SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KR-07/478
Sarajevo, 3 July 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting as the Panel composed of Judge Šaban Maksumić as the Presiding Judge, and Judges Snezhana Botusharova-Doicheva and Ljubomir Kitić as the Panel members, with the participation of the Legal Officer Lejla Konjić as the record taker, in the criminal case against the accused Momir Savić, for the criminal offence of Crimes against Humanity in violation of Article 172(1)h) in conjunction with items a), d), e), f), g), i) and k) of the Criminal Code of Bosnia and Herzegovina (the BiH CC), upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-205/06 dated 4 March 2008, following the public hearing that was partly closed for public, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Adnan Gulamović, the accused Momir Savić and the Defense Counsels for the accused, Attorneys Dragan Međović and Milan Romanić, rendered and on 3 July 2009 publicly announced the following:

V E R D I C T

The accused: MOMIR SAVIĆ, son of Milorad and Vitorka, nee Tešević, born on 21 January 1952 in the settlement of Drinsko, the municipality of Višegrad, JMBG 2101952500145, Serb, citizen of BiH, brick-layer by occupation, married, father of one child, with residence in Višegrad, Karađorđeva Street number 91

I

IS GUILTY

Because:

During a widespread and systematic attack of the Serb Army, police and Serb paramilitary formations directed against the civilian Bosniac population in the territory of the municipalities of Višegrad and Rudo, knowing of such an attack, firstly as a member of an unidentified paramilitary formation during the activities of the former JNA Užice Corps, and thereupon as the Commander of the 3rd Company of the Višegrad Brigade of the Republika Srpska Army, during the period from April through September 1992, he persecuted the civilian Bosniac population on political, national, ethnical and religious grounds, in the manner that he ordered, committed and in concert with other persons participated in murders, forcible resettlements of the population, confinement, rape and other inhuman acts of similar nature, in as much as:

1. During the period from 17 to 22 April 1992, while Ramiz Gušo, son of Šaban was detained with 23 other Bosniacs in the building of the Secretariat of Internal Affairs in Višegrad, he questioned him in the office located on the floor of the building,

2. while cursing and insulting him, cursing Alija Izetbegović and the SDA party, calling him names such as „Balija“, all accompanied by one Captain Dragan, while on one occasion he punched him twice in his head and due to the force of the blow Ramiz fell on the ground and felt dizziness, while on the second occasion the accused was present when Captain Dragan punched Ramiz Gušo in the head.

3. On 29 April 1992 in the village of Meremišlje, Višegrad municipality, in a group of uniformed, masked and armed Serb soldiers, including Zoran Tešević a.k.a. Leka, he participated in the questioning and beating up of Bosniac civilians Vejsil Hota, Salko Sinanović, Hasan Mutapčić and Ibro Mutapčić, and thereupon in the plundering and burning of the house of Mehmedalija Topalović.

4. Around 23 May 1992, having previously ordered the Bosniac civilian population from the settlement of Drinsko, the Višegrad municipality, to gather at the crossroads near the cemetery in the center of Drinsko, he addressed more than 50 civilians that had gathered there, and told them it was a Serb land and that there was no more joint life of Serbs and Muslims, threatening them with death and, escorted by his soldiers, gave them an ultimatum to leave Drinsko and all their property by noon, which they did leaving in different directions carrying only their personal belongings.

5. Around 23 May 1992, in a group with Dragan Savić and several other uniformed and armed Serb soldiers, in the settlement of Drinsko, the Višegrad municipality, he took out of the houses the Bosniac civilians: Idriz Mušanović son of Aziz, Ramiz Mešanović son of Aziz, Suljo Mustafić son of Nurija, Mehmed Hubić son of Ibro, Salko Gušo son of Sabit, Senad Gušo son of Salko, Asim Gušo son of Taib, Hajrudin Gušo son of Taib, Hajrudin Topalić son of Mehmed and Ramiz Mešanović son of Ramo, they questioned and beat them first in the house of Aziz Mešanović, and thereupon took them to the nearby hill called „Kik“ to the woods called „Pušin Do“, where they executed them with fire arms.

6. On 25 May 1992, in the village of Donja Strmica, the Rudo municipality, after Dragan Savić and other Serb soldiers had abused and beat the previously arrested Bosniac civilians, namely Šaban Ćato, Šećo Ćato and Suvad Kurtić, Momir Savić, uniformed and armed, beat Suvad Kurtić son of Smail with a police baton, due to which he fell on the ground, and when at one moment Suvad stood up and started running away, he said to him: „Damn your Balija mother, you think you can escape from a Chetnik“, shot him from a fire arm and killed Suvad Kurtić having inflicted injuries on his back and head.

7. During the period from 7 June 1992 through late September 1992, he frequently visited the house of T.B. in Višegrad, wearing his uniform and arms, where he raped her and humiliated her being dirty and untidy and telling her that „she had enough of giving birth to Muslim children and that she should now give birth to Serb children“, he beat her and threatened her not to tell anything to anybody, and on one occasion

he took the money she had, which all together caused a constant fear within her due to which she still feels health and mental problems.

8. On 13 June 1992, he issued commands to his unit members and participated together with them in the expulsion of Bosniac civilians from the settlement of Dušće, the Višegrad municipality in the direction of Višegrad, and after reaching the „Employment Bureau“ building, singled out from the line were Nezir Delija, Ahmet Delija, Osman Demir, Midhat Nuhanović and Uzeir Nuhanović, who were taken by the same road back towards Dušće, where they were killed by fire arms in a stable owned by Ajka Balić from Dušće, and thereafter Nezir Delija and Osman were burnt, while Ahmet Delija, Midhat Nuhanović and Uzeir Nuhanović have been unaccounted for ever since.

9. On 30 June 1992, on the „Limski bridge“, which is located on the road to the settlement of Međeđa, the Višegrad municipality, he commanded a larger group of armed Serb soldiers who arrested around 30 Bosniac civilians, mostly women and children, from where they transported them by trucks first to the Drinsko settlement for questioning and thereafter further to the premises of the Primary School „Hasan Veletovac“ in Višegrad, where more than 50 Bosniac civilians had already been detained and where they were unlawfully confined for four days in inhumane conditions, after which they were released.

Thus,

By the actions described under Sections 1 through 8 in the reasoning of this Verdict, within a widespread and systematic attack directed against the civilian Bosniac population, knowing of such attack, and having acted alone and in concert with other persons, the accused persecuted the Bosniac civilian population on political, national, ethnic and religious grounds, in conjunction with murders, forcible resettlement, rape, detention and other inhumane acts committed intentionally in order to inflict serious physical and mental injuries,

Whereby he committed

the criminal offence of Crimes against Humanity in violation of Article 172(1)h) in conjunction with the offences set out in:

- Item k) with respect to Section 1 of the Reasoning of the Verdict
- Item k) with respect to Section 2 of the Reasoning of the Verdict
- Item d) with respect to Section 3 of the Reasoning of the Verdict
- Item a) with respect to Section 4 of the Reasoning of the Verdict
- Item a) with respect to Section 5 of the Reasoning of the Verdict
- Item g) with respect to Section 6 of the Reasoning of the Verdict
- Items d) and e) with respect to Section 7 of the Reasoning of the Verdict
- Item e) with respect to Section 8 of the Reasoning of the Verdict

specifically in connection with Article 29 of the CC BiH, with respect to Sections 2 and 4 of the Reasoning of the Verdict, all together in conjunction with Article 180(1) of the CC BiH.

Thus this Court Panel, pursuant to Article 285 of the CPC of BiH, applying Articles 39, 42 and 48 of the CPC BiH

SENTENCES

him to 18 (eighteen) years of imprisonment

II

Pursuant to Article 56 of the CC of BiH, the time the accused spent in custody pursuant to the Court Decision, commencing on 14 December 2007 until 17 December 2008, shall be credited towards the imposed sentence.

III

Pursuant to Article 188(4) of the CPC of BiH, the accused is fully relieved of the duty to reimburse the costs of criminal proceedings.

IV

Pursuant to Article 198(2) of the CPC of BiH, the injured parties are hereby referred to take civil action with their claims under property law.

R e a s o n i n g

By the Indictment of the Prosecutor's Office of BiH number KT-RZ-205/06 dated 4 March 2008, Momir Savić was charged with the criminal offence of Crimes against Humanity in violation of Article 172(1)h) in conjunction with items a), d), e), f), g), i) and k) of the CC of BiH in conjunction with Article 29 and Article 180 (1) and (2) of the CC of BiH.

On 19 March 2008, the accused pleaded not guilty under all Counts of the Indictment.

The main trail commenced on 12 August 2008 by the reading of the Indictment, which is when the Prosecution presented their opening argument. The Defense for the accused presented their opening argument on the same day. A large number of witnesses were heard and numerous pieces of physical evidence was tendered during the main trial.

During the evidentiary proceedings the Prosecution tendered the following physical evidence, under the following ordinal numbers: (T-1) Witness Examination Record for Bahrudin Gušo, of 25 January 2008, number KT-RZ-205/06; (T-2) Witness Examination Record for Ramiz Gušo, of 26 December 2007, number KT-RZ-205/06; (T-3) Witness

Examination Record for Nizija Gušo, of 12 June 2007, number KT-RZ-205/06; (T-4) Witness Examination Record for Husein Mujakić of 27 December 2007, number KT-RZ-205/06; (T-5) Witness Examination Record for Hasan Hubić, of 6 August 2007, number KT-RZ-205/06; (T-6) Witness Examination Record for Almasa Hadžić, of 14 June 2007, number KT-RZ-205/06; (T-7) Witness Examination Record for Mirsad Hubić, of 17 May 2007, number KT-RZ-205/06; (T-8) Witness Examination Record for Medo Tabaković, of 2 August 2007, number KT-RZ-205/06; (T-9) Witness Examination Record for Mehmedalija Topalović, of 7 January 2008, number KT-RZ-205/06; (T-10) Witness Examination Record for Šuhra Gušo, of 3 January 2008, number KT-RZ-205/06; (T-11) Witness Examination Record for Latifa Hodžić, of 22 January 2008, number KT-RZ-205/06; (T-12) Witness Examination Record for Rasim Ćato, of 3 January 2008, number KT-RZ-205/06; (T-13) Witness Examination Record for Fahro Ćato of 03.01.2008, number KT-RZ-205/06; (T-14) Witness Examination Record for Šaban Ćato, of 10 May 2007, number KT-RZ-205/06; (T-15) Excerpt from the Register of deaths for Suvad Kurtić, of 9 March 1998; (T-16) Witness Examination Record for Hajrija Kos, of 25 January 2008, number KT-RZ-205/06; (T-17) Witness Examination Record for Sabina Maslo, of 31 January 2008, number KT-RZ-205/06; (T-18) Witness Examination Record for Omer Delija, of 31 January 2008, number KT-RZ-205/06; (T-19) Witness Examination Record for Suada Logavija, of 30 January 2008, number KT-RZ-205/06; (T-20) Witness Examination Record for Tiro Božica, of 24 December 2007, number KT-RZ-205/06; (T-21) Witness Examination Record for Redžep Salić, of 8 January 2008, number KT-RZ-205/06; (T-22) Witness Examination Record for Fatima Mujakić, of 12 February 2008, number KT-RZ-205/06; (T-23) Witness Examination Record for Fadil Salić, of 4 January 2008, number KT-RZ-205/06; (T-24) Witness Examination Record for Medina Gušo, of 20 June 2007, number KT-RZ-205/06; (T-25) Witness Examination Record for Ramiza Mustafić, of 29 January 2008, number KT-RZ-205/06; (T-26) Witness Examination Record for Hasiba Mešanović, of 22 May 2007, number KT-RZ-205/06; (T-27) Witness Examination Record for Kada Mešanović, of 16 May 2007, number KT-RZ-205/06; (T-28) Witness Examination Record for Hafiza Gušo, of 25 June 2007, number KT-RZ-205/06; (T-29) Witness Examination Record for Alija Mešanović, of 8 January 2008, number KT-RZ-205/06; (T-30) Witness Examination Record for Momir Savić, of 8 August 2007, number KT-RZ-205/06; (T-31) Witness Examination Record for Omer Ćato, of 15 May 2007, number KT-RZ-205/06; (T-32) Witness Examination Record for Čedomir Tešević, of 3 January 2008, number KT-RZ-205/06; (T-32-A) Excerpt from the Register of Deaths for Čedomir Tešević, of 25 August 2008; (T-33) Witness Examination Record for Vejsil Hota, of 15 May 2007, number KT-RZ-205/06; (T-33-A) Excerpt from the Register of Deaths for Vejsil Hota, of 12 June 2007; (T-34) Witness Examination Record for Fehida Hubić, of 29 December 2004, number 14-04/2-1/04; (T34-A) Excerpt from the Register of Deaths for Fehid Hubić, of 7 February 2007; (T35) Document of the Cantonal Prosecutor's Office Goražde, of 27 December 2007; (T36) Order on Exhumation, of 24 April 2006; (T37) Order by the Cantonal Court Goražde, of 25 April 2006; (T-38) Exhumation Record by the Federation Commission for Missing Persons, of 28 April 2006; (T39) Record of On-site investigation, of 3 May 2006; (T40) Document of the Cantonal prosecutor's Office Goražde, of 11 February 2008; (T-41) Forensic Expert Evaluation Report for Hajrudin Topalić, of 8 February 2008; (T-42) Forensic Expert Evaluation Report for Asim Gušo, of 6 February 2008; (T-43) Forensic

Expert Evaluation Report for Hajrudin Gušo, of 6 February 2008; (T-44) Forensic Expert Evaluation Report for Salko Gušo, of 6 February 2008; (T-45) Forensic Expert Evaluation Report for Senad Gušo, of 6 February 2008; (T-46) Forensic Expert Evaluation Report for Mehmed Hubić, of 6 February 2008; (T-47) Forensic Expert Evaluation Report for Ramiz Mešanović son of Idriz, of 6 February 2008; (T-48) Forensic Expert Evaluation Report for Ramiz Mešanović, of 6 February 2008; (T-49) Forensic Expert Evaluation Report for Ramiz Mešanović son of Ramo, of 6 February 2008; (T-50) Forensic Expert Evaluation Report for Suljo Mustafić, of 6 February 2008; (T-51) Identification Record for Idriz Mešanović, of 8 February 2008; (T-52) Identification Record for Suljo Mustafić, of 8 February 2008; (T-53) Identification Record for Hajrudin Gušo, of 8 February 2008; (T-54) Identification Record for Salko Gušo, of 8 February 2008; (T-55) Identification Record for Ramiz Mešanović, of 8 February 2008; (T-56) Identification Record for Asim Gušo, of 8 February 2008; (T-57) Identification Record for Senad Gušo, of 8 February 2008; (T-58) Identification Record for Mehmed Hubić, of 8 February 2008; (T-59) Identification Record for Ramiz Mešanović, of 8 February 2008; (T-60) Identification Record for Idriz Mešanović, of 8 February 2008; (T-61) Death Certificate for Ramiz Mešanović, of 11 February 2008; (T-62) Death Certificate for Salko Gušo, of 11 February 2008; (T-63) Death Certificate for Idriz Mešanović, of 11 February 2008; (T-64) Death Certificate for Suljo Mustafić, of 11 February 2008; (T-65) Death Certificate for Hajrudin Topalić, of 11 February 2008; (T-66) Death Certificate for Ramiz Mešanović, of 11 February 2008; (T-67) Death Certificate for Asim Gušo, of 11 February 2008; (T-68) Death Certificate for Senad Gušo, of 11 February 2008; (T-69) Death Certificate for Mehmed Hubić, of 11 February 2008; (T-70) Death Certificate for Hajrudin Gušo, of 11 February 2008.godine; (T-71) Crime Scene Sketch, Goražde Ministry of Interior, of 26 April 2006; (T-72) Photo-documentation, MoI Goražde for exhumation of Drina, Pušin, of 26 April 2006; (T-73) Document of the Cantonal Prosecutor's Office Goražde, of 27 December 2007 regarding exhumation in the area of Dušće, the stables owned by Aska Balić; (T-74) Order by the Cantonal prosecutor's office Goražde, of 17 February 2006; (T-75) Order by the Cantonal Prosecutor's Office Goražde to conduct exhumation, of 27 October 2006; (T-76) Record of the Federation Commission for Exhumation on the location of Stables, Dušće, of 1 November 2005; (T-77) Crime Scene Investigation Report by the Cantonal Court Goražde, of 23 November 2005; (T-78) Forensic Expert Evaluation Report, number of case 723, of 22 February 2006; (T-79) Forensic Expert Evaluation Report, number of case 723 B-01/LMT, of 22 February 2006; (T-80) Forensic Expert Evaluation Report, number of case 723 -01/LU, of 22 February 2006; (T-81) Forensic Expert Evaluation Report, number of case 723-02/RR, of 22 February 2006; (T-82) Forensic Expert Evaluation Report, number of case 723-I, of 22 February 2006; (T-83) Forensic Expert Evaluation report, number of case 723-C, of 22 February 2006; (T-84) Forensic Expert Evaluation Report, number of case 723-II, of 22 February 2006; (T-85) Forensic Expert Evaluation Report, number of case 723-A, of 22 February 2006; (T-86) Forensic Expert Evaluation Report, number of case 722, of 22 February 2006; (T-87) Forensic Expert Evaluation Report, number of case 720/721, of 22 February 2006; (T-88) DNA reports by ICMP, number of case 720/721 in the name of Nezir Delija, of 12 September 2007; (T-89) DNA reports by ICMP, number of case NN 720/721-1-04 in the name of Osman Demir, of 12 September 2007; (T-90) Photo-documentation of MoI Goražde for exhumation of Dušće, of 31 October 2005; (T-91) Excerpt from the ICRC

Missing Persons Register for Midhat Nuhanović, of 4 February 2008; (T-92) Excerpt from the ICRC Missing Persons Register for Ahmet Delija, of 4 February 2008; (T-93) Document of the Višegrad Municipality, Office of the Head, of 28 December 2007; (T-94) Certified copy of personal registration file, of 28 December 2007; (T-95) Certified copy of unit file, of 28 October 2007; (T-96) Certified copy of the Decision by the Defense Ministry, Zvornik, of 30 November 2004; (T-97) Certified copy of the Decision of the Military Post Office, of 27 September 1995; (T-98) ICTY, Report of the Command of the 2nd Podrinje Light Infantry Brigade, addressed to Staff Sergeant Momir Savić, of 24 December 1992; (T-99) Court of BiH Official Activity Report, prepared by SIPA, of 17 December 2007; (T-100)Record of the search of the apartment, of 14 December 2007; (T-101) Certificate of seizure of objects, SIPA, of 14 December 2007; (T-102) Record of the search of the apartment, other premises and movable objects, SIPA, of 14 December 2007; (T-103) Certificate of seizure of objects, SIPA, of 14 December 2007; (T-104) Photo-documentation of SIPA, of 15 January 2007; (T-105) Photo-documentation of SIPA, of 14 December 2007; (T-106) Report on punishment by the Public Security Service Istočno Sarajevo, Police Station Višegrad, of 11 January 2008; (T-107) Arrest Report, SIPA, of 14 December 2007; (T-108) Record of the arrested person surrender to a responsible prosecutor, of 14 December 2007; (T-109) CIPS excerpt with a photo; (T-110) Two photos found during the search, of 14 December 2007; (T-111) Document of the Federation Commission for Missing Persons, of 3 March 2008, (T 112) Suspect Questioning Record, number KT-RZ 205/06, of 14 December 2007, Prosecutor's Office of BiH; (T 113) Witness Examination record for witness „A“, number KT-RZ 205/06, of 27 December 2007, Prosecutor's Office of BiH; (T 114) Witness Examination Record for witness „B“, number KT-RZ 205/06, of 12 February 2008, Prosecutor's Office of BiH.

The Panel heard the following witnesses proposed by the Defense: Miloje Inđić, Momir Savić son of Milan, Miladin Savić, Milenko Jevđić, Amir Tabaković, Nada Miličević, Stanimir Kirdžić, as well as the witnesses with the pseudonyms „OA“, „OB“ and „OC“. In addition, the Defense for the accused presented the physical evidence: (O-1) Testimony by witness Nizija Gušo, number ST 22-040007/02, of 30 January 2002, Federal Criminal Administration Meckenheim; (O-2) Information submitted by the civil engineering company „Partizanski put“, number 282/1, of 23 January 2009; (O-3) Notice, delivery of information, number 11-04/1-115/09, of 3 February 2009, MoI of RS, Public Security Service Istočno Sarajevo; (O-4) Order of the Commander of the VRS General Staff, number 30/18-25, of 3 July 1992.

Prosecution Closing Argument

In its closing argument, the Prosecution commented on the evidence that proves the existence of the essential elements of the criminal offence of Crimes against Humanity. The Prosecution argues that it is proved that the accused, having acted with the discriminatory intent, committed the criminal offences described in the factual description of the Indictment. In the closing argument, the Prosecution outlined that they believed that the Panel, while meting out the length of punishment, should consider that no mitigating circumstances exist on the part of the accused, which might result in a reduced punishment

or a more lenient punishment than the one prescribed by law. On the contrary, the Prosecution holds that there is a series of aggravating circumstances on the part of the accused, specifically: persistency, brutality and callousness in the perpetration of the crime, as well as the fact that the consequences of his acts are still felt by the victims and their family members. The Prosecution pointed out that during the trial the accused did not express any remorse or compassion for the victims. Finally, the Prosecution moved the Panel to find the accused guilty under all the Counts of the Indictment, and sentence him to a long term imprisonment.

Defense Closing Argument

In its closing argument, the Defense commented individually on every Count of the Indictment, specifying that they are arbitrary, general and incomplete.

Attorney Milan Romanić presented the general context of the period of time and events with respect to the offences the accused is charged with. Furthermore, the Defense Counsel analyzed the legal elements of the criminal offence of Crimes against Humanity in violation of Article 172 of the CC of BiH, the legal institute of „*nullum crimen sine lege, nulla poena, sine lege*“, and the retroactive application of the CC of BiH from 2003. Within that context, the Defense Counsel commented on the principle of legality, the command responsibility of the accused, the standard of evaluation „beyond a reasonable doubt“ and the principle *in dubio pro reo*, as well as the jurisprudence of The Hague Tribunal (examples of acquittals), pointing out that the prosecution did not prove that the accused Savić was connected with the incriminated offences referred to in the Indictment.

Attorney Dragan Međović commented on the testimonies of the Prosecution witnesses in this criminal case, stating that they were inaccurate and illogical. Regarding Count 1 of the Indictment, Attorney Međović argued that the testimonies of Ramiz Gušo and Nizija Gušo were inaccurate and false and that they made up everything and falsely accused Momir Savić. Regarding Count 2 of the Indictment, Attorney Međović argued that the testimony of witness Topalović was unconvincing and that it could not have any probative value. Also, regarding the prosecution witnesses who testified with respect to Count 3 of the Indictment, the Defense believed that the witness testimonies did not confirm the factual allegations of Count 3 of the Indictment. The Defense Counsel for the accused went on to say that the Prosecution witness testimonies regarding Count 4 were completely inaccurate, unconvincing and contradictory, and that, as such, they did not indicate that the accused took part in the incriminated incident in the hamlet of Željača (the Kik hill). Regarding the killing of Suvad Kurtić as described in Count 5 of the Indictment, the Defense claimed that the Prosecution witness testimonies (who are not familiar with the accused Savić at all) as well as the Defense witness testimonies, with certainty pointed to a conclusion that the accused did not participate in the perpetration of the incriminated offences. In his closing argument, Defense Counsel Međović pointed out that the injured party „T.B.“ and Defense witness Nada Miličević were heard with regard to Count 6 of the Indictment. Defense Counsel Međović argued that witness „T.B.“ presented a lot of illogical things in her testimony, and that based on the testimony of the Defense witness Nada Miličević it could

be found that the accused was falsely reported for rape and maltreatment. Concerning the Prosecution witnesses who testified with regard to Count 7 of the Indictment, the Defense argued that the Prosecution did not prove the allegations of the Indictment, since none of the examined witnesses was familiar with the accused Savić, and their testimonies by themselves point to a conclusion that the accused did not participate in the events that happened in Dušće on 13 June 1992. The Defense further mentioned that the Prosecution witnesses who testified with regard to Count 8 of the Indictment confirmed the thesis of the Defense that the accused did not participate in capturing the civilians on the „Limski bridge", rather the contrary, that those civilians were given food and transferred from the region of combat operations.

1. Procedural decisions of the Court

1. 1. Decisions on the protective measures for the witnesses and decisions on exclusion of the public from the sessions

Pursuant to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses (the Law on Protection of Witnesses) the Preliminary Procedure Judge granted protective measures to a Prosecution witness and assigned him the pseudonym „T.B."[1]. During the evidentiary proceedings, the prosecution requested that protective measures be granted to two more witnesses for the reason that those witnesses had been granted certain protective measures before the International Criminal Tribunal for the former Yugoslavia (ICTY). Pursuant to Article 75(F) of the Rules of Procedure, protective measures ordered by the ICTY „shall continue to have effect *mutatis mutandis* in any other proceedings before the ICTY or any other jurisdiction...".

The witnesses that had been granted protective measures before the ICTY were also examined in this case before this Court under the same protective measures. Specifically, the witnesses were, first of all, assigned pseudonyms „A" and „B", alongside with the additional measures for them consisting of the electronic distortion of voice and image of both witnesses, and the public was excluded when the witness „A" testified (pursuant to Article 235 of the CPC of BiH). Witness „B" testified with electronically distorted voice and image, while the public were not excluded pursuant to Article 235 of the CPC of BiH. Both witnesses testified in the courtroom, and the Court and the parties to the proceedings (including Defense Counsel for the accused) are familiar with their images and voices.

Pursuant to the decisions of the Court as mentioned above, the genuine witnesses' names, as well as other personal details, were proclaimed confidential for a period not longer than 30 years following the date when the decision became final. In addition, and during the testimony of witness „T.B.", upon the explained motion of the prosecution, and having become familiar with the opinion of Defense, the Panel excluded the public pursuant to Article 235 of the CPC of BiH, therefore the court session was completely closed for the public during the entire examination of this witness. The measure of exclusion of the public

[1] Decision of the Court of BiH number X-KRN-07/478, of 25 January 2008

(for witnesses „T.B.“ and „A“) was granted in order to protect the interests of these witnesses and to protect their private lives. While deciding to exclude the public, the Panel clearly took into account that such a measure was an exception to the rules of public nature of the proceedings. However, regarding the particular situation, the Panel weighed between the right of the witness to protect his private life and the right of the public to be correctly and timely informed, and found that the same desired objective could be realized by the exclusion of the public as long as harmful consequences for the witness were prevented. On the other hand, public information would be provided in a different, more acceptable manner.

Considering that the identity of these witnesses was protected (even 30 years following the date the decision becomes final), throughout the proceedings the Panel was mindful not to disclose any data which might lead to disclosure of their identities. In the Verdict the witnesses will be referred to by the pseudonyms assigned to them previously.

The Panel notes that the accused and his Defense Counsels, regarding each of the above mentioned circumstances, were informed about the identities of the protected witnesses and their entire testimonies.

During the Defense evidentiary proceedings, pursuant to the motion of the Defense Counsel for the accused, Attorney Dragan Međović, and upon the approval of the Prosecution, the Panel granted protective measures to the Defense witnesses under the pseudonyms “OA”, “OB” and “OC”.

At the hearing held on 26 January 2009, the Defense Counsel proposed to exclude the public during the hearing of witness „OA“. As a reason for that he said that the witness was concerned about her security, and that she had one or two telephone calls, during which the person who called her was silent. After the Prosecution had expressed its disagreement claiming that no particular threat existed, the Panel examined the witness alone, who demanded that her first name and surname should be kept confidential in the public, and that the public should hear only the contents of her testimony. The Prosecution agreed with the above mentioned, so that beside pseudonym „OA“, the Panel granted additional protective measures reflected in the distorted image of the witness, thus only her voice and the contents of her testimony were available to the public.

After that, at the hearing held on 4 March 2009, the Defense Counsel for the accused, Attorney Dragan Međović, proposed that protective measures also be granted to witness „OB“. The Defense Counsel noted that this witness had received a call that could be objectively understood as a threat, but the Panel would not go into describing further particular circumstances of that call for the purpose of the best possible protection of the witness. The Defense Counsel proposed that a pseudonym be granted to the witness, protecting his voice and image. The Prosecution opposed the motion. Having considered the motion of the Defense, the Panel rendered the decision to assign pseudonym „OB“ to the witness. The Panel found that the witness was under threat pursuant to Article 3 of the Law on Protection of Witnesses, and that these measures were justified. Namely, it is

indisputable that in this particular case we are dealing with the witness who believes that there is „a reasonable ground for fear“ that his personal security or the safety of his family might be threatened if he testified in this case. Besides, taking into account that this was a video link witness examination (without the technical capacity to distort the image or voice of the witness under such circumstances), the Panel decided that witness “OB” would be examined in a closed court session pursuant to Article 235 of the CPC of BiH.

During the hearing held on 24 March 2009, the Defense Counsel for the accused, Attorney Međović, also proposed protective measures for the Defense witness who was scheduled to be examined by video link on 30 March 2009. The Defense Attorney stated that the witness had informed him that he would testify only under protective measures, specifically he wanted to be assigned a pseudonym and that his identity not be disclosed in the public. The Prosecution opposed such a motion arguing that no particular reasons justifying existed the granting of the requested measures to the witness. Before rendering its decision, the Panel examined the witness himself (at the hearing held on 30 March 2009). The witness stated that he believed that his testimony, if done in public, might cause problems and inconvenience to him as well as to his family members. In addition, the witness pointed out his and his family frequent visits to their pre-war place of residence, and that he believed that his former fellow-citizens would anathemize him if they found out about his testifying in this case.

The Panel considered the presented arguments, and decided to grant the Defense motion, assigning pseudonym “OC” to the witness and excluding the public during his testimony pursuant to Article 235 of the CPC of BiH. Specifically, as it was a video link examination, no other option was available or rather it was not possible to grant “less restrictive” additional protective measures that would provide full protection of the witness. The Panel rendered this decision having in mind Article 3 of the Law on Protection of Witnesses, which reads: “A witness under threat is a witness whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony, or the witness who believes that there is a reasonable ground for fear that such danger would probably result as a consequence of his testifying.” Considering the above mentioned circumstances as well as the information the Panel received from the witness, which will not be described in detail here (due to obvious reasons involving the witness protection), it is indisputable that in this particular case we are dealing with a witness who believes that there is a reasonable ground for fear that the above described danger (as in the quoted Article) would probably result as a consequence of his testifying.

1. b) Decision on judicial notice of established facts

By the Decision number X-KR-07/478 dated 13 August 2008, the Panel partially granted the Motion of the Prosecutor's Office of BiH, concerning the acceptance of the facts established by ICTY judgments. Pursuant to Article 4 of the Law on the Transfer of Cases from ICTY, the Panel accepted the following facts established by the ICTY Trial Panel in the case *Prosecutor vs. Mitar Vasiljević* (IT-98-32):

1. „The municipality of Višegrad is located in south-eastern Bosnia and Herzegovina, bordered on its eastern side by the Republic of Serbia. Its main town, Višegrad, is located on the eastern bank of the Drina River“ (paragraph 39).
2. „In 1991, 21,000 people lived in the municipality, about 9,000 in the town of Višegrad. Approximately 63% of the population was of Muslim ethnicity, while about 33% was of Serb ethnicity“ (paragraph 39).
3. „In November 1990, multi-party elections were held in this municipality“ (paragraph 40).
4. „Two parties, the primarily Muslim SDA (Party of Democratic Action) and the primarily Serb SDS (Serb Democratic Party) shared the majority of the votes.“ (paragraph 40).
5. „The results closely matched the ethnic composition of the municipality, with 27 of the 50 seats that composed the municipal assembly being allocated to the SDA and 13 to the SDS“ (paragraph 40).
6. „Serb politicians were dissatisfied with the distribution of power, feeling that they were under-represented in positions of authority. Ethnic tensions soon flared up“ (paragraph 40).
7. „From early 1992, Muslim citizens were disarmed or requested to surrender their weapons. In the meantime, Serbs started arming themselves and organized military training.“ (paragraph 41).
8. „Muslims also attempted to organize themselves, although they were much less successful in doing so.“ (paragraph 41).
9. „From 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines“ (paragraph 42).
10. „Soon thereafter, both of the opposing groups raised barricades around Višegrad, which was followed by random acts of violence including shooting and shelling“ (paragraph 42).
11. „In the course of one such incident, mortars were fired at Muslim neighborhoods“. (paragraph 42).
12. „Many civilians fearing for their lives fled from their villages“ (paragraph 42)
13. „In early April 1992, a Muslim citizen of Višegrad, Murat Šabanović, took control of the local dam and threatened to release water“ (paragraph 42).
14. „On 13 April 1992, Šabanović released some of the water, damaging properties downstream“ (paragraph 42).
15. „The following day, the Užice Corps of the Yugoslav National Army (JNA), intervened, took over the dam and entered Višegrad“ (paragraph 42).
16. „Even though many Muslims left Višegrad fearing the arrival of the Užice Corps of the JNA, the actual arrival of the Corps had, at first, a calming effect“ (paragraph 43).
17. „After securing the town, JNA officers and Muslim leaders jointly led a media campaign to encourage people top return to their homes“ (paragraph 43).
18. „Many actually did so in the later part of April 1992“ (paragraph 43).
19. „The JNA also set up negotiations between the two sides to try to defuse ethnic tension“ (paragraph 43).
20. „Some Muslims, however, were concerned by the fact that the Užice Corps was composed exclusively of Serbs.“ (paragraph 43).
21. „Soon thereafter, convoys were organized, emptying many villages of their non-Serb population.“ (paragraph 44).

22. „On one occasion, thousands of non-Serbs from villages on both sides of the Drina River from the area around the town of Višegrad were taken to the football stadium in Višegrad“ (paragraph 44).
23. „There, the people were searched for weapons and were addressed by a JNA commander. He told them that the people living on the left side of the Drina River could return to their villages, which had been cleansed of „reactionary forces“, whereas the people from the right side of the Drina River were not allowed to go back.“ (paragraph 44).
24. „As a consequence, many people living on the right side of the Drina River either stayed in the town of Višegrad, went into hiding or fled“ (paragraph 44).
25. „On 19 May 1992, the JNA withdrew from Višegrad. Paramilitary units stayed behind, and other paramilitaries arrived as soon as the army had left the town. Some local Serbs joined them“ (paragraph 45).
28. „Those non-Serbs who remained in the area of Višegrad, or those who returned to their homes, found themselves trapped – disarmed and at the mercy of paramilitaries which operated with the complicity – or at least with the acquiescence – of the Serb authorities, in particular by the then Serb-only police force“ (paragraph 47).
30. „As early as June 1992, non-Serb civilians were arbitrarily killed.“ (paragraph 49).
32. „On 14 June 1992, more than 60 Muslim civilians of all ages fleeing from Koritnik and Sase were locked up in a Muslim house in Pionirska Street, Višegrad, by local Serb paramilitaries, led by Milan Lukić. The house was then set on fire. Those who tried to escape through one of the windows were shot at and all but six were burned alive“ (paragraph 50).
33. „Many other incidents of arbitrary killings of civilians took place in Višegrad during this period.“ (paragraph 51).
34. „From early April 1992 onwards, non-Serb citizens also began to disappear“ (paragraph 51).
35. „For the next few months, hundreds of non-Serbs, mostly Muslims – men and women, children and elderly people, were killed“ (paragraph 51).
36. „Many of those who were killed were simply thrown into the Drina River, where many bodies were found floating“ (paragraph 52).
37. „Of all the bodies pulled out of the water, only one appeared to be that of a Serb.“ (paragraph 52).
38. „Hundreds of other Muslim civilians of all ages and of both sexes were exhumed from mass graves in and around Višegrad municipality“ (paragraph 52).
39. „The number of disappearances peaked in June and July 1992. Sixty-two percent of those who went missing in the municipality of Višegrad in 1992 disappeared during those two months.“ (paragraph 53).
40. „Most, if not all of those who disappeared were civilians.“ (paragraph 53).
41. „The pattern and intensity of disappearances in Višegrad paralleled that of neighboring municipalities which now form part of Republika Srpska. Disappearances in those various neighboring municipalities occurred at approximately the same time“ (paragraph 53).
43. „Many were deprived of their valuables - by Milan Lukić and his men – amongst others.“ (paragraph 54).
44. „Injured or sick non-Serb civilians were denied access to medical treatment.“ (paragraph 54).

