. The inciter always acts

⁹ ICTR, Trial Chamber Judgment-Akayesu, para 482; Blaškić, para 280; Kvočka, para 252

¹⁰ ICTY, Trial Chamber Judgment-Kordić, para 387; Kvočka, para 252

¹¹ ICTY, Trial Chamber Judgment-Kordić, para 387; Kvočka, para 252

¹² ICTR, Trial Chamber Judgment-Akayesu, para 482

with intent. The intent of the inciter has to include all the essential elements of the criminal offense.

However, not even in this case was the evidentiary procedure focused on proving this form of criminal responsibility of the Accused Marko Samardžija, while the factual substratum of the Indictment does not include the grounds for the conclusion that the Accused acted in the murder of persons as an inciter.

Thus, based on the results of the adduced evidence, the Panel is not convinced that the intent of the Accused was to prompt the perpetration of murder of the imprisoned persons in front of the primary school and cultural centre, that is, on the Lanište location, nor that he was “aware of the significant possibility that a probable consequence of his acts would be perpetration” of the murder, pursuant to which, this Panel did not find the Accused guilty of intentional incitement to murder the civilians.

III 1.c) Accessory

Accessory, as a form of criminal responsibility, is regulated by Article 31, that is, as part of individual criminal responsibility by Article 180(1) of the BiH CC.

Article 30 of the BiH CC reads as follows:

- (1) Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.
- (2) The following, in particular, shall be considered as helping in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.

The essence of this notion is that an accessory, either physically or mentally (morally), that is, by act or omission, undertakes certain actions aiding the perpetrator to commit the offense. Subjectively, it is required: 1.) that the accessory is aware that by his actions he aids the perpetrator to commit the criminal offense and 2.) that he must be aware of the essential elements of the criminal offense (in the specific situation – the circumstances referring to the victims (civilians), existence of the attack and the like). However, in the specific case, the Panel does not find it proven that the Accused knew that the imprisoned civilians would be murdered, thus he could not be an accessory to the direct perpetrators given that he had not been aware of the crime which was subsequently perpetrated.

If it followed based on the adduced evidence that the Accused knew that the civilians in whose imprisonment he took part, would be executed, his actions could rather be characterized as criminal acts of murder as a Crime against Humanity given that taking and

detaining the civilians in that case would constitute a decisive contribution to the achievement of the final goal, that is, their murder.

Since based on the adduced evidence it is not possible to conclude that the intent of the Accused (either direct or indirect) would include the subsequent killings of the detained civilians, thus it cannot be concluded that the Accused, in respect to this crime, acted as a (co)perpetrator.

Pursuant to the foregoing, the Court concludes that the Accused was not an accessory to the criminal offense of murder as a Crime against Humanity either, because, as stated above, an accessory has to have the knowledge that by his actions he assists the perpetration of the prohibited action of another person as well as the knowledge of the essential elements of the criminal offense he assists in. Since it was found that the Accused had no knowledge of the subsequent murders, he could not be an accessory to the perpetration of the murders. Taking into consideration the numerous pieces of documentary evidence testifying to the murders (autopsy records, photo documentation of exhumations and similar), for this Panel it is not disputable that those crimes did happen, but since the aforementioned elements have not been satisfied, the Panel did not find that the Accused is responsible for the murders, even as an accessory.

Here, it is also necessary to note that not even the factual description of the Indictment contains the acts of accessory to murder, that is, it does not describe which actions of the Accused would constitute accessoryship, or what his intent in that respect would derive from. In that regard, the factual description of the criminal offense should have contained the facts and circumstances showing that the Accused was aware of the offense and the perpetrators of the murder, as well as that by his actions he was aiding and abetting the act of the perpetrator, which is not the case here.