45. „On one occasion, a Muslim woman who was severely burned was denied proper and adequate medical treatment and, in place of a medical prescription, was advised by a local Serb doctor to cross the mountains and the frontline in order to find a hospital on the other side where they would be prepared to treat“ (paragraph 54).
46. „Two Serb witnesses testified that it would not have been safe for them to provide Muslims with medical assistance“ (paragraph 54).
48. „In the process of transfer of these people, identification documents and valuables were often taken away.“ (paragraph 55).
49. „Some of these people were exchanged, whilst others were killed“ (paragraph 55).
50. „In one incident, Muslim men who had been told that they would be exchanged were taken off a bus, lined up and executed“ (paragraph 55).
51. „Muslim homes were looted and often burnt down“ (paragraph 55).
52. „The two mosques located in the town of Višegrad were destroyed“ (paragraph 55).
56. „Such dramatic changes in ethnic composition occurred systematically throughout what is now the Republika Srpska, but proportionally the changes in Višegrad were second only to those which occurred in Srebrenica“ (paragraph 56).

The Panel refused to accept the facts stated in the Motion of the Prosecution under numbers: 26, 27, 29, 31, 42, 53, 54 and 55, taking into account the criteria for the acceptance of a particular fact as established. The facts under numbers 32 and 47 were partially accepted or denied by the Panel to the extent as described below. Those are the following facts:

26. „Vasiljević admitted that he knew that some of those paramilitaries killed or robbed Muslim civilians and that they were committing such crimes only because the victims were of Muslim ethnicity“ (paragraph 45).
27. „A particularly violent and feared group of Serb paramilitaries was led by the Vasiljević's co-accused Milan Lukić. In the course of a few weeks, this group committed many crimes, ranging from looting to murders“ (paragraph 46).
29. Sometime in May 1992, Vasiljević was present when Milan Lukić and his men searched the village of Mušići for weapons. During this search, money and other valuables disappeared from some of the houses that had been searched“ (paragraph 48).
31. „In one such incident, on or about 7 June 1992, Milan Lukić, Vasiljević and two other men took seven Muslim men to the bank of the Drina River where they were shot. Five of them were killed. This incident will be referred to as the Drina River Incident“ (paragraph 49).
32. „This incident will be referred to as the Pionirska Street Incident“ (paragraph 50).
42. „Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes and beatings“ (paragraph 54).
47. „...systematically...and in an orderly fashion...“ (paragraph 55).
53. „As a result of this process, by the end of 1992, there were very few non-Serbs left in Višegrad“ (56).
54. „Hundreds had been killed arbitrarily, while thousands of others had been forcibly expelled or forcibly transferred through violence or fear.“ (paragraph 56).
55. „Today, most of the people living in Višegrad is of Serb ethnicity“ (paragraph 56).

Article 4. of the Law on the Transfer of Cases enables the Court to use the ICTY findings in order to achieve judicial economy on one side, and protect the right of the accused to a fair trial on the other[2]. Additionally, the Panel considers that the Law on the Transfer of Cases must be interpreted as a *lex specialis* in relation to Article 15 and 273 of the CPC of BiH. The above mentioned Article 4 of the Law on the Transfer of Cases states: „the Court, after hearing the parties, may decide, at its own discretion or upon the motion of a party, to accept as proven those facts that are established by legally binding decisions in any other proceedings before the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings."

The relevant Rule 94(B) of the Rules of Procedure and Evidence of the ICTY states: „At the request of a party or *proprio motu* a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts (…) from other proceedings of the Tribunal relating to the matter at issue in the current proceedings." It can be concluded from these above quoted provisions that both have the same *ratio.*

The Panel, in considering whether to accept the proposed facts, took into account the jurisprudence of the Court of BiH[3] as well as the jurisprudence of ICTY/ICTR[4]. The

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[2] See Decision in the case of *Željko Mejakić et al,* number X-KR-06/200 of 22 August 2007 and Decision in the case of *Paško Ljubičić* number X-KR-06/241 of 7 January 2008, Decision in the case of *Zdravko Mihaljević* number X-KR-07/330 of 7 April 2008 and Decisions in the case of *Predrag Kujundžić* number X-KR-07/442 of 7 May 2008 and 8 May 2008.

[3] Some of the decisions on judicial notice of established facts rendered by the Trial Panels of the Court of BiH:
Decision in the case of *Radovan Stanković*, Case No. X-KR-05/70 of 13 July 2006; Decision in the case of *Gojko Janković*, Case No. X-KR-05/161 of 4 August 2006; Decision in the case of *Miloš Stupar et al* (Kravica), Case No. X-KR-05/24 of 3 October 2006; Decision in the case of *Momčilo Mandić*, No. X-KR-05/58 of 5 February 2007; Decision in the case of *Krešo Lučić*, No. X-KR-06/298 of 27 March 2007; Decision in the case of *Nenad Tanasković,* **Case No**. X-KR-06/165 of 26 June 2007; Decision in the case of *Željko Lelek,* Case No. X-KR-06/202 of 3 July 2007; second Decision in the case of *Momčilo Mandić,* Case No. X-KR-05/58 of 5 July 2007; Decision in the case of *Željko Mejakić et al,* Case No. X-KR-06/200 of 22 August 2007; Decision in the case of *Miata Rašević and Savo Todović,* Case No. X-KR-06/275 of 2 October 2007; Decision in the case of *Jadranko Palija,* Case No. X-KR-06/290 of 14 November 2007; Decision in the case of *Milorad Trbić*, Case No. X-KR-07/386 of 13 December 2007; Decision in the case of *Paško Ljubičić* No. X-KR-06/241 of 7 January 2008, Decision in the case of *Zdravko Mihaljević* No. X-KR-07/330 of 7 April 2008 and decisions in the case of *Predrag Kujundžić* **No**. X-KR-07/442 of 7 May 2008 and 8 May 2008.
Some of the oral decisions on established facts that were later included in the First Instance Verdict:
First Instance Verdict in the case of *Neđo Samardžić*, Case No. X-KR-05/49 of 7 April 2006, pp. 10-13; First Instance Verdict in the case of *Dragoje Paunović*, Case No. X-KR-05/16 of 26 May 2006, p. 13; First Instance Verdict in the case of *Boban Šimšić*, Case No. X-KR-05/04 of 11 July 2006, par. 49; First Instance Verdict in the case of *Nikola Kovačević*, Case No. X-KR-05/40 of 3 November 2006, p. 19; First Instance Verdict in the case of *Marko Samardžija*, Case No. X-KR-05/07 of 3 November 2006, pp. 15-18; First Instance Verdict in the case of *Radislav Ljubinac*, Case No. X-KR-05/154 of 8 March 2007, pp. 15-20.
Revision of the Trial Panels' Decisions on Established Facts in Second Instance Verdicts:
Second Instance Verdict in the case of *Dragoje Paunović*, Case No. X-KRŽ-05/16 of 27 October 2006, p. 5; Second Instance verdict in the case of *Neđo Samardžić*, Case No. X-KRŽ-05/49 of 13 December 2006, pp. 8-12; Second Instance Verdict in the case of *Radovan Stanković*, Case No. X-KRŽ-05/70 of 28 March 2007, p. 10 (p. 9 of English version); Second Instance Verdict in the case of *Nikola Kovačević*, Case No. X-KRŽ-05/40 of 22 June 2007, pp. 5-6.

provisions of the CPC of BiH[5] as well as the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] allow the accused to dispute any established fact that has been accepted by the Court. The principle of equality of arms are satisfied in this manner. If one takes into account that all evidence accepted as established facts can be disputed at trail by applying all legal or factual arguments or counter-evidence[7], it follows that the principle of evidentiary proceedings has also been satisfied. The Court of BiH is not bound to base its verdict on a fact established by ICTY judgments. Instead, the established facts are accepted and considered in the light of the entire body of evidence during the proceedings, in accordance with the principle of free evaluation of evidence under Article 15 of the CPC of BiH.

Adopting such an approach has led to the fulfillment of basic principle of presumption of innocence under Article 3(1) of the CPC BiH and Article 6(2) of the ECHR. This approach has been supported by the relevant jurisprudence of the European Court of Human Rights, provided, however, that the accused is given opportunity to dispute the accepted facts.[8]

According to this Panel, the use of this procedural instrument is justified due to general judicial economy and the fact that, in most cases, seriously traumatized witnesses should be spared by repeated testifying in several cases connected with the same events or regions. Also, this approach enables a harmonization of the jurisprudence of the Court of BiH with the relevant ICTY jurisprudence. The Panel finds that the use of established facts can be also considered as an instrument ensuring the right to a trial without delay under Article 13 of the CPC of BiH and Article 6(1) of the ECHR, which is particularly important in case when the accused is held in custody. Specifically, if the facts are accepted at the initial stage of the proceedings, it can considerably reduce the duration of trial.

Criteria for deciding on proposed facts

As neither the Law on the Transfer of Cases nor the CPC of BiH has stipulated any criteria as a basis of the Court's discretion to accept or refuse certain facts proposed by the parties to the proceedings, the Panel has accepted, as the guidelines, the standards developed by the ICTY and the International Criminal Tribunal for Rwanda (ICTR) in conjunction with Rule

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[4] See as the best elaborated example so far, providing a breakdown of the ICTY/ICTR jurisprudence: Decision on judicial notice of the adjudicated facts in the case of *Vujadin Popović et al*, Case No. IT-05-88-T of 26 September 2006, elaborating additionally on the criteria that are explained in the two ICTY Decisions on the adjudicated facts, in the case against *Momčilo Krajišnik*, case No. IT-00-39-T of 28 February 2003 and 24 March 2005.

[5] Article 6(2) of the CPC of BiH.

[6] Article 6(3) d) of the Convention.

[7] The established facts represent the evidence that can be disputed as any other evidence by applying all available procedural instruments. The Court shall determine if the disputing was successful or not in its final verdict. The same was inferred by the Court of BiH in its Decision on Established Facts in the case of *Jadranko Palija*, Case No. X-KR-06/290 of 14 November 2007, p. 5.

[8] Judgment of the European Court of Human Rights in the case *Salabiaku vs. France*, rendered on 7 October 1988, 13 EHRR 379, para. 28.-29. See also the reasoning in the Decision on Established facts in the case of *Milorad Trbić*, Case No. X-KR-07/386 of 13 December 2007, p. 12.

94(B) of the Rules on Procedure and Evidence. By accepting this approach, the Panel has also become aware of the obligations stipulated by the ECHR, the CPC of BiH and the Law on the Transfer.

With regard to the criteria, as stated in the previous Decisions rendered by this Panel in other cases[9], the Panel has based its findings on the Decision of the ICTY Trial Chamber of 26 September 2006 in the case ICTY *Prosecutor vs. Vujadin Popović et al* (IT-05-88-T). This Decision further elaborates on the criteria established in two Decisions of the ICTY Trial Chamber in the case *Prosecutor vs*. *Momčilo Krajišnik* (IT-00-39-T), however the mentioned Decisions were already partly taken into account by the Appellate Panel of the Court of BiH in the *Neđo Samardžić Verdict* (Case No. X-KRŽ-05/49) of 13 December 2006 and the *Radovan Stanković Verdict* (Case No. X-KRŽ-05/70) of 28 March 2007. These Decisions were taken as a basis for deciding on the acceptance of the established facts also in other decisions of the trial panels of this Court.

1. The fact must be relevant to an issue in the current proceedings

Taking into account that the acceptance of established facts represents part of the evidentiary proceedings, it is clear that the Court accepts only relevant evidence as such.

From the wording of this criterion, which is closely associated with the wording of Rule 94(B) of the Rules on Procedure and Evidence and Article 4 of the Law on the Transfer, it can be concluded that it is not required that the proposed fact „is not the subject of dispute" by the parties to the proceedings (which has the same meaning as if it is not „disputable"), as stated in the ICTY jurisprudence and some other cases of the Court of BiH.[10] When one takes into consideration that the parties discuss only the facts relevant to a specific case, which need to be proven with evidentiary instruments (such as established facts, witness testimonies or physical evidence), the existence of such requirement would be illogical. In other words, the established fact only produces an assumption about the existence of a particular fact, and such presumption, as stated before, may be always disputed with arguments and/or other evidence.[11] The parties to the proceedings can agree on the facts that "are not the subject of dispute", thus the need to prove such facts by using the established facts instrument would be much lesser. Therefore, if the Court had the

[9] The Cases of *Željko Mejakić et al.* (X-KR-06/200), *Paško Ljubičić* (X-KR-06/241), *Zdravko Mihaljević* (X-KR-07/330) and *Predrag Kujundžić* (X-KR-07/442).

[10] See this criterion stated in the first ICTY Decision for Judicial Notice in the case of *Momčilo Krajišnik* of 28 February 2003, p. 7, which was expressly removed from the second Decision for Judicial Notice in the same case, of 24 March 2005, p. 8, footnote 45. This criterion is also mentioned in the Decisions of the Court of BiH on established facts, such as the following Decisions: the case oft *Gojko Janković*, Case No. X-KR-05/161 of 4 August 2006, see p. 2 of Decision; the case oft *Marko Samardžija*, Case No. X-KR-05/07 of 3 November 2006, see p. 17 of the First Instance Verdict; the case of *Radislav Ljubinac*, Case No. X-KR-05/154 of 8 March 2007, see p. 17 of the First Instance Verdict; the case of *Jadranko Palija*, Case No. X-KR-06/290 of 14 November 2007, see also Decision, pp. 3-4 and 6 in the case of *Milorad Trbić*, Case No. X-KR-07/386 of 13 December 2007, see Decision, pp. 10-11.

[11] See ICTY Decision for Judicial Notice in the case of *Vujadin Popović et al*, the ICTY Case No. IT-05-88-T of 26 September 2006, paragraph 5, footnote 19.

opportunity to reduce the scope of evidence presented during the evidentiary proceedings by using the established facts instrument with regard to indisputable issues only, the judicial economy would not be achieved.

The facts stated under numbers 26, 27, 29, 31, 32 (partly) and 55 were denied as irrelevant, based on this criterion. However, the facts under numbers 26, 27, 29 and 31 are specific facts in regard of which Mitar Vasiljević has been sentenced, and they are the facts that represent part of the allegations against Milan Lukić before the ICTY with respect to the crimes committed in the area of Višegrad. According to the Panel, the proposed facts relate to their criminal responsibility. Additionally, the fact under number 29 of the Annex relates to a particular place (the village of Mušići) which is not covered by the Indictment. Part of the fact under number 32 of the Annex relates to the title of the above mentioned incident, which is described in detail in the fact. As stated in the Annex (as well as the Motion of the Prosecutor's Office) the incident occurred at the Pionirska Street with its consequence being the murder of around 60 Muslim civilians. The Panel accepted that part of the fact considering that it may be used in the context of proving the nature of the attack (systematic and/or widespread). However, the title of the incident as such is not relevant to this case. The fact under number 55 represents a factual conclusion, and the Panel dismissed it as being such. The Panel will provide its conclusions in its decision, based on the presented evidence and facts.

2. The fact must be distinct, concrete and identifiable

The ICTY Decision in the case of *Popović et. al*. provides a view that judicial notice of a purported adjudicated fact must not be inextricably commingled either with other facts that do not fulfill the requirements for judicial notice or with other accessory facts that serve to obscure the principal fact. In order to determine whether a purported fact is distinct, concrete and identifiable, the Chamber must examine the purported fact in the context of the original judgment.[12] Besides, the very purported quotation must contain facts which make it relevant to the specific case. If the purported fact contains only general factual (non-legal) conclusions without stating the base thereof, the information that should be delivered to the Court is not identifiable and such fact should be denied.

These criteria served the Chamber as a basis to deny the fact under No 27 of the Annex. Firstly, the Chamber also considers this fact to be irrelevant. However, the Chamber considers that despite being irrelevant the purported fact is also inconcrete. The information it contains is not identifiable enough for the Chamber, which makes it unclear. It is not clear what the purported fact refers to, who the object of committed acts was or what the place where the acts were committed was. Accordingly, the Chamber has denied this fact as being inadequately defined.

[12] ICTY Decision for Judicial Notice in the case of *Vujadin Popović et. al.*, No. IT-05-88-T of 26.9.2006 para. 6.

3. The fact formulated by the moving party must not differ in any substantial way from the formulation of the original judgment

The Chamber has adopted the approach from the previously quoted recent ICTY jurisprudence that in case of a minor inaccuracy or ambiguity as a result of its abstraction from the context of the original judgment, the Chamber may, using its discretion, correct the inaccuracy or ambiguity *proprio motu.*

This criterion has not served as a basis for denial of any facts from the Prosecutor's Office motion.

4. The fact must not be unclear and misleading in the context in which it is placed in the moving party's motion

The purported fact must be analyzed in its original context in order to assess if the context of the purported fact creates certain confusion surrounding its actual meaning. Thus, if the meaning of the fact in the original judgment is considerably different by its strength or content in comparison with the meaning of the suggested context of the motion, the fact should be denied judicial notice.

The Chamber finds that none of the facts from the Prosecutor's motion it has decided to accept is not unclear or misleading because we are dealing here with the facts that are clear and identifiable, and they do not create confusion in respect of the meaning in which they are proposed.

5. The fact must be identified with adequate precision by the moving party

This criterion involves identification of exact paragraphs of the judgment the proposed facts have been extracted from. Again, same as with Criterion 3, the Court may still take judicial notice of the facts in the case when the moving party has mistakenly cited a wrong paragraph of the judgment, provided the proximity of the intended factual finding and the mistakenly cited paragraph makes it reasonable that the non-moving party should have understood which factual finding was intended.

The Chamber has not denied any proposed facts based on this criterion, because, as stated above, the proposed facts are distinct and clear and also adequately specified.

6. The fact must not contain characterization of an essentially legal nature

In the previously cited *Krajišnik* case it was emphasized that: "Many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on

case-by-case bases whether the proposed fact contains findings or characterization that are of an *essentially* legal nature."[13]

The view of the ICTY Trial Chamber given in the Decision on the facts in the case of *Mejakić et al*, excludes the facts describing the existence of "the policy of committing inhumane acts against civilian population" and „the acts committed on a large scale and systematically" due to their legal nature.[14] However, in contrast to this Decision, another ICTY Trial Chamber in the *Krajišnik* case decided to accept the proposed facts, stating that the crimes were "committed during an armed conflict within a widespread or systematic attack on civilian population", the fact pointing out that "ethnic cleansing (…) was committed within the context of an armed conflict", and that the perpetrator participated in "a joint criminal objective to cleanse the area of Prijedor from non-Serbs by perpetrating inhumane acts".[15] Finally, the ICTY Trial Chamber in the *Ljubičić* case accepted the facts depicting the attack "directed against civilian population for the purpose of ethnic cleansing", the camp inmates who were „subjected to severe psychological and physical maltreatment", or depicting the living conditions in the camp as „unacceptable violation of international human rights (...)"[16]

So far, the Trial Panels of the Court of BiH have predominantly taken the position that the facts containing the qualifications such as indirect legal qualifications of criminal offences committed within "a widespread or systematic attack" are eligible for acceptance as established facts[17], although there are several more recent Decisions with a different position[18].

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[13] Decision of the ICTY for Judicial Notice in the case of *Momčilo Krajišnik*, ICTY No. IT-00-39-T, of 24.3.2005, para. 15.

[14] ICTY Decision for Judicial Notice in the case of *Željko Mejakić et al*, ICTY Case No. IT-02-65-PT of 1 April2004, p. 6.

[15] ICTY Decision for Judicial Notice in the case of *Momčilo Krajišnik*, ICTY Case No. IT-00-39-T of 24 March 2005; Annex: List of adjudicated facts accepted by the Chamber, facts numbered 323, 321 and 316.

[16] ICTY Decision for Judicial Notice in the case of *Paško Ljubičić*, ICTY Case No. IT-00-41-PT of 23 January 2003.

[17] See Decision for Judicial Notice in the cases of: *Radovan Stanković*, Case No. X-KR-05/70 of 13 July 2006; *Gojko Janković*, Case No. X-KR-05/161 of 4 August 2006; *Momčilo Mandić*, Case No. X-KR-05/58 of 5 February 2007; and *Krešo Lučić*, Case No. X-KR-06/298 of 27 March 2007.
See also Decision contained in first instance Verdicts of the Court of BiH against: *Neđo Samardžić*, Case No. X-KR-05/49 of 7 April 2006, pp. 10-13. (pp. 12-16 of English version); First Instance Verdict in the case oft *Dragoje Paunović*, Case No. X-KR-05/16 of 26 May 2006, p. 13. (p. 15 of English version); First Instance Verdict in case of *Boban Šimšić*, Case No. X-KR-05/04 of 11 July 2006, paragraph 49 (in English and BCS versions; First Instance Verdict in the case of *Marko Samardžija*, Case No. X-KR-05/07 of 3 November 2006, pp. 15-18 (pp. 16-19 of English version); First Instance verdict in the case of *Radislav Ljubinac*, Case No. X-KR-05/154 of 8 March 2007, pp. 15-20 (pp. 17-22 of English version).

[18] See Decision with this more restrictive position: Decision in the case of *Miloš Stupar et al* (Kravica), Case No. X-KR-05/24 of 3 October 2006, concerning the facts listed in the Annex to the Prosecutor's Office Motion of 10 March 2006; Decision on established facts in the case of *Nenad Tanasković*, Case No. X-KR-06/165; decision of 26 June 2007; in the case of *Željko Lelek*, case No. X-KR-06/202 of 3 July 2007; Decision in the case of *Željko Mejakić et al,* Case No. X-KR-06/200 of 22 August 2007 and Decision in the case of *Mitar Rašević and Savo Todović*, Case No. X-KR-06/275 of 2 October 2007, Decision in the case of *Zdravko*

The position of this Panel is that the facts containing any legal conclusions should not be accepted as established facts. Therefore, the Panel is of the opinion that the facts containing legal qualifications of the criminal offence, such as "....systematic", "persecuted" or "...in an orderly fashion", and the legal qualification depicting the acts of perpetration, such as, "rape and beating" should not be accepted as established facts either. These above mentioned notions represent legal qualifications of incriminating acts and should not be regarded as facts that may be accepted by the Court by the use of this mechanism.[19]

Consequently, this Panel shall not accept as proven any legal conclusions, however it may accept certain facts (which might be attributed with legal qualification), by strictly reducing the proposed quotations to their factual parts. Specifically, while evaluating the facts themselves, the Court is not bound by legal qualifications attributed to them in the original ICTY judgment. Ultimately, the Panel shall separately render its decision about the legal meaning of such facts in case they have been accepted as proven.

The Panel holds that once the pure factual status is accepted as an established fact, then it is considered evidence just like the evidence obtained from witnesses and physical evidence presented during the trial. Therefore, pursuant to Article 15 of the CPC of BiH, this Panel may freely draw its own legal conclusions based on the factual findings which it has accepted as established facts.[20]

The fact under number 41 represents a clear legal conclusion of the ICTY Trial Chamber in the case of *Mitar Vasiljević,* concerning particular acts of perpetration, „*....rape and beating*". The quote mentioned under number 46, according to the Panel, represents specific legal conclusions with regard to the existence of a widespread and systematic attack ("*...were systematically persecuted in an orderly fashion*...").

According to this Panel, the facts numbered 53 and 54 contain the conclusions inappropriate for use within the mechanism of acceptance of established facts. Namely, the Panel is of the opinion that only the facts directly provable by means of particular evidence can be covered

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Mihaljević No. X-KR-??/??? of ??.??.2008. Also see Decision in the case of *Milorad Trbić*, Case No. X-KR-07/386 of 13 December 2007, pp. 9-10, inclines to this more cautious approach.

[19] Second Decision of the Court of BiH on established facts in the case of *Momčilo Mandić*, Case No. X-KR-05/58 of 5 July 2007, p. 3 (p. 4 of English version) and Decision in the case of *Jadranko Palija,* Case No. X-KR-06/290 of 14 November 2007, p. 4 (p. 4 of English version) explain their approach to the acceptance of the facts containing a legal conclusion on the existence of „a widespread or systematic attack" together with the argument that those facts do not describe personal criminal responsibility of the accused but they only describe the wider context within which the crimes were committed. Two different criteria for the acceptance of established facts are mingled in this argument. According to this Panel, the criterion suggesting not to accept the facts containing legal conclusions reflects the distinguished privilege and duty of a court trying the case to draw its own legal conclusions. The criterion suggesting not to accept any facts depicting directly the criminal responsibility of the accused is, after all, a more direct protective measure for the accused, ensuring that, essentially, he will not be tried by using the evidence presented during another trial that he is not part of, and the conclusions of another court that are related to another accused, based on such evidence. Due to their different objectives, these criteria should be applied independently.

[20] See ICTY Decision for Judicial Notice in the case of *Miroslav Kvočka et al*, ICTY Case No. IT-98-30/1-T of 8.6.2000 p. 6.

by the regime of the Law on the Transfer. This excludes, among other things, the conclusions of the ICTY Chamber in case when wider effects are involved, which are alleged consequences of certain acts and events. The conclusion in the fact numbered 53 relates to the consequences of a certain process (not only to the existence of the process itself) – namely to the assertion that as a result of this process, there were very few non-Serbs left in Višegrad. The same applies to the conclusion of the ICTY Chamber in fact number 54.
It is necessary to make a difference here, on one side between the process itself, i.e. the facts contained in it (which, if all relevant requirements are met, can be the subject of acceptance), and on the other side the assessment of the consequences of that process. The consequences of the entire range of acts and events are the subject of assessment of the ICTY Chamber and as such they cannot be accepted as proven by this Panel.

Consequently, we are not dealing with a directly provable fact (for example, whether some process took place), but with the consequences of specific events, which are of the kind requiring the evaluation of a process and its consequences. Such evaluation exists at the heart of judicial function when the probative process is at stake. According to this Panel, such evaluation (determining whether certain events, as a consequence, resulted in certain effects) must be undertaken by this Court, and it cannot be considered a proven fact.

Therefore, finding that this criterion is not met in the above mentioned cases, the Panel refuses to accept the proposed facts numbered 42, 47 (in part), 53 and 54 to the extent as previously stated.

7. The fact must not be based on the response of parties in the original proceedings

One of the requirements for accepting the fact as established is that the fact has been previously disputed at trial. Therefore, a fact taken from a verdict that resulted from a guilty plea agreement and the understanding that certain facts are not the subject of dispute between the parties of the proceedings does not meet the prerequisites for its acceptance as an established fact. If the fact has not been disputed in previous proceedings, the probative value of the fact does not reach the level of assurance needed to believe that the Prosecution has fulfilled its original obligation of presentation of evidence in favor of its own case.
This criterion has not been related to any of the facts proposed by the Prosecutor's Office.

8. The fact must not relate to the deeds, behavior or mental state of the accused

The recent ICTY jurisprudence in relation to this criterion has been explained in the ICTY Decision in the case of *Popović et al*: "This exclusion focuses narrowly on the deeds, behavior, and mental state of the accused – or the behavior of the accused fulfilling the physical and mental elements of the form of the responsibility through which he or she is charged with responsibility. It does not apply to the conduct of other persons for whose

criminal acts and omissions the accused is alleged to be responsible through one or more forms of responsibility (…)."[21]

Unlike this narrow definition, the ICTY Trial Chamber in the case of *Mejakić et al* excluded all the facts related to the living conditions in the Omarska camp as being too biased, without giving any specific explanation of its decision.[22] On the contrary, the ICTY Trial Chamber in the case of *Ljubičić* accepted numerous facts implicating the members of Military Police as direct perpetrators although the accused was allegedly a superior commander of all those units.[23]

The jurisprudence of the Court of BiH in this regard also varies: some Panels follow the definition provided in the ICTY Decision in the case of *Popović et al*, accepting all the facts that do not mention the accused as a direct perpetrator[24], while others have a more restrictive approach, additionally excluding the facts that might indirectly imply the criminal responsibility of the accused through his position of a superior or his participation in a joint plan.[25]

As was the case in its previous Decisions about established facts[26], this Panel is of the opinion that indirectly incriminating facts should not be excluded from being accepted as established facts. Given that every piece of evidence presented at trail must be relevant to the case, every piece of evidence presented by the Prosecution must at least indirectly lead to determining the responsibility of the accused. It would then be illogical if any even indirect connection of the accused himself with the facts proposed is taken as a reason for their exclusion.

The Panel finds that none of the facts proposed by the Prosecution relates to the deeds, behavior or mental status of the accused in terms as described above.

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[21] ICTY Decision for Judicial Notice in the case of *Vujadin Popović et al*, ICTY Case No. IT-05-88-T of 26 September 2006, paragraph 13.
[22] ICTY Decision for Judicial Notice in the case of *Željko Mejakić et al*, ICTY case No. IT-02-65-PT of 1 April 2004, p. 6.
[23] ICTY Decision for Judicial Notice in the case of *Paško Ljubičić*, ICTY Case No. IT-00-41-PT of 23 January 2003, see facts numbered 47, 65, 221, 237, 281 of the Annex to Decision.
[24] See, for example, Decision in the case of *Momčilo Mandić*, Case No. X-KR-05/58 of 5 February 2007, p. 4. (p. 4 of English version), accepting as established the fact that *Miroslav Krnojelac* was assigned Minister of Justice of the Serb Republic of BiH by *Momčilo Mandić* at that time.
[25] See for example Decision in the case of *Gojko Janković*, Case No. X-KR-05/161 of 4 August 2006, p. 3; Decision in the case of *Miloš Stupar et al.* (Kravica), Case No. X-KR-05/24 of 3 October 2006, p. 8 (p. 8 of English version); Decision in the case of *Nenad Tanasković*, Case No. X-KR-06/165 of 26 June 2007, p. 5 (p. 5 of English version); Decision in the case of *Željko Lelek*, Case No. X-KR-06/202 of 3 July 2007, p. 5 (p. 5 of English version); Decision in the case of *Mitar Rašević and Savo Todović*, Case No. X-KR-06/275 of 2 October 2007, p. 5 (p. 5 of English version) and Decision in the case of *Milorad Trbić*, Case No. X-KR-07/386 of 13 December 2007, pp. 10-11 (pp. 10-11 of English version).
[26] In the cases of *Mejakić et al* (X-KR-06/200), *Ljubičić* (X-KR-06/241), *Mihaljević* (X-KR-06/330).

9. The fact must not be the subject of current appellate proceedings

This criterion relates to the pre-requisite that the facts contained in the ICTY trial judgments must also be upheld in the appeals procedure, specifically that these facts are not disputed during the appeals procedure.

This criterion must be particularly carefully evaluated in case when the proposed facts are part of a trial judgment that is currently subject of appeal before the ICTY. Under such circumstances, the fact resulting from a judgment under reconsideration can be accepted only if that particular fact is obviously not the subject of appeal.[27]

The judgment from which the facts presented in the Motion are taken was the subject of appeal, but the proposed facts were not disputed or their disputing was not successful.[28]. Therefore, none of the facts presented in the Prosecution's Motion was denied based on this criterion.

Comprehensive test: Use of discretion by the Court regarding the established facts

Following the analysis of all proposed facts individually, applying all the above mentioned criteria, the Panel should decide whether the acceptance of the previously mentioned facts from the Prosecution's Motion, by their composition, number and contents, can achieve the judicial economy, protecting at the same time the right of the accused to a fair, public and efficient trial.

This kind of test is considered necessary because „the principle of judicial economy is more likely to be frustrated in this manner where the judicially adjudicated facts are (…) unduly broad, vague, tendentious, or exclusory".[29] In the final analysis, even the facts satisfying all the above mentioned pre-requisites can be denied by a Panel according to its discretion if the facts, taken jointly, jeopardize the right of the accused to a fair trial.

In this particular case, the Panel, for the purpose of reaching an efficient balance between judicial economy on one side and the right of the accused on the other side, accepted the facts from the Prosecution's Motion, except for the facts numbered in Annex to the Decision as 26, 27, 29, 31, 32, 42, 47, 53, 54 i 55, to the extent being already mentioned. Namely, the Panel finds that the accepted facts make part of the Prosecution's case, but at the same time they are not directly related to the criminal responsibility of the accused. Therefore, the Panel has decided to accept the proposed facts, finding that they satisfy the requirements of the above mentioned criteria.

[27] ICTY Decision for Judicial Notice in the case of *Vujadin Popović et al*, ICTY Case No. IT-05-88-T of 26 September 2006, paragraph 14.
[28] See ICTY Appeals Chamber Judgment in the case of *Prosecutor vs. Mitar Vasiljević (IT-98-32).*
[29] ICTY Decision for Judicial Notice in the case of *Vujadin Popović et al*, ICTY Case No IT-05-88-T of 26 September 2006, paragraph 16.

Finally, having analyzed the jurisprudence of this Court as well as the ICTY jurisprudence, the Panel tried to adhere to the strict criteria for acceptance of facts established by the ICTY Judgments, establishing a balance between the objective of judicial economy through reduction of evidentiary proceedings, on one side, and the right of the accused to a fair and honest trial on the other side. Finally, although this was already said, the Panel particularly points out that the above mentioned accepted facts have been accepted only as assumptions that can be disputed by the other party and the Defense Counsels for the accused during the hearing of evidence at the main trial.

The Defense Counsels for the accused did not present their motions to accept the facts established by the ICTY Judgments.

1. c) Exceptions from imminent presentation of evidence

On 14 November 2008, the Prosecutor's Office of BiH proposed that the testimonies of witnesses Vejsil Hota, Fehida Hubić and Čedomir Tešević, given during the investigative phase, be tendered into evidence. They include the following Records:

- Witness Examination Record for witness Vejsil Hota, No. 17-04/2-04-2-521/07 of 15 may 2007
- Witness Examination Record for Fehida Hubić, No. 14-04/2-1/04 of 29 December 2004
- Witness Examination Record for Čedomir Tešević, No. 17-04/2-04-2-735/07 of 10 July 2007

The reason for the exemption from the imminent presentation of evidence is the fact that these three persons passed away, so the Prosecution submitted to the Court Death Certificates for all three above mentioned persons.

The Defense for the accused opposed the reading of these statements, believing that it would have violated the rights of the accused under Article 6(3) of the ECHR, and the right to a fair trial.

The Panel decided to admit into evidence the above mentioned statements for the following reasons:

(1) Article 273(2) stipulates: „Notwithstanding Paragraph 1 of this Article, records on testimony given during the investigative phase, and if judge or the Panel of judges so decides, may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult due to important reasons.“.

It is indisputable that in this particular case the persons whose testimonies were proposed to be read, passed away, which follows from the presented Death Certificates for all the three persons. These persons had given their statements to the authorized officials of the State

Investigation and Protection Agency (SIPA) pursuant to the provisions of the CPC of BiH. Therefore, the requirements from the quoted Articles have been met. The deficiency of this evidence is reflected in the inability of the other party (the Defense) to examine the witnesses. However, this is an objective inability caused by the above mentioned circumstances.

Being mindful of the above stated, the Panel decided to grant the Prosecution's motion, and all three statements were admitted into evidence in this case during the hearing held on 14 November 2008. However, the Panel is aware that the Verdict must not be based to a decisive extent on the testimonies of unavailable witnesses whose statements are used at the main trial, because the Defense is denied of the right to directly examine such witnesses.

2. Application of the CC of BiH

The question being imposed at the beginning is the application of substantive law in this particular case. While deliberating, the Panel started from Articles 3, 4 and 4. a) of the CC of BiH as well as Article 7 of the ECHR.

The accused Momir Savić is charged with the perpetration of the criminal offence in violation of the CC of BiH, which was enacted in 2003, which occurred after the periods relevant to the events covered in the Indictment. The Panel finds that the general principles contained in Articles 3 and 4 of the CC of BiH are qualified by Article 7(2) of the ECHR (as well as Article 4 a) of the CC of BiH). In other words, the principles of legality and time constraints regarding applicability of the law under Articles 3 and 4 of the CC of BiH, in any case, shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.
In this case, the incriminated acts of the accused, at the moment of perpetration, represented a criminal offence pursuant to the general principles of international law.

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

This principle (principle of legality) is stipulated in Article 7(1) of the ECHR. It should be noted, with respect to this, that the ECHR is given priority over all other laws in BiH (pursuant to Article 2(2) of the Constitution of BiH). The foregoing provision of the ECHR prohibits a heavier punishment than the one that was applicable at the moment when the

criminal offence was perpetrated. However, this provision does not prescribe the application of the most lenient law.

It is prescribed in Article 4 a) of the CC of BiH that Article 3 and 4 of the CC of BiH shall not prejudice the trail 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 „*, and Article 7(2) of the ECHR provides for the same exception under the condition that paragraph 1 of the same Article "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations" (the provisions of Article 15 (1) and (2) of the International Convention on Civil and Political Rights are also given in this spirit[30]).

Pursuant to all the above mentioned, we can conclude that the exception from the principles established under Articles 3 and 4 of the CC of BiH (and Article 7(1) of the ECHR) is possible, which, as a result, makes it possible to depart from the application of the Criminal Code that was applicable at the time of perpetration and the application of a more lenient law in the proceedings instituted for the offences constituting the criminal offences pursuant to international law. In this particular case, the accused is charged with the criminal offences constituting the criminal offences pursuant to customary international law, thus falling within *„general principles of international law"* as provided for by Article 4 a) of the Law on Amendments to the CC of BiH, and within *„the general principles of law recognized by the community of nations,"* as provided for by Article 7(2) of the ECHR. Based on the above mentioned, it is clear that the CC of BiH is applied in this criminal proceeding.

Furthermore, at the time related to the relevant period covered in the Indictment, none of the provisions of the Criminal Code of SFRY related explicitly to Crimes against Humanity as is now provided for by Article 172 of the CC of BiH.

The status ascribed to the Crimes against Humanity in customary international law as well as the attributing of individual criminal responsibility in the period covered by the Indictment, are contained, among other things, in the report of the Secretary General of the United Nations pursuant to paragraph 2 of Resolution 808 of the Security Council of 3 May 1993, Commentaries on the Draft Code of Crimes against the Peace and Security of Mankind (1996), as well as the ICTY jurisprudence and the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR). The jurisprudence of these institutions has established that culpability of the Crimes against Humanity represents *jus cogens* or an imperative norm of international law[31]. Therefore, it is indisputable that Crimes against Humanity were part of customary international law in 1992.

[30] The State of Bosnia and Herzegovina, as one of the successors of SFRY, ratified the International Covenant on Civil and Political Rights.

[31] International Law Commission, Commentaries on the Draft Articles about the responsibility of State for internationally illegal actions, 2001, Articles 26.

Furthermore, the fact is that the forms of perpetration of the criminal offence as stated in Article 172 of the CC of BiH were also covered by the law that was applicable in the relevant period of time, at the time when the offence was perpetrated (Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186 of the CC of SFRY), specifically that those criminal offences were also punishable under then applicable criminal code, which additionally contributes to the Panel's conclusion with respect to the principle of legality.

Finally, the application of the CC of BiH is additionally justified with the fact that the punishment prescribed by the CC of BiH is, in any case, more lenient that the death penalty that was applicable at the time when the criminal offence was perpetrated, which satisfies the principle of time constraints regarding the applicability of the law and the application of the more lenient law to the perpetrator.

Such position of the Panel is in accordance with the position taken in the Verdicts of Section I of the Appellate Division of the Court of BiH. This position was also upheld by the Decision of the Constitutional Court of Bosnia and Herzegovina No. : AP -1785/06 of 30 March 2007.

3. Evaluation of legal elements and elements of criminal offense

3.1. General consideration concerning evaluation of evidence

The Panel, in the relevant proceedings, considered the evidence in accordance with the applicable procedural law or the CPC of BiH, having applied, to the accused, the presumption of innocence prescribed in Article 3 of the CPC of BiH, which embodies the general principle of law, according to which the prosecution bears the burden of proof beyond any reasonable doubt with regard to the guilt of the accused.

Considering the evidence of the witnesses who testified during the evidentiary proceedings, the Panel especially considered their attitude, behavior and characters, having also considered, regarding these witnesses, other evidence and circumstances with respect to this case. Furthermore, the Panel took into account that the credibility of witnesses was dependable upon their knowledge of the facts they testified about, their personal integrity, reliability and the fact that they had a duty to tell the truth in accordance with their oath.

Therefore, by thorough evaluation of all presented evidence, both individually and in correlation, the Panel established the facts as stated below.

3.2. Crimes against Humanity

The accused is charged with having committed the criminal offense of Crimes against Humanity under Article 172 of the BiH CC, which reads as follows:

“Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:

- Depriving another person of his life;
- Deportation or forcible transfer of population;
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture;
- Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;
- Enforced disappearance of persons;
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,

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

In order for an offence to be characterized as the criminal offence of „Crimes against Humanity", it is above all necessary that the general elements be satisfied first, and they will be explained below.

3.2.1. General elements of the criminal offence of Crimes against Humanity

The Panel has, first of all, established the existence of general elements (as indicated above) of the criminal offence of Crimes against Humanity[32], including:

- The attack directed against any civilian population means a course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.
- The attack must be widespread or systematic
- The attack must be directed against any civilian population
- The acts of the perpetrator must be part of the attack and the perpetrator must know that his acts fall within the context of numerous widespread or systematic crimes directed against civilian population, and that his acts are part of that pattern.

The Panel has taken into regard the established facts from the Judgment in the case of *Mitar Vasiljević* (IT-98-32), which were previously mentioned.

[32] See the case of *Kunarac, Kovač and Vuković,* ICTY Trial Chamber Judgment, paragraph 410.

3.2.1.1. Existence of a widespread or systematic attack

Article 172(1) of the CC of BiH, *inter alia*, requires the existence of a widespread *or* systematic attack. It is clear that we are dealing with an alternative, and that the existence of either widespread or systematic attack is sufficient. However, in this particular case, the Panel has determined the existence of the attack that fulfilled both requirements.

In the ICTY jurisprudence, an attack is described as the undertaking of actions including the perpetration of violent acts or the acts of violence.[33] This requirement is also reflected in Article 172(2)a) of the CC of BiH, incorporating into the definition of notion „attack", among other things, a course of conduct involving the multiple perpetrations of acts (referred to in Article 172(1)) against any civilian population.

The notions of "attack" and "armed conflict" are not identical. Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be part of it. Furthermore, the notion of "attack" in the context of a crime against humanity carries a slightly different meaning than in the laws of war. In the context of a crime against humanity, "attack" is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities (such as keeping someone in detention)[34]. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.[35].

The acts [of an accused] need not be committed in the midst of that attack provided that they are sufficiently connected to that attack"[36]. For example, the ICTY Trial Chamber in the case of *Kunarac* found that a crime committed several months after, or several kilometers away from the main attack could still, if sufficiently connected otherwise, be part of that attack.[37]

As has already been mentioned, an attack is not only defined by an object (civilian population) but also by its intensity (being widespread) or by being systematic (systematic nature of attack).

The requirement of being widespread refers to the large scale nature of the attack and a large number of victims as a consequence[38]. It excludes an isolated inhuman act committed by a perpetrator acting on his own initiative and directed against a single victim.[39]

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[33] See the case of *Kunarac et al.*, ICTY Appeals Chamber Judgment, paragraph 415.
[34] See the case of *Kunarac,* ICTY Appeals Chamber Judgment, paragraph 86.
[35] See the case of *Kunarac,* ICTY Trial Chamber Judgment, paragraph 416.
[36] See the case of *Fatmir Limaj et al*, IT-03-66-T, Judgment, 30 November 2005, paragraph 189.
[37] See the case of *Kunarac et al*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001. See also the case of *Brđanin*, IT-99-36-T, Judgment, 1 September 2004, paragraph 132.
[38] See the case of *Stakić,* ICTY Trail Chamber Judgment, paragraph 625.
[39] See the case of *Blaškić,* ICTY Trial Chamber Judgment, paragraph 206.

The requirement of being systematic signifies the organized nature of the acts of violence and a low probability of their random occurrence. Patterns of crimes, that is, the non accidental repetition of similar conduct on a regular basis are a common expression of such systematic occurrence.[40].

From the point of view of the notion of being widespread or systematic, first of all one must identify the population that is the object of the attack and then, in the context of methods, resources, instruments and results of the attack against that population, one should determine whether the attack meets the requirement of being widespread and systematic.

Based on the presented evidence, particularly the testimonies of witnesses who lived in the area of the Višegrad municipality and in the wider region in early April 1992, and based on the facts accepted by the Panel as established, it is clear that, from April through September 1992, there existed the attack of the military and police formations in the area of the municipalities of Višegrad and Rudo.

The municipality of Višegrad is located in south-eastern part of BiH, boarded on its eastern side by the Republic of Serbia. In 1991, around 21,000 people lived in the municipality, of whom about 9,000 in the town of Višegrad. Approximately 63% of the population was of Muslim ethnicity, while about 33% was of Serb ethnicity.

Interpreting the above mentioned established facts numbered 3-12, and 16-20, the Panel finds that ethnic tensions arose in the municipality of Višegrad in April 1992. The tensions were motivated by political objectives. In November 1990, multi-party elections were held in this municipality. Two parties, the majority-Muslim Party of Democratic Action (SDA) and the majority-Serb Serb Democratic Party (SDS), shared the majority of the votes, and the results closely matched the ethnic composition of the municipality. Being dissatisfied with such distribution of power, from 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines.

Soon thereafter, ethnic tensions flared up, both of the opposing groups raised barricades around Višegrad, which was followed by random acts of violence including shooting and shelling. Many civilians, fearing for their lives, fled from their villages. Upon arrival of the Užice Corps (the JNA Corps), many inhabitants who had fled from Višegrad and the surrounding villages returned to their homes. However, the Muslim population that returned to their homes found themselves trapped and at the mercy of paramilitaries that operated in that area, which follows from the testimonies that will be analyzed below.
The Panel has found that in early April 1992 an attack against and the destruction of the area of Višegrad and the surrounding villages was launched by the Serb paramilitary formations consisting of local Serbs, police and other paramilitary formations (that arrived from the Republic of Serbia). During the attack, soldiers, the members of paramilitary formations, were collecting male and female Bosniacs, and took them away from their homes so that some of them disappeared without trace (especially men fit for military

[40] See the case of *Kunarac,* ICTY Trail Chamber Judgment, paragraph 429.

service). The witnesses who testified at the main trial had lived in the area of Višegrad, in the villages of Drinsko, Dušće, Meremišlje and other surrounding villages.

Based on the testimonies of the interviewed witnesses, the Panel has inferred that the Užice Corps left the area of Višegrad in May 1992 (in the ICTY Case of *Mitar Vasiljević* it is established that JNA withdrew from Višegrad on 19 May). Ramiza Mustafić stated that during the period when the Užice Corps was in Drinsko, the villagers were in their homes like prisoners, they did not dare go out or appear at any place, and they did not dare turn the lights on in their homes in the evening. Among other things, she also mentioned an incident during the stay of the Užice Corps, when the house of Murat Šabanović in Dušće was set on fire, and the villagers were taken out from their homes by the JNA (the mentioned Corps) to watch the burning house.

It follows from the previously mentioned established facts that are corroborated by the testimonies of the Prosecution witnesses that paramilitary units remained in the area of Višegrad after withdrawal of the Užice Corps, and that after the JNA had left the town, some new paramilitaries arrived in the town and were joined by local Serbs. Witnesses Hasan Hubić and Ramiza Mustafić identically stated that, following the JNA departure, Serbs took over their strategic positions and arms in the entire area of Višegrad and the surrounding villages populated by Serb inhabitants. Also witnesses Latifa Hodžić and Šuhra Gušo, as well as witness Alija Mešanović, testified that their neighbors arrived following the withdrawal of the Užice Corps, thus witness Šuhra Gušo stated that there arrived their neighbors "Orthodox Serbs and some of them were from Višegrad". Witness Latifa Hodžić claimed that "our Serbs" remained after the withdrawal of the Corps.

Witness Hajrija Kos testified about the situation prevailing at that time in the area of the municipality of Višegrad, stating that around March or April 1992 everybody was in a hurry to flee from Višegrad, due to the threat of Murat Šabanović that he would open the dam on the Drina River. At that time she went to Prijepolje (Montenegro) with one of her two sons, but she soon returned to Višegrad. The witness further stated that the inhabitants of Višegrad were encircled, and that the Užice Corps was present in the town of Višegrad itself, which was allegedly calming the situation. She testified that the Serb neighbors from the surrounding villages were uniformed and that she noticed them supervising the Muslim population. Some of these armed individuals, according to her testimony, wore JNA uniforms, some of them wore civilian clothes, and some wore camouflage uniforms, and all of them were armed. Furthermore, witnesses Suada Logavija, Sabina Maslo and Omer Delija stated that in April 1992 the Užice Corps arrived in the area of the municipality of Višegrad, and that, besides that Corps, the Local Serbs wearing camouflage uniforms and carrying arms were also present there. Witness Suada Logavija testified about the killings of inhabitants, which she saw out of the window of her apartment. She testified that the Užice Corps was stationed in Višegrad in April 1992, and that there were also „local Serbs in camouflage uniforms and carrying rifles", and she asserted that they did not dare walk around the town, because firing was heard in the area. Witness Redžep Salić also testified that the Serb villagers from the surrounding Serb villages (Pijavice, Ćaćice, Stražbenice, Oblozi) arrived after the withdrawal of JNA. Witness Bahrudin Gušo stated that volunteers

were organized as "the army of Momir Savić" even during the stay of the Užice Corps in the area of the municipality of Višegrad. Furthermore, witness "A" stated that the village of Repuševići (also the municipality of Višegrad) was also attacked in early April. All these witnesses stated that the people hardly moved around the town, and that fear was present.

Witness Ramiz Gušo stated that the attack on his village (the witness lived in the village of Jarci, the municipality of Višegrad) was launched on 11 April by the local Serb population. According to his information, the attack of the Serb forces was carried out with about 40 rifles.

The Prosecution witnesses, as previously stated, testified that upon the withdrawal of the Užice Corps, when the Serb authorities being led predominantly by local Serbs, took over control, Muslim men were being taken away for interrogation, and some of those individuals returned but some of tem were killed. Some of them disappeared without trace. Witnesses Suada Logavija, Hajrija Kos, Latifa Hodžić and Sabina Maslo testified, among other things, about these circumstances, stating identically, among other things, that five men were singled out from the civilian column in the village of Dušće, in the critical period, and they have been unaccounted for ever since.

In addition to these witnesses, the Panel heard the injured parties Ramiz Gušo and his mother Nizija Gušo, who gave identical statements that Ramiz was taken to the Secretariat of Interior (SUP) in Višegrad without any explanation, and that he was detained there together with 23 persons. It follows from the testimonies of these two witnesses that such arrest was followed by arbitrary detention during which the civilian prisoners were maltreated and subjected to abuse on ethnic grounds (in its later elaboration on the criminal acts of the accused the Panel will specifically deal with the events that occurred in SUP). Witnesses Latifa Hodžić and Fatima Mujakić were also among those who were arrested and detained in the Elementary School *Hasan Veletovac* in Višegrad. They stated that they were captured by the Serb soldiers without any explanation, and were taken to the Elementary School *Hasan Veletovac* in Višegrad where the conditions were very poor, the prisoners did not have enough food, they were sitting on ceramic tiles of a gym. The witnesses stated that they were aware of soldiers coming and taking away the girls, and that men were abused.

Also, the Defense witnesses Miladin Savić, Momir (father's name Milan) Savić i Milenko Jevđić stated that, following the withdrawal of the Užice Corps, they got mobilized and ordered to report to the Local Community (MZ) of Drinsko. These witnesses asserted that they did not know who had sent them the call-up papers in order to report to MZ Drinsko. Witness Momir (Milan) Savić stated that he reported to Drinsko, at the cemetery, saying that he knew his place of mobilization from before. Witness Milenko Jevđić stated that he got mobilized on 18 May, and testified that he received his call-up papers in order to report to Drinsko as a meeting point, adding that it was about 5 km away from Višegrad. According to his testimony, Drinsko was marked as a meeting point pursuant to the wartime posting. All the three above mentioned Defense witnesses, as they themselves stated, were members of the unit under the command of Momir Savić.

From the facts that the Panel accepted as established (in the ICTY *Mitar Vasiljević* case*)*, which were not disputed by the Defense during the evidentiary proceedings, it follows that non-Serb inhabitants in the municipality of Višegrad started disappearing already in early April 1992, and that hundreds of non-Serbs, predominantly Muslims – men, women, children and elderly, were killed during the few months that followed. Also, it follows from the established facts that many of the killed were simply thrown into the Drina River, and that many dead bodies were found floating down the river. Among all of the bodies that were pulled out of the water only one appeared to be that of a Serb. Also, hundreds of Muslim civilians of all ages and of both genders were exhumed from the mass graves in and around the municipality of Višegrad. As the Panel has found based on the established facts, the number of disappearances peaked in June or July 1992 (62% of those who went missing in the municipality of Višegrad in 1992 disappeared during those two months) and most, if not all of them, were civilians. It can be concluded from all the above mentioned that the pattern and intensity of disappearances in Višegrad paralleled that of the neighboring municipalities which now form part of Republika Srpska (RS). In addition, the Panel has found, based on the facts accepted as established, as well as the testimonies of the Prosecution witnesses, that in the process of transfer of these people identification documents and valuables were often taken away. Some of these people were exchanged whilst others were killed. Muslim homes were looted and often burnt down, which was, among other things, also described by Mehmedalija Topalović in his testimony. From the testimonies of the Prosecution witnesses (that will be addressed in detail by the verdict in its part related to particular criminal offences of the accused), it can be clearly concluded that Bosniacs, who had not fled, were systematically persecuted in an orderly fashion and were unlawfully detained.

The Panel has found that, beside the municipality of Višegrad, the widespread and systematic attack also existed in the municipality of Rudo. The municipality of Rudo is a neighboring municipality to the municipality of Višegrad. Having taken into consideration all physical evidence regarding the period, scope and elements of the attack, the proximity between these two municipalities, and specific testimonies of the injured parties and witnesses (that lived in the municipality of Rudo at that time) about the events that occurred in that territory, the Panel has found that the attack, in terms of Article 172(1) of the CC of BiH, covered the municipality of Rudo as well.

This conclusion of the Panel is supported by the testimony of the Prosecution witnesses: Šaban Ćato, Omer Ćato and Fahro Ćato who testified about the events in the village of Donja Strmica, about the attack of Serb forces against that village in May 1992 when infantry shots were fired and the houses in the village were burnt down. These persons testified that the attack was launched from the direction of Višegrad, specifically from the direction of the villages of Stražbenice, Čačice and Gornja Strmica which were populated by Serbs. During the first attack of the Serb army, the whole village was not burnt, but another attack of the Serb forces was launched on Donja Strmica a few days later, which is when the rest of the houses were burnt down. It is under the assault of that army that the local population was forced to leave Donja Strmica. Witness Rasim Ćato stated that all inhabitants of the village fled, that the Serb soldiers burnt down the village and then left.

The testimony of the accused himself supports the above mentioned, and he stated that the road to Rudo was precarious, that soldiers and police were on that road, due to which he advised the villagers of Drinsko (Vahid Hubić, Sabit Omerović), whom he had come across on that road, not to go to Rudo.

Taking into account the above mentioned, the Panel has found that a widespread and systematic attack existed in the area of Višegrad and Rudo during the relevant period (from April through September 1992). In this particular case, the Prosecution did not prove the existence of an attack in the entire region of Eastern Bosnia, for the reason of which the Panel considered the existence of the elements of a criminal offence in the context of the geographic region in which the Panel did find the existence of the attack. The attack contained many constituent elements and had various forms, ranging from capturing the town itself by the Serb army to murders, looting private homes, taking away of men and women, and their maltreatment and unlawful detention. The above described incidents were committed in the entire territory of these municipalities, including the surrounding villages and settlements of Dušće, Drinsko, Donja Strmica, Meremišlje and other places. It is obvious that the attack against the Bosniac population was widespread, covering, in any case, the entire municipalities.

That the attack was systematic follows from many circumstances and evidence regarding the events that occurred during the above described period and in relevant territory. Namely, on many occasions, there was a clear pattern of treatment of civilians, particularly of men who were being taken out of their homes, so that for example, after having been arrested, they were taken to the SUP building for further interrogation and beating. Some men were separated from women and children and were then summarily killed. Furthermore, it clearly follows from the scope of later incidents that these were the incidents which, by their nature, were not isolated or random acts figured out by individuals, but the acts based on joint endeavors of the Serb army which operated together with paramilitary groups and police (as well as JNA at the initial stage). It can be concluded that, from the moment when the Užice Corps arrived, there existed the joint endeavor of local Serbs to disarm the Bosniac population and expel them from the municipalities of Višegrad and Rudo, by committing many acts of violence against that population.

Consequently, based on the above described events, the Panel concluded beyond any reasonable doubt that during the period from April through September 1992, there was a widespread and systematic attack launched by the Serb army, paramilitary Serb formations and police against the Bosniac civilian population in the municipalities of Višegrad and Rudo. The attack took place in many forms, starting from the capture of Višegrad and the surrounding villages, to the systematically committed murders, looting, detention, various forms of abuse and persecution of the Bosniac population.

All these events finally resulted in dramatic changes in the ethnic composition of the population, as proportionally the changes in Višegrad were second only to those which occurred in Srebrenica.

a) In the ICTY case of *Kunarac et al*[41], it is expressed that neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There is nothing in customary international law which additionally requires the nexus of the criminal actions with some policy or plan. However, Article 172(2)a) of the CC of BiH prescribes: "attack directed against any civilian population means a course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

The element of "policy" can be expressed in the form of four sub-elements, as follows:

- it must be shown that there existed a State or organizational
- policy
- to commit such attack
- that the attack was actually launched on the basis of or in furtherance of that policy.

In its interpretation of this element, the Panel started with the Rome Statute (Article 7 of the Statute). The Panel considers that the Rome Statute, although not being directly applicable in BiH, is relevant due to the following reasons: it is accepted by many countries, and as such, it reflects the standards of customary international law; it uses almost identical meanings as the CC of BiH; BiH is its signatory and it has ratified it; the CC was adopted (with the wording that closely follows the Rome Statute) after the Rome Statute.

"State" as a notion is clearly defined in international law, while "organization" is a much wider notion. This sub-element should be interpreted freely in order to include a wide range of organizations, and the relevant considering should be focused on the ability of an organization as a group to devise and adopt the policy of attack against civilians in a widespread and systematic manner, rather than on the formal characteristics and taxonomy of the subject organization[42].

Policy as the second sub-element should not be understood as a "plan" or policy in terms of state organizations. In this context, policy should be interpreted in the manner that it represents the defining of the objectives which should then be implemented though individual decision making on lower levels. Article 7(2)a) of the Rome Statute prescribes: ""Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." It can be concluded that the third sub-element results from the above quoted Article, "policy to commit such attack". However, that policy should not be related to particular criminal offences under Article 7(1) of the Rome Statute (which were committed) but it should be related to the perpetration of an attack in general terms.[43].

[41] Ibid, paragraph 98.
[42] See the case of *Rašević and Todović,* Verdict of the Court of BiH Trial Panel, p. 39.
[43] Ibid, p. 39.

Nexus between "policy" and attack implies analyzing every individual case in the light of the existing facts and circumstances. However, the existence of an attack does not necessarily imply the existence of a "policy". In order to establish the existence of this nexus, the following factors can be taken into consideration: joint acts of members of an organization or state; individual but similar acts of the members of the organization or state; preparatory activities before launching the attack; activities prepared or steps undertaken during or towards the end of the attack; existence of political, economic or other strategic objectives of the state or organization, which will be realized by the attack; in case of failure to undertake the acts, knowledge about the attack and intentional failure to undertake the acts. Although every individual attack must be considered widespread and systematic, the pattern of the attacks against civilians, irrespective of whether it is individually widespread or systematic, would (under certain circumstances) be proof of the policy to commit such attacks.

In this particular case, it can be clearly concluded from the previously stated circumstances described by the mentioned witnesses and described in the accepted facts established in the case of *Mitar Vasiljević,* that there existed a pattern of the attack against civilians (as previously explained). Such pattern of conduct (or attack) definitely could not have been a product of an individual or isolated behavior of an individual. On the contrary, all the above mentioned circumstances clearly point out that there existed joint activity of the Serb army to expel Bosniacs from the area of Višegrad and Rudo, so that that activity can be considered as the implementation of the policy that existed on a higher level. The described events, according to the Panel, resulted from a detailed planning, organization and coordination with the objective to launch the attack against the non-Serb civilian population, which included multiple perpetration of crimes. In this particular case, we can say that this organization was represented by the Serb authority which operated through local players, such as, inter alia, organized military units of local Serbs.

Based on all the above mentioned, it is unmistakable that the widespread and systematic attack was launched on the basis of and for the purpose of the SDS policy and plan to commit the attack on the non-Serb population of the municipalities of Višegrad and Rudo. The entire situation that preceded the attack in that area is definitely in the background of this policy. During that period, multi-party elections were held, SDS and SDA shared the majority of the votes according to the ethnic proportions of the population However, Serb politicians were dissatisfied with the distribution of power, feeling that they were under-represented in positions of authority. Ethnic tensions soon flared up. From early 1992, Muslim citizens were disarmed or requested to surrender their weapons. In the meantime, Serbs started arming themselves and organized military training. From 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines. The above mentioned facts are established in the accepted facts numbered 3, 6, 7 and 9, and they were not challenged by the Defense. The above described widespread and systematic attack took place following all these preparations. During that attack, the non-Serb population was being expelled, killed and intimidated (in the manner that will be explained in detail in the continuation of the Verdict), all of which had the objective of changing the ethnic

composition of the entire municipality of Višegrad and of a wider area, or fully taking over that area by Serbs.

The thesis of the Defense that the Bosniac civilians also kept sentries and that they were armed is irrelevant in this context, having in mind that customary international law absolutely forbids the use of armed force against civilians, so that the principle *tu quoque* does not represent any defense.[44] Besides, the ICTY Appeals Chamber in the case of *Kunarac et al* found: „When determining whether there was an attack against a particular civilian population, it is irrelevant that the other side also committed atrocities against the enemy's civilian population. The fact that one side committed the attack against the civilian population of the other side does not justify the attack of that other side against the civilian population of the first side, and it does not exclude the conclusion that the forces of that other side actually directed their attack precisely against the civilian population as such. Any attack on the enemy's civilian population is unlawful and the crimes committed within such an attack can be qualified as crimes against humanity, provided that all other requirements are met."

3.2.1.2. Attack directed against any civilian population

The notion of "directed against any civilian population" precisely defines the element that, within the context of the crimes against humanity, the civilian population is a primary target. The notion "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack[45].

Article 3(1)a) of the Geneva Convention relative to the Protection of Civilian Persons (IV Geneva Convention) defines the category of civilians in the manner that they are "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." This Article prescribes 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.

Additionally, the attack needs not be directed against the enemy, it may also be directed against any civilian population, including any part of the population of the attacked country. The notion of civilians, in the strict sense, includes all those persons who were placed hors de combat when the criminal offence was committed[46]. Additionally, the definition of civilian population includes individuals who might have offered resistance at a certain point

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[44] See the case of *Mitar Rašević and Savo Todović*, X-KR/06/275 (the Court of BiH), First Instance Verdict, 28 February 2008, p. 45; also see the case of *Kunarac et al*, IT-96-23-A and IT-96-23/1-A, Judgment, 12 June 2002, paragraph 88; *Prosecutor vs. Marjan Kupreškić et al*, IT-95-16-T, Judgment, 14 January 2000, paragraph 517; Case of *Kupreškić et al*, Decision on Evidence on the Good Character of the accused and the Defense of "*Tu Quoque"*, IT-95-16-T, 17 February 1999, pp. 3-4.

[45] See the case of *Kunarac et al*, ICTY Appeals Chamber Judgment, paragraph 90.

[46] See the case of *Jelisić*, Appeal Judgment, paragraph 54.

and those placed hors de combat[47]. Population may be considered as civilian even if certain non-civilians are present – it must simply be predominantly civilian in nature[48]. Witnesses Hasan Hubić and Medo Tabaković stated that Bosniacs in Drinsko had hunting weapons, and that they organized sentries in that area. However, they did not take part in military activities, and as being such, they have the capacity of civilians in terms of the relevant provisions of IV Geneva Convention.

The previously mentioned witnesses that testified about the separation of 5 Bosniac men from the column in Dušće and their being taken away, stated that the men who had been separated from women were sent back towards Dušće. Witness Sabina Maslo stated that on 13 June 1992 all of them were expelled from their apartments (about 50 people) and that they moved in a column which finally comprised many people that soldiers had found in the houses and woods. According to this witness, five men (named under Count 7 of the Indictment) were separated from that column and sent back towards Dušće. Witness Sabina Maslo stated also that she later heard that these five men had been killed and burnt down in the stable owned by Ajka Balić, located between Dušće and Višegrad.

Further, witnesses Medina Gušo, Ramiza Mustafić, Hasiba Mešanović, Mirsad Hubić and Hafiza Gušo testified about ten men being taken away from the village of Drinsko to the woods of Pušin where they were killed, and their bodies were exhumed on 24 April 2006.

Witness Alija Mešanović testified about the above mentioned incident, stating that, at the relevant time, while he was standing in front of his house in Drinsko, he saw a column of people walking towards the woods of Kik, Pušin Do. He claimed that soldiers and civilians were in that column. Witness Medina Gušo, with respect to this event, stated that ten Bosniac men were first lined up (they are listed under Count 4 of the Indictment) and that the soldiers (Dragan, Momir, Leka and another one) marched them to Pušin Do. The witness was determined that the taken men did not have weapons and that they were civilians.

Witnesses Šaban Ćato, Rasim Ćato and Fahra Ćato testified about the killing of Suvad Kurtić within the widespread and systematic attack on the municipality of Rudo. It follows from their testimonies that Suvad Kurtić, as well as other villagers of Donja Strmica who were the target of the attack of the Serb army on 25 May 1992, were civilians.

Although, there might have been also armed persons among the Bosniac population, their number was irrelevant within the context of the entire group of people which was predominantly of civilian nature and, as such, it was the target of the attack.

In this particular case, the Panel is satisfied that the manner in which the attacks were committed, as well as the scope of crimes against the Bosniac population are sufficient to find, beyond any doubt, that they were directed against the Bosniac civilian population.

[47] See the case of *Naletilić and Martinović,* ICTY Appeals Chamber Judgment, paragraph 235.
[48] See the case of *Kordić and Čerkez,* ICTY Trial Chamber Judgment, paragraph 180.

Based on the above mentioned evidence and circumstances, the Panel found that the attack was directed against the Bosniac civilian population and that none of the injured witnesses or victims was armed, in uniform or on the frontline.

According to the above mentioned circumstances, the Panel has established, beyond reasonable doubt, that the launched attack was directed against the civilian population and that none of the individuals that were the object of the attack was armed or participated in combats.

3.2.1.3. Nexus between the offences the accused is charged with and the attack

Pursuant to Article 172 of the CC of BiH, it follows that the nexus between the offences the accused is charged with and the attack has objective and subjective elements.

The objective element would relate to a sufficient nexus of the acts of accused with the attack, specifically that the acts of the accused may relate to the attack to a sufficient degree. However, the acts of the accused themselves need not be widespread or systematic in order to represent part of the attack, as that requirement relates only to the attack itself[49]. The acts that are, due to the reasons related to geography and time, detached from the core of the attack may still be considered as part of the attack if they are, without regard to that, connected with the attack (for example, by the manner in which those acts were committed or by the identity of victims or in cases when the acts were continued after the peak of the attack)[50].

According to customary international law and the provisions laid down in Article 172 of the CC of BiH, it is necessary that the accused knows about the attack against the civilian population and that his acts represent part of that attack[51]. It is not necessary that the Prosecutor proves by means of direct evidence that the accused knew about the relevant context and nexus. Such proof may be established by the supporting evidence such as: the status of the accused in civil or military hierarchies; the accused as a member of a group or organization involved in the perpetration of crimes; the scale of violence, and his presence on the crime scene.

The Panel finds that this nexus (objective and subjective) between the acts of the accused and the attack has been proven beyond a reasonable doubt. Certainly, the Panel has reached this conclusion primarily based on the proved membership of the accused in the formations which participated in the attack, as well as on his actual acts committed within the formations that were carrying out the above mentioned attack. The witnesses of Prosecution and Defense testified about the role of the accused, and stated that he was Commander of the Military Unit in the Local Community (MZ) of Drinsko, which consisted of two

[49] See the case of *Kordić*, ICTY Appeals Chamber Judgment, paragraph 94.
[50] See the case of *Brđanin*, IT-99-36-T, Judgment of 1 September 2004, paragraph 132. See also the case of *Kunarac et al,* IT-96-23/1-T- Judgment of 22 February 2001, paragraph 581-592.
[51] See the case of *Kayishem and Ruzidan,* ICTR-95-1-T, Judgment of 21 May 1999, paragraph 134. Also, see the case of *Bagelshema,* ICTR-95-1A-T, Judgment of 7 June 2001, paragraph 94.

platoons with 50-70 villagers from that local community. Witness Vojislav Topalović (Mayor of the municipality of Rudo at the critical time) stated that Momir Savić was Commander of the Brigade. Momir (father's name Milan) Savić and Miladin Savić also testified about these facts. In addition to the above mentioned witness testimonies, the Panel also took into account the physical evidence of the Prosecution – "Report on getting acquainted with brigade commanders, battalion commanders and company commanders of 24 December 1992" as well as „the personal registration file and unit file for Momir Savić"; from which it ensues that Momir Savić was Commander of the 3rd Company of the Army of Republika Srpska (VRS) in Višegrad during the war.

The Defense does not particularly dispute the fact that the accused was Commander of the Unit in MZ Drinsko. The Defense disputes the period of time when the accused was appointed Commander.

The Prosecution witnesses who had known the accused from before the war, stated that they saw him, at the critical time, on several occasions, in uniform and carrying weapons.

All incriminated acts that the accused is charged with, which the Panel has found him guilty of, occurred during the widespread and systematic attack. Beside the fact that the accused was Commander of a military unit (the 3rd Company) in the relevant period, the Panel takes note of the evidence that members of his unit were part of the attack and that they undertook the activities on the basis of which it can be undoubtedly concluded that they constituted part of the attack. In that regard, based on particular events that occurred at that time (which will be considered by the Panel within individual Counts of the Indictment) it is indisputable that members of that unit were taking the Bosniac civilians to SUP for interrogation, which is especially depicted by the events with respect to Count 1 of the Indictment. Furthermore, it follows from the events which will be explained below, that members of the unit which was under the command of the accused were taking away the Bosniac civilians and were killing them summarily. The accused took part in all those acts with the awareness and intention to commit them. Other acts that occurred in the municipalities of Višegrad and Rudo also fit into the overall events, and they cannot be, in any way, separated from the context of the attack. Thus, unlawful arrests, forcible transfer of the population and rapes are acts which the witnesses stated occurred during the attack. That these acts were committed almost exclusively against non-Serbs (except for the act under Count 6 of the Indictment), predominantly against the Bosniacs, follows from the witness testimonies, consistent with the established facts that are accepted in this case, as well as the presented physical evidence. The Panel has found that the accused is criminally responsible for the listed acts, however none of the acts of the accused cannot be, in any way, singled out as individual or being separated from the overall events. In addition, the accused committed the crimes jointly with other persons that took part in the crimes, and with the members of police, military and paramilitary groups which committed the widespread and systematic attack. All the above mentioned clearly points out that the accused was fully familiar with the attack which was taking place in the area of Višegrad and Rudo in the period from April through September 1992 and he knew that he contributed to the attack with his acts.