The Appellate Panel did not find beyond any reasonable doubt that the Accused Marko Samardžija, after the civilians were brought in front of the primary school, “*stayed in the school courtyard looking how the soldiers subordinated to him were detaining one part of the Bosniak men in the school classrooms and the other in cultural centre and then based on the lists known to him how the soldiers from his company were taking them out in groups of 5 to 10 and killing them, then looking the same soldiers, who formed the gauntlet and forced the remaining men to run the gauntlet, hitting them on their way to the parked buses by which the remaining civilian population from the primary school and cultural centre were transported to the Lanište location and killed...*,” In other words, pursuant to the text of the Order for further activities of the Command, military postcode 2207, strictly confidential, Ref. number 03-135 dated 9 July 1992, it is not possible, beyond any reasonable doubt, to draw a conclusion that the same Order also resulted in the order to murder any persons including the population of the aforementioned areas. Subparagraph 3.b) *in terms of security* – it is clearly stated – to undertake all the measures, actions and procedures to protect our own units and prevent leak of important data. To apply the war-time regime of movement, isolate uninvited persons and escort to the competent authorities, seize all types of weapons, combat means, ammunition and mines and explosives. Subparagraph 5.- *morale* – to inform every soldier about the aim of the activities, tasks of the units, neighbors and the manner of execution of the task. I forbid burning and destroying of the houses except during the combat operations where necessary.

Defining the real goal of the operation, in terms of the meaning of the term “cleansing of the terrain”, used before the beginning of the operation but not specified in the foregoing written order, this Panel deems that it can be said with certainty that it implied the apprehension of able-bodied Bosniak men, seizure of weapons and ammunition, but not necessarily the killing of these persons. That is, such conclusion does not follow from the Order itself, and based on the statements of the examined witnesses, particularly the defense witness and the witness Mile Pešević who said that cleansing meant “the apprehension of able-bodied men to take them to a camp for it had happened earlier too” there could be sufficient evidence only for a conclusion that the Accused could have been aware of the fact that Muslims, Bosniak men, able-bodied men, were deprived of liberty to be taken to a camp.

The witnesses also saw the Accused in front of the school and gave different statements about the duration of his stay.

Ferid Avdić, upon arriving in front of the school, saw the Accused in a uniform, he addressed the soldiers present there waiving his hands and explaining something to them based on which the witness concluded that he was a central figure. The witness stayed for a certain period of time in the school but since he was under 18 he was ordered as well as Elvis Velić to go home. When he left the school he saw the accused again in the courtyard surrounded by the soldiers. Šećira Avdić also saw the Accused in front of the school while she was standing in front of the cooperative. The Accused would walk around the courtyard but did not approach the women, and she adds that she did not see him killing anyone. Ifeta Džaferagić, who was standing in front of the cooperative and on the plateau in front of the school, also saw and heard the Accused Marko Samardžija surrounded by soldiers dressed in uniform of the former JNA. On the relevant occasion she also recognized Dušan Lakić while, out of fear, she did not recognize other soldiers. While she was in the house Ranko Samardžija came to take the witness Azemina Mujezinović and took her in front of the cooperative. At one moment Ranko Samardžija came for her again and took her to the school to give information about the whereabouts of her sons. For a certain period of time she stayed in the school. After she was ordered to leave the classroom, she went downstairs and at that moment she saw a bus with many young people (“our young people”) and the army standing around the bus. Among the soldiers she recognized Marko Samardžija standing next to the bus. The witness Šemsudin Omanović also saw the Accused upon his arrival in front of the school. On that occasion he was dressed in a uniform and he noticed that he had the highest rank among the present soldiers. Enisa Čehić also saw the Accused in the courtyard. Specifically, while she was sitting with the women in front of the cooperative, at one moment, a bus driven by Ranko Samardžija arrived in the courtyard. The bus came empty and was parked. However, even before she arrived in the courtyard with the women, one bus had already been parked. There, next to Ranko Samardžija, she recognized Marko Samardžija, Mile Pešević, Jadranka Banjac who was a nurse, and Mladen Todorović, a doctor from Sanica.

Upon his arrival at the school, the witness Husein Čajić also saw the Accused standing under a linden tree in the close vicinity of the school. After the Accused greeted the soldiers present, the civilians were ordered to enter the school, in pairs, on which occasion the witness also entered the school. Then, in the school, the mistreatment and the killings started, one could hear burst of fires, yowls and screams for help. Omer Dervišević was

called out first and then Smail Avdić as well. Ten minutes later, they ordered groups of five to come and form a line at the door. Around 50 were called out before the witness was called out. In the corridor of the school were policemen that let the civilians out one by one. When he left the school and was boarding the bus the witness states explicitly that he saw the Accused still standing under the linden tree.