Taking into account all the above mentioned, the Panel finds that the incriminated acts occurred during the widespread and systematic attack by the Serb army, police and paramilitary formations against the civilian population of the municipalities of Višegrad and Rudo, and that the accused acted through his acts within such attack, knowing that his acts were part of such attack. All acts of the accused were part of such attack and they contributed to the widespread and systematic nature of the attack. The accused was aware of the existence of this attack, and he undertook particular criminal acts within the attack.

4. Evaluation of evidence by counts of the Indictment

While evaluating the evidence or testimonies of the witnesses who testified before the Court, the Panel has taken into account their attitude, behavior and characters to the extent that it was possible. Furthermore, the Panel has taken into consideration the plausibility and consistency of the witnesses and their testimonies in relation to other evidence and circumstances of the case. The Panel is aware of the fact that the credibility of the witnesses is dependable upon their knowledge of the facts they testified about, their integrity, honesty and the fact that they were bound to tell the truth before the Court.

Apart from the fact that a witness should testify honestly, his testimony also needs to be reliable. Being mindful of that, the Panel has been aware, during the entire proceedings, that uncertainty is present in the testimonies about the facts which happened many years ago before testifying, due to the instability of human perception regarding the traumatic incidents and memories of those incidents.

Regarding indirect evidence (hear-say), the Panel points out that such evidence is acceptable in the jurisprudence of this Court. Of course, the evidentiary value of such evidence is dependable upon the context and nature of the subject testimony, as well as whether that testimony is supported by other evidence. Besides, the Panel reminds that the Court is free concerning the evaluation of evidence (pursuant to Article 15 of the CPC of BiH).

With regard to the acts of perpetration of the criminal offence, the Prosecution witnesses who testified about the acts of perpetration as described in the Counts of the Indictment, are predominantly direct eyewitnesses, and some of them are direct victims.
The Panel points out that all incriminated acts were committed in 1992, so the Panel is not going to specify year each time when a date is mentioned.

4. 0. The accused and the military unit under his command

The Panel has already established that, upon withdrawal of the Užice Corps, paramilitary units remained in the municipality of Višegrad, and were joined by some local Serbs. Defense witness Vojislav Topalović stated that the joint army of Rudo, Višegrad and Čajniče was formed following the departure of the Užice Corps. The accused was also, during the stay of the Užice Corps, seen in uniform and carrying weapons in the municipality of Višegrad, which was testified about by Bahrudin Gušo, Ramiz Gušo and Nizija Gušo.

The accused himself does not deny that he was Commander of the 3rd Company during the war in the municipality of Višegrad, but he denies that it was during the relevant period of time covered in the Indictment. The accused claims that he was appointed Commander of the 3rd Company only on 13 July, specifically that the Company was formed only at that time. The allegations of the accused were confirmed by Milenko Jevđić, the Defense witness who stated that Vinko Pandurević (Commander of the Višegrad Brigade), at the critical time, was superior to platoon commanders (Dragan Savić and Zoran Tešević). With respect to this, the Defense presented Exhibit "Changes and modifications in the organization and formation of the Army of RS" of 3 July 1992 (Exhibit O4).

In the Record on suspect questioning during the investigation, the accused stated that he was appointed Commander of the 3rd Company "around 20 May 1992"[52].

The Panel accepted this record upon the Prosecution's motion, although the Defense opposed it. Namely, the Defense Counsel for the accused holds that legal provisions do not allow for the evidence of the suspect given during the investigation to be used subsequently as evidence due to the reason that, during that questioning, the accused was not instructed in accordance with amended Article 78(2) of the CPC of BiH.

The Panel is satisfied that the tendering and use of this evidence is in conformity with law. Having inspected the statement, the Panel found that the accused, during his questioning in the capacity of a suspect pursuant to Article 78(2) of the then applicable CPC of BiH, was instructed about his rights. Article 78 of the CPC of BiH (at the time when the suspect was examined) prescribed basic instructions of which the person who conducts the examination (prosecutor) is supposed to advise the person being examined in the capacity of a suspect, i.e.:

a) The suspect shall be informed of the charge against him and the grounds for the charge:
b) The right not to present evidence or answer questions;
c) The right to retain a defense attorney of his choice who may be present at questioning and the right to a defense attorney at no cost in such cases as provided by this Code;
d) The right to comment on the charges against him, and to present all facts and evidence in his favor;
e) That during the investigation, he is entitled to study files and view the collected items in his favor unless the files and items concerned are such that their disclosure would endanger the aim of investigation;
f) The right to an interpreter service at no cost if the suspect does not understand the language used for questioning.
g) The suspect may voluntarily waive the stated rights but his questioning may not commence unless his waiver has been recorded in writing and signed by the suspect.

[52] Suspect Examination Record No. KT-RZ-205/06 of 14 December 2007, p. 6.

To waive the right to a defense attorney shall not be possible for the suspect under any circumstances in case of mandatory defense under this Code;

h) In the case when the suspect has waived the right to a defense attorney, but later expresses his desire to retain one, the questioning shall be immediately suspended and shall resume when the suspect has retained or has been appointed, or if the suspect has expressed a wish to answer the questions.
i) If the suspect has voluntarily waived the right not to answer the questions asked, he must be allowed to present views on all facts and evidence that speak in his favor.

In this particular case, the Panel has found that the statement of the accused (the then suspect) is formally correct, in terms of the provisions of the quoted Article being fully complied with during the questioning at investigation. Also, the Panel has found that the right of the accused to a defense was not jeopardized during the taking of statement from him. Specifically, during the taking of that statement, the accused had a defense council present during his questioning. Also, it is obvious that the accused did not have any objections to the Record that he signed. The Panel is further satisfied that the acts of the Prosecutor during the taking of statement from the suspect (now the accused) were not contrary to Article 78 of the CPC of BiH. Also, the Panel points out that the proposed Record was made in accordance with Article 79(1) of the CPC of BiH, as stated therein.

The procedure of "the questioning of the suspect" is one of the probative procedures during investigation aimed at collecting evidence for the purpose of discovering the perpetrators and presenting arguments during the main trial. An investigative statement of the suspect, thus, represents part of evidentiary material of the prosecution. The law provides all guarantees protecting the rights of the suspect during the taking of such statement. If those guarantees have been complied with (prerequisites under Article 78 of the CPC of BiH) and if such a freely given statement contains evidence relevant to the case, there is no reason to deny it as evidence even in the case when the accused has decided to exercise his right to remain silent during the main trial. A conclusion contrary to this one would, from the point of view of exposing the criminal offences, reduce the questioning of the suspect to an absolutely useless process except in the case when the accused has pleaded guilty following the confirmation of the indictment (in which case his investigative statement is almost unnecessary) or when he has decided to testify at the main trial.

The Panel finds that there are no logical reasons for the statement of the suspect taken in accordance with law during a certain phase of the proceedings (during the investigation in this case) to lose its procedural value in later phases. Also, it follows from Article 78(6) of the CPC of BiH that the Court's decision may not be based on the statement of the suspect *if, during the taking of that statement any actions have been taken contrary to the relevant legal provisions*. Accordingly, the Panel finds that, in case when actions have been taken in accordance with all legal provisions, the investigative statement of the suspect may be used in rendering the Court's decision. Under the circumstances when the statement of the suspect has been taken in accordance with relevant legal provisions, its admitting into evidence is in accordance with Article 6 of the ECHR.

Considering this issue, the Panel has also taken into account the jurisprudence of the European Court of Human Rights (The European Court) as relevant. Namely, the provisions of the CPC of BiH with respect to the rights of the suspect during questioning are aimed, *inter alia*, at ensuring the rights under Article 6 of the ECHR, specifically the right to remain silent, the right to have a defense attorney and the right to understand the charges against him as well as the right to have an interpreter. If the statement was taken from the suspect contrary to the provisions of Article 77 or 78 of the CPC of BiH, "the decision of the Court may not be based on the statement of the suspect."[53]

Article 6(2) of the CPC of BiH stipulates: „*The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favor"*, and paragraph (1) of this Article reads: „*The suspect, on his first questioning, must be informed about the offense that he is charged with and grounds for suspicion against him, and that his statement may be used as evidence in further proceedings"*. It follows from the quoted provisions that the suspect may use both options at the trial: he may comment on the evidence against him and, at the same time, he may refuse to answer any questions. The Court is only bound to provide him with an opportunity to make a statement regarding any piece of evidence incriminating him, pursuant to Article 6(2) of the CPC of BiH.

The Courts point to the position of the European Court in the case of *Saidi vs. France, number 14647/89, Decision of* 20 September 1993, paragraph 43 which reads: "*All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3(d) and (1) of Article 6 (art. 6-3-d, art. 6-1), provided that the rights of the defense have been respected. As a rules these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings."*

In this particular case, the Defense has not presented any jurisprudence which would, in any manner, support their argument that the previous, legally obtained and freely given statement of the accused may not be accepted as evidence against him at the main trial, especially in the case when the accused has decided to present his defense.

The Panel has taken into regard that, by recent amendments of the CPC of BiH, Article 78(2)c) was changed in the manner that the accused must be also warned, inter alia, that his statement (from investigation) is admissible as evidence at the main trial and that it may be read out without his consent at the main trial. Also, a similar modification is contained in Article 6(1) of the CPC of BiH. Both provisions bind the relevant authorities to warn the suspect that his investigative statement may be used as evidence at the main trail.

[53] Article 77(3); Article 78(6) of the CPC of BiH.

The law that was applicable at the time when the accused was questioned in his capacity of a suspect did not contain this obligation for the prosecutor. Certain changes have been made to the provisions of Article 273 of the CPC of BiH by adding Paragraph 3 which reads: „If the accused during the main trial exercises his right not to present his defense or not to answer questions he is asked, records of testimonies given during the investigation may, upon decision of the judge or the presiding judge, be read and used as evidence in the main trial, only if the accused was, during his questioning at investigation, instructed as provided for in Article 78 Paragraph (2) Item (c) of this Code."

Therefore, pursuant to this provision, even when the accused does not exercise his right to present his defense, his investigative records may be used as evidence at the main trail.

Although, in its arguments, the Defense did not comment on the principles under Article 4 of the CC of BiH when considering this issue, the Panel considered the provision of paragraph 2 of this Article, stipulating that "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." A similar provision can be found in Article 15(2) of the International Covenant on Civil and Political Rights. The Panel is of the opinion that, as is the case with Article 15(2) of the Covenant, Article 4(2) of the CC of BiH refers only to the norms of substantive law, specifically the provisions of the Criminal Code, including those which stipulate the elements of the criminal offence and the gravity of punishment prescribed for that offence (however the Panel definitely notes that Article 4 is in any case qualified by the provisions set forth in Article 4 a)). The Panel holds that the principle under Article 4(2) of the CC of BiH does not relate to the procedural legal norms, specifically the provisions of the CPC of BiH.

This legal position is, by the opinion of the Panel, fully logical and consistent both with the respect for the basic rights of suspects and the accused and with the efficient functioning of the criminal justice system. Namely, at any given moment, the authorities, including investigative authorities and Prosecutor's Offices, must carry out their activities in accordance with the law which is in force at that time. If that law has been modified, it would be illogical and contrary to the interests of justice to retroactively „invalidate" the activities performed pursuant to the law that was applicable in the previous period, by relying on subsequent modifications of the law. Such an outcome would have a negative effect on law enforcement, putting the prosecution authorities into a position where they cannot guarantee that the activities undertaken pursuant to the applicable law will be valid in subsequent analysis of the Court's body. This would neither be in the interest of the individuals being targeted by the activities of the law enforcement authorities, because the authorities which do not have a clear picture of the law they are supposed to uphold might act in an unpredictable and unharmonized manner.

The situation could be different if a procedural provision which is in force at the moment of conducting the investigative activities represents in itself a violation of human rights protected by the Constitution (for example, the rights contained in the ECHR). In that case, one could argue that, since the legal provision was in itself unconstitutional at the given

moment, any acting in accordance with it would not be valid. Anyway, that situation was not present in this case, so the panel will not address such a theoretical issue.

Besides the above mentioned, when the accused exercises his right to present his defense before the Court (or, when he waives „the right to remain silent“), he thus enables the Prosecutor to cross examine him as well. In our procedural system, cross examination of the accused is possible only in that case, when the accused has made such choice. However, by presenting his defense, the accused shall be subjected to the entire range of cross examination including the possibility of questioning the credibility of the accused. In the criminal practice, that credibility is, in most cases, questioned by the use of the previous (conflicting) testimony of the accused (the person who testifies). From the aspect of a fair trial and thorough consideration of all relevant facts, it would be illogical to deny the Prosecutor the opportunity, if he considers necessary, to question the credibility of the accused by using his previous conflicting testimony.

Taking into consideration the above mentioned reasons, and believing that the proposed statement is relevant to this case, the Panel has upheld the motion of the prosecution and admitted the mentioned statement of Momir Savić into evidence. The Panel has found that this statement is formally correct, bearing in mind that the accused testified, however its probative value shall be evaluated within the context of other presented evidence.

In the admitted Record, as was already mentioned, the accused stated that he was appointed Commander of the 3rd Company around 20 May 1992, not on 13 July, as he claimed during his testimony at the main trail.

Pursuant to the averments of the accused himself, as well as to other presented evidence, the Panel has found that the accused was appointed Commander of the 3rd Company around 19 or 20 May 1992. The Company was stationed in Drinsko, and according to the testimony of Vojislav Topalović it belonged to the Višegrad Brigade and comprised two platoons. Dragan Savić was Commander of one of the platoons, while Zoran Tešević a.k.a. Leka was Commander of the other one. The above mentioned has, in the first place, resulted from the testimonies of Defense witnesses who were members of that unit, specifically Momir (father's name Milan) Savić and Miladin Savić. Additionally, these facts have followed also from the testimony of Vojislav Topalović, and from the statement of Čedomir Tešević whose investigative testimony was accepted by the Panel based on Article 273(2) of the CPC of BiH (as explained under Section 1.c of this Verdict). Members of that unit included Dragan Savić, Zoran Tešević a.k.a Leka, Momir (father's name Milan) Savić, Miladin Savić, Željko Krsmanović, Boško Tešević and Nikola Tešević. The above mentioned was testified about by Defense witnesses Miladin Savić and Momir (father’s name Milan) Savić, as well as Prosecution witnesses Fadil Salić, Husein Mujakić, Hasan Hubić, Redžep Salić and Fatima Mujakić who had known many of these persons from before, because those were local people that, before the war, lived for a long time in a small territory of the area of Višegrad. The Command of the Unit was stationed in Drinsko.

Defense witness Vojislav Topalović, as already pointed out, was Mayor of the Municipality of Rudo during the relevant period, and was involved in the activities of mobilization of the reserve JNA forces and the establishing of crisis staffs. As such, he was aware that the Unit under the command of the accused belonged to the Višegrad Brigade. He stated that the part of the territory of the municipality of Rudo that bordered Višegrad ("from the Hydropower Plant, down the right bank, to Brod, about 15 kilometers in length") was under control of the Company which was under command of the accused. Witnesses Miladin Savić and Momir (father's name Milan) Savić confirmed that one part of the municipality of Rudo was within their unit's area of responsibility (which is particularly relevant to Count 5 of the Indictment).

Defense witness Miladin Savić stated that the members of the 3rd Company had weapons from before, since all of them were reserve JNA soldiers, and they possessed machineguns M-48 and semi-automatic rifles "Papovka", as well SMB (olive-drab) uniforms of JNA. The witness stated that the Unit consisted of about 50 soldiers, and its members were neighbors from Drinsko. The accused was, according to this witness, „the person in charge", or Commander of the entire Company. This witness was a clerk in that unit and he stated that he used to submit all reports exactly to the accused, and he received all his assignments from the accused. The testimony of Momir (father's name Milan) Savić is consistent with the foregoing.

Prosecution witness Bahrudin Gušo had known the accused „since early childhood" and he stated that he had found out from the Commander of Logistics of the Užice Corps, Vlado (he cannot recall his surname), that Momir Savić had led an organized group of volunteers even during the stay of the mentioned Corps. Members of that group also included Dragan Savić, Zoran Tešević and Goran Tešević.

With respect to determining the date on which the accused was appointed Commander of the 3rd Company, the Panel also considered the letter of the Municipality of Višegrad of 28 December 2007[54] (Exhibit T 93) stating that the accused was a member of the Army of RS during the period from 18 May 1992 through 27 January 1993.

The Indictment alleges that, during the relevant period covered by the Indictment, the accused had a nickname of Vojvoda, which was testified about, among others, by Bahrudin Gušo, Mirsad Hubić, Hasan Hubić, Husein Mujakić, Šuhra Gušo, Latifa Hodžić and Redžep Salić. This fact is consistent with the statements of the Defense witnesses that the accused was Commander of the military unit whose Command was stationed in Drinsko, as well as the presented physical evidence which demonstrated that the accused was Commander of the 3rd Company of the Army of Republika Srpska (VRS) in Višegrad during the war[55].

[54] Letter of the Municipality of Višegrad number 03-831-7/07, of 28 December 2007 (Exhibit T 93)
[55] Report on getting acquainted with the commanders of brigades, battalions and companies dated 24 December 2009 and the Registration card for Momir Savić.

4.1. Count 1 of the Indictment

With respect to Count 1 of the Indictment, the Panel heard the aggrieved parties Ramiz Gušo and Nizija Gušo (Ramiz's mother). Šuhra Gušo and Bahrudin Gušo also testified about the circumstances surrounding this Count of the Indictment.

Based on the statements of the witnesses who have been heard, analyzed in detail below, the Panel established that it has been proved beyond any reasonable doubt that during the period from 17 to 22 April 1992, while Ramiz Gušo was imprisoned with 23 other Bosniacs in the building of the *SUP /Secretariat of Internal Affairs; hereinafter the SUP building/* in Višegrad, the accused interrogated Ramiz Gušo, while cursing and insulting him, cursing Alija Izetbegović and the SDA party */Democratic Action Party/,* calling him names such as *balija /Translator's note: Balija is a pejorative term for Bosniacs/.* Furthermore, on one occasion the accused punched him twice in his head and due to the force of the blow the aggrieved party fell down on the ground and felt dizziness. Back then the accused was accompanied by a Captain Dragan who punched Ramiz Gušo with his hands. In the operative part of the Verdict, the Panel adapted the allegations from the Indictment to the state of facts established at the main trial.

The witness (aggrieved party) Ramiz Gušo states that on 11 April the local Serbs attacked his village (of Jarci, Višegrad municipality) with firearms from the "hill from the direction of the Bijegovići village and from the flank from the direction of the Serb village of Čačice". All local residents of the village of Jarci fled to the woods and further towards the local community of Drinsko, where the local residents of other neighbouring Bosniac villages came too. All the Bosniac population, in fear of their own lives, set off towards the YNA barracks *Uzamnica*, where they spent a night, whereupon they had to leave the barracks (upon the order of the YNA commander). The witness states that he, his mother and sister left the barracks to go to Međeđa and further towards Goražde. They stayed in Goražde for a couple of days and once it was declared in Višegrad that all population had to come back or would be fired otherwise, they returned to Višegrad.

A few days after, at the entrance to the *Šumarstvo* /*Forestry Company*/ in Višegrad (where the witness worked before the war broke out) he saw a list of 24 persons against whom military proceedings were allegedly underway. On that occasion Dragan Savić and Jovan Marković whom he knew (he worked together with Dragan Savić in the same company and Jovan Marković was his classmate) were standing behind him. The aggrieved party Ramiz Gušo testifies that Dragan Savić and Jovan Marković handcuffed him immediately and took him to the *SUP* building, to one of the rooms on the upper floor of the building. The witness further states that in the room he found a certain Captain Dragan who was allegedly a commander of the military police of the Užice Corps. In addition to the captain, the witness claims that he also saw Momir Savić in the room and "one of the Lukićs". In his further testimony Ramiz Gušo states that he remembers the abusive language and curses hurled by the accused and Captain Dragan, such as: "Where are the *Green Berets*; why did he vote for Alija (Izetbegović, the then president of the Presidency of the Republic of B-H); and then Dragan and the accused swore his Muslim and *balija's* mother at him. The witness claims

that no one beat him at that point in time. Having spent several hours in a room with the above referenced persons, the witness was taken to the basement of the building and imprisoned in a room together with 23 other persons, so the total of 24 Bosniacs were imprisoned in the basement. They were all civilians. The witness Ramiz Gušo remained imprisoned in that room for about a week.

In addition to the foregoing, the witness Ramiz Gušo testifies that on one occasion Dragan Savić and a son of "a certain Budo" took him to his village, looking for 150 rifles that had allegedly been buried by the members of the *Green Berets*. They met Dragan's father Ilija Savić on the way. Ilija Savić, as described by the witness, asked Dragan where he had taken the witness from and whether someone had seen that. When Dragan said that Nizija and Ramiza Gušo (mother and sister of the witness Ramiz Gušo) saw him in front of the *SUP* building, Ilija told him to return him alive to the *SUP* and Dragan did so.

The witness Nizija Gušo stated that at the relevant time her son was arrested and taken to the *SUP* building and that he was abused there. Although she did not witness him being taken away (her daughter told her about it), she states that she visited her son while he was imprisoned at the *SUP* building and claims that she saw him in the prison, in the corridor.

Subsequently (during the Defense case), the Defense tendered into the case-file a Record on the Examination of Witness Nizija Gušo (O 1) in the Federal Republic of Germany in the case versus Momir (son of Milan) Savić for the suspicion that he took part in genocide and other criminal acts. In that statement, the witness mentions a huge number of crimes that were allegedly committed by Momir (son of Milan) Savić, but she did not mention the accused in that context at all. The Panel notes that the witness, in her earlier statement, speaks about different circumstances, that is, about events that are not subject-matter of the Indictment in the case. When she was examined at the man trial the witness Gušo confirmed that the aggrieved party Ramiz Gušo was imprisoned at the SUP building at the relevant time, as well as that Miloje Inđić took him out from Višegrad (and B-H). Given that she did not present other facts that are decisive for the case, the Panel finds that her testimony does not undermine the probative value of the evidence given by the aggrieved party Ramiz Gušo, which was absolutely convincing and beyond any reasonable doubt.

The witnesses Bahrudin Gušo and Šuhra Gušo confirmed that during the relevant period of time Bosniac civilians were imprisoned at the *SUP* building in Višegrad. The witness Bahrudin Gušo states that on 28 May his brother Mirsad Gušo was taken away to the *SUP* building in Višegrad from his work place at Terpentin /*Company*/. The witness states that the accused told his mother (Šuhra Gušo) that Mirsad would come back home the same night. However, Mirsad has been unaccounted for ever since. The statement of Bahrudin Gušo completely corresponds to the statement of the witness Šuhra Gušo, in the part in which she testifies that she saw the accused in a red coloured vehicle make *Lada Niva* in front of the *SUP* building in Višegrad. She states that the accused told her that her son Mirsad who was imprisoned at the *SUP* building would come home before dusk. It clearly follows from all these statements that Bosniac civilians were imprisoned at the *SUP* building and that the accused was at the spot and took part in those acts.

As for the relevant incident at the *SUP* building, the witness Ramiz Gušo testifies that people were taken upstairs to a room (in which the witness was placed on the first day of his arrest) and that the interrogations took place in that room. The interrogations were carried out by Momir Savić and Captain Dragan. One night the witness was taken for interrogation, at which point Momir Savić requested him to write down who had rifles in the village. The witness states that the accused was angry at the time, and the way how the accused requested that from him frightened him even more. The witness claims that he wrote down the requested information, however the accused did not even look at it, but only said that it was not good and tore a paper. The witness states that at that moment Momir Savić punched him three times in his head. On that occasion and in the presence of the accused he was also hit by Captain Dragan. The prisoners that the aggrieved party was imprisoned with at the *SUP* building previously told the witness that if they fell down while being beaten they would step on them and the witness thus tried to get up as fast as he could. The witness states that it took him quite some time to stand up and that he leaned against the wall to stand up and felt like it took him ages to get up although he did his best to get on his feet as fast as he could. The witness further states that he was asked the impossible, for example to tell them where the *Green Berets* were, where their weapons were, where their command was, where certain connections of theirs were and where Murat and Avdija Šabanović were. Besides, as alleged by the witness, the Captain Dragan and Momir Savić swore his *balija* and Muslim mother at him, cursing the *SDA* and Alija Izetbegović, Alija's mother and "everything that had to do with the religion".

By explaining the discrepancy between the statement given during the investigation in which he stated that the accused hit him twice and the statement given at the main trial when he stated that he was hit three times, the witness Ramiz Gušo states that he knows when he sustained the first blow in his head, and he then already had lapses of memory, but knows that he sustained another blow. The witness states that he knows that he was also hit by Captain Dragan and that Dragan and Momir were standing one next to another while he was only thinking of how to get on his feet in order not to be stomped on and he slowly leaned against the wall to stand up. Having in mind the allegations by the aggrieved party Ramiz Gušo, the Panel concluded that the accused punched him at least two times.

The witness identified the accused stating that he knew him from before, that the accused lived in the "third village" from the witness's village, that he knew his mother Vitorka and he is aware that Dragan and Momir Savić are cousins ("children of two sisters"). The witness describes in detail how the accused looked like at the relevant period of time, stating that on the relevant occasion he had a greenish camouflage uniform, was corpulent, with a short haircut and receding hair.

During the testimony the accused stated that he did not know Ramiz Gušo. He further claims that in April 1992 Dragan Savić brought Ramiz Gušo to the house where the mother of the accused lived. On that occasion Dragan requested the accused to provide information where the weapons were located in Jarci. The ACCUSED claims that on that occasion he told Dragan to return Ramiz Gušo to the place from which he had brought him and that he did not see him again after that. The Panel, at the proposal of the Defense, also heard Miloje

Inđić who only describes the situation as to when and how he transported Ramiz Gušo from B-H to Priboj. Miloje Inđić knew Ramiz Gušo for a longer period of time because both of them worked in the same company (*Šumarstvo*). He states that while they travelled to Priboj Ramiz did not mention that he had ever been imprisoned at the *SUP* building in Višegrad.

In such circumstances the Panel found the testimony of the accused to be reliable and truthful. The fact that the witness was imprisoned over the above referenced period has been proved beyond any doubt. The aggrieved party Ramiz Gušo describes in detail both the circumstances of him being taken away and the circumstances surrounding his imprisonment, as well as the verbal and physical mistreatment, from which it is clear that the experience that the witness had been through was personal and traumatic. Besides, the aggrieved party also mentions circumstances referring to other persons who, like himself, were imprisoned and physically abused at the *SUP* building, and presents clear and detailed circumstances about it. The Panel did not find that the witness, when testifying, was exaggerating or avoiding something, and found that the witness presented his allegations without expressing any malicious intents or feelings against the accused (the witness even indicated that he was not physically mistreated at the time of his first interrogation). Under those circumstances, his testimony bears more weight too.

It is clear that the witness knew the accused from before (and therefore there could be no mistake regarding identification), and that he was a direct victim of his abuse, in the manner he described. The truthfulness of this testimony is also corroborated by the fact that the witness told his mother about these events immediately after he was released. It is clear that, under those circumstances, by informing his mother of the horrific events that he had just experienced (which he remembers even 15 years later), the witness tried to authentically present all details of everything he had been through. His mother Nizija Gušo also testified about the same circumstances and she, as mentioned above, confirmed that at the relevant time her son was detained and that he was rescued by Miloje Inđić.

The Panel did not find reliable the testimony of the accused, which was obviously given in order to avoid responsibility. There is nothing corroborating it and is contrary to other evidence presented with respect to this Count. Moreover, the statement of the witness Miloje Inđić does not contain facts that would call into question the quality of Prosecution evidence regarding this Count of the Indictment. Moreover, this witness describes how he helped Ramiz Gušo to leave Višegrad and B-H, and does not mention any information about the circumstances that the aggrieved party experienced. The testimony of Miloje Inđić that the aggrieved party Ramiz Gušo did not mention to him that he had been imprisoned and mistreated does not diminish the credibility of the witness Gušo's testimony at all since his statement is entirely convincing and consistent. In other words, there is a realistic possibility that under the circumstances in which the aggrieved party and Miloje Inđić found themselves (in which the witness Inđić rescues the aggrieved party), and having in mind the state in which the aggrieved party was, the aggrieved party had no need to explain all details of everything he had been through to Miloje Inđić because of the fear that he had while leaving Višegrad and B-H.

The Panel established beyond a reasonable doubt the participation of the accused in the above mentioned incriminated acts.

Under this Count, the accused is charged with torture and other inhumane acts referred to in Article 172, Paragraph 1 of the CC of B-H. Based on the presented evidence the Panel concluded that the acts of the accused constitute other inhuman acts referred to in this Article, which acts imply:

- act or omission, whose gravity is similar to the gravity of other acts referred to in Article 172, Paragraph 1 of the CC of B-H;
- that the act or omission caused serious mental or physical suffering or injury, that is, that they constitute a serious attack on human dignity;
- that the act or omission was intentionally committed by the accused or a person for whose acts and omissions the accused is criminally responsible.

The examples of inhumane acts referred to in Article 172 of the CC of B-H in the ICTY case law are: mutilation or severe bodily harm[56]; beatings and other acts of violence[57]; injuring[58]; serious injuries to physical or mental integrity[59]; serious attack on human dignity[60]; forced labour that caused serious mental or physical suffering or injury or the act constituted severe attack on human dignity[61]; deportation and forcible transfer of groups of civilians[62]; enforced prostitution[63] and enforced disappearance of persons[64].

To assess the seriousness of an act, consideration must be given to all factual circumstances. Some of these circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. The fact that an act has had long term effects may be relevant to the determination of the seriousness of the act[65].

The *mens rea* of inhuman acts from this Article is satisfied where the offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or

[56] See *Kvočka et. al* case, ICTY Trial Judgment, para. 208.
[57] Ibid, paragraph 208.
[58] See *Kordić and Čerkez* case, ICTY Appeals Judgment, paragraph 117.
[59] See *Blaškić* case, ICTY Trial Judgment, paragraph 239. Then, see *Krstić* case, ICTY Trial Judgment, paragraph 523.
[60] See *Vasiljević* case, ICTY Trial Judgment, paragraphs 239-240.
[61] See *Naletilić and Martinović* case, ICTY Trial Judgment, paragraphs 271, 289, 303.
[62] See *Kupreškić et. al* case, ICTY Trial Judgment, paragraph 566.
[63] Ibid, paragraph 566.
[64] Ibid, paragraph 566.
[65] See *Vasiljević* case, ICTY Trial Judgment, paragraph 235. Then, see *Blaškić* case, ICTY Trial Judgment, paragraph 243.

omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.[66]

Based on the overall circumstances in which the acts that the aggrieved party Ramiz Gušo (and partially, bearing in mind the corroborating statement of his mother Nizija Gušo) testified about occurred, it follows that those are the acts that have the same gravity as other acts referred to in Article 172 of the CC of B-H. The aggrieved party was unlawfully imprisoned at the SUP building where he faced uncertainty and fear as to what was going to happen to him. The persons who imprisoned him as well as those who interrogated him at the *SUP* (the accused and Captain Dragan) behaved in a manner which definitely caused a great level of fear with the accused.

The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious.[67] Mental suffering is typical for the conditions that the prisoners, including the aggrieved party Ramiz Gušo, definitely found themselves in the *SUP* prison in Višegrad. It can be concluded from the above mentioned circumstances that the aggrieved party was in constant fear of arbitrary mistreatment by the accused and Captain Dragan, particularly having in mind that he saw the suffering of other prisoners and the consequences of their mistreatment. Furthermore, the aggrieved party was imprisoned without being informed of any reasons thereof; he was in placed a small room in a basement, hygienic conditions in that prison were "poor" (substandard) and the prisoners received only smaller quantities of food. All 24 prisoners were sitting on the floor of the room where they were locked up and had no possibility to move freely. The witness describes that he always had fear, that he kept expecting to be taken to the interrogation room again (where the interrogations and mistreatments were taking place) and states: "A human being, at that point a human being is helpless to seek any assistance". He saw in what condition other prisoners were after they had been mistreated in a room where the interrogations were conducted. What remained etched on the memory of this witness is the way how the prisoner Dževdo Kustura looked like after he had been abused in the interrogation room; they just threw him in among other prisoners. Dževdo Kustura, as alleged by the witness Ramiz Gušo, was beaten up with a table leg, he was covered in blood all over and was swollen and bruised. The other prisoners comforted him and tried to calm him down so that the guards would not hear him and harm the others.

Around 23 or 24 April after he, assisted by a Serb, was rescued from the *SUP* prison, the aggrieved party Ramiz Gušo went to Macedonia to the Red Cross where he was hospitalised because of serious stomach problems.

It follows from the statement of the aggrieved party Ramiz Gušo that the accused was present when the prisoners were interrogated and then abused. Ramiz Gušo himself was also a victim of the acts by the accused (as described above). Besides, Ramiz Gušo claims that the prisoners would be beaten most severely when interrogated by Momir Savić. In

[66] Ibid, paragraph 132.
[67] See *Krnojelac* case, ICTY Trial Judgment, paragraph 131.

addition, he states that the *SUP* staff addressed the accused as a sort of superior, and that Dragan Savić and Jovan Marković, at the time when they brought Ramiz Gušo to the SUP, addressed him as a sort of a leader.

The Panel concludes that the described living conditions at *SUP* as well as the physical abuse of prisoners caused great suffering and serious physical or mental injuries upon those persons, including Ramiz Gušo, and it considers that those conditions, viewed as a whole and in the specific context, are of a similar gravity as the offences referred to in Article 172, Paragraph 1 of the CC of B-H. The Panel is satisfied that the described conditions in which the persons of Bosniac ethnicity were detained (including the aggrieved party Ramiz Gušo) were created deliberately and were directed at causing great suffering and serious mental or physical injures, which eventually happened. The acts of the accused satisfy the elements of the incrimination referred to in Article 172, Paragraph 1, Subparagraph k) of the CC of B-H, and thus the Panel did not accept the legal definition of torture proffered by the Prosecutor's Office with respect to the abuse of the aggrieved party Ramiz Gušo.

4.2. Count 2 of the Indictment

Count 2 of the Indictment charges the accused that on 29 April 1992 in the village of Meremišlje, Višegrad municipality, in a group of several uniformed, masked and armed Serb soldiers, including Zoran Tešević a.k.a. *Leka*, he participated in the interrogation and beating up of Bosniac civilians Vejsil Hota, Salko Sinanović, Hasan Mutapčić and Ibro Mutapčić, and thereupon in the plundering and burning of the houses of Mehmedalija Topalović and Hajro Hanić.

Testimonies of two witnesses Mehmedalija Topalović and Vejsil Hota are relevant to this Count of the Indictment, which pursuant to Article 273, Paragraph 2 of the CPC of B-H were read at the main trial (as previously explained in detail in the Verdict under Section 1. c) of the Procedural Decision).

The witness Mehmedalija Topalović states that until 29 April 1992 he lived in the village of Meremišlje (the municipality of Višegrad) with his wife and four children and he claims that his house was set on fire that day. He states that on that day (29 April) he saw a Serb army descending from the adjacent hills to the village, saying aloud: "Do not run, we will shoot" to the persons that the witness saw at that moment. Those were the following persons: Vejsil Hota, Salko Sinanović, Hasan Mutapčić and Ibro Mutapčić. The soldiers set off through the village and brought the above named men to the house of the witness and started shooting at the house from three directions. According to the witness, his wife, children and mother were in the house and all of them started running away when the shots were fired at the house. At that moment the witness, together with Avdija Šabanović, was hidden in a thicket nearby the house, wherefrom he watched his house. At that point the witness heard soldiers calling him by name, cursing his mother at him and threatening they would slaughter his children if he failed to show up. The witness did not show up, regardless. The witness further describes that the soldiers were masked which is why he was not able to recognize them. Then the soldiers threw something into the house of the witness

(the witness did not see what that was exactly) but he knows that an explosion was heard after that and one could immediately see a flame coming through all windows of the house. The soldiers were some twenty meters away from the house when the explosion took place, when the house was set on fire.

The soldiers brought the captured men to a place which was some 50 meters away from the house of the witness, and it was those men themselves that told him what happened thereafter. They told him that those soldiers forced them to kiss a cross that the soldiers had previously drawn on the ground. When some of the men did that, he would be kicked in the head by a soldier. Vejsil Hota, Hasan Mutapčić, Salko Sinanović and Ibro Mutapčić have told Mehmedalija Topalović that Momir Savić had been there and that he took part in the described incident. The witness himself states that he saw the accused approximately two times in his life and that he could not recognize him on the relevant occasion among the soldiers who were present there. The Panel finds that it is quite understandable that the witness Mehmedalija Topalović could not recognize the accused under the referenced circumstances, since the situation he found himself in made him think only of how to save himself and his family and survive while he watched his house being set aflame, especially having in mind that he had seen him only twice in his life some time before the war in completely different, peace-time circumstances.

The witness Mehmedalija Topalović states that before his house was torched he saw that the soldiers who were standing next to the house took out all valuables from it, all they could carry with them. The witness Topalović additionally claims that he saw the house of Hajro Hanjić being torched. However, asked by the Defense Counsel whether that was the same group of soldiers who had torched his house, the witness claims that it was not the same group of soldiers. In the statement that he gave during the investigation, which the Panel pursuant to Article 273, Paragraph 2 of the CPC of B-H admitted into the evidence, Vejsil Hota also states: "That day, when they beat up the four of us, they torched the house of Hajro Hanić and the house of Mehmedalija Topalović, we were in front of the house when they took out nine sofas and all other valuables from the house of Mehmedalija Topalović"[68].

From the above referenced statement of the witness Mehmedalija Topalović as well as the statement of the late Vejsil Hota it arises that a group of armed, uniformed, masked soldiers plundered the house of Mehmedalija Topalović (the Panel will provide detailed explanation about the plundering and torching of houses in Section 5 of the Verdict). The Prosecution did not prove beyond a reasonable doubt that the house of Hajro Hanić was plundered too.

The witness Topalović further states that Vejsil Hota, Salko Sinanović and Hasan Mutapčić told him later on that Momir Savić was among a group of soldiers who torched his house.

[68] The statement of the witness Vejsil Hota given to SIPA officers number 17-04/2-04-2-521/07 of 15 May 2007

As for the allegations presented by the witness Topalović, the Panel also assessed the statement of the witness Vejsil Hota, having in mind the limited use of this piece of evidence.

In the statement that Vejsil Hota gave to the SIPA officers during the investigation he states that the "chetniks" came to Meremišlje in March 1992, but he is not sure whether it was actually in March. Having in mind the convincing and definite statement of the witness Mehmedalija Topalović who claims with certainty that it was 29 April (the day when his house was torched) and the fact that witness Vejsil Hota was not sure about the date, the Panel finds that it was really in April, specifically 29 April that Mehmedalija Topalović clearly remembers. The Panel believes that the events that the aggrieved party Topalović experienced on that day (the witness lost all property, his house was torched, he was in great fear) had significant influence on the precise recollection of the date.

In the statement given during the investigation Vejsil Hota describes the relevant incident in Meremišlje. He states that around nine o'clock in the morning "the chetniks" started shooting at Meremišlje from two directions, from the direction of Drinsko and from the direction of Strmica, so the village was encircled. According to his statement "the chetniks" opened bursts of fire on the village while the male voice shouted from the direction of *groblje /cemetery/* (Drinsko): "You all come here, if you do not come we will torch your houses". At that moment the witness was standing in the village together with Suvad Omeragić and his two sons and saw a person by the name of Salko Sinanović running towards the cemetery with his two sons. At that moment a soldier in an olive-drab uniform shot from a light machine gun, all the time cursing. The soldier called the witness to approach him and the witness did so, so they met at the place that the witness calls Livade – Krivače. The witness further describes that back then "chetniks*"* started arriving at the location of *cemetery*, some 40 to 50 of them, armed *from head to foot* with automatic weapons. Those soldiers brought Salko Sinanović and Hasan Mutapčić with them. The witness did not recognize any of the soldiers because they were masked (had stockings over their heads) so one could only see their eyes, and therefore the witness assumed that those soldiers knew them all. From the place where they gathered, the soldiers took those people (Vejsil Hota, Salko Sinanović and Hasan Mutapčić), as well as Ibro Mutapčić whom they met on the way, to the house of Mehmedalija Topalović. Around fifty soldiers gathered in front of the house. They immediately started interrogating the four men mentioned above, asking for weapons. The witness states that they first requested weapons from him personally, believing that Hajro Hanić (who was a police officer at the time) and the witness were leaders of *Green Berets*.

In the statement that he gave during the investigation, Vejsil Hota further states that he did not recognize anyone at that spot, save Momir Savić who was clad in a camouflage uniform and had an automatic rifle. The witness describes in detail how the accused looked like on the relevant occasion and states that he was from the Drinsko local community, around 40

years old, was "diligent",[69] corpulent, and handsome. In addition, Vejsil Hota states that he knew the accused from before the war because they used to meet each other while hunting, and that he is aware that the accused worked in the Republic of Slovenia before the war and that he was a good friend with Hajro Hanić. Having in mind all these circumstances, the Panel believes that Vejsil Hota undoubtedly recognized the accused on the relevant occasion.

As for the relevant incident, Vejsil Hota claims in his statement that the accused was at the distance of seven to eight meters from them (four named Bosniac men) while the masked soldiers approached and interrogated the men who had been brought upon his order. On several occasions the soldiers forced them to lie down, and then beat them with their boots all over their bodies and on the head too. Vejsil Hota is explicit in saying that Ibro Mutapčić, Salko Sinanović and Hasan Mutapčić had the so-called French caps on their heads, so that these soldiers kicked their heads over those caps. In such a process they asked them where Hajro Hanić was and where Avdija Šabanović and many other Muslims were. According to the statement of Vejsil Hota the abuse lasted for some two to three hours. They asked Vejsil Hota where his sons were; they threatened him by pointing a heavy machine gun at him, and they shot right next to his right ear. On that occasion Vejsil Hota's ear drum got impaired and his body was black and blue with beatings that he sustained from "Momir Savić's soldiers". In his statement Vejsil Hota also states that Momir Savić was the main *vojvoda*, so that he was in a position to issue orders to the soldiers who were beating the mentioned persons.

The statement further reads that after the described mistreatment the soldiers released Hasan Mutapčić, Ibro Mutapčić and Salko Sinanović to go home, while the accused called Vejsil Hota and asked him to write down who had weapons in the village. The accused received the requested information from this man, whereupon the accused warned him that he should leave the village because "it was a total chaos" and released him. Zoran Tešević, a.k.a. *Leka,* also set off with Hota at the time and advised him to run away wherever. In the statement he gave, Vejsil Hota additionally mentions that he knew Leka's father Čedo very well and that he often went hunting with him, so it is undisputable that the identification of Leka is absolutely reliable.

In his testimony the accused does not contest that the relevant incident took place in Meremišlje on the relevant day and that he was personally present. However, he claims that Dragan Savić is responsible for the abuse of the civilians (including Vejsil Hota) and the plundering of Topalović's house. In other words, the accused claims that on the relevant day his mother told him that Dragan Savić went to Meremišlje together with a group of soldiers to plunder the local residents of the village and asked him to go there so that Dragan and the soldiers would not harm the people in Meremišlje. The accused states that he, together with Zoran Tešević, Ljubiša Savić and another soldier whose name he does not remember, went to prevent Dragan from his intention to commit the mentioned acts. Furthermore, he stated

[69] During the evidentiary proceedings in the case many witnesses used the term „diligent", but when asked by the Court they explained that they actually meant that a person was corpulent. Accordingly, the Panel notes that a term „diligent" should be understood that this was a corpulent person.

that he found Dragan Savić and the soldiers beating four or five men who were lying on the ground.

First of all, the Panel did not find convincing the allegations by the accused that he showed up at the relevant location only subsequently, having in mind the convincing evidence of witnesses Hota and Topalović, based on which it can be concluded with certainty that the accused was present there throughout the relevant incident. Furthermore, the Panel did not find the testimony of the accused to be truthful because it is contradictory to the convincing evidence about his active participation in the mentioned criminal acts. When one takes into account the consistency of evidence that clearly suggests his direct involvement in those acts, the Panel finds the averments of the accused that he participated in the event in Meremišlje out of good intentions to be completely unconvincing. Even based on the fact that he, himself, admits in his testimony his presence at the scene and his authoritative role in the unit favour the conclusion that he was an active participant in the criminal acts committed against the mentioned Bosniac men in Meremišlje. In other words, the statement of Vejsil Hota directly incriminates the accused and all its substantive parts are completely consistent with the statement of the witness Topalović. It is important to note that Topalović, although he does not remember the accused personally, does not mention any person that (as claimed by the accused) tried to prevent the mistreatment of the civilians, the plundering and destruction of their property, as described above. It is clear from the testimony of Topalović as well as from the statement of Hota and the nature of the incident that all Serb soldiers who were present during this incident, actively and willingly participated in it. When this conclusion is coupled with the fact that the accused does not contest that he was present during the incident and his authoritative position towards other soldiers that existed as early as then, it is clear that the accused took part in it.

The intent of the accused to commit the described specific acts arises from the evidence that was presented regarding this Count of the Indictment. Both witnesses Mehmedalija Topalović and Vejsil Hota (in the statements given during the investigation) confirmed that the accused was present during the relevant incident in the village of Meremišlje on 29 April. In his statement Vejsil Hota states that the accused even advised him that he should leave Meremišlje, or else all kinds of things could happen to him. Accordingly, it is clear that the accused was aware of all events in that area. Besides, Vejsil Hota claims that the accused issued orders to the soldiers who were present there, and states that the soldiers, exactly upon the order of the accused, approached and interrogated the four men in front of Mehmedalija Topalović's house and beat them during the interrogation, which clashes with the averments by the accused. Having in mind those statements of the Prosecution witnesses as well as the fact that the accused personally confirmed his presence at the spot, the Panel did not accept the averments by the accused that he was against the mistreatment of civilians in Meremišlje and the plundering of their property. Instead, based on the presented evidence (described above in detail) it clearly follows that the accused was present there all the time and that he, by his presence, decisively contributed to the perpetration of the criminal acts. This is particularly so because of the testimony of the accused in which he states that upon his insistence the members of that *paramilitary* released the above named

Bosniacs that they had mistreated before. It is clear that he had certain authority among those soldiers even before he was formally appointed a commander.

The Panel thus finds that the criminal responsibility of the accused with respect to this Count of the Indictment has been proven by the entire body of evidence including the testimony of Topalović, the evidence about the rank and responsibilities of the accused at the relevant time, the testimony of the accused himself about being present during the referenced incident and the statement of the witness Hota that corroborates previous evidence and sheds a new light to the mode of perpetration of the accused.

Under this Count of the Indictment the accused is also charged with other inhumane acts and torture referred to in Article 172 of the CC of B-H.

Based on specific circumstances in which the relevant incident took place, the Panel concludes that this act is of the same gravity as other acts referred to in Article 172 of the CC of B-H. In other words, Vejsil Hota, Salko Sinanović, Hasan Mutapčić and Ibro Mutapčić were brought in front of Mehmedalija Topalović's house without any explanation and were there subjected to physical abuse that lasted for two to three hours. The soldiers beat them all over their bodies and heads. In his statement Vejsil Hota states that his ear drum was injured by the sustained beatings.

As for the gravity of mental or physical suffering, the Panel finds that such suffering completely characterised the overall situation in which the four Bosniac men found themselves on 29 April in front of the house of Mehmedalija Topalović. Based on the circumstances as described by witnesses Mehmedalija Topalović as well as Vejsil Hota in his statement, it can be concluded that those Bosniac men were subjected to severe physical abuse by Serb soldiers without knowing the reasons thereof. On that occasion they were cursed by the soldiers of the Serb Army who were present there, which additionally intimidated them while they were completely helpless. In other words, those were elderly persons who happened to be alone without any protection, surrounded by armed soldiers (around 40 to 50 armed soldiers), and it is logical that they were in great fear for their lives. As previously mentioned, the abuse of those persons lasted for a couple of hours and was followed by the torching and plundering of houses, which indicates that it was not a sporadic, unplanned attack. Apart from physically abusing the victims, the soldiers humiliated them by forcing them to kiss the cross, that is, the ground on which the cross was drawn, hitting them in their heads at the same time. The plundering and torching of Mehmedalija Topalović's house in those circumstances definitely intensified the fear and uncertainty that the victims could have felt.

Accordingly, the Panel finds that the described conditions, in their entirety, are of the same gravity as individual offences referred to in Article 172, Paragraph 1 of the CC of B-H. According to the Panel, those conditions were created deliberately and were directed at causing great suffering and serious mental or physical injures upon Bosniacs, which was the ultimate result.

Under this Count the accused is charged with having perpetrated the above described acts based on individual responsibility provided by Article 180, Paragraph 1 of the CC of B-H in conjunction with Article 29 of the CC of B-H.

The Panel concluded beyond a reasonable doubt that the accused, in a group of several uniformed, masked and armed Serb soldiers acting together, decisively contributed to the perpetration of the crime in question by participating in the interrogation and beating up of Bosniac civilians (Vejsil Hota, Salko Sinanović, Hasan Mutapčić and Ibro Mutapčić) and then in the plundering and torching of Mehmedalija Topalović's house. Based on the presented evidence, the Panel concluded that the accused acted as a co-perpetrator in the perpetration of the criminal offence referred to in Article 172, Paragraph 1, Subparagraph k) of the CC of B-H, while the elements of torture have not been satisfied.

As of the moment when the soldiers entered the village of Meremišlje, when four Bosniac men were brought in front of Mehmedalija Topalović's house, and then their abuse, all these acts took place one after another in short time intervals. It is clear that all these acts are part of a wider event in which the paramilitary unit that Momir Savić was also a member of indisputably participated, as well as that he was present and participated in all perpetrated acts alleged under this Count of the Indictment.

Although it appears at first sight that there are discrepancies between the statement of Mehmedalija Topalović and statement of Vejsil Hota, the Panel is of the opinion that those statements are consistent with the decisive facts, that is, that there is no clash when the witnesses speak about the specific incident at the spot and the conduct of its participants (although Topalović has no particular recollection of the accused). It is quite natural that the witnesses, after more than 16 years, give statements that are not completely consistent – such limited discrepancies even support the conclusion that the witnesses are testifying truthfully because they rely on their memory about the relevant events without trying to harmonise them with other testimonies or evidence. In doing so, it is necessary to take into account the fact that each individual has a different perception of an event as well as that every person will individually focus on a certain detail(s), which was also the case here.

Based on the described testimonies it is undisputable that there is certain a pattern of conduct in the relevant incident in which the accused undoubtedly took part. The described incident took place at the time of a widespread and systematic attack and it is a part thereof. It is not only that this incident took part during and in the context of the already described widespread and systematic attack, but the existence of the attack made all that possible and it constituted an act in a chain of acts by which the attack was carried out.

In accordance with the mentioned facts, the Panel established that the accused committed the criminal offence referred to in Article 172, Paragraph 1, Subparagraph k) of the CC of B-H as a co-perpetrator.

4.3. Count 3 of the Indictment

Count 3 charged the accused Momir Savić that on 23 May 1992, having previously ordered the Bosniac civilian population of the Drinsko settlement, Višegrad municipality, to gather at the crossroads near a cemetery, whereupon around 200 of them gathered, he told them that it was a Serb land and that there was no more joint life of Serbs and Muslims, and, threatening them with death, escorted by his soldiers, gave an ultimatum that the Bosniac civilians leave Drinsko and all their property by noon, which they did by leaving in different directions carrying only their personal belongings.

The Prosecution witnesses who were heard with reference to this Count of the Indictment provided a detailed description of what happened on 23 May 1992 in the settlement of Drinsko, Višegrad municipality. Some of them were personally present during the gathering at the place known under the name *groblje* /*cemetery*/, while some of the witnesses found out about the subject-matter of the gathering indirectly, that is, from those who were there.

The settlement of Drinsko is a suburban settlement in the municipality of Višegrad. Before the war it was largely a Muslim settlement and after the war the number of Muslims is significantly lower than the number of Serb residents. Husein Mujakić, Almasa Hadžić, Mirsad Hubić, Medo Tabaković, Šuhra Gušo, Latifa Hodžić, Redžep Salić and Fadil Salić testified about this, as well as Defense witnesses "OB" and "OC". These facts were also not disputed by either the Defense of the accused or by the accused himself.

The location of the *cemetery* that is mentioned under this Count of the Indictment, according to testimonies of the (Prosecution and Defense) witnesses is located at the crossroads in Drinsko, and the Command of the unit commanded by the accused was quartered there[70].
The Panel primarily notes that some of (Prosecution as well as Defense) witnesses stated that the relevant incident took place on 23 May, but some said it was on 24 May (1992). Given that these are only minor discrepancies and having in mind that it is quite realistic and understandable to have such discrepancies after more than 15 years, the Panel established that this event, as well as the relevant incident under Count 4 of the Indictment, took place around 23 May 1992.

While describing the situation that preceded the incident that took place around 23 May 1992, the witness Redžep Salić states that at the mosque in Drinsko, which was occupied by Serb forces during the relevant period of time, in the evening hours those soldiers were provoking, insulting and cursing the residents, so that in the evening hours the people were fleeing into woods to hide. Music was played from the mosque, chetnik songs were sung and there were exclamations: "Balije we shall kill you if you happen to be there, those who

[70] Testimony of Husein Mujakić at the main trial held on 18 August 2008; testimony of Mirsad Hubić at the main trial held on 20 August 2008; testimony of Medo Tabaković at the main trial held on 25 August 2008; testimony of Šuhra Gušo of 26 August 2008; testimony of Redžep Salić at the main trial held on 7 October 2008; testimony of Fadil Salić at the main trial held on 9 October 2008; testimony of the witness „OB" at the main trial held on 24 March 2009.

remain will be slaughtered". The consistent statements about this were also given by witnesses Šuhra Gušo and Medo Tabaković. The witness Redžep Salić states that the soldiers of the unit commanded by the accused were armed and uniformed, some of whom had olive-drab and some multicoloured uniforms. The statement of the witness Fadil Salić is also consistent with this and he testifies that during the night it happened that some of the Serb soldiers who were in Drinsko would climb on the mosque and threaten over loudspeakers: „We shall slaughter all those that we find".

All Prosecution witnesses pertaining to this Count of the Indictment, to wit: Husein Mujakić, Almasa Hadžić, Mirsad Hubić, Medo Tabaković, Šuhra Gušo, Latifa Hodžić, Redžep Salić and Fadil Salić are consistent regarding the details of the relevant incident that took place around 23 May 1992 at the *cemetery*. The accused himself does not contest the facts presented by those persons, but claims that he acted in a described manner due to the safety of the Drinsko population.

As for the charges that Momir Savić ordered the population of Drinsko to gather at the *cemetery*, the Panel concluded that the accused, through Fadil Salić (who is also a local from Drinsko), informed the local population of the village that it was necessary for them to gather at the *cemetery* on the mentioned day around 8 or 9 o'clock.

The witness Fadil Salić states that a day before the gathering of the Drinsko population, the accused interrogated him at his command post asking whether a brother of the witness was a messenger in *Green Berets*, and also interrogated the witness as to why he set a Serb flag on fire in Višegrad, where his family was, where the *Muslim leader* Hasan was. Then the accused, as stated by the witness, opened a small hard-cover notebook and asked which Muslims were still in the village. Having finished the conversation, the accused told the witness that as of that night he designated him to be the Muslim leader and that as of the following day he had to gather all the people who had remained in Drinsko to come for a meeting at 9 o'clock a.m. (he also emphasizes that the accused did not order, but requested him to inform the local population). Besides, the witness claims that the accused said: "...all (the population) that we have here to come tomorrow for a meeting at 9 o'clock, who wants to be loyal to this Serb state can remain to live there, no one will harm them". The witness complied with such a request by the accused and informed the people in Drinsko (the witness states that he visited around 35 houses) about the meeting that was going to take place and informed them that he had been instructed by the accused to come for a meeting at 9 o'clock, so that the accused could verify who would be loyal to the State to remain to live there. The accused himself agrees with these allegations. In other words, the accused states that the local people who knew him from before, being aware of all events in the area of Višegrad, were asking him all the time what to do, what he was suggesting to them. For that reason he called Fadil Salić who, as alleged by the accused, got "frightened a bit" because he did not know why the accused had called him. The accused further states that in the conversation "over the brandy" they agreed that Fadil inform all locals of the village to show up at the *cemetery* on the following day in order to make arrangements about their future life in Drinsko.

The witness Husein Mujakić states that he did not personally receive an order from the accused to show up at the *cemetery*, but that his female neighbour informed him about it. The witness Redžep Salić describes that one night in the final days of May 1992 his cousin Fadil Salić told him that on the following day, around 8 or 9 o'clock in the morning, they had to go to the *cemetery* and Mirsad Hubić also testified about it. The witness Latifa Hodžić states that the soldiers of Momir Savić went from one house to another saying that Momir said that they had to leave Drinsko.

Accordingly, and having in mind that he was the commander of the unit whose command was quartered in Drinsko, and that the local population from Drinsko were also aware of that (and that some of them approached him for help because of it), the Panel finds that such a request of the accused can be considered to be an order. But one has to have in mind that the accused had a whole military unit behind him that belonged to the forces that controlled the whole region, so it is quite certain that Fadil Salić did not feel free to refuse to comply with his request. Even the accused himself, as already stated above, says that Fadil Salić got frightened when he came to talk to him.

Although it is clear that the request was conveyed to the population (which was essentially an order when one takes into account the position of the civilian population), the witness Fadil Salić states that in his opinion the locals practically could hardly wait any longer to arrive there for the meeting in order to "end the torture in the village". In the morning the witness came to the *cemetery*, but the people had already been dispersing and one of the neighbours (Himzo Tabaković) told him that nothing was as explained by the witness, but that the accused told them that all of them should come at the same place at 12:00 hrs in order to leave Drinsko. As a reason for it the accused stated that more army would come to the settlement and he would not be able to control them. He told the local population that they could take only what they could carry in their hands, and nothing more than that.

The witness Fadil Salić states that he did not leave Drinsko voluntarily, but out of fear. According to the Panel, his words: "Who would voluntarily leave his own village, own house, and leave everything" symbolically describe the position of each and every civilian. The witness Redžep Salić was present at the *cemetery* and heard the speech of the accused who told the gathered people that as of that day there was no more joint life. The witnesses Mirsad Hubić and Šuhra Gušo were also present at the *cemetery* and claim that on the relevant occasion the accused addressed them by saying that they had to leave Drinsko on the same day by 11 or 12 o'clock and that it was a Serb land from that moment on and that he could no longer guarantee for anyone's life. The witness Šuhra Gušo states that she was "afraid and nervous", and that she immediately started to leave Drinsko. At that moment there were no other soldiers with the accused (at the place where he addressed the local population of Drinsko) although the other soldiers were present in the wider area. All those soldiers were uniformed and armed. The witness Redžep Salić states that the accused said that some soldiers, whom he would not be able to control and who would kill someone, had come and that is why it was better for them to leave. This witness understood it in a way that the accused could not guaranty security to them any longer. However, the witness himself understood the speech of the accused as an order and states: "Well, the order when

he told us to leave, how come it is not an order, of course it is an order". Besides, when the locals asked the accused to take their property with them, he did not approve it but said that nothing could be taken except the belongings they could carry in their hands and that they had to leave by 12 o'clock, which was also confirmed by other witnesses who were present at the relevant place that day (Medo Tabaković, Šuhra Gušo and Almasa Hadžić). The witness Mirsad Hubić states that the accused did not allow them to take anything with them. Instead, he said that they could take only what they could carry in their hands. All the property of people who left Drinsko remained in Drinsko and was subsequently set on fire. The witness Mirsad Hubić states: "It was the worst moment in my life really, I had two houses and everything else (...) I simply left it, took two bags and set off". This witness further describes that once the locals dispersed he personally addressed the accused to ask him, on behalf of all locals, to start towards Višegrad. However, the accused asked him what he was doing there again and swore at him referring to God. He then addressed him by saying: „If I see you once again, I will kill you", and told the witness to "get lost", whereupon he returned and joined the rest of the population.

During the direct examination the witness Husein Mujakić stated that he arrived at the *cemetery* only after the accused left and that the locals who were present there told him what the accused had told them before. When evaluating the statement of this witness, the Panel also evaluated his previous statement[71] because those two statements differ with reference to important facts. In his earlier statement the witness said that he saw the accused at the *cemetery* and that he was personally present when he addressed the locals of Drinsko. During cross-examination the witness also confirmed that he was personally present at the *cemetery* and that he saw the accused in a camouflage (military) outfit. Although there are the above mentioned inconsistencies with reference to the statements given by this witness, the Panel finds that this issue is not decisive having in mind that the accused does not contest his presence at the *cemetery* either.

Based on the testimony of Medo Tabaković it follows that the accused told the locals of Drinsko that he would not be able to protect them, that a huge army would be there and that there would be both killing and slaughtering. Many locals of Drinsko addressed the accused because it was known that he was a leader of those soldiers who were in the village and it was known that he was in charge. In addition to witness Tabaković this was also confirmed by Fadil Salić as well as by Defense witnesses "OB" and "OC".

From the statements of the mentioned Prosecution witnesses it follows that they did not leave Drinsko voluntarily. Instead, all of them testified that during the meeting the accused was explicit in saying that the gathered locals had to leave Drinsko on the same day by 12 o'clock and that they could only take what they could carry in their hands, thus all the property of the people remained in Drinsko and was subsequently torched.

In addition to the mentioned witnesses, Kada Mešanović, Medina Gušo, Ramiza Mustafić, Hasan Hubić, Hafiza Gušo and Alija Mešanović also testified about the relevant incident.

[71] Record on Examination of the Witness Husein Mujakić, KT-RZ-205/06 of 27 December 2007.

The knowledge of those witnesses is indirect knowledge and corroborates the statements of witnesses that were present at the relevant place around 23 May 1992.

The accused is specifically charged with the forcible transfer of population or deportation referred to in Article 172, Paragraph 1, Subparagraph d) of the CC of B-H, which is defined as a „forced displacement of the persons concerned by the expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law". Unlawful deportation along with forcible transfer is a form of forced displacement of population, that is, the displacement of persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law[72]. Accordingly the elements of this criminal offence are:

- the forced displacement of the persons concerned by expulsion of other coercive acts;
- from the area in which they are lawfully present;
- without grounds permitted under international law.

Based on the listed elements of the criminal offence, one can clearly see that it is sufficient that the persons be expelled from the area in which they are lawfully present. Both deportation and forced displacement of persons across internationally-recognized borders and forcible transfer and displacement within a state is a crime against humanity under customary international law too. Article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) provides:

1. "The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacement have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygienic, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict".

The forcible transfer is treated as a crime against humanity in the jurisprudence of the ICTY too. The Appeals Chamber in the *Krnojelac* case concluded that „displacements within a state or across national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute...". Such conclusion is a result of the fact that the ICTY Statute does not contain the criminal offense of forcible transfer as a separate offence (unlike the deportation that is included in Article 5 of the ICTY Statute), so the ICTY Trial and Appeals Chambers

[72] Statute of the International Criminal Tribunal, Article 7, Paragraph 2, Subparagraph d). Also see the ICTY Trial Judgment in the case *Blaškić*, paragraph 234 and the ICTY Trial Judgment in the case *Stakić*, paragraph 680.

classified this offence as *other inhumane acts*. However, the CC of B-H recognizes forcible transfer and deportation together as a distinct crime, which encompasses the transfer within and outside a national border. The relevant inquiry under the CC of B-H is only whether the victim has been displaced by expulsion or by coercive acts, while the location to which they are displaced is not critical.[73] Of course, along with those specific elements, the Court must also apply the wider elements relating to the widespread or systematic attack.

The first element of the criminal offence of forcible transfer or deportation implies the force used to effect the displacement of persons. This force should be interpreted so as to include physical violence, threat of force or coercion (to the extent that it causes a fear of violence), duress, detention, psychological oppression or abuse of power or by taking advantage of coercive environment. The question is (as emphasized by the Defense of the accused) whether the concerned persons had any real choice in the matter. The ICTY Trial Chamber in the *Simić* case (paragraph 125) established that: „A civilian is involuntarily displaced if he is not faced with a genuine choice as to whether to leave or to remain in the area ... An apparent consent induced by force or threat should not be considered to be real consent".

Generally, the displacement of persons is absolutely prohibited except in specific, limited circumstances, as mentioned in the previously quoted provision of Article 17 of the Additional Protocol II. Article 49, Paragraph 2 of the Fourth Geneva Convention further provides: "Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased".

Mens rea of the criminal offence of forcible transfer, that is, deportation is „the intent to remove the victims, which implies the intention that they should not return"[74]. Based on the previously mentioned Article of the Fourth Geneva Convention it follows that evacuees should be returned to the place from which they had been evacuated as soon as the circumstances causing their evacuation have ceased. When one takes account of everything mentioned above, it follows that under customary international law, the *mens rea* of this criminal offence is the intent to remove the victims and that they do not return.

In the specific case it is clear that the accused knew what was going on in the village and in the area of Višegrad municipality. Evidently, he was informed that additional military formations were about to come to the area of Drinsko (and Višegrad municipality). The accused had a commanding role and was well informed of the policy that was pursued against the Bosniac population in the area of Višegrad.

To tell the truth, the accused did not explicitly threaten the gathered persons. However, under the previously described circumstances the Panel is of the opinion that it is not necessary that a person, in a position of the accused, threaten the helpless civilians to make them understand that they had no choice whatsoever whether to leave their homes. The Panel takes into account the fact that the accused himself states that he told the locals that he

[73] Verdict by the Court of B-H in the *Rašević and Todović* case, number X-KR-06/275 of 28 February 2008, p. 96.
[74] See *Blagojević* case, ICTY Trial Judgment, paragraph 601.

did not guarantee to those potentially remaining in Drinsko that nothing bad would happen to them. On that occasion the accused also set a deadline by which the Bosniac population had to leave Drinsko (by 12 o'clock of the same day) allowing them only to take the basic belongings that they could carry in their hands. Also, the accused allows some Bosniac families to remain in Drinsko[75], thereby demonstrating his power and possibility to protect persons that he chose. Besides, the Panel had in mind that the settlement of Drinsko belongs to the zone of responsibility of the unit that was under his command, and even that the unit command was quartered exactly in Drinsko. The manner in which the accused behaved towards the witness Mirsad Hubić demonstrates not only his influence and the position of power in the mentioned situation, but also his determination to forcibly displace the locals of Drinsko.

As previously mentioned, the accused is charged that he, while issuing death threats, gave the ultimatum to the Bosniac population of Drinsko to leave the village, which is what the Defense contests.

All the Prosecution witnesses heard state that on the relevant occasion the accused told them that they had to leave Drinsko taking only their basic personal belongings and that there was no more joint life there, that as of that moment that was a *Serb land* and that their lives were at stake and that if they stayed in their homes he could not guarantee security to them. The Panel notes that the accused was the commander, meaning that he was in the position of power.

Many witnesses stated that they approached the accused asking for help exactly because they knew that he was in a position to help them. The Defense witnesses "OB" and "OC" described how the accused helped them to leave Drinsko. Both witnesses are consistent in terms that they were aware that the accused had soldiers in Drinsko of whom he was the commander and that they approached him believing that the accused could really help them. The witness "OB" states that in May the house across the river (in relation to Drinsko) was set on fire, which made him frightened for himself and his family and he thus decided to approach the accused and ask for help. It was widely known that the command of the army that was in Drinsko was quartered at the location of *cemetery*, so the witness went to the command. He states that he only knew Željko Krsmanović (who was also a member of the unit that was under the command of the accused) and that he knew the accused only casually. The witness states: „I asked for Momir because he was in charge there, as much as I heard", so he did talk to the accused and complained that he needed help to leave together with his family. On that occasion the accused told him not to worry and that he would help him. Assisted by the accused, the witness left Drinsko for Serbia and Macedonia.

The Defense witness "OC" testified about similar circumstances. He too states that he heard from the locals of Drinsko that the accused could help him to leave. Knowing that and having in mind that the accused was a friend of his father-in-law the witness approached

[75] Testimony of Medo Tabaković, Fadil Salić, Almasa Hadžić and Šuhra Gušo, as well as testimonies of Defense witnessess "OA", "OB" and "OC".

him asking for help that he and his family be transported to Priboj. The accused provided a car and a driver who transported them to Priboj. The witness states that at the moment when they got in the car the accused came to give them a send-off and told the driver „take care of this family". The witness states that he and his family were surprised with such conduct of the accused (he helped them to leave B-H) because other people were "disappearing" from that area.

As previously mentioned, the accused as well as his Defense did not contest that the transfer of local population of Drinsko took place, but claimed that it was not a forcible transfer. The Defense contests the responsibility of the accused in that respect. In other words, the Defense claims that the accused, by his actions, had the intention to ensure the safety of the local population of Drinsko. During the testimony the accused confirmed the allegations of the Prosecution witnesses as to how it happened that the locals gathered at all, as well as about the content of the conversation that took place at the location called *cemetery*. The accused stated that even after that meeting in Drinsko, six Bosniac families voluntarily remained in the area. It is evident from the presented evidence that the accused was in a position to help, he had such a possibility and he even helped those Bosniacs that he wanted to, which he could obviously do because he had a high level of power and influence.

When one analyzes the testimonies of persons who gave their statements regarding this Count of the Indictment, it clearly follows that the civilians left their homes under threat of death and uncertainty as to what would happen if they remained in Drinsko. The fact that the transfer took place within a single day confirms the reality of a feeling of fear and threat that the local population faced after the gathering and the speech held by the accused. Besides, the Panel finds that the violence that happened in the adjacent villages (in the immediate vicinity of Drinsko) and the psychological pressure on the civilians who were the target of the violence created an atmosphere of fear and insecurity in the place of Drinsko and even in a wider region of the Višegrad municipality.

All previously mentioned witnesses (for the Prosecution and the Defense alike) stated that they had lived in Drinsko before the war, that is, (most of them) lived there from the moment they were born until the events described in the Indictment began to take place. The fact that those persons were fully entitled under the law to remain in their homes is undisputable.

The Panel finds that one of the ultimate purposes of the attack against civilians in the territory of Višegrad municipality was that only Serbs remain in the municipality. This is undoubtedly a reason for which the mentioned locals of Drinsko were forced to leave their place of residence (only because they were Bosniacs). All the civilian population became a victim of acts carried out within the widespread and systematic attack that existed in the territory of Višegrad municipality and was forced to leave the place where they had lived, leaving all their property in Drinsko. All of them felt fright, unrest, insecurity, sought protection and hoped that the accused would help them. They were in fear for their own safety because they knew what was going on in the neighbouring places in the area of Višegrad municipality, as well as in the wider region, throughout Bosnia and Herzegovina.

The expulsion of these people was a result of planning by Serb authorities, and the preparations for their transfer from Drinsko (as well as from other major Bosniac villages), based on all circumstances that existed at the time and presented facts, had been long underway by the then Serb authorities. Under such circumstances the ultimatum that the accused gave to them had a gravity of threat of death, and of course it met no resistance. Instead, being insecure and frightened for their lives those people left Drinsko almost with nothing. It was clear to all of them that the safety of Bosniacs in the area was threatened for quite some time and they now faced the final ultimatum by a person who had a role of the commander over the local armed forces.

The presented evidence and testimonies in this case clearly suggest that the forcible transfer of the Drinsko population was not done for reasons permitted under international law. In other words, at the time of the forcible transfer of the population a wider attack on the whole area of Višegrad municipality was underway and the activities related to the attack made the life of the Bosniac civilians in Drinsko (as well as in the wider region of Višegrad municipality) difficult and uncertain. In that regard, the Panel invokes Article 17 of the Additional Protocol II that clearly prohibits that the civilians be compelled to leave their own territory for reasons connected with the conflict. The motive for transfer was definitely not to ensure their safety, which would require their evacuation in order to enable the necessary military operations, because those civilians were the target of the attack and the forcible transfer of population was done by forces that also participated in the attack against them. Besides, there were no natural disasters or other circumstances that would justify the transfer of those people for humanitarian reasons. The victims of this act of the accused were civilians who were lawfully present in the area of Drinsko, who were involuntarily leaving their homes and transferred to other locations (that they did not choose on their own). The previously mentioned exceptions, in which the evacuation of population is permitted, are not applicable to the specific situation.