Therefore, opposite to the arguments of the defense, and starting from the testimony of the aforementioned witness which was clear, impressive and essentially consistent with the other testimonies, it follows that the Accused also partly witnessed the events in front of the school that led to the conclusion that he did not treat the detained civilians in the school premises and outside the school correctly.

Although some of the witnesses said that the Accused had a notebook, in the first place Munira Avdić (who unlike the other witnesses claimed that the Accused entered the school several times) and Šećira Avdić, inherently that is not a proof that, even if it did exist, it contained any lists, what is more the witnesses themselves, the survived victims, state that the lists were made in the school, naming the persons who did that. In addition, in the case file under ordinal number 34 there is a piece of evidence: Original list of persons imprisoned in the Biljani Primary School, written in Cyrillic and Latin scripts, dated 10 July 1992 and a note "Biljani school" on the list written in Cyrillic script. In spite of that fact, given that not a single list includes signatures of persons who made the list or any information leading to the conclusion that the Accused is the author of one or both lists, the Panel could not, beyond any reasonable doubt, draw the conclusion that one or both lists were made by the Accused himself. In addition, based on the statements of the relevant witnesses, primarily the detained civilians, it has been established that the Accused did not enter the school premises. Furthermore, none of the examined witnesses stated clearly and specifically which of the soldiers subordinated to the Accused undertook some concrete action against the civilians except for the actions directed to bringing them from Jezerine. In that context, analyzing the factual substratum of the Indictment, it also remains unclear whether the Accused is prosecuted because the soldiers subordinated to him acted on his order or on their own initiative while the Accused failed to prevent them. The arguments that "*the Accused stayed in the school courtyard looking*" are not sufficient for such an act to be evaluated and qualified as any form of criminal responsibility.

Consequently, the Indictment does not include any description of the actions, nor has it been proved during the proceedings just how the Accused instigated, incited or aided and abetted the perpetrators of the described actions in the beating and later on in the killing of the victims.

Numerous prosecution witnesses: Nesima Avdić, Enisa Čehić, Ifeta Džaferagić, Hata Hajdarević, Subhija Domazet, mostly have superficial knowledge of the event, that people were taken away, that they did or did not see the Accused in front of the school, that they heard that he too took the people away, or the witnesses Ale Mujezinović who does not know of the event, Nedim Osmanović who did not see the Accused on the relevant day but heard that he was in charge. Even the witness Mumin Hodžić, the best men of the Accused with whom he is not on good terms any more, charges the Accused based on the things that he heard or concluded himself about the role of the Accused in the relevant event, as well as Azemina Mujezinović who was in the school with Milan Tomić because of her sons, states that the Accused was guilty, albeit failing to indicate of which actions, but stressing that

others were more guilty. Starting from the previously presented arguments referring to the personality, authority and reputation of the Accused in Biljani, the Panel concludes that such a position of the witnesses, his villagers and neighbors who expected support and protection by the Accused, is expected and comprehensible but not sufficient for the conclusion about the guilt of the Accused in respect of his contribution to the murder of Bosniaks.

There is no reliable evidence that the Accused knew that the civilians, able-bodied Bosniak men, after being taken out from the school and having boarded the buses, would be driven to the Lanište location and killed. In addition to the documentary evidence that has already been mentioned, the Prosecutor's Office also tried to prove the awareness of the Accused about this important fact by the statements of the prosecution witnesses. However, the statements of the examined witnesses were not of such quality to provide the grounds for the conclusion on whether the Accused knew of the plan of execution of the Bosniak civilians, and their testimonies pertaining to that circumstance fall within the sphere of their own speculations and arbitrary conclusions.

The fact that the Accused was not aware that the civilians that he rounded up would be deprived of their lives also follows from the testimony of the witness Petar Despot, who confirmed the statements of the Accused about the manner of surrender of the civilians in the courtyard of the primary school, and testimonies of all other defense witnesses, soldiers under the command of the Accused, as well as the witness Mile Pešević who almost identically described the arrival of the Accused with the civilians, the conduct of the soldiers who took over the civilians from him and then the conduct of the Accused who was surprised by such actions. The testimony of the witnesses Slavko Štrbac and Drago Banjac confirms the defense of the Accused that he made a contact with his superior, Jovan Kavac, the Brigade Commander, and that on that occasion he said that something strange was happening and that he needed further instructions. It stems from the testimony of the witness Dragan Vukić that the Accused requested a bicycle from him, which in the end he personally took, went to the house of Boško Kuridža, where he stayed for some time with some of his soldiers, and after that nobody had seen him again and it stems from the testimony of the witness Šefika Domazet that the same day she saw the Accused on a bicycle passing in the direction of his house in Donje Samardžije.