Many witnesses (for the Prosecution and the Defense) testified that the accused told them to leave Drinsko because he could not guarantee security to them. However, the Panel finds that that fact does not mean that the population was not transferred forcibly. "Forcible" should be interpreted broadly and thus the essential question is as to whether all transferred persons had "a genuine choice as to whether to leave or remain in the area"[76].

Although many witnesses described that they had already lived in fear in Drinsko and that they felt insecure, that by itself at no rate shows that they chose to be displaced, that is, to leave Drinsko. Instead, from the above referenced circumstances it follows that they had no control over their fate, either when it comes to stay or move to another location, which is a contradiction/antithesis to genuine choice. That is exactly the essence of force in broader terms. The specific case involves civilians, a population that was frightened and insecure, surrounded by the army, and aware of all events in other Bosniac-populated villages. Even if one would accept the thesis that the locals of Drinsko had a choice, it would mean that they had the choice of either to leave Drinsko or to be left at the mercy of Serb army under

[76] See *Simić* case, ICTY Trial Judgment, paragraph 125.

the circumstances of insecurity and fear and the potential slaughtering (that the accused threatened them with). That is the essence of the term "forcible", which denies the expression of free will.

Given the described circumstances and the events about which the Prosecution witnesses provided consistent testimonies (which are at no rate undermined by the Defense evidence), the Panel finds that the accused, by his acts, committed the criminal offence that he has been charged with. Besides, the accused as a direct perpetrator was aware of the act and sought its perpetration.

According to the customary international law, it is necessary to prove the existence of the intent to permanently displace the population[77]. In this case it is undisputable that no steps were taken by the accused to ensure the return of the displaced Bosniacs. His conduct is in accordance with the conduct and activities of the Serb army and police, the aim of which was that only Serbs remain in the area of Drinsko (and wider area, the area of Višegrad municipality).

The Panel could not accept the averment of the accused that he addressed the locals in order to ensure their safety because it is ungrounded, having in mind all the above mentioned pieces of evidence and testimonies as well as his further activities on the relevant day (as will be explained further under section 4.4.).

The forcible transfer of the Bosniac population of Drinsko was part of the campaign and was committed within the widespread and systematic attack with the intention to permanently remove all non-Serbs from the area of Višegrad. Accordingly, the Panel concludes that the Bosniac population of Drinsko was a subject of forcible transfer and deportation referred to in Article 172, paragraph 1, subparagraph d) of the CC of B-H.

4.4. Count 4 of the Indictment

Under this Count of the Indictment, the accused was charged that he, among other things, on 23 May 1992, in the group with Dragan Savić and several other Serb soldiers, in the settlement of Drinsko, Višegrad municipality, took out of the houses the Bosniac civilians Idriz Mešanović, Ramiz Mešanović, Suljo Mustafić, Mehmed Hubić, Salko Gušo, Senad Gušo, Asim Gušo, Hajrudin Gušo, Hajrudin Topalić, and Ramiz Mešanović, questioned and beat them first in the house of Aziz Mešanović, and thereupon took them to the nearby hill called "Kik", to the woods called "*Pušin do*", where they executed them with fire arms.
The Panel finds it proven that these men, all 10 of them, were taken out of their homes, physically abused, and questioned in the house of Aziz Mešanović. It was also proven that these men were taken to the woods *Pušin do*. These conclusions stem from the testimonies by Medina Gušo, Ramiza Mustafić, Hasiba Mešanović, and Hafiza Gušo, who were there on the site and who could clearly see the incriminating event. Their testimonies were

[77] Article 35 of the CC of B-H; see *Blagojević and Jokić* case, ICTY Trial Judgment, paragraph 601: also see *Naletilić and Martinović,* ICTY Trial Judgment, paragraph 520.

corroborated by the testimony of Kada Mešanović, who had not physically been present there but heard of the event from Hasiba Mešanović, her daughter-in-law, as well as the testimony by Fehida Hubić, who gave her statement during the investigation, which the Panel accepted in accordance with Article 273(2) of the CPC BiH (as it was reasoned in Section 1. c) of the Verdict). The document in question is the Record on the examination of Fehida Hubić No. 14-04/2-1/04 of 29 December 2004.

According to the evidence by Ramiza Mustafić, the woods known as *Pušin do* and the Kik hill represent a single entity. In explanation, the Kik hill continues on the edges of the woods *Pušin do*, which is at the edge of the village of Drinsko. The entrance to the woods *Pušin do*, according to the testimony by Ramiza Mustafić, Medina Gušo, and Hasib Mešanović, is some 10 minutes walk from Drinsko.

As for the date when this incriminating event took place, the Panel found that it had been the same day when the Drinsko residents had been forcibly transferred, meaning that it had been on or around 23 May 1992.

The disputable fact surrounding this matter was the role of the accused in the commission of these criminal acts.

The witness Medina Gušo gave an exhaustive description of the events that had happened on the relevant day. Hajrudin Gušo and Asim Gušo are the sons of this witness, and both of them died on that day. The witness eye-witnessed the entire event that preceded the taking away of the men, and she also added that her daughter-in-law, Hafiza Gušo, who also testified about this critical event, was with her back then.

The witness Medina Gušo stated that her sons (Hajrudin and Asim) were at the meeting that took place "in the cemetery", and once they returned home, they started packing their things intending to leave Drinsko. However, at that moment the accused and Dragan Savić entered the village, that is, the hamlet of Željača (where this witness and her sons lived). Leka and another man whom this witness did not know, accompanied the former two persons. The witness described that these four men walked into the village, that they were armed, that they wore "blue brown police uniforms" and she added "well, we all knew them well; I knew Dragan like my Asim". They, according to Medina Gušo, walked from the bus stop, and they first took the husband of Ramiza Mustafić, then her (Medina's) sons, then Mehmed (Hubić), the sons of Aziz Mešanović, and finally "Salko and Senad", and they lined them all up in front of the house of Aziz Mešanović. The witness could see all this clearly because the house of Aziz Mešanović, as she claimed, was immediately above her house, and she was at the terrace of her house, together with her daughter-in-law Hafiza Gušo. She said that she held a child of one of her sons in her arms and she observed Dragan Savić, Momir Savić, Leka and the fourth person, not known to her, lining up the men after which they took all ten of them to the woods *Pušin do*. At that moment she started crying "why are you taking my children, who provide bread for me" to which the accused ordered Dragan Savić "go and hit her, and he swore my balija's mother", which was also confirmed by the witnesses Ramiza Mustafić i Fehida Hubić. Dragan hit her at her mouth so that he

broke her teeth. During that time, the accused was telling Dragan Savić "hit her, and fuck her balija's mother, slit her throat", and then he went to Salko (Gušo) and he hit and kicked him. The witness stated that they also took the son of Salko Gušo, who was only 17 at the time. After the men were taken, the witness heard the shots from the woods *Pušin do* and she never saw again any of the persons who went towards *Pušin do*. Medina Gušo alleged that Momir Savić was the commander of the group of four soldiers, and that she heard when he told Dragan Savić to hit her.

Ramiza Mustafić, Hafiza Gušo, and Fehida Hubić were also present in this place at this relevant time. In explanation, the house of Fehida Hubić was in the immediate vicinity of the house of Medina Gušo; Medina Gušo claims that Hafiza Gušo was with her at the terrace of the house, whereas Ramiza Mustafić was in front of the house of Medina Gušo.

Hajrudin and Asim Gušo, who were taken away, were civilians, they had no arms, and they did not partake in any way in the hostilities. Having been taken to *Pušin do*, Medina Gušo never saw them again. She stated that their bones were found in *Pušin do*, that they were tied with wire and killed. Although she cannot remember the exact day of the exhumation, the witness stated that they were buried in June or July 2008.

The witness Ramiza Mustafić repeated the same facts Medina Gušo testified about. The witness stated that on 23 May 1992 Momir Savić killed her brothers (Idriz and Ramiz Mešanović) as well as her husband Suljo Mustafić. She testified that on this relevant day Momir Savić, Dragan Savić, Zoran Tešević, and Nikola Savić came to the door of her house where Momir (in her words "the big one") told her husband "come with us". The witness's husband asked him not to touch him because he has a wife and children, but Momir started swearing his balija's mother and ordered him to go in front of him. The witness stated that Momir ordered Zoran and Nikola to "do their job" and then these two persons went from one to another house and they took the abovementioned male Bosniacs out and took them to the house of Aziz Mešanović. The witness alleges that the sound of beating came from that house, she heard them screaming, and she could hear that because she was some 20 meters away. Having left the house, the abovementioned soldiers took the men towards the woods *Pušin do*, and as soon as they entered the woods, the witness lost them from her sight. She took the child into her arms and went towards the town, and she heard the shots from the woods. As of then, these ten Bosniacs have been unaccounted for. She found the remains of her brothers and husband during the exhumation in 2006.

At the relevant time, Hafiza Gušo lived in Drinsko, the hamlet of Zeljača, with Medina Gušo. She corroborated her evidence and the evidence of Ramiza Mustafić in terms of the circumstances surrounding this event.

In addition to these witnesses, on 29 December 2004, Fehida Hubić too gave her statement relative to these events during the investigation. She died later on, so that she could not give her evidence before the Court. The Panel admitted her statement as evidence given during the investigation in accordance with Article 273(2) of the CPC BiH, acknowledging the limited probative value of this evidence (given the fact that the witness could not be

cross-examined). She was an eye-witness of these events, and her statement was consistent with the testimony by witnesses Medina Gušo, Ramiza Mustafić, and Hafiza Gušo. In explanation, this witness also confirmed that after the meeting in Drinsko, several Serb soldiers came to Zeljača, and the accused and Dragan Savić were among them, and they took the abovementioned ten men out of the houses. The witness alleged that she was an eye-witness, and stated that the Bosniacs, who were taken out were not allowed to do anything (to defend themselves) because the rifles were pointing at them. The captured men were taken to the woods *Pušin do*, and she never heard of them again, except that she learned that their mortal remains were exhumed in *Pušin do* a few years ago. The witness pointed out that Chetnics took away her son Mehmed and other Bosniacs from Drinsko, and expelled her and all the others from their homes just because they were Muslims.

The witness Hasiba Mešanović corroborated all the facts surrounding this event, and also added that she heard that Dragan Savić had slapped her husband. Hasiba Mešanović described this event to Kada Mešanović, who also gave her testimony at the main trial.

In addition to these witnesses, the witnesses Alija Mešanović, Šuhra Gušo, and Hasan Hubić testified about these events described in this count of the Indictment. Just like the witness Kada Mešanović, these prosecution witnesses have only indirect knowledge of these events, that is, the eye-witnesses talked to them about these events, so that they only indirectly corroborate the credibility of the actual eye-witnesses.

The Panel concluded based on the presented evidence that the incriminating event took place exactly in the manner described in Count 4 of the Indictment. However, considering that the identification and the presence of the accused were contested, the Panel particularly considered this matter. The Panel thereby particularly considered the details of the testimonies of eye-witnesses, especially whether they knew the accused from before and the circumstances surrounding their identification of the accused during the critical event. Before analyzing the details, the Panel pointed out that all the three eye-witnesses of the abovementioned events (when they had seen the accused) confirmed that the accused (in court room) was the same person that they had seen on the specific date.

Medina Gušo knew Momir Savić and Dragan Savić from before. She mentioned that she knows two persons under the name of Momir Savić and she was resolute that one of them was from Pijavice, married to a Muslim woman, while the other one was the son of Vitorka from Stražbenica (Vitorka is the mother of the accused, which stems from his personal details and the testimonies of a large number of witnesses). She used to see the accused together with Dragan Savić and Leka even before the war, and the neighbors who knew him personally told her that he was "Vitorka's son Momir". Considering that this is a small area, where residents mainly know one another, the identification of the person by the names of parents may suffice to identify the person. It is a crucial fact that all these witnesses were consistent in their description of the accused, that is, his physical appearance at the relevant time.

Ramiza Mustafić testified: "When around, I am not sure, but around noon, a Fiat vehicle came in front of my house; the entrance is on the road, and four of them jumped out: Momir Savić, Dragan Savić, Zoran Tešević and Nikola Savić...". The witness stated that she knew Zoran and Nikola well, and that she did not know Momir personally but she saw him two or three times. All those persons were wearing camouflage uniforms, they were armed, they had batons, pistols, rifles and bandoliers hanging down their shoulders. Dragan and Momir had hats with cockades on them, while Nikola and Zoran did not have hats. Moreover, the witness added that other persons called Momir "commander". Ramiza Mustafić described the accused as a short person, fat, big, slightly bald, and dark. Furthermore, Ramiza Mustafić stated that she saw the accused 3-4 years before the war "during the fair in Drinsko". The witness alleged that, after the men were taken on that critical day, she heard Medina Gušo saying: "Momir and Dragan, don't. Please, do not take my children, they provide bread for me". The witness was certain and explicit that she heard Medina Gušo saying these two names.

Hasiba Mešanović did not know the accused personally either, but her husband did. She stated that her husband knew personally both Momir and Dragan Savić, and that he told her when these two appeared on this critical day that they were the two he had referred to. Additionally, the witness knew Dragan (during the fairs, Dragan and her husband were waiters) and she knew that Dragan and Momir were cousins, that the mother of Dragan was Borka, and of Momir Vitorka. The witness alleged that she would see Momir Savić in Drinsko in the period of four years between 1988 and 1992, and she confirmed during the main trail that the accused was the same person she used to see in Drinsko and that she recognized him by his face. She added for Dragan and Momir that they were heavily armed, in dark blue uniforms, with straw hats.

Hafiza Gušo knew Dragan Savić, while her family members, her mother-in-law (Medina Gušo) as well as other residents of Drinsko knew Momir Savić. She learned from them that the man she had seen on the critical day was Momir Savić also known as "*Vojvoda*". During the main trail, the witness stated that she could not remember what the accused looked like back then. She pointed out that she remembered Dragan Savić because of the incident with Medina Gušo (when he beat her). The Panel considered that Hafiza Gušo came to Drinsko no sooner than in 1990, so that it is quite realistic that she did not know all the residents of Drinsko. Thus, it is understandable that the residents, who had lived there for long, told her subsequently the names of the persons who took away their dear ones (in any case, this witness confirmed that the accused was the person she saw on the critical day).

All these witnesses describe the same circumstances. The Panel finds that these testimonies are even more credible because there are some minor inconsistencies among their testimonies. All these testimonies are consistent in the conclusive part which relates to specific actions by the persons who were present there, the identity of the accused, and the identity of ten men who were taken away that day, as well as the way of their taking away. It is important to consider that all these witnesses survived rather traumatic and stressful events, when they feared for their lives and the lives of their dearest ones, so that it is

understandable that they could not remember all the details and memorize them in the exact same order.

In addition to the analysis of the testimonies of these witnesses relative to this count in the Indictment, the Panel also analyzed the documentation related to the exhumation completed in April 2006 (Report on the forensic medical expertise, Minutes on establishing the identity, and certificates on death for ten killed persons)[78]. As the cause of death, all ten reports stated that it was a violent death. These reports also clearly show that the mortal remains of the ten men, listed in paragraph 4 of the enactment clause of the Verdict, were found on 26 April 2006 in *Pušin do*. Dr. Vedo Tuco testified before the Court about the forensic report and the procedure of exhumation, and he is the author of the documentation relative to the exhumation that was completed on 26 April 2006 in Drinsko, the area of *Pušin do*, in accordance with the written order by the Cantonal Prosecutor's Office Goražde of 24 April 2006. As for the process of exhumation, the expert witness was one of the expert team members (a team consists of two forensic experts, CID technician, Crime inspectors, and other support staff). The expert witness stated that those were mortal skeletal remains of at least ten persons (the remains were incomplete) found on the surface of around 200 square meters, which were only partly covered with leaves, grass and other vegetation. The team also found an ID issued to Mehmed (Ibro) Hubić and an ID issued to Ramiz (Ramo) Mešanović. Those were the only identification documents found on the victims. The victims had ties on their hands, which were found by the bodies during the exhumation. One of the victims had the ties around his arms – the lower parts of both forearms. At the main trial, the expert witness clarified the procedure of establishing the identity of victims in cases where no identification documents were found. Thus, the expert witness clarified that they conducted the primary forensic-medical expertise which involves the determination of gender, age, *antemortem* height, registration of any damages of *antemortem*, *perimortem* or *postmortem* character, as well as the state of teeth. This primary analysis also involves the DNA analysis.

The expert witness particularly pointed out that in this specific case those were incomplete mortal remains, where a significant number of bones were missing, which is understandable by him as the skeletons were on the surface, so the elapse of time and the influence of environment caused that the skeletons remain incomplete. The expert witness stated that it was found during the final expertise that the number of exhumed bodies in the area of *Pušin do* is ten. In three cases the forensic expertise did not discover the cause of death. Those are the cases of Hajrudin Topalić, Senad Gušo, and Hajrudin Gušo. The expert witness explained that the reason for this are incomplete skeletons with a significant number of bones missing, so that he allowed for the possibility that those missing bones could have damages or traces of the cause of death. Additionally, the expert witness stated that there is a possibility that a projectile goes through a body, damage vital organs, without leaving any marks on the bones, and the elapse of time affected that, practically speaking, all those tissues disappear. It was found for all other remains that the firearms wounds were the cause of death.

[78] Prosecution evidence, T-36 to T-92

The documentation compiled in relation to the exhumation of these ten men included that the date of death was 24 May 1992. In reference to this, the expert witness stated that it is the practice that the date of death is registered based on the witness statement, which means the date when the person was last seen, when s/he was taken as of when the person did not appear again. The expert additionally clarified, from the professional view, that it is not possible to determine the exact date of death at the time of exhumation on the basis of mortal remains or skeletons or any other characteristics. The Panel notes that it was not precisely determined whether the events, described in Counts 3 and 4 of the Indictment, took place on the 23rd or the 24th of May, but it was found that these events took place on one and the same day.

In accordance with everything stated above, it stems from the testimony of this expert witness that the remains of the killed men, who were taken away around 23 May 1992, were found exactly in the area of the woods *Pušin do* where they had been taken on the critical day, according to the testimony of the prosecution witnesses. The identification of the victims was first done by the direct identification of documents found on the victims (Mehmed Hubić and Ramiz (Ramo) Mešanović) or the identification by the relatives and friends (the clothes or objects found on the victims), and then by the forensic medical expertise, which in addition to DNA analysis and the 99.99% probability that these are the persons in subject confirmed that the death of seven found victims was violent caused by shots from firearms.

The defense pointed out that in this specific case, during the exhumation, the mortal remains were found on the surface, that they were covered with leaves and low vegetation, clearly visible, and also that the ties were found on one victim only. Moreover, the defense objected that the Reports on the identity did not contain the signature of Prof. dr. Zdenko Cihlarž, who was the lead expert, and that some of the reports were missing the signatures of the representative of the Commission for Missing Persons.

The Panel considered that the expert witness Tuco is a forensic medical specialist, employed by the University Clinical Center ("UKC") Tuzla, that he has been working in the Forensic Pathology Department for twelve years, and on the tasks pertaining to the war crimes as of 1993, as of when he has been an active participant in the exhumations and forensic medical expertise. Thus, it is undisputed that the expert witness possesses all the necessary qualifications for the tasks he carried out. The objections raised by the Defense pertaining to the missing signatures on these documents are merely of the formal character and they by no means put at issue the validity of the expertise or the credibility of the expertise.

The Defense for the accused contested the presence of the accused at this critical place, while the accused himself claimed that he was never in the hamlet of Zeljača up until after the war, when he went hunting in that area. Additionally, the accused stated that, in relation to the killing of the men in Zeljače, Dragan Savić told him about the conflict of Serb soldiers and armed men in Zeljača, as a result of which Bosniac men got killed. At the same time, the accused confirmed that the soldiers were stationed in the woods Kik, and that they

kept guards in one of the trenches there (so, he does not contest the presence of his soldiers in that critical place).

The defense witness Miladin Savić tried to corroborate the testimony of the accused, but his testimony was not credible, because he stated that he had never accompanied the accused in the field (given that he was a clerk in the unit), so that he could not know with certainty where the accused went on this critical day after the gathering of Drinsko residents. Moreover, this witness alleged that Zeljača is a part of Drinsko (distance of around 1 kilometer from the Drinsko cemetery) and stated that the shooting was heard on that day, but he cannot say if the shots came from the direction of *Pušin do*. However, the defense witness Miladin Savić, Momir (Milan) Savić and the accused himself confirmed that there was no other unit, except for the unit under the command of the accused, in the territory of the Local Community Drinsko (which the hamlet of Zeljača is a part of).

The Panel did not give credence to the allegation by the accused that he was not present on the site at the relevant time, because this allegation is not consistent with the convincing proof of his active involvement in the perpetration of criminal acts in this case. Considering, among other things, the testimonies of Medina Gušo, Ramiza Mustafić, Hafiza Gušo, and the statement of Fehida Hubić, the version of the event as presented by the accused is not founded. Having considered the consistency of all the evidence suggesting his direct involvement in these acts, the Panel finds the allegations by the accused totally unconvincing that he had not been present on the site and committed the described acts.

The Panel did not find conclusive or essentially relevant to the final conclusion the objections by the defense that some of the witnesses described the soldiers differently, specifically by giving different descriptions of uniforms. In explanation, the Panel considered that the circumstances surrounding this event were rather specific. The witnesses feared for their lives, they were in panic, and they wanted to leave Drinsko quickly, and these are mainly persons who do not have any knowledge about military uniforms or the armament. Moreover, at the time of this critical event, at the very beginning of war, it is a well known fact that the soldiers wore versatile uniforms. Acknowledging these reasons, the Panel did not find the objection by the defense grounded, by which they wanted to challenge the testimonies of the prosecution witnesses.

Based on everything stated above, the Panel concluded beyond any reasonable doubt that the group of four soldiers, under the leadership and with the active involvement of the accused, took the abovementioned civilians to the woods Kik, that is, *Pušin do*, where they deprived them of their lives by shooting at them from the firearms. Such a conclusion is corroborated also by the utterly convincing testimonies of witnesses related to the taking away of the victims, the behavior of the accused and his subordinates, the shooting that followed soon after they had gone to the woods, and the finding of the mortal remains of the victims (who were tied up and executed from firearms).
As it stems from the description of facts under this Count, the accused is charged as an accomplice to the criminal offense of murder set forth under Article 172(1) a) of the CC BiH, whose basic elements are as follows:

- that the person was deprived of his/her life
- that the deprivation of life was committed with intent, because the accused was aware of his actions and he wanted to do so.

The ICTY Trial Chamber concluded in its Judgment in the case against *Krnojelac* that: "*The fact of the victims' death can be inferred circumstantially from all of the evidence presented to the (...) Panel. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or one or more persons for whom the accused is criminally responsible*".[79]

Although the witnesses did not witness the murder of the men who had been taken away, the Panel carefully analyzed the entire course of the event, as previously described, from the taking out of men from their homes and taking them to the house of Aziz Mešanović, physical ill-treatment of the men in the house of Aziz Mešanović, the behavior of the soldiers towards the present witnesses (Medina Gušo and Fehida Hubić) who asked them not to harm those men, and the shooting that was heard after the column of ten men and four soldiers entered the woods *Pušin do*, as well as the fact that these men were seen alive for the last time on that critical date and on that critical place (and that the bodies of all these ten men were exhumed in *Pušin do*), and the Panel concluded that the group of soldiers under the command and with the active involvement of the accused deprived these ten victims of their lives in the way described in the Indictment.

The facts found in the Records on the exhumations carried out in this area and the testimony by the expert witness Dr. Vedo Tuco supported the conviction of the Panel that there is a causal relation between the described actions and the death of these ten men, as it was previously discussed.

The accused was charged in this count of the Indictment that he committed the criminal offense of murder as an accomplice. The essential and conclusive feature of complicity is the joint involvement in the act of perpetration but also some other actions which in a conclusive manner contribute to the commission of the criminal offense. The only reasonable conclusion that can be made based on these evidence is that there was an agreement between that group of soldiers, members of the unit under the command of the accused, and the accused himself, to kill the following persons: Idriz Mešanović, Ramiz Mešanović, Suljo Mustafić, Mehmed Hubić, Salko Gušo, Senad Gušo, Asim Gušo, Hajrudin Gušo, Hajrudin Topalić, and Ramiz (Ramo) Mešanović. The accused was directly involved in the murder of these men insofar as he, as the superior to other present soldiers, together with them took ten Bosniac men out of their homes, took them to the house of Aziz Mešanović, where those men were interrogated and beaten, and then they took them to the woods *Pušin do*, where they killed them with the use of firearms. In line with the previously described actions, the accused expressed his consciousness and intention to deprive these

[79] See the case *Tadić*, ICTY Trial Chamber Judgment, paragraph 240, case *Kvočka*, ICTY Appeals Chamber Judgment, paragraph 260, and case *Mrkšić et al.*, ICTY Trial Chamber Judgment, paragraph 486.

ten Bosniac men of their lives, regardless of whether he did it personally or not. Although it is not very clear who among the soldiers (or all of them or only some o them) fired from the firearms at these ten victims, this fact does not change the criminal liability of the accused.

Referring to the fact that the forensic expertise could not establish the cause of death of three mortal remains (as previously described), and evaluating all the evidence and testimonies surrounding this case, the Panel finds that these three persons were killed from the firearms at the same place, time and in the same way as the other seven victims, who were found with the traces of execution. Considering the circumstances surrounding this case in which the murder of this group of victims followed their taking to the woods *Pušin do* (no victim has ever been seen ever after, and the mortal remains were found on the exact place from which the shooting had been heard, and seven bodies have direct damage caused by bullets), the Panel finds that no other conclusion is possible.

Considering all these circumstances, evidence, and witness testimonies, the Panel finds proven beyond any reasonable doubt that the accused conclusively contributed to the deprivation of life of these ten Bosniac men, as it was previously described. Thus, he is held liable for the commission of the criminal offense in violation of Article 172(1) a) of the CC BiH (murder). This criminal offense was committed within a widespread and systematic attack in this specified territory and it was facilitated by this attack. As earlier explained, military operations were conducted in the greater Višegrad (and Rudo), armed members of the Serb military, police and paramilitary formations were present in the area, who acted in accordance with the plan to commit such offenses in the wider area, so that this specific offense is only one in the series of crimes directed against Bosniac civilians.

4.5. Count 5 of the Indictment

Under Count 5 of the Indictment, the accused was charged with Crimes Against Humanity, through the murder of Suvad Kurtić. The elements of murder in violation of Article 172(1) a) of the CC BiH were already discussed in paragraph 4.4 of the Indictment.

The witness Šaban Ćato is the only eye-witness to the murder of Suvad Kurtić and he described the critical event in detail. He remembers well the 25th of May, 1992 because it was on that day that he was captured, together with Suvad Kurtić, at the meadow Bošče in the village of Donja Strmica, Rudo municipality. Both the witness and Suvad Kurtić were civilians, they were unarmed and they were not in combat positions. The Panel particularly evaluated the testimony of this witness considering that he was the only eye-witness of this event, and that his testimony, as it will be explained in detail, is completely convincing and logical and corroborated by other indirect evidence.

The witness Šaban Ćato describes that on 25 May he and Suvad Kurtić were on that meadow, when two soldiers in camouflage uniforms came by and ordered them to come close to them, which this witness and Suvad Kurtić did. Then, a uniformed person approached them, who the witness later on learned was Dragan Savić. Namely, the soldiers referred to that person as “Dragan” or “Savić”. The witness pointed out that he did not know

Dragan Savić from before, and described that on that occasion he appeared "around 170 cm in height, fat, with a bit bigger head, (...) combing to a side". Dragan Savić brought him and Suvad Kurtić in front of a tunnel (Šaban Ćato added that he saw "a blue" TAM truck in the tunnel and two Lada Niva vehicles, one of which was red, which coincides with the testimony of Vojislav Topalović who claimed that the accused used to come to Rudo in a Lada Niva vehicle) and he started interrogating them about who was standing guard in the village, who was the commander of those guards, and then he started kicking him in his back and telling the captives that this was a Serb country and that they should run to the Alija's country. Then, Dragan forced them to sit on the pavement by the tunnel, gave them a piece of paper and a pencil and told them to write down all the weapons the villagers have, and at the same time he separated them so that they cannot copy from one another. While writing the requested information, Dragan took the knife and threatened him, asking him "shall I cut" to which he (Šaban Ćato) kept silent. When he repeated the same question, one of the soldiers came with a rifle and he pressed the rifle barrel against the forehead of Šaban Ćato and he asked the other soldiers whether to shoot, to which one of the present soldiers replied "how can you spare a bullet on Balija, it is better (…) to kill the shit with knife". Witness Ćato then added that at that moment his father (Mahmut Ćato) and Šećo Ćato (father of Rasim Ćato) came by. At that moment Šećo Ćato was captured. Šećo started arguing with one of the soldiers and this soldier hit him with his head, so that Šećo fell immediately down on asphalt. Šećo Ćato was more than 60 at the time.

The witness went on to say that Dragan Savić gave that list to Šećo Ćato and ordered him to go around the entire village and bring him all the listed weapons within 45 minutes. He also threatened that he would kill the witness (Šaban Ćato) and Suvad Kurtić unless he returns within this time. After Šećo left, the shooting started towards the area where he (the witness) was, as well as soldiers and the other abovementioned persons. The bullets started buzzing towards the tunnel so that the soldiers found themselves panicking. Then, Dragan took RUP (the witness clarified that it is a radio station) and called a person whom he referred to as Momir Savić. The witness was some 3-4 meters from Dragan, and he claimed that he heard Dragan saying: "Momir, fucking hell, stop shooting, the bullets are coming over here, you will kill us. I told you not to shoot if there is no resistance. Let us surround the village of Donja Strmica and capture the people". Then the shooting stopped.

The soldiers (around 15-20 of them) took him and Suvad Kurtić to search the village (to search the houses of the people who allegedly had weapons) and used them as a human shield, threatening to kill them if they tried to escape. While moving towards the shop, Šećo Ćato joined again the two captives and continued walking with them, in the presence of the soldiers.

The witness Šaban Ćato further stated that while they were on the way to the village "the ones from Momir's group came by. I can see that they are not the ones who were in front of the tunnel. And these are also more aggressive".[80] The witness concluded that they belong to "Momir's group" and added that they could not have been a part of Dragan's group who

[80] Evidence by Šaban Ćato during the main trial of 22 septembar 2008

were in front of the tunnel, because, among other things, he did not see those men in front of the tunnel. The witness stated that some of these men were in uniforms and some were not, and they immediately wanted to beat the witness and Suvad. But, Dragan Savić did not allow them to do so, and he still insisted on using them as a human shield. It is obvious that Dragan had some kind of commanding authority over this group who were with him before another group with Momir Savić arrived, including the authority over "Momir's soldiers". The Panel has already found that Dragan Savić was the commander of one platoon within the 3rd Company, and the accused was his superior.

The present soldiers let Šećo Ćato go and bring the pistol which was allegedly with his wife. The witness Šaban Ćato stated that Šećo (while still alive) told him about that event and that he allegedly told him that he had escaped towards the lake when the soldiers allowed him to go and bring the pistol. During that time, the witness was above the house of Omer Ćato.

On that day around 15:30 hours, Dragan's group of soldiers and these two captives arrived "below the shop (...) there was a fountain there. Ibro had some sheep and there was a water basin there, a plum tree, and right there, there it was, I saw him there, and he was there from that moment up until he came up". Then, a person known as Momir Savić came by with several other soldiers and joined the group that had already been there with Dragan Savić and his group. The witness stated that he did not know Momir from before, but that he heard other soldiers calling him that name. Moreover, when that person wanted to hit him with a police rubber baton, Dragan told him: "Momir, do not touch the guy while I am talking to him". The witness also confirmed convincingly and without any doubt that the accused who is in the courtroom is the same person he saw that day and whose name he recognized as Momir Savić. In the further course of events on that day, both these groups of soldiers were present.

Šaban Ćato stated that he observed that Momir was "rude" because he started yelling immediately while talking to him and Suvad Kurtić and asking them which soldiers built the huts in Polje. As neither the witness nor Suvad knew that, Momir stopped Suvad and started hitting him with a rubber baton, to which Suvad stopped and started crying, while Šaban Ćato continued with the soldiers. When they reached a curve on the road, he (Šaban) turned around to see Suvad and he managed to see Momir beating him with a rubber baton, while Suvad was on the ground crying. The next thing Šaban Ćato saw was that Suvad got up at one moment and then Momir Savić shot at him from the sniper rifle, swearing him "Balija's mother" and telling "you think (...) escape from a chetnic". The witness stated that Suvad stood so close to Momir that there was no need for Momir to aim at him to shoot at him. The witness saw Suvad falling down into the rocks and bushes, and Momir shooting again at him. It stems from everything described above that Šaban Ćato could clearly see what was going on, given that he was only some 7-8 meters away from these persons at that time.

Šaban Ćato told the witness Fahra Ćato what had happened to him and the other two captured men on 25th May, an she confirmed that she was told about this event in 1992 (immediately after the event).

The testimonies of these witnesses clearly suggest that on 25 May, 1992 Šaban Ćato, Suvad Kurtić, and Šećo Ćato were captured in the village of Donja Strmica by Serb soldiers including Dragan Savić, and that Dragan Savić and other soldiers maltreated and beat them.

After this event, Dragan (Savić) and the witness Šaban Ćato agreed that the witness bring him the next day by 2200 hours the weapons from the villagers of Donja Strmica, whose names were included in the previously made list. Dragan instructed Šaban Ćato to tell the villagers that all the houses "would be blown up" unless they surrendered their weapons.
The witness stated that he was scared and that he did not trust Dragan Savić. On the way back to the village, the witness took the road that they had previously been on, and at the moment when the soldiers could not see him, he came close to the place where Suvad Kurtić fell. He saw him lying in the grass and he tried to call his name. But, Suvad did not respond, so that the witness concluded that he was dead. The witness stated that he had been in fear, so that he did not dare to approach Suvad. Having returned to the village, he met Hana Kurtić (the mother of the killed) and told her that Suvad was killed, after which both of them (Hana and he) went to the place where the killed person was. At that moment they heard the soldiers leaving Strmica; they heard vehicle engines and soldiers leaving the village. The witness stated that on the way to where the body was, they met Fahra (Suvad's sister) and her husband Rasim Ćato, so that they all together went to the place where the body of Suvad was lying. They approached his body and saw that he was shot twice. The same evening, they took the body to the house of Omer Smajlović, but the witness cannot recall if they buried him in the local cemetery the same evening or the following day.

The Panel particularly considered the testimony by the witness Šaban Ćato, the eye-witness of this incriminating event, who provided a detailed and clear description of the course of the events that took place that day, which he later on retold other persons, who practically confirmed in their testimonies the allegations presented in his testimony.

The witness further stated that on the same evening he told Fahra Ćato, the sister of the killed, and her husband Rasim Ćato, that Momir Savić killed her brother. That same evening the witness also informed the father of the killed Suvad Kurtić about all this.

Rasim Ćato and Fahra Ćato confirmed the credibility of Šaban Ćato in their testimonies. Rasim Ćato testified that he saw the Serb forces entering Donja Strmica on the critical day, and that the villagers escaped to the woods. He further added that on that day, he and his wife Fahra Ćato met Šaban Ćato in the early evening hours and that he informed them that Suvad Kurtić was killed. Immediately after that, the witness, Fahra Ćato, and several other present men, in the presence of Šaban Ćato, went to the site. The witness described that the body of Suvad was lying by the rock near a smaller stream, and added that they saw he had been shot in his neck and hip, and that Šaban had earlier told them that Suvad was dead, so that they did not even try to call his name.

Testifying during the main trial, Rasim Ćato stated that Šaban Ćato did not tell him who had killed Suvad or who of the soldiers had beaten the captured persons. But, in his statement given during the investigation, witness Rasim Ćato, among other things, stated: "Šaban

Ćato told us on that occasion that Suvad had been killed. He told us that Momir Savić and some other soldiers who were with him such as Dragan Savić, Milomir Savić or something like that as he said, arrested him, his brother-in-law Suvad Kurtić and my father Šečo Ćato. Šaban told us that at one moment Momir Savić hit Suvad in his head with the rifle, that Suvad started running away after that, and that Momir Savić shot at him because of that and killed him. I might have seen Momir once or twice, he was big, with a round head ... according to the count of Šaban Ćato, it was only Momir Savić who shot at Suvad, and he also wanted to kill Šaban Ćato, but Dragan Savić allegedly did not allow him to do so because he told Momir that Šaban will do the favor and bring all the weapons from the village".[81] Clarifying the inconsistencies, Rasim Ćato stated that he is sick and that he cannot remember all the things well, and then he confirmed his previously given statement.

In reference to the abovementioned circumstances the Panel took as credible the statement of the witness Rasim Ćato given during the investigation, considering that he gave this statement earlier, and that it is realistic that the witness cannot remember all the details he had told at that time, given the elapse of time and the fact that it is quite natural and logical that the witness who testifies cannot remember all the details each time he tells his story. Moreover, the Panel acknowledged that every person has a different perception or relevant and irrelevant details, that the person observes different details and that he remembers different details, and in this specific case the Panel notes that this witness is not an eye-witness to the murder of Suvad Kurtić.

The witness Fahra Ćato remembered well the 25 May 1992, because her brother was killed on that day. Not only that she testified about what Šaban Ćato had told her, but she also stated that in the early evening hours on that critical day her father Smajo Kurtić told her that Suvad got killed, after which she ran towards the body of her brother. Šaban Ćato was with her at that moment, and her husband Rasim Ćato joined them "from the other side". Although she did not see the body of her brother, her other brother (Zijad) told her that Suvad was hit to his groins and head. Although she did not approach the body of the deceased Suvad, the witness managed to see that his body was dwindled on a side. His body was at the end of the village, on a rocky terrain, above which there was a shop and a mosque.

Omer Ćato testified before the court about his indirect knowledge of the murder of Suvad Kurtić, which he learned from Šaban Ćato, who, as he claims, mentioned Momir Savić in relation to his murder.

All these witnesses are in agreement that the body of the killed Suvad Kurtić was buried at the village cemetery in Donja Strmica, where his body still is.

Based on everything stated above, the Panel finds proven beyond any reasonable doubt that Suvad Kurtić was killed as the witness Šaban Ćato described.

[81] Witness examination record of Rasim Ćato, No. KT-RZ-205/06 of 3 January 2008

The defense challenged this count in the Indictment using the alibi of the accused. The accused alleges that he has never been in the village of Donja Strmica, and that he does not know anyone from the village. He also alleged that on 25 May he was, together with Milenko Jevđić, in Rudo around 10:00 or 11:00 hours, and that, among other things, he met Vojislav Topalović there. These allegations made by the accused were confirmed by the defense witnesses, Jevđić and Topalović. During his testimony, the witness Vojislav Topalović stated that he met the accused on 25 May around 11:00 or 12:00 hours in the hotel in Rudo. The witness stated that the accused came to the meeting in a red Lada Niva vehicle but he cannot remember what he was wearing. The witness stated that he stayed with the accused until 14:00 or 15:00 hours that day. The defense witness Milenko Jevđić confirmed that he went to Rudo with the accused on 25 May.

The Panel considered these two testimonies in their mutual relations and the relation towards the other evidence in the case. Witnesses Vojislav Topalović and Milenko Jevđić tried to corroborate the testimony by the accused, but their testimonies are given arbitrarily and are totally opposed to the testimonies by the prosecution witnesses. Moreover, in case of Vojislav Topalović, the Panel considered the fact that he apparently has extremely friendly relations with the accused, and that he had one of the leading positions in the municipal authorities at that time, and who has an interest to help the accused. On the other hand, the prosecution witnesses, who testified in relation to this Count of the Indictment, both the direct eye-witness to the murder who is sure and convincing in his testimony and has no motive to charge the accused without any ground, and the other witnesses who saw the body of the killed and who even back then heard from the eye-witness who had committed that murder.

The death of Suvad Kurtić, who was killed on that day, was also confirmed in the Death certificate for the deceased Suvad Kurtić[82] which included 25 May 1992 as the date when he died.

Furthermore, the Panel considered the facts related to the responsibility of the accused for the murder of Suvad Kurtić. Thus, the Panel particularly considered the identification of the accused.

The events of 25 May related to the capturing of Šaban Ćato and Suvad Kurtić, their taking away, and the murder of Kurtić, according to Ćato's testimony, began around 12:00 hours and continued until 18:30 or 19:00 hours. The witness stated that, considering the prolonged time frame in which these events had taken place, he could even today recognize Dragan and Momir Savić, although he never saw them again after that. The witness, without any hesitation or doubt, recognized the accused in the courtroom as a person he remembered by the name of Momir Savić.

[82] Death certificate for the deceased Suvad Kurtić, No. 202-1333/98 of 9 March 1998 (exhibit T – 15)

The defense however alleged that the accused was not on the site, and that the witness Šaban Ćato could not recognize the accused on that critical occasion because he had not known him from before and did not see him ever after.

The Panel acknowledges that the testimonies by eye-witnesses may bear certain dangers, including the objective jeopardy that a witness may make an error by confusing the identity of a person he saw on the site with the person he would subsequently identify as a perpetrator. The testimonies by eye-witnesses therefore have to be analyzed carefully and methodically, which the Panel did in this specific case, considering primarily the nature and the seriousness of the event, how this event could influence the witness, and the period which went by since the event until the moment of the identification of the accused in the courtroom.

In the case *Kupreškić et al.,* the ICTY Appeals Chamber, among other things, stated: "The Appeals Chamber notes, however, that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction".

Most civil law countries, our included, adopted the principle of "free evaluation of evidence", allowing judges considerable scope in assessing the evidence put before them. Particularly in cases where the identification of the accused depends upon the credibility of a witness testimony, the Judge must comprehensively articulate the factors relied upon in support of the identification of the accused and the evidence must be weighed with the greatest care. A Trial Panel must always, in the interests of justice, proceed with extreme caution when assessing a witness' identification of the accused made under difficult circumstances. While a Trial Panel is not obliged to refer to every piece of evidence in the case-file, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Panel must rigorously implement its duty to provide a "reasoned opinion". Thus, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence.

In the case *Marko Škrobić*[83] in this Court, five factors were defined for testing the reliability of identification within the context of overall circumstances, as follows:

- the opportunity of the witness to view the accused at the time of the crime
- the witness degree of attention to the accused at the time of event
- the witness's capacity to observe the event, including his/her physical and mental acuity
- whether the witness's identification was made spontaneously and remained consistent thereafter or whether it was the product of suggestion

[83] See the case *Marko Škrobić (X-KR-07/480)*, Court of BiH Verdict of 22 October 2008, p. 26

- the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly (this last factor relating to whether or not it was an ordinary event or not).

In this specific case, the witness Šaban Ćato who, as pointed before, is the only eye-witness, described the person who he claims is Momir Savić as: "around 170 cm tall, brown hair, not so fat, sort of medium". The witness remembers that Momir Savić had a black overall, a rifle with the sniper (down his shoulder) and an automatic rifle with the folding rifle butt across his back, and a police baton. The witness was positive that one of the weapons had a sniper and he is familiar with such weapons given that he did his military service in JNA. Šaban Ćato testified that, at some moments of those critical events, he was only 1-2 meters away from Momir Savić, that he faced him (face to face) so that he could clearly see him and remember the appearance of that person. Moreover, although the Panel finds that the mere identification of the accused in court is not sufficient for the positive identification, we note that Šaban Ćato recognized with certainty the accused in court as the person who shot and killed Suvad Kurtić.

The Panel considered all the previously discussed legal principles, including the opinion by the ICTY Appeals Chamber, as well as five elements from the Škrobić case, and in that light it evaluated the testimony by Šaban Ćato and found it completely credible, reliable, and truthful.

The witness Šaban Ćato stated that he did not see the accused after that event until the trial. However, despite all that and the nature of that event and the circumstances surrounding the event, it remains clear that the witness memorized the person who shot at Suvad Kurtić. Šaban Ćato was a young person at the relevant period, he was adult and had no physical or psychological problems that could affect his memory. Evaluating this testimony, the Panel finds that another fact should be considered too. Witness Ćato was not a mere observer who describes the event, but rather was an active participant in the event. The events, the witness talked about, lasted for several hours, and in the course of the events the witness had sufficient time and opportunity to see the accused on more than one occasion and from different views, and was even a direct victim of his threats and violent behavior. In such circumstances, the certainty that the witness does not make an error is intensified in terms of the identification of the accused. It remains clear that the witness maintained the consistency in the recollection of these events, and that he showed a high degree of certainty and honesty during his testimony before the Panel.

Although the name of the accused per se is not of an essential relevance, the fact that the witness beyond any doubt saw the person whose name is Momir Savić corroborates the accuracy of the identification of the accused (e.g. no other credible possibility was presented before the court that would potentially suggest that it was another person with the same name who killed Suvad Kurtić, with the same position in the army, present in the same area, someone resembling the accused).

The Panel considered other circumstances as well, even the fact that it stems from the testimonies of the witnesses that a military unit was on that relevant day present in the village of Donja Strmica, including Dragan Savić. The Panel had previously found that this entire unit was under the command of the accused. The Panel notes the described situation on the relevant day when Momir Savić arrived and Dragan Savić told him not to beat Šaban. Also, Šaban Ćato has also linked that person with the person who had earlier talked via Motorola to Dragan, by the tunnel (namely, Dragan used the same name to call that person). Dragan and Momir Savić talked to each other in the way expected and natural for the communication between two cousins, which is what they were. Moreover, at that time, at the outbreak of war conflicts in BiH, when there was no strict military hierarchy or the army in its strict sense, it was not unusual that Dragan talks to Momir in the manner described above. Furthermore, the Panel considered the fact that the same names always appear under the same circumstances (Dragan Savić, Momir Savić, "Leka"), that they are members of the same unit falling under the command of the Višegrad brigade. Then, there is a continuity in the sequence of events between 23 May (when the population of Drinsko was moved out) and 25 May 1992, in the narrow area falling under the area of responsibility of the unit under the command of the accused, that there is the same pattern reflected in the seizure of the weapons from the Bosniac population, incarceration and killing of the Bosniac population. While all these circumstances per se do not prove the event described in this count of the Indictment, they for sure provide a wider context based on which the Panel may evaluate the truthfulness and consistency of the key testimony by Šaban Ćato.

Based on everything stated above, the Panel holds that any doubt in relation to the identity of the accused and the commission of the criminal acts by the accused has been removed.

The Panel additionally considered that on the occasion of the search of the house owned by the mother of the accused (Vitorka Savić), also confiscated, among other things, were a rifle with the optical sniper aim, a pistol, rifle M48 and some other kinds of guns, which was all documented in the certificate of the seized items.[84] The Panel notes that the witness Šaban Ćato testified that the accused had a sniper rifle and an automatic rifle on the critical event.

It is clear that the accused was aware and that he wanted to kill Suvad Kurtić on that relevant day, and so acting with the direct intent he shot at the deceased. Among other things, after he shot the victim from close range, the accused fired another bullet at him. The attitude and the words that accompanied this act (the accused swore the "Balija's mother" to the victim and said "you think you can escape a chetnic") left no doubt that the accused was fully aware of his actions and he showed his clear persistence and wish to deprive Suvad Kurtić of his life. This offense was committed within a widespread attack against the greater Rudo municipality (as already described), which satisfied the elements of the criminal offense of murder under Article 172(1) a) of the CC BiH.

[84] Certificate on the seized items, No. 17-04/2-04-2-34/07 of 14 decembar 2007 (exhibit T – 103)

4.6. Count 6 of the Indictment

Count 6 of the Indictment charges Momir Savić that he coerced the person T.B. into sexual intercourse or an equivalent sexual act by using force.

In respect of this Count the Prosecution heard the Protected Witness – Aggrieved Party T.B. In her testimony the Aggrieved Party told particulars of what happened to her.

T.B. lived with her family (husband and two daughters) in Višegrad. Because of the then situation her daughters left Višegrad in January and May 1992, whereas her husband left Višegrad at around 6 June. The Aggrieved Party remained in order to keep their property, as well as for the fact that she performed compulsory work service at the catering establishment in which she had worked before the war. Besides, she considered that nothing bad could happen to her because she is a Serb, as it was a matter of common knowledge that crimes were committed against the Bosniac population of that Municipality.

Serb soldiers were gathering in the grill restaurant in which the witness worked. They wore camouflage uniforms and were armed. She stated that at that time there were no other soldiers in Višegrad but Serb. Among those soldiers was the accused with whom the Aggrieved Party got acquainted one day in June while her husband was still at home. On that occasion the accused came into the kitchen of the grill restaurant and asked the Aggrieved Party what her name was and where her family was, whereupon the Aggrieved Party replied that her daughters left Višegrad and that her husband was still there. The Witness described the accused stating that he was fat and had receding hairlines, and that his belly was a bit large. Around his waist he had a pistol; he carried an automatic rifle and was dressed in a camouflage uniform. During that conversation the accused told her that he would drop by her house.

At around 6 June 1992, the Witness's husband left Višegrad after he had been issued a passport. On the same day when her husband left, the accused appeared at the house of the Aggrieved Party in the evening. He was uniformed and armed. The Aggrieved Party maintained that he had always worn a uniform and had been armed all the time as she was seeing him (from June until October 1992). Describing further developments at that night, the Witness stated that the accused told her to make herself comfortable. In the meantime, he also got undressed. He told her to go into the room. Then he told her to put his sexual organ into her mouth. Afterwards, he had a sexual intercourse with her several times. All the time, as T.B. stated, the accused addressed her in a raised voice, and she further stated that the accused did not take a bath, that he was dirty, untidy and that he was sadistically abusing her all the night. She did not ask any questions, nor did she try to resist him because she was afraid of the appearance and behaviour of the accused. The Aggrieved Party stated that the accused was a terror itself in Višegrad, so that she did not dare to speak. She said: "...the very face of his, the very appearance of his, I didn't dare to say anything." During the sexual intercourse, the accused did not, as she stated, beat her but the "sexual sadistic abuse" lasted until morning. On his leaving, the accused threatened her not to tell anybody anything about what happened. On his leaving, the accused took the money from T.B.

which she had been saving. The Aggrieved Party did not still know the name of the accused at that time. It is only when she came to work next morning that she learnt from Zora Miličević, whom she worked with, about the name of the accused. The Aggrieved Party stated that she did not dare to tell anyone what happened to her the previous night because she was afraid of the accused and his threat that she must not tell anyone anything about his visit.

The following few days the accused did not come to the house of the Aggrieved Party, but he came with soldiers to the grill restaurant where she worked. The Witness stated that a lot of soldiers were always in the company of the accused, both local (those from Višegrad) and from Serbia. She noticed, looking through a hole in the kitchen, that they addressed him as "Duke" */the term was used as a title for leaders of Serb paramilitary formations/*, and she alone noticed that he was a pure terror among the soldiers and she knew that he had his own group of soldiers in the village of Drinsko.

The Witness further stated that a few days later the accused called her at around 23,00 hours and told her to prepare some food for him to eat. She said that he always talked to her in a commanding tone. As she did not dare to contradict him, she did not ask him anything and she prepared the supper. The accused arrived at around 1,00 hour and he subjected her again to sadistic sexual abuse, "he changed all positions". The Witness further stated: "When he left in the morning, I took a bath, I was crying, I felt humiliation, I wanted to (...) physically clean myself all over (...) He was always dirty, I was sick to my stomach of him. I had a feeling that he treated me as an animal but not a woman."

The Aggrieved Party especially stated that the Serb women in Višegrad addressed her as "*balinkura*" */derogatory expression denoting a Muslim woman/* and "*Momir's whore*", and many in Višegrad knew what was going on ("*even ants knew that he was coming to me*") because Višegrad is a relatively small town. The Witness further stated that in mid-July 1992, two nights in succession Spasoje Vidaković (whom she did not know before) came to her house and raped her, too. The accused came the night after Spasoje, angry and drunk, yelling. He beat her up for the first time, whereafter he beat her on a number of occasions. Besides, the accused was always threatening her.

She did not dare to tell anybody anything about what was happening to her, because the accused was "hot-tempered". One night she found the door of her house broken through, so that she had to spend the night at her neighbour Nada Miličević's house. The Aggrieved Party knew that Nada is a relative of the accused, so that she did not tell her anything. However, she thought that Nada supposed what was going on.

Late in July, and early in August, the Aggrieved Party got pregnant and she told the accused, who started yelling at her, saying that it was good for her to give birth to Serb children, and that she had had enough of giving birth to Muslim children. The accused was opposed to abortion. He told her that she must not have the abortion. However, T.B. decided to have an abortion, so that she obtained a passport (3 September 1992), went to a hospital in Užice (Republic of Serbia), had the abortion and returned to Višegrad on the same day.

As the accused was against her decision, she lied to him saying that she was going to visit her friends in Užice. After she had notified the accused about the performed abortion, he yelled, hit her several times and left, whereafter she never saw him again. The Aggrieved Party stayed in Višegrad until 28 October 1992.

T.B. did not inform the police in Višegrad about anything that happened to her, because she considered that they were not able to help her or would not help her, taking into account the authority and the role of the accused in Višegrad and the state of war that was in effect. The Witness thought that the reason for the described behaviour of the accused was the fact that her husband was a Muslim. Among other things, she concluded so from the fact that the accused told her that the time had come for her to give birth to Serb children, that she had had enough of giving birth to Muslim children.

The Witness maintained that, after all of those events, she has major health and mental problems, because of which she is regularly seeing a psychiatrist (each month) and she uses the prescribed medicaments for her mental state, but she still has fear of coming to Višegrad. What happened to her she told only to her husband and daughters.

The Defense contested the testimony of the Aggrieved Party by evidence of the accused himself and Nada Miličević.

The accused maintained that he and T.B. had a love affair, and that their relationship existed on a voluntary basis. He also maintained that he had helped the Aggrieved Party. He supplied her with food, helped her husband to obtain a passport and that he was often with her in the house of Nada Miličević. The accused stated that he had often taken the Aggrieved Party to the command post of his unit which was based in the *Hasan Veletovac* Primary School in order that she could contact her husband and daughters. As he maintained, their relationship ended because one day in August he found a new lover in her house.

Nada Miličević is a distant relative of the accused (although she allegedly did not know him personally), and at the relevant time she knew the Aggrieved Party well. She stated that she got acquainted with the accused late in May 1992 when T.B. and the accused came together to her house to have a coffee. The Witness Miličević maintained that T.B. told her that she had fallen in love with the accused, and also that the Aggrieved Party told her that the accused should help her in obtaining the passport for her husband. Further, the Witness Miličević testified about other situations when the Aggrieved Party was hugging and kissing the accused while they were in her company, and maintained that T.B. had never hidden her feelings for the accused or their relationship. Nada Miličević further stated that she had often stayed at T.B.'s house, but that she never saw any signs on her showing that she was exposed to violence of any kind. During a cross-examination, the Witness Miličević stated that the Aggrieved Party had gone to Užice to contact her family (and not because of abortion), since it was not possible from Višegrad.

On 29 May 2009, the Panel held the confrontation between the Aggrieved Party T.B and Nada Miličević, pursuant to Article 85(2) of the BiH CPC. During the confrontation both witnesses entirely maintained their testimonies which they gave at the main trial before.

The Witness Vojislav Topalović did not mention the Aggrieved Party T.B. at all, but he stated that the accused had been coming to Rudo in order to obtain a passport for "*some friend*", which should confirm the argument of the Defense that the accused helped the Aggrieved Party in obtaining the passport for her husband.

The Panel assessed the testimonies of witnesses who testified about the circumstances under this Count of the Indictment, and the Panel concluded that it was proved beyond any doubt that the accused committed the offence he is charged with.

First of all, during the evidence the Aggrieved Party described a large number of facts and details (relating to the relevant period), among which there are no contradictions. She testified about her tortures and humiliation she experienced, and the Panel finds her conduct to be sincere and her description of events from this Count to be credible and consistent with the way in which she imparted to the Court the painful personal experience she went through. The Aggrieved Party and the accused did not even know each other before the relevant event (an opposite situation could potentially indicate a particular motive in favour of the Witness or a different nature of their relationship). The Panel assesses that the Witness T.B. has no motive to incriminate the accused and expose herself to the participation in such proceedings before the Court, which certainly was a stressful and painstaking experience for her.

At the relevant time the Aggrieved Party was a woman who had her family and two adult daughters. Therefore, she is a mature person with clearly formed emotions and thinking. On the other hand, the Witness Miličević maintains that as early as late May, that is, early in June she used to see T.B. who allegedly appeared to be in love, wherefrom it ensues that it happened immediately after her getting acquainted with the accused. It is quite a logical question to ask whether it is realistic that a mature woman, who has such family status, who is dedicated to her family and to seeking a way how to save it, without knowing the accused until then, felt such emotions for him all of a sudden, and showed her intimate emotions for him in front of everyone and that she started to openly foster an intimate relationship with him (while her husband and daughters were in exile). The Panel finds that such assertion by the Witness Nada Miličević is inadmissible and aimed at destroying the credibility of the Aggrieved Party and at aiding the accused. The Panel had in mind the fact that Nada Miličević is a relative of the accused and is beyond doubt interested in helping him to avoid his criminal responsibility. Besides, the averments of this Witness that the Aggrieved Party even went to Užice (another country) in order to contact her family are quite illogical and contradictory to the very assertions of the accused who stated that he used to take the Aggrieved Party to the command post in order for her to contact her family. The Panel is of the opinion that, even if the accused and T.B. did appear to the Witness Miličević as a sort of a "couple", such perception of hers does not exclude the involuntariness and non-consent of the Aggrieved Party to sexual intercourse with the accused. One must not forget that

Nada Miličević is a relative of the accused (of which the Aggrieved Party was aware at the relevant time), so that T.B. certainly did not feel free to confide in her in respect of the sort of the relationship with the accused and the manner in which the accused treated her, bearing in mind the power and influence he had over her during that period of time.

Further, the Defense noted the argument that the Aggrieved Party got particular benefits from the relationship with the accused. In this regard, the accused maintained that he had helped the Aggrieved Party to obtain the passport for her husband. The Panel does not find this assertion to be well-grounded. On the contrary, the Panel finds that the Aggrieved Party did not have any contact with the accused save the one she personally described, which started with his address to her in the grill restaurant where she worked. Further, the Panel finds that such argument by the Defense does not challenge the fact (which the Panel concluded to have been the key one) that the sexual contact came without the consent of the victim. Although the Panel does not accept the argument that the victim had any benefit from that "relationship" for it finds it to be ill-grounded, the Panel notes that, hypothetically, even though a victim of the rape receives a sort of benefit from the perpetrator (*e.g.* when a perpetrator provides the victim with a shelter or food), it certainly does not relieve the perpetrator of criminal responsibility for the criminal offence committed.

Under the definition under Article 172(1)g) of the BiH CC, the crime of rape exists if, *inter alia*, there exists:

- coercing another by force or by threat of immediate attack upon his life or limb (...)
- to sexual intercourse or an equivalent sexual act.

In the *Furundžija* Case, the ICTY Trial Chamber opined that the sexual penetration would mean the rape if it did not occur at a true will or with a consent of a victim. The relevance not only of the force, threat of force and coercion, but also the absence of consent or willful participation is explained in the *Kunarac* Case in which the following was observed: "*all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless*"[85].

In the same case the hereunder factors were established which (alternatively, but not cumulatively) must be satisfied in order for a criminal offence of rape to exist:

- the sexual activity is accompanied by force or threat of force to the victim or a third party;
- the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- the sexual activity occurs without the consent of the victim.

[85] See *Kunarac et al.* Case, ICTY Trial Chamber Judgment, para 440.

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person[86].

In the present case, the fact is that the criminal offence took place under specific circumstances of the existence of the widespread attack directed against Bosniac population of the Višegrad Municipality, at the time when that Municipality was under full control of the Serb Army. Additionally, murders and abuse of the Bosniac population took place in that area every day. It is evident that the family of the Aggrieved Party was in danger because her husband is a Bosniac, for which reason he had to leave Višegrad together with their daughters. The Aggrieved Party stayed in Višegrad in order to save their property and job, but she remained alone and unprotected. In such circumstances the accused appeared. He enjoyed beyond a doubt a specific authority and influence in the town. He knew well the entire region and had connections and acquaintances in government authorities. He knew about the situation in which T.B. was, so he took advantage of that situation and forced her to sexual intercourse. The Aggrieved Party was completely unable to oppose him, so she did not even try to resist him, being frightened by all that he represented. Additionally, the accused wore a uniform and was armed. He addressed her with a raised, commanding and threatening tone. Also, it was established that the accused was insulting her on "ethnic grounds" during the rapes.

It was with special attention that the Panel assessed the testimony of the Aggrieved Party T.B., her conduct before the Court, her attitude towards what happened as well as the fact that she never told anyone what happened to her, except for her close family. The Aggrieved Party presented clearly and in detail all circumstances surrounding the criminal acts. She described all the ways in which the accused behaved towards her, how he treated, harassed and humiliated her (as was previously described in detail). She stated, *inter alia*, that he treated her as an animal, not as a human being. Further, it ensues from her testimony that, at a later phase of their "relationship" the accused even beat her, after which she was all swollen, and she feels the consequences of that even today. All the acts of the accused were aimed at degrading T.B. as a person, only because she was married to a Bosniac. The entire situation in which T.B. found herself during the period from June to October 1992 quite certainly provoked in her the fear and anxiety about her life.

The accused personally committed that act of rape, and thus he is an individual perpetrator. The accused was aware of all prohibited aims because of which the Witness was raped and he wanted such outcome. The accused acted with direct intent and he did so as an individual perpetrator within a widespread attack of the Serb Army, police and paramilitary formations on the non-Serb civilian population in that area.

It is clear from the description of the specific act that the elements of rape laid down in Article 172(1)g) of the BiH CC are satisfied in the actions of the accused.

[86] See *Furundžija* Case, ICTY Trial Chamber Judgment, para 176.

4. 7. Count 7 of the Indictment

By this Count of the Indictment the Prosecutor's Office charges Momir Savić with the acts referred to in Article 172(1) a), d), e) and i) of the BiH CC. Specifically, the accused is charged that on 13 June 1992 he was in command of the members of his unit and he, together with them, participated in the expulsion of Bosniac civilians from the settlement of Dušće, as well as in the separation of five men (whose individual names are listed in the Indictment) from a column, who were returned in the direction of Dušće, where (Nezir Delija and Osman Demir) were deprived of their lives by use of firearms and then burnt in Ajka Balić's stable in Dušće, whereas Ahmet Delija, Midhat Nuhanović and Uzeir Nuhanović remain unaccounted for.

The settlement of Dušće is a suburb of Višegrad and at the relevant time it was inhabited by the majority Muslim population. Dušće was (as was the Višegrad proper) at the relevant time under control of units of the Serb Army and Police, as well as paramilitary units composed of local Serb population (upon departure of JNA).

Witnesses who gave their testimony in connection with this Count of the Indictment (including Suada Logavija, Sabina Maslo, Omer Delija) testified about the events in this area in Spring 1992, the events that preceded 13 June. They stated that in April, out of fear that Murat Šabanović would lift the dam, and being afraid of shooting by Serb military units, they left their homes and went to Priboj (upon Lim) where they stayed 10 to 15 days. The three referenced witnesses lived in the same building in which the other members of their family lived. All of them (witnesses and members of their family) left Dušće together and also came back to Dušće together, to their apartments. Witnesses stated that they had come back to Dušće for the reason of impossibility of a longer stay in Priboj, because of the fact that the local police insisted on their return to Višegrad. It ensues from the testimonies of those persons that there were a lot of soldiers in Višegrad, as well as in Dušće, when they returned, whereas the local residents told them that it was the Užice Corps. Witnesses saw the soldiers every day. They were all armed and wore uniforms. Such situation lasted until 13 June when the Bosniac residents from Dušće were forced to leave their homes again in the manner as described hereunder.

Suada Logavija, Omer Delija and Sabina Maslo were eye-witnesses of the crime described in this Count of the Indictment (except for the very murder of five men of Bosniac ethnicity). All of the three witnesses have family ties with one another (Omer Delija and Sabina Maslo are brother and sister, whereas Suada Logavija is their aunt), and they too are victims of expulsion from their homes in Dušće. The following ensues from the testimony of those witnesses:

On 13 June 1992, in the morning hours, they were all in their apartments when a shooting was heard (the witnesses could not specify whether it was infantry or artillery shooting) in the distance. The noise started straight off, people started to stir up and the shooting was coming closer to the referenced building. During the shooting, some soldiers, more precisely, a large number of Serbs who wore camouflage uniforms and were armed, began

to come in at the same time. Occupants of the building (including the witnesses Ahmet Delija, Nezir Delija, Osman Demir, Uzeir Nuhanović and Midhat Nuhanović) came out of the building and set off along the road running next to the Drina, with a view of taking a shelter from the shooting and soldiers who kept on coming in. However, at a nearby cross-road they met armed soldiers who sent them back to the building from which they had started, that is, along the road that ran next to railroad tracks and on which a column of civilians of Bosniac ethnicity was already formed. Soldiers were gathering civilians from different houses and buildings and they directed all of them towards the centre of Višegrad. The column numbered some 50-70 people, and at the head and at the rear of it soldiers were walking, watching over the movements of those persons. No one of those civilians knew what exactly was happening, where they were taken or what would happen to them.

Among the soldiers who directed the civilians towards the town and who escorted them, there were, among others, Goran Tešević and Zoran Tešević (brothers), as well as Ljubiša Savić, whom some of the civilians present in the column knew from before. As the Panel concluded before, the referenced persons were in a unit which was under command of the accused. Zoran Tešević Leka was, in addition, a platoon commander. All the soldiers present wore camouflage uniforms and were armed.

Ahmet Delija (brother of Suada Logavija and father of Omer Delija and Sabina Maslo) knew Goran Tešević from before, because he often went fishing with him. Consequently, the witnesses Sabina Maslo, Suada Logavija and Omer Delija also knew him by sight, so that they could recognize him at the relevant time. Besides, the Witness Suada Logavija described Goran as "a tall boy. He had a beard, and was a rather thin boy." Explaining how she knew Goran Tešević, she also stated that she did not know him personally, but by sight, and stated "because those children from above who were passing by, I mean the young, young people and all others, they were passing by on their way to school, I knew them, thus, by sight". On the relevant occasion, her brother Ahmet Delija told her that it was Goran Tešević, and Ahmet even addressed Goran begging him to save his (Ahmet's) children. Suada Logavija testified that she knew Zoran Tešević also by sight, but she did not know his name. She learnt about his name and his family ties with Goran Tešević when the local residents said that Leka had come on the same day, while the column was moving. She heard that nickname later on, on the same day, when civilians were halted and when a row broke out between Leka and Goran (as it will be described, when men were separated from the column).

Omer Delija was one of the two men whom Goran Tešević saved on the relevant occasion. In the column he was walking next to his father, Ahmet Delija, so that he directly heard his father's address to Goran. The witness stated that his father told him then that he knew Goran's brother Leka, too.

Suada Logavija testified that on the relevant occasion, when Ahmet Delija addressed Goran Tešević asking for help, Goran said: "Well, I'd let you go but (...) they'll kill both me and you. You won't (...) pass even 10 meters and they'll shoot at you straight off". The witnesses Omer Delija and Sabina Maslo also testified about the above stated, and thus Sabina Maslo

maintained that Goran replied to her father "...What were you waiting for? You should have taken shelter with your children somewhere before now... All the men folk will lose their lives", with which the testimony of her brother Omer Delija is also entirely consistent. It is clear from the aforementioned that Goran Tešević was fully aware of the fate awaiting the separated men.

The Witness Suada Logavija stated that a Lada Niva car, white in colour, often passed by the column of civilians which was moving towards the town. On a number of occasions, the car passed by in the Dušće-Višegrad direction. In the vehicle she saw only a driver whom she did not recognize immediately, but she heard from among civilians in the column that it was Momir Savić. The column of civilians was halted near the *Employment Bureau* building in Višegrad by soldiers who escorted them all the time, and then the white Lada Niva came up again. Civilians in the column mentioned among them "*Goran and Momir*". The car stopped on a rising ground next to the road where the gathered Bosniacs (50-70 of them) from Dušće were standing. Leka approached the car. The accused came out of the car and talked to him. After that conversation, Leka singled out five men (Ahmet Delija, Nezir Delija, Osman Demir, Uzeir Nuhanović and Midhat Nuhanović) from the column. Sabina Maslo, Omer Delija and Suada Logavija recalled that Leka singled out exactly the listed persons, which they remembered in particular because, among them, there were their relatives, too (Ahmet Delija and Nezir Delija), whereas Uzeir Nuhanović was their neighbour (he lived in the same building in which they lived). They knew Osman Demir and Midhat Nuhanović as residents of Dušće, which is a relatively small area where people know one another.

When Leka started to separate Omer and Selvedin Delija from the column, his brother Goran Tešević did not allow him to do so. More specifically, when Leka came over to separate those two children (then, they were minors) from the column, too, Goran told him "Leka, don't do that, (...) although we're brothers, don't do that, because I know their father", so that after a short row between Goran and Leka, Omer and Selvedin Delija stayed with the civilians in the column which was moving towards the town. The separated men (five of them) were returned towards Dušće, in which direction the accused also went by the Lada Niva vehicle. The Witness described in detail that her brother Ahmet Delija, leaving with the other separated men raised his arms and said: "Take care of my children". The Witness Logavija is completely convincing in her testimony when she stated that she would never forget the words of her father Nezir Delija when he said: "My dear, forgive and forget your fetching a glass of water for me" at the time when soldiers were taking him away in the Dušće direction.

Witnesses stated that they subsequently learnt that the men who had been taken away were killed in the area between the centre of the town of Višegrad and Dušće, at the place called Lalovine, whereupon they were burnt in Ajka Balić's stable.

The Witness Hajrija Kos stayed at her sister's house in Dušće in June and July 1992. She testified that throughout that period the accused had come often to their house looking for members of the household – men. The accused always wore a uniform. He was armed and

was escorted by soldiers. He would come at any time of the day and night, take the women out and question them. On one occasion, he even took the Witness's pulse in order to check if she was lying. The fact is that the accused showed his unequivocal interest in finding those men, and in connection with that he was brazen and angry. On such occasions he was accompanied by Dragan Savić, Zoran Tešević aka Leka and Goran Tešević. Hajrija Kos stated that she had not personally seen the taking away of five Bosniac men from Dušće, but she heard from neighbours that Nezir Delija, Ahmet Delija, Osmo Demir, Midhat Nuhanović and Uzeir Nuhanović were killed by Serb soldiers.

The Witness Šuhra Gušo too was in Dušće (at the house of her husband's brother) at the relevant time, and she stated that she had stayed there until the "cleansing" of Dušće. She further stated: "Our soldiers, neighbours, those Serbs. Soldiers came from above and drove that people (...) and they drove us also towards Višegrad again. They left the men in Dušće (...) I personally saw Midhat there among the men." This Witness further stated that she had seen the accused when he had come to Dušće with his soldiers among whom she recognized Željko Krsmanović, Vlado Vidaković and Dragan Savić. Šuhra Gušo maintained that she saw those soldiers separating men from women and children in Dušće, and among the soldiers she recognized the accused by "his back". When they arrived in Višegrad, the Serb soldiers told them that they could stay there until the following day, whereafter they were transported to Visoko by buses.

Fatima Mujakić was in the house of Mujo Hodžić in Dušće at the relevant time (previously she was expelled from Drinsko, as described in Count 4.3. of the Verdict), wherefrom, together with the other Bosniac civilians, she was expelled on 13 June. She testified that "Momir's soldiers": Željko Krsmanović, Boško Tešević and Leka appeared in Dušće on 13 June 1992 and ordered civilians to come out of their houses and start walking towards the "Red Cross" in Višegrad. She confirmed that, while the column of civilians was moving towards the centre of the town, soldiers separated some men, including Nuhanović whose name she could not recall, and they turned them back towards Dušće along the road they came.