This Panel too accepts that the Accused spent some time, first in the schoolyard, under the linden tree, then on the road and in the house of Boško Kuridža, which is located near the school, and that he was an eyewitness to the unfortunate events even at the time when they started boarding the men into the buses as stated by the witness Azemina Mujezinović ("I saw him standing near the buses while they were forcing the men in") and that shooting could be heard, so it is possible that the execution had already started; however, it is not important just how long the Accused stayed in front of the school and which events he might have attended, since the Panel, based on the results of the adduced evidence, did not find it proven that the Accused had control over the events. Although the injured persons and members of their families believed that the Accused was a very important person, who was in a position to change something, in the case concerned that eventually proved to be incorrect.

Besides, there is no direct evidence that there was such a plan at the time when the meeting in the Lovac restaurant was held, when the company commanders were given their tasks,

who was the creator of that plan, and in particular that the Accused was informed about such plan.

It is true however, the Accused did know of some similar events when people were apprehended and when the apprehended persons were killed and for that reason exactly, in order to prevent such consequences, but only as possible incidents, the Accused issued strict orders to soldiers to avoid the incidents, which was achieved.

With regard to the collection of the dead bodies of those murdered, later in the afternoon or as stated by some in the evening hours, on 10 July 1992, the Court could not establish beyond any reasonable doubt that the Accused participated in those actions. It was dark, the witnesses speak differently about these circumstances both in respect of time and visibility, those who claim that they saw and recognized the Accused describe in various ways where he was standing, some of them claim that the Accused had a hat, however there are no indicia that he, at the relevant time, did wear a hat, except that the witness Subhija Domazet said that she had seen him with a hat before 10 July 1992. However, since the testimony of this witness cannot be supported by the testimonies of the other prosecution and defense witnesses, the Court does not consider it credible. The witness Ismet Zukanović, who stated that he recognized the Accused, first claimed that he was watching the event from the cornfield and then that he did it from his house; as stated by some of them, the Accused was standing on the foot-board of the truck and according to others he was inside the excavator (which, after all, is a working machine requiring some skills to drive) while the witness Dževad Džaferagić, who also saw the excavator collecting the dead bodies, states that he did not recognize anybody on the excavator. Therefore, the testimonies of the witnesses by which they charged the Accused with having committed these actions are not fully convincing and accurate for the Panel to ground its decision on such evidence.

As stated by the Accused, which was confirmed by the testimonies of the witnesses Šefika Domazet and defense witness, it follows that the Accused left the crime scene rather early, which does not mean that he could not have returned. However, the statement of the Accused is quite logical that it is unacceptable that if he did not participate in the executions that he would come to collect the dead bodies is quite logical. At the time concerned the Accused was close to 60, a First Class Captain and a Company Commander, so given those circumstances his arguments are logical that he would not be doing any such work.

Starting from the aforementioned, and from the *in dubio pro reo* rule, that based on the evaluation of evidence the court may consider a fact established if at the main trial the court is satisfied that the fact exists and once it has no doubts in that respect; however, all facts to the detriment of the accused have to be established with certainty, that is, proved, and if this is not achieved then it is considered that they do not exist. All the facts in favor of the accused shall be considered existent even if established with likelihood (meaning, not with certainty). This was the rule that the Panel was guided by when deciding on the aforementioned charges against Marko Samardžija, which the Panel did not find the Accused guilty of.

Based on the foregoing, the Appellate Panel finds that by the acts described in the operative part of this Verdict, the Accused Marko Samardžija committed the criminal offense of Crimes against Humanity by imprisonment or other severe deprivation of

physical liberty referred to in Article 172(1)e) of the BiH CC in conjunction with Articles 180 and 29 of the same Code, and found him guilty of that offense.

IV Application of the Substantive Law

In the specific situation, the Panel applied the Criminal Code of Bosnia and Herzegovina (entered into force on 1 March 2003) and found that by the aforementioned acts the Accused committed the criminal offense of Crimes against Humanity, in violation of 172(1)e) of the same Law, being of the opinion that the following legal provisions are relevant sources for its application: Principle of Legality (Article 3), Time Constraints Regarding Applicability (Article 4) and Article 4a) - Trial and Punishment for Criminal Offences pursuant to the General Principles of International Law, of the BiH CC.

Principle of Legality, Article 3 of the BiH CC

(1) Criminal offences and criminal sanctions shall be prescribed only by law.

(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Time Constraints Regarding Applicability, Article 4 of the BiH CC

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

The principles of legality and time constraints regarding applicability are also laid down in Article 7 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and Article 15(1) of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR).

Article 7(1) of the ECHR reads: *“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”*

On the other hand, Article 15(1) of the ICCPR prescribes: *“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby“.*

Pursuant to the foregoing, these provisions stipulate the prohibition of the imposition of a heavier penalty, while not determining the consequent mandatory application of the (most) more lenient law (if it was amended on several occasions) to the perpetrator, in relation to the penalty that was applicable at the time of the commission of the criminal offence.

However, Article 7(2) of the ECHR prescribes: *“This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations”*. Likewise, Article 15(2) of the ICCPR prescribes: *“Nothing in this article shall 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 law recognized by the community of nations”*.

The cited provisions, therefore, constitute exceptions to the rule defined in Article 7(1) of the ECHR and Article 15(1) of the ICCPR.

Trial or punishment for criminal offences pursuant to the general principles of international law, Article 4a) of the BiH CC

The same exception is also provided for in Article 4a of the CC BiH which stipulates that Articles 3 and 4 of the Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. By this Article, the provisions of Article 7(2) of the ECHR and Article 15(2) of the ICCPR have been adopted in their entirety, thereby providing for an exceptional derogation from the principle enshrined in Article 4 of the CC BiH as well as derogation from the mandatory application of a more lenient law in the proceedings involving criminal offences pursuant to international law. This is exactly the case in the proceedings at hand, since the acts of the Accused, at the relevant time, constituted a crime in violation of the provisions of international law, as well as a violation of the highest values protected by any existing legal order.

In the context of the foregoing, it should be noted that the State of BiH, as a successor state (legal successor) of the former Yugoslavia, ratified both the ECHR and ICCPR, hence these treaties are binding on the State and the courts of Bosnia and Herzegovina have to apply them. Article 4a is therefore merely a national legal reminder since it is not a requisite for the application of these treaties and it shall apply in the prosecution of any war crimes defined in Chapter XVII of the Criminal Code of BiH, the title of which is “Criminal Offences against Humanity and Values Protected by International Law”.

The customary status of punishability of war crimes and stipulation of individual criminal responsibility for the commission thereof in the period of 1992 have been recognized by the UN Secretary General¹³, hence it is indisputable that in 1992 crimes against humanity were integral part of international customary law.

In view of the foregoing, this criminal offence can, in any case, be included in the “general principles of international law” referred to in Article 4a of the CC BiH. Hence, regardless of

¹³ UN Secretary General Report in relation to paragraph 2 of the Security Council Resolution No. 808 of 3 May 1993, para 34-35 and 47-48

whether it is viewed from the position of customary international law or from the position of “the principles of international law”, it is indisputable that Crimes against Humanity constituted a criminal offence in the relevant time period, or more precisely, that the principle of legality has been satisfied. Finally, in relation to Article 7(1) of the ECHR, the Panel notes that the application of Article 4a is additionally justified by the fact that the imposed sentence is, in any case, more lenient than the death penalty which was in force at the time the criminal offence was committed, thereby satisfying the principle of time constraints regarding the applicability of the criminal code.

Finally, in support of the foregoing, the Court points to the Decision of the Constitutional Court of Bosnia and Herzegovina in the *Abduladhim Maktouf*¹⁴ case, concluding that the issue of the application of the CC BiH in those proceedings before the Court of BiH does not constitute a violation of Article 7(1) of the ECHR.

V Decision on Criminal Sanction

When deciding on the criminal sanction the Panel was guided by the general principles laid down in Article 48 of the BiH CC and also the purpose of punishment referred to in Article 39 of the BiH CC.