None of the five Bosniac men who were taken away was ever seen alive after their separation from the column. It was only in the aftermath of the war, that is, on 31 October 2005, that mortal remains of Nezir Delija and Osman Demir were found in Višegrad, in the "Stable" building owned by Ajka Balić, whereas the other three men, Ahmet Delija, Midhat Nuhanović and Uzeir Nuhanović, remain unaccounted for.

The expert witness MD Vedo Tuco testified at the main trial about the circumstances surrounding the exhumation carried out at the location of Dušće-Višegrad ("Stable" building) on 31 October 2005 and about the circumstances surrounding the report made in respect of forensic medicine expertise of the bodies found, as well as further activities on the examination and identification of bodies. He stated that mortal remains of at least three adult male persons were found on the mentioned location. However, those were mortal remains which could not have been separated so as to form anatomical components since they were mixed very much. That those remains belong to at least three adult men was

established on the ground of keeping statistics of bones which MD Tuco described in detail. Specifically, he stated that all the bones of lower part of skeleton of left and right side and bones that are the most numerous (in this case, those were three left upper legs) were listed. On that ground, the least number of bodies was determined in the particular case.

During the DNA analysis, findings were made for three persons, more precisely, for Nezir Delija, Osman Demir and Sadik Bjelkan. It is evident that at the same place the other persons (other than the five persons whose individual names are listed in Count 7 of the Indictment) were killed, but the Panel will not deal hereunder with particulars related to the killing of Sadik Bjelkan, given that he is not included in the factual description in Count 7 of the Indictment.

The expert witness Tuco explained that only the identification of Nezir Delija has been completed and that it was done at the insistence of the family of the killed person. Specifically, he explained that a death certificate is issued only after the mortal remains are completed to the extent of at least 75%, which was not the case with Nezir Delija, nor the other two persons either. The expert witness explained that, in the particular case, those were mortal remains which were found on the surface, and a large part of them was not present on the site, and for that reason the identification process was completed with the help of members of the family of the killed person. The identification process for the other two persons (Osman Demir and Sadik Bjelkan) has not been completed because additional DNA findings (6-7 DNA findings have already been made) are still expected. Nevertheless, the expert witness Tuco maintained that there is no dilemma about the identity of those persons, because there already exists a specific, sufficient number of DNA findings (on the ground of which the identification process takes place) which unequivocally indicate who the persons concerned are.

As for defining the cause of death, the expert witness Tuco explained that medical doctors comment on that if there are some injuries on the skeleton, but if no such injuries are found (on the skeleton), it does not mean that even in that case vital organs or other parts of the body were not injured and that such injuries cannot be the cause of death. The expert witness Tuco further stated that the bones of the mortal remains found were so much chipped and charred that it was difficult to establish a possible cause of death, but that, given the damage found on those remains, he did not exclude the possibility that the persons who had been brought to that place were first executed with firearms and then burned. It was found on the basis of the DNA analysis, as it was previously said, that the remains of Nezir Delija, Osman Demir and Sadik Bjelkan were found at the referenced place. Mortal remains of the remaining three men who were taken away on the relevant day were not found and those persons (Ahmet Delija, Uzeir Nuhanović and Midhat Nuhanović) are still listed as missing persons, which is evident also from a report of the International Red Cross, and a document of the Federation Commission for Missing Persons[87].

[87]Excerpt from the ICRC Register of Missing Persons for Midhat Nuhanović of 4 February 2008 (T-91) Excerpt from the ICRC Register of Missing Persons for Ahmet Delija of 4 February 2008; (T-92), Document of the Federation Commission for Missing Persons of 3 March 2008 (T-111)

It is evident from reports on forensic medicine expert evidence which were made following the exhumation[88] that the cause of death could not have been established for the bodies found. The Panel accepts the testimony of the expert witness MD Vedo Tuco that in the events when gunshot wounds are not on bones but are, for example, on a soft tissue (or vital organs) the cause of death cannot be established by a forensic medicine analysis which is conducted several years after the death, because the soft tissue has become decomposed in the meantime. Additionally, in the present case, beyond doubt, there are mortal remains which were on the surface and the large part of which was not present on the site, so that the bodies are not complete, which is not to say that on those parts of the body which have not been found yet there are no such damage on the basis of which the cause of death could be established.

It is evident from the Exhumation Record of 1 November 2005[89] that mortal remains of at least three persons were found during the exhumation, and that more than 10 pieces of cartridge cases of 7,62 mm caliber for an automatic rifle were found, too.

The Panel finds that the existence of the described event was proved by facts. The accused himself confirmed that the crime had been committed and that he had heard about it ("Well, it was heard. Of course it happened"[90]). The accused stated that on 13 June Zoran Tešević was leading a patrol above the settlement of Dušće when shooting and conflict between the two opposing sides took place in the vicinity of Višegrad. People who were in Dušće, mainly women and children, as he stated, set off for Višegrad and it was then that the incident, the term which the accused used, occurred; he personally did not allegedly learn about it until the next day. The accused maintained that at the relevant time he was in Drinsko, at the command post, where he received Zoran Tešević with a group of soldiers who were in the patrol, and who allegedly had previously clashed with the armed members of the opposing side, which caused the shooting. The accused further claimed that he had a row with Tešević because of the reason why it happened and he asked him whether it could have been avoided. Next day, the accused allegedly heard a story that "some group" from the town came along, and that it met the civilians who started walking towards the "Red Cross" in Višegrad, that it picked up a group of people and that it returned them somewhere. Therefore, except that he confirmed that the incident took place, the accused confirmed that on the relevant day a group of civilians set off for the centre of Višegrad, and that a small group of people was separated from that group and returned towards Dušće. All of those averments are completely consistent with the testimonies of witnesses in respect of the referenced circumstances. The accused further stated that on the relevant day he saw a stable on flame, without concretizing then which stable he referred to.

The Panel will deal hereunder with the identification and participation of the accused in separating and taking away the five above named men.

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[88] Exhibits of the Prosecutor's Office, T 78 through T 87

[89] Record on exhumation of bodies of Bosniac ethnicity in the settlement of Dušće, of 1 November 2005 (Exhibit T 76)

[90] The accused at the main trial held on 4 May 2009

Suada Logavija knew the accused by sight even before the war. She used to see him when he visited Stanimir and Slobodanka Kirdžić (called Mica) who lived in the same building in which she lived (in Dušće). The Witness maintained that, on such occasions, her neighbour Mica would say to her: "My Momir has come to see me". The Defense Witness Stanimir Kirdžić maintained in his testimony that the accused had never visited him and his wife, and the same assertion was made by the accused during his pleading. The Panel did not accept those averments of the Defense. The Witness Kirdžić presented only general assertions that the accused had never visited them (although he was a relative of his wife) without any explanation why it was so. It is incontestable that Slobodanka (wife of the Witness Stanimir Kirdžić) has family ties with the accused. The Witness Stanimir Kirdžić and the accused did not state that they possibly had bad relationships because of which the accused would avoid the visit. The Panel had in mind that this is a person that has specific family ties (through his wife) with the accused, and as such he certainly has interest in helping the accused.

Contrary to these ill-founded assertions of the Defense witnesses, Suada Logavija described the accused at the time when he used to come to visit the Kirdžić family, and she stated that he was not too tall, that he was heavily-built, that he had a dark hair, curly a bit naturally, chubby face and head. The testimony by this Witness and the identification of the accused are found by the Panel to be completely consistent, all the more because this Witness stated that she did not know his parents nor where he lived, but she knew him by sight in the manner as described. During the main trial, the Prosecutor's Office presented a photograph[91] to the Witness Suada Logavija with the aim of identifying the persons in the photograph in which the Witness immediately and with certainty recognized the accused without any dilemma. She said that it was the person whom she saw when he used to come to visit Stanimir and Slobodanka Kirdžić and that it was the same person who on the relevant occasion came in the white Lada Niva and talked to Leka, whereupon five Bosniac men were separated from the column. The Witness Omer Delija also testified that, at the time when the column of civilians had been halted in front of the *Employment Bureau*, "someone came in the Lada Niva car" and then men were separated from the column. The Witness Delija stated that he did not know who that person was, but he subsequently heard from his aunt (Suada Logavija) and mother that it was Momir Savić. The Panel notes that a great number of witnesses (both of the Prosecution and Defense) confirmed that, at the relevant time, the accused drove a Lada Niva besides other vehicles; however, some of them recalled that it was a Lada red in colour, whereas the others maintained that it was a Lada white in colour. The accused himself stated that the red Lada Niva was his property. The Panel finds that these inconsistencies related to the colour of the car which the accused drove are irrelevant to the essence of this Count of the Indictment in the light of the witnesses who directly identified the accused as a person who was on the site of the mentioned incident. The Panel finds that the testimonies of witnesses must inevitably differ in some less relevant details, especially when the lapse of time (more than 16 years) is taken into account.

[91] Exhibit T 111

Sabina Maslo too did not know the accused, but she remembers that on the relevant occasion her aunt (Suada Logavija) and other civilians present (who were expelled from their homes in Dušće) mentioned that Momir Savić had come in a car and ordered that five Bosniac men be separated and returned towards Dušće.

By this Count the accused is charged *inter alia* with the murder (in respect of Nezir Delija and Osman Demir), enforced disappearance of persons (in respect of Ahmet Delija, Uzeir Nuhanović and Midhat Nuhanović) and imprisonment or other severe deprivation of liberty in violation of the fundamental rules of international law (in respect of these persons). The Panel concluded that in the present case the elements of severe deprivation of liberty, contained in Article 172(1)e) of the BiH CC, are satisfied:

- imprisonment or other severe deprivation of physical liberty;
- in violation of fundamental rules of international law;
- with direct or indirect intent.

It ensues from the evidence stated above that it were exactly the members of the unit which was under command of the accused, with the presence of the accused in his role as the commander, who committed the act of separating Ahmet Delija, Nezir Delija, Osman Demir, Midhat Nuhanović and Uzeir Nuhanović from the group of the civilians. The eye-witnesses of the act of separating: Sabina Maslo, Omer Delija and Suada Logavija testified about this. All of the three witnesses clearly remembered all that was happening on the relevant day, because on the relevant occasion members of their families (Omer Delija and Nezir Delija) were also separated from the column. The listed witnesses are consistent that those soldiers were escorting them while they were walking towards Višegrad and halted them at the entrance to Višegrad, near the *Employment Bureau* building, where the separation of five men (listed in Count 7 of the Indictment) took place, whereupon none of those men was ever seen alive. The Panel notes that, among those soldiers, the witnesses recognized the "Serb neighbours", that is, they recognized in particular Goran Tešević, Zoran Tešević, Ljubiša Savić, Željko Krsmanović, Dragan Savić and Boško Tešević. It has previously been established that all those persons were members of the 3rd Company. Further, it has been proved that, while the column of civilians escorted by soldiers was moving towards Višegrad, the accused appeared in the Lada Niva vehicle, had a talk with Leka, whereupon Leka separated the men from the group of Bosniac civilians. The separated men escorted by a certain number of soldiers were taken towards Dušće, in which direction the accused also left by his vehicle. The accused himself maintained that at the relevant place and at the relevant time Leka was present with a part of the unit, because he carried out patrol (related to the alleged conflict between that patrol and armed men of Bosniac ethnicity which was referred to above).

That the action was contrary to the fundamental rules of international law is clear, in the first place, from the very fact that those persons were civilians. Besides, they were never given any explanation why the soldiers were taking them from their homes or evidence about the need for the deprivation of their liberty.

That this action includes exactly the direct intent of the accused is concluded by the Panel on the basis of the fact that the accused was present on the site, that he supervised the separation of the men and he even escorted the separated persons towards Dušće. Further, it was members of his unit that were present on the site, and it was the Bosniac population from Dušće who were expelled from their homes that day. The fact that the accused was the commander (and superior to the present soldiers) indicates that he certainly knew that, if he deprived a particular person of his liberty, such deprivation of liberty must have been based on law and carried out as prescribed by law, and it should in no case include any arbitrariness.

The Panel accepted neither the legal qualification of enforced disappearance in respect of Ahmet Delija, Uzeir Nuhanović and Midhat Nuhanović, nor the qualification of murder in respect of Nezir Delija and Osman Demir.

The Panel finds that it can be concluded from all the above stated testimonies of the witnesses that the overall situation in which the separation of five men took place indicated that their murder is a great likelihood. In that connection, the finding of their mortal remains, together with the location and the manner in which they were buried (and the fact that those whose mortal remains were not found have never appeared), indicate beyond any reasonable doubt that they were deprived of their lives. The men who were taken away were also aware that they would be killed, which is especially substantiated by the fact that Ahmet Delija begged Goran to deliver his son and nephew, as well as by the testimony of Suada Logavija who stated that her father had told her to forgive him whatever there was to forgive in his life. However, although those five persons have never been seen alive after that, there is no evidence whether the accused knew and what in particular he knew would happen to them after they had been taken away, nor is there any evidence that the accused knew about the fate that was awaiting them at the time when his soldiers unlawfully deprived them of liberty and took them away. Also, it has not been proved what the accused thought in particular the final outcome of such taking away would be, in other words, that his intention in respect of the persons taken away indeed was that they be deprived of their lives, that is to say, that they be denied legal protection for a long period of time, or that the providing of information about their fate or place where they were after he unlawfully deprived them of their liberty be rejected, the knowledge of which would indicate a special intention whose existence is required by this Article within the listed elements. Because of these deficiencies, the Panel did not find that the elements of the criminal offence of murder (in respect of Nezir Delija and Osman Demir) and enforced disappearance (in respect of Ahmet Delija, Uzeir Nuhanović and Midhat Nuhanović) were satisfied. However, as was previously reasoned, the act of severe unlawful deprivation of liberty, which also constitutes the crime against humanity, was proved.

Further, the accused is also charged in this Count of the Indictment with the forcible transfer of population or deportation referred to in Article 172(1)d) of the BiH CC, which is defined as "*forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law*". Essential elements of this criminal offence have already been developed in detail

under Count 4.3. of the Verdict (relating to the forcible transfer of the Bosniacs from Drinsko).

Displacement of persons is generally absolutely forbidden, except in specified restricted circumstances, as it was stated in previously cited Article 17 of the Protocol Additional II. Besides, Article 49, Paragraph 2, of the Fourth Geneva Convention specifies: "*Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased*". It ensues from the referenced Article of the Fourth Geneva Convention that evacuated persons must be returned to the place from which they were evacuated immediately after the circumstances because of which they were originally evacuated have ceased to exist. Bearing in mind all the aforementioned, it ensues that *mens rea* of this criminal offence, according to customary international law, is the intention that victims be removed and not returned to the place from which they were removed.

First of all, it is necessary to have in mind that the expulsion of the Dušće residents took place under the cover of a widespread and systematic attack on the whole of the area of the municipalities of Višegrad and Rudo during the spring and summer 1992. The Panel found in the previous sections of the Verdict that the expulsion of Bosniacs and their physical abuse and murder committed by the Serb soldiers and police and paramilitary units, composed of local Serb residents, took place in the area of the settlements of Drinsko, Meremišlje and Donja Strmica, too. All of those expulsions and abuses of the Bosniac population are, beyond doubt, the result of a plan devised by the Serb authorities to expel the whole of the non-Serb population, among others, from the areas of the Višegrad Municipality. One should not forget that Bosniac population, which was in Višegrad at the relevant time, found themselves trapped, disarmed and at the mercy of paramilitaries which were active, to say the least, with the acquiescence of the Serb authorities, especially the police which were already composed of the Serbs only (established fact under number 28). Further, it was a matter of common knowledge that a great number of incidents, including murders and disappearance of civilians of non-Serb ethnicity, took place in the area of the Višegrad Municipality at the relevant time (established facts from 30-39 which the Panel admitted from the Judgment in the ICTY *Mitar Vasiljević* Case, and which were not challenged by the Defense).

Further, witnesses who were heard about the circumstances referred to in this Count of the Indictment testified that they lived in Dušće before the war or after they were expelled and driven to Dušće from their homes in other settlements of the Višegrad Municipality. They lived in that area until the relevant events happened. Therefore, it is incontestable that it was the population which had full legal right to remain in Dušće. Those witnesses described the developments in Dušće on 13 June 1992, giving thereof a clear image of what the Bosniac civilians experienced on the said day. The witnesses Sabina Maslo, Šuhra Gušo, Fatima Mujakić and Hajrija Kos testified that Serb soldiers expelled them from their houses. Suada Logavija and Omer Delija testified that they alone left their apartments in order to hide from shooting by Serb soldiers which was heard in Dušće that morning, but while they were moving they came across Serb soldiers who directed them to the column of other local residents of Dušće who were heading for Višegrad. Therefore, although those civilians left

their homes voluntarily, at the time they came up to the Serb soldiers they did not have choice any more to return, because the soldiers took control over them and their fate and forced them to leave the place, together with the civilians who were previously expelled from their houses by soldiers. The overall picture of developments in Dušće that morning tells that civilians of Bosniac ethnicity were forced to leave their homes. The Panel finds that, in the present case, no option existed for that Bosniac population to choose between staying in Dušće or leaving, which constitutes the substance of coercion in a broader sense.

Further, witnesses Suada Logavija, Omer Delija and Fatima Mujakić testified that the following day upon their arrival in Višegrad they were told (witnesses in this connection were not explicit as to who addressed them) to report to the *Red Cross* in Višegrad, wherefrom their transportation towards Kladanj was arranged. The Witness Logavija stated that "two persons in camouflage uniforms" required that they sign their statements showing that they were voluntarily moving out to Kladanj and that they were leaving all of their movable and immovable property to the Serb Republic. Fatima Mujakić stated: "They chased us off towards the *Red Cross*. They stopped by one house after another, making us all go out of Dušće". Šuhra Gušo also testified that they were told by Serb soldiers that they could stay in Višegrad only until "the next day" (after they had been expelled from their houses in Dušće on 13 June), whereupon they were transported to Visoko by buses. It can be concluded from the testimony of those witnesses that in those buses there was a large number of other civilians (of Bosniac ethnicity, too) who were transported from Višegrad first towards Olovo, and then towards Kladanj.

All the adduced pieces of evidence indicate beyond any doubt that the forcible transfer of the population from Dušće was not made for the reasons admissible under international law. During the forcible transfer of that population there were military operations in the immediate vicinity of the place where they lived, and the reason for their transfer was certainly not to provide security to them. It was those civilians who were the target of the attack, and the forcible transfer of the population was carried out by the forces that participated in the attack on them. Further, it is incontestable that, at the relevant period, there were no natural disasters or other circumstances so as to justify the transfer of those persons for humanitarian reasons. Therefore, victims of those crimes were civilians who were lawfully present in the territory of Dušće but left their homes against their own will.
It ensues from the previously stated evidence that it was the members of the unit which was under the command of the accused, in the presence of the accused in his role as their commander, apart from having unlawfully deprived of liberty the five men who were separated from the column of civilians which was heading towards Višegrad (as it was already described), who also participated in the expulsion of Bosniac population of Dušće.

The Panel notes that among those soldiers the Prosecution witnesses recognized "the Serb neighbours", in particular, Goran Tešević, Zoran Tešević, Ljubiša Savić, Željko Krsmanović, Dragan Savić and Boško Tešević. The accused stated in his evidence that, at the place concerned and at the material time Leka was present with a certain number of members of that unit. Sabina Maslo, Suada Logavija, Omer Delija, Šuhra Gušo and Fatima Mujakić testified that those soldiers expelled them from their homes, and that they directed

all of them towards the column of civilians of Bosniac ethnicity which was heading towards Višegrad. Those witnesses are consistent in stating that the referenced soldiers escorted them while they were moving towards Višegrad and that they halted them at the entrance of Višegrad, near the *Employment Bureau* building, where the separation of the five men took place. Also, the Panel found that, while the column of civilians was moving towards Višegrad escorted by soldiers, the accused passed by the column several times.

Under this Count of the Indictment the accused is charged with "ordering" as a form of individual criminal responsibility. The Prosecutor's Office put forward a thesis in the closing argument that the command responsibility of the accused ensues from the factual description pursuant to Article 180(2) of the BiH CC, with which the Panel did not agree (as will be explained in detail hereunder).

It is established in the ICTY[92] case law that "ordering" entails a person in a position of authority using that position to convince another to commit an offence. It is not necessary that the order be issued in some special form. All forms of criminal responsibility can be proved by direct evidence or by indicia[93]. In order that some conduct bring about individual criminal responsibility, there must exist the intent. *Mens rea* which is required for all forms of participation under Article 7(1) of the Statute (identical to Article 180(1) of the BiH CC) is that the accused "acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct"[94]. *Mens rea* of the accused need not be explicitly expressed, but can be derived from circumstances[95].

The Panel has already established that the accused, at the material time, held the position of commander of the 3rd Company of the Višegrad Brigade, which means that he held a position that implied power to decide and issue orders and decisions. It ensues from the previously stated testimonies, as well as from the role which the accused played, that he must have known what was happening in the village as well as in the territory of the whole of the Višegrad Municipality. The Defense witnesses Miladin Savić and Momir (Milan) Savić stated consistently that the accused was "a leading figure" in that unit and that it was he who was to be asked about everything, and that he was also superior to Leka and Dragan Savić. Therefore, it is clear that the accused had effective control over his soldiers. The accused, as the Commander of the 3rd Company, was beyond doubt well acquainted with the policy that was carried out towards the Bosniac population in the area of Višegrad, and his overall behaviour is in accordance with the behaviour and activities of the Serb Army and police whose aim was that only the Serb population remain present in the area of the Višegrad Municipality (including Dušće as a suburban settlement). This aim was achieved, which is evident from Fact 56 which the Panel accepted from the *Mitar Vasiljević* Case,

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[92] See *Krstić* Case, ICTY Trial Chamber Judgment, para 601, then *Akayesu* Case, Trial Chamber Judgment, para. 483; *Blaškić* Case, ICTY Trial Chamber Judgment, para 281; *Kordić* Case, ICTY Trial Chamber Judgment, para. 388.
[93] See *Čelebići* Case, ICTY Trial Chamber Judgment, paras 384-386; also, see *Blaškić* Case, ICTY Trial Chamber Judgment, para. 307.
[94] See *Kvočka* Case, ICTY Trial Chamber Judgment, para 251.
[95] See *Čelebići* Case, ICTY Trial Chamber Judgment, para 328.

which the Defense for the accused did not challenge. In the present case, the accused did not personally order the residents of Dušće to go towards Višegrad, nor did he personally separate the Bosniac men from the column. Also, no one heard that he directly ordered Leka to separate the men. However, in the circumstances as described above, especially bearing in mind that he was the Commander to the present soldiers, that it was he who was to be asked for everything, that at the particular time he was on the site, that a number of times while the column of civilians was moving he passed by the column which was heading towards Višegrad, the Panel finds that he had the necessary authority and the active control over his soldiers, so that the Panel finds that he was the only one who could give orders to his soldiers to take the described actions against civilians of Bosniac ethnicity. Finally, although it is not of decisive importance, it is a fact that, after the civilians had been expelled from Dušće, the accused did not take a single action directed towards the return of the removed Bosniac population (which he was obliged to do under Article 49(2) of the Fourth Geneva Convention).

Therefore, during the relevant day and the described events, the accused acted as a superior, supervising the activities of his soldiers during the control of movement of civilians who were expelled from Dušće, and the separation and taking away of the mentioned group of five men who were first separated and then executed.

In terms of all the aforementioned, the Panel finds proven beyond any reasonable doubt that the accused in his role as the Commander participated in the severe deprivation of liberty of Nezir Delija, Osman Demir, Ahmet Delija, Uzeir Nuhanović and Midhat Nuhanović. Further, the Panel concluded from the adduced evidence that the accused, also in his capacity as the commander, in the described manner, participated in the expulsion of civilians of Bosniac ethnicity from the settlement of Dušće. Given the role the accused had at that time, his activities on the relevant day, the Panel finds that he, with his actions, is individually criminally responsible for those acts. The accused was aware of the acts and he wanted their commission, which ensues from the fact that he, in his capacity as the Commander, was present on the site and coordinated the activities of his subordinates, thus contributing to the actions which they undertook.

From all the adduced evidence the Panel established the elements of the offence of severe deprivation of liberty in violation of Article 172(1)e) of the BiH CC in respect of all five separated Bosniac men, as well as the commission of the criminal offence of forcible transfer or deportation of Bosniacs from the settlement of Dušće in violation of 172(1)d) of the BiH CC, in the manner as stated in the operative part of the Verdict under section 4.7.

4.8. Count 8 of the Indictment

Under this Count of the Indictment the accused is charged that on 30 June 1992 on the Limski Most he was in command of a group of armed Serb soldiers which took captive about 30 civilian Bosniacs, wherefrom they transferred them first to Drinsko for questioning and then to the *Hasan Veletovac* Primary School in Višegrad where they kept them unlawfully detained in inhumane conditions for four days.

Regarding this Count of the Indictment, the Panel assessed the testimony of the Prosecution witnesses A, B, Latifa Hodžić and Fatima Mujakić who are at the same time the aggrieved parties in that offense, as well as the testimony of the accused and Defense Witness Miladin Savić.

It incontestably ensues from the testimonies of those witnesses as well as from the testimony of the accused himself that the crimes in question were committed exactly on 30 June 1992 on the Limski Most standing on the road for the settlement of Međeđa in the Višegrad Municipality. The witnesses A, B, Latifa Hodžić and Fatima Mujakić testified that Momir Savić's soldiers took captive about thirty civilian Bosniacs on the Limski Most on 30 June 1992. The referenced women witnesses are at the same time the aggrieved parties of the commission of that criminal offence and they were present during the relevant event. The civilians who happened to be on the mentioned bridge ran away towards the territory which was under control of the forces of the BiH Army. Those civilians included mainly women, children and several men. When the column was halted by Serb soldiers, the present Bosniac men ran away, except for one, Mehmed Memić, who remained with the women and children on the bridge. The Witness Latifa Hodžić stated that those soldiers told them that they could not let them go anywhere until the arrival of their "Duke". The Witness Hodžić stated that, after Momir Savić and Dragan Savić had come on the site, the Serb soldiers ordered the captured civilians to board a two-ton TAM truck, and that Momir Savić yelled on Ismeta Kasapović on that occasion. Besides the accused and Dragan Savić, the Witness also saw Momir Savić from Pijavice and Zoran Tešević. The Witness B stated that her mother-in-law and the present women said that those were Momir Savić's soldiers, and they also mentioned Dragan Savić and Zoran Savić. She stated that, some half an hour later, the two-ton TAM truck full of soldiers arrived, and then also a car with the accused. The Witness B further stated that back then she did not know the accused personally, but the women who come from the place from which the accused also comes knew him. The accused, as she testified, approached the soldiers who were already there, and they were talking about something and then he, together with the other soldiers, ordered the civilians to board the two-ton TAM truck, whereupon they were taken to Drinsko. The Witness A too did know the accused, but she stated that she heard from the present women that those were Momir Savić and Dragan Savić who arrived after a short time had passed from the halting of the civilians on the bridge. She also stated that Dragan Savić arrived by "a small truck" in which the civilians were crammed up and transported to Drinsko where they stayed for an hour or two in a house. The testimony of the Witness Fatima Mujakić is consistent with the testimonies of the witnesses A and B and she additionally stated that Momir Savić (by Lada Niva), Dragan Savić, Leka Tešević and Milovan Savić came by a car, together with the truck which was full of soldiers. Also, the Witness Mujakić stated that, with the civilians on the truck, four soldiers were sitting at the corners of the truck, which the Witness Latifa Hodžić also confirmed.

The civilians were transported to a house in Drinsko, in which all the witnesses who testified about the circumstances from this Count of the Indictment are consistent. The Witness B stated that the captured civilians were full of fear, that the walls of that house read: "to slit Muslims' throats", whereas the Serb soldiers cursed "*bule*" /*veiled Muslim*

women/. The Witness further stated that, after the civilians had eaten, "Mr. Savić" came in and took out Bakša Ramović and brought her behind the house where he questioned her, whereafter Bakša Ramović said that he asked her about the money and golden items. The Witness Fatima Mujakić also testified that Momir Savić told her to go home and bring along money and golden items. The Witness A confirmed that a couple of women were taken out of the house, but she did not say who took them out. The Witness Latifa Hodžić also stated that soldiers asked them who had the money and golden items, and she personally was questioned by Dragan Savić.

They transported the captured civilians, except for Mehmed Memić (whom the witnesses last saw in Drinsko), from Drinsko to the *Hasan Veletovac* Primary School in Višegrad where there had already been over 50 Bosniac civilians detained. They unlawfully kept them in inhumane conditions in the school for four days. The Witness A described the conditions in the school as "poor"; they all were interned in a gym, and they were lying on tiles. They were not able to freely come out of the school, and in the school there were many examples of abuse of civilians by members of the Serb Army and paramilitary units, about which the Witness B testified too. The Witness Fatima Mujakić stated that the school had been full of people, and she maintained that she had never received any paper nor had she ever been told why she was detained in the school. Latifa Hodžić also testified that they had not been allowed to come out of the school, that there had been a guard at the door, and that armed soldiers in camouflage uniforms would come to school and abuse the detainees.

The Witness A could not recall if she saw the accused when they boarded the trucks in Drinsko in order to set off for Višegrad. However, she maintained that soldiers from the same group that started with civilians from the Limski Most had escorted the civilians from Drinsko to Višegrad. Fatima Mujakić stated, among other things, "I guess it was Momir Savić who ordered that we should be taken to the school, as soon as he said that we should be taken to Višegrad". The Witness B and Latifa Hodžić are consistent that, after the questioning in Drinsko, the soldiers took the civilians by the two-ton TAM truck to the *Hasan Veletovac* Primary School. The Witness Hodžić stated in that connection that she did not know at whose order the civilians were transported to that school.

The accused confirmed that he, together with his unit, was present at the relevant place, and that it was he who ordered that the Bosniac civilians be taken to Drinsko. Further, the accused maintained that civilians were transferred to the referenced school, but he maintained that the order to do that was, in his absence, issued by Pero Kovačević (the accused stated that Pero Kovačević was a leading figure in the Territorial Defense), with which the testimony of the Defense Witness Miladin Savić is consistent. Besides, the Witness Miladin Savić stated that the accused ordered that those people be removed since the times were hard. However, during the cross-examination, that Witness stated that there were no other military units in that area except for the unit which was under the command of the accused, so that it is not clear why then they should be removed in the first place.

In this Count of the Indictment, the accused is charged with detention or other severe deprivation of liberty contrary to the basic rules of international law and with other inhumane acts in violation of Article 172 of the BiH CC.

Based on the testimonies of the above witnesses, the Panel established that the Bosniac civilians were deprived of their liberty against their will on the Limski Most and taken to Drinsko, and then to the said school. That it was a severe deprivation of liberty is clear from the overall circumstances in which this action took place on 30 June 1992. Specifically, fleeing towards the free territory, those civilians were halted on that bridge and prevented from crossing to the territory under the control of the forces of the BiH Army. The soldiers who captured them behaved in the manner which, because of all those circumstances, quite certainly caused fear in the captured civilians (they insulted them, and the accused was yelling at one of the women).

That the action was contrary to the basic rules of international law is clear, in the first place, from the very fact that the detained persons were civilians. None of the soldiers ever explained why they transported them to Drinsko and then to the *Hasan Veletovac* Primary School, nor did they offer any evidence to the captured persons about the legal grounds for their deprivation of liberty. In the *Krnojelac* Case, the ICTY Trial Chamber concluded that ”a deprivation of an individual’s liberty will be arbitrary and, therefore, unlawful if no legal basis can be called upon to justify the initial deprivation of liberty.”[96] Evidence that the persons deprived of liberty were not informed about the reasons of deprivation of their liberty or that the justification of such deprivation of liberty was not the subject of review in judicial or administrative procedure can mean that there were no legal grounds for the deprivation of liberty. In the present case, the captured persons were not given any explanation for the deprivation of liberty (either in writing or orally), whereas the accused personally, as the commander of the unit that was on the Limski Most, was certainly informed that, if he deprived a certain person of his liberty, such deprivation of liberty must be based on law and prescribed by law, and it in no case includes arbitrariness in the action, and especially ruthlessness and abuse.

Further, it is incontestable from the adduced evidence that conditions in the school were very poor, that the detained persons were lying on the floor of the gym, that there were no beds and blankets, and that there were no basic standards of hygiene. Besides, in the school the abuse of detained civilians by Serb soldiers took place, which made the stay of the detained persons even more unbearable. However, the Panel finds that the accused is not responsible for the conditions that existed in the school as no evidence was presented that it was he who was responsible for the school, in other words, that he affected or could have affected the conditions in that school. Consequently, the Panel finds that the requirements referred to in Article 172(1)k) of the BiH CC were not satisfied in respect of the accused.

As it has already been mentioned, the accused maintained that he acted in the described manner only to keep the civilians away from military operations. He maintained that he took

[96] See *Krnojelac* Case, ICTY Trial Chamber Judgment, para 114.

care of their security and that he, for that reason, halted them on the bridge and transported them towards Drinsko. Specifically, the accused testified that on 30 June there were military operations on the road which the civilians were supposed to take, so that he, when he heard that a group of civilians appeared, ordered his soldiers who were deployed on that bridge to keep those people in front of the tunnel until he came. After they had been transported to the command post in Drinsko, as the accused stated, no one was detained and questioned. The accused maintained that he kept them there because he did not want to let them face military operations. The accused further testified that he went to the town, and stated that, in the meantime, Pero Kovačević (previously mentioned) came on the site and ordered that the civilians be transported to the *Hasan Veletovac* School.

However, the Panel considered the testimonies of the aggrieved parties, from which it arises that the accused did not treat them as someone who was concerned about their security. Further, civilians were halted in his zone of responsibility, in the area where he was in charge. After the civilians were halted on the Limski Most and taken to Drinsko, the questioning and further inhumane treatment of those civilians took place, about which Latifa Hodžić and the Witness B testified.

The accused is charged that "*...he commanded a larger group of armed Serb soldiers who arrested around 30 Bosniac civilians...*".

It was concluded in the ICTY case law that ordering can be proved also indirectly, not only on the basis of written orders or statements of the witnesses that the accused issued the order for the commission of the criminal offence. An order need not be in a particular form, it can be given in a wide variety of manners[97]. An order as a form of individual criminal responsibility is detailed under section 4.7. of the Verdict.

The Panel had in mind the overall circumstances showing a particular way of the conduct of the members of the unit which was under the command of the accused as well as him personally. The Panel also considered the testimonies of the witnesses (previously mentioned), taking also into account the testimony of the accused, from which it ensues that the accused ordered that they be taken captive and transported to Drinsko first. The accused, beyond doubt, personally ordered (which he did not even contest) that civilians be taken to Drinsko, he personally conducted the questioning of some civilians, whereupon the civilians (some 30 of them) were escorted to the *Hasan Veletovac* School. According to the Panel, there exists no other argument that anyone else but him could have the authority and opportunity to issue the decision to transport the civilians to that school. The argument of the accused that a certain Pero Kovačević ordered that is absolutely inapplicable, especially when one has in mind that the command role of the accused is incontestable, and he personally showed no concern about the captured civilians. If this argument were accepted, a logical question could be asked why he did not come to deliver them after someone else had allegedly sent them to the school where they were kept in inhumane conditions. Also, the Panel took into account that the actions of the accused took place at the time when the

[97] See *Galić* Case, ICTY Trial Chamber Judgment, para 740.

fate of the civilians who set off in order to save their lives was uncertain, when they were running away from the raid of the Serb forces. All of those persons left their homes and set off for the territory under control of the R BiH Army (Međeđa), being aware of everything that was happening to the Bosniac population in the area of the Višegrad Municipality. In all of those circumstances, they were halted by Serb soldiers, who abused them verbally, whereafter they were transported towards Drinsko.

The Panel concluded that the referenced act includes exactly a direct intent of the accused. This conclusion is based by the Panel on the fact that the accused was aware that the captured persons were civilians, that they were Bosniacs and that they set off for the free territory. Even the accused himself confirmed that he knowingly halted those civilians in their moving towards Međeđa. His further actions, which are reflected in the questioning of some captured women and the manner in which he addressed those civilians on the Limski Most, also clearly indicate that he was aware of his actions and that he wanted the commission of his acts