Purpose of Punishment (Articles 6 and 39 of the BiH CC)

The purpose of punishment is:

- a) To express the community’s condemnation of a perpetrated criminal offence;
- b) To deter the perpetrator from perpetrating criminal offences in the future;
- c) To deter others from perpetrating criminal offences; and
- d) To raise the awareness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators.

a) The Community’s condemnation of a perpetrated criminal offence

This aspect implies the condemnation of the perpetrated criminal offence by both the citizens of Bosnia and Herzegovina and the general public.

*“...imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions.”*¹⁵

*“Retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes”*¹⁶

¹⁴ Decision rendered on 30 March 2007

¹⁵ ICTY, Blaškić, Appeals Chamber Judgment, 1420

¹⁶ ICTY, Brđanin, Trial Chamber Judgment, 2691

The criminal offense of Crimes against Humanity falls into the group of criminal offenses under Chapter XVII of the BiH CC (Crimes against Humanity and Values Protected by International Law) in relation to which Article 19 clearly reads that criminal prosecution and execution of a sanction are not subject to the statute of limitations. The aforementioned provision shows a clear intention of the legislator that these criminal offenses deserve condemnation and that they should not be left unpunished, that is, that they require efficient sanctioning. Violation of the values protected by national and international law (freedom, life, dignity...) demand adequate criminal sanction in order to satisfy the requirements of legal certainty and finally of fairness.

b) To deter the perpetrator from perpetrating criminal offences in the future (Article 6(1)b) and Article 39(1)b) of the BiH CC)

Duration of the sentence and time served in prison constitute legitimate factors to deter the perpetrator from perpetrating criminal offences in the future in a manner to strengthen his morals. If to the aforementioned one adds the fact that the Accused is an elderly person the risk of repetition of similar criminal offenses is reduced to the minimum. The time that the Accused will serve in prison will give him an opportunity to analyze his actions, consequences of his actions for the victims and to redeem himself.

Besides, the corrective institutions are bound to adopt a system of modern educational measures in order to influence reformation of the convicts with the aim of easier social reintegration when released, and to behave as responsible law abiding citizens.¹⁷

These legal requirements are harmonized with the international obligations of BiH:

“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”¹⁸

Therefore, the requirements of special prevention are twofold, as follows: “individual deterrence and prevention of the perpetrator to repeat the criminal offense (...)” and “training of the perpetrator to live without committing criminal offenses (rehabilitation, re-socialization)”¹⁹

The Appellate Panel deems that the type and length of the punishment will influence the Accused to deter him from perpetrating criminal offences in the future, that is, that the imposed sentence of imprisonment will fully meet the requirements of special prevention.

c) To Deter Others from Perpetrating Criminal Offences (Article 6(1)a) and Article 39(1)c) of the BiH CC)

“The process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.”²⁰

¹⁷ Law on Execution of Criminal Sanctions, Detention and other Measures, (LECS) Article 105

¹⁸ International Covenant on Civil and Political Rights (ICCPR), Article 10 (3)

¹⁹ Bojanić, M. Mrčela, Purpose of Punishment in the Context of the Sixth Law on Amendments to the Criminal Code, Croatian Chronicle for Criminal Law and Practice (vol. 13) number 2/2206, page 436

²⁰ ICTY, Brđanin, Trial Chamber Judgment, para 2696

The crimes committed during the widespread or systematic attack are directed against the civilian population, which is the targeted group of suffering regardless of the concrete criminal actions. The adequate sentencing of the perpetrator of the criminal offense of Crimes against Humanity sends a clear message to all future participants in such hostilities that they will not be left unpunished and that they are not above the law and justice. Compliance with law and generally accepted rules and codes of conduct is the obligation of every individual not only in the peacetime but also during hostilities. Considering the foregoing, and within the context of this case, the Appellate Panel finds that the sentence of imprisonment imposed on the Accused Marko Samardžija will send a clear signal on the unlawfulness and punishability of his criminal actions to all possible future perpetrators of similar events, that it will strengthen their morale and prevent them from participation in any activities which would constitute the elements of criminal offense.

Therefore, the Appellate Panel is of the opinion that in the specific case both requirements of special prevention have been met and as follows: the *negative aspect* which is “*detering the potential perpetrators of the criminal offenses*” while the content of the *positive aspect* of general prevention consists of “*maintaining and strengthening of the trust of citizens in the functioning of the legal order, permanent proving of the integrity of law (...) thus raising awareness and citizens’ commitment to law.*”

d) To raise the awareness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators

Although every conduct identified by the legislator as a criminal offense includes a certain level of danger, it is also necessary to evaluate the specific conduct of the Accused Marko Samardžija within the context of the danger of the criminal offense both from the aspect of the perpetrator himself and the aspect of the community’s judgment of the established actions of the Accused.

Based on the analyzed criminal actions of the Accused it is found that their gravity is indisputable and the consequences themselves have far-reaching effects. It is found that the Accused, as the perpetrator, unlawfully deprived of liberty around 50 able-bodied Bosniak men. However, the sentence imposed on the Accused should in no way be seen as a retaliation of the society for the committed criminal offense but as having its own purpose. Its purpose is achieving the legitimate goal, which is to serve justice.

Starting from the aforementioned and that “*the process of individualization of punishment should not be seen as a mechanical process of the application of the legal standard to the specific defendant and in such process of individualization of punishment a judge, aside from the obligation to take into consideration the legal frameworks for pronouncement of punishment and general rules on the selection of type and duration of punishment, is also bound to adequately evaluate all these circumstances and then to pronounce to a perpetrator the adequate criminal sanction*”²¹, applying the above mentioned provisions,

²¹ www-vsrbh.hr; General Rule on Selection of Type and Duration of Punishment, Damir Kos, justice of the Supreme Court of the Republic of Croatia

the Court has sentenced the Accused Marko Samardžija to imprisonment for a term of seven (7) years.

With regard to the **aggravating circumstances** for the Accused, the Panel found, in the first place, the degree of criminal responsibility, the motives for the commission of the criminal offense given that all the victims were Bosniaks, then the massive scale of the consequences of the criminal actions of the Accused. It is true however that the Court did not find extreme brutality and persistence in the commission of the criminal actions, quite the contrary, the criminal offense was committed far more considerately than could have been expected, given the context of the overall events. However, the Accused committed the criminal actions as a military officer who is expected to demonstrate a high level of awareness and consideration in perception of the overall events and, therefore, it is indisputable that the Accused was fully aware of the unlawfulness of the actions undertaken. The Accused should have been a defender of law and order. On the other hand, the witnesses and victims knew the Accused as a teacher. The professional ethics itself required a more conscientious conduct of the Accused in respect to the time and geographical context that he was active in, even more so because the criminal offense was committed in a small, rural community which had a high respect for the teacher's profession. The villagers also expected him to protect them, but not only that he failed to protect them but the Accused actually carried out their capturing. Consequently, the witnesses, in addition to all the sufferings, felt betrayed and deceived.

With regard to the **extenuating circumstances** for the Accused the Panel found that he is a family man, with no prior convictions, his overall conduct following the commission of the criminal offense - voluntary reporting to the prosecution authorities, public addresses right after the perpetration of the crime, when he appealed that the actual perpetrators of the murder be identified, then the way in which he executed the order of the command, as well as the fact that he did not have either *de iure* or *de facto* authority to prevent the crime, the age and health of the Accused.

The Court evaluated all the foregoing extenuating circumstances in their entirety as particularly mitigating circumstances justifying the mitigation of the sentence under the special legal minimum, thus the imprisonment for a term of 7 years, in the case at hand is deemed adequate to achieve the purpose of punishment referred to in Article 39 of the BiH CC.

In addition to the aforementioned, the Panel is of the opinion that the pronounced sentence of imprisonment reflects the gravity and seriousness of the crime and provides for an adequate punishment of the perpetrator and that it will achieve the ultimate goal - to serve justice as a universal principle.

Pursuant to Article 56 of the BiH CC, the time the Accused spent in custody from 18 March 2005 (there is an error made in the first-instance Verdict as to the time the Accused spent in custody to be credited towards the prison sentence - it is indicated there that the custody commenced on 21 March 2005) until 1 October 2007.

Pursuant to Article 188(4) of the BiH CPC, the Court has relieved the Accused of the duty to reimburse the costs of the criminal proceedings given that he is a pensioner, with no additional income and that the payment of the costs of the criminal proceedings would threaten his and the subsistence of his family.

MINUTES-TAKER

Neira Kožo

PRESIDING JUDGE

Azra Miletić

REMEDY: No appeal from this Verdict shall be allowed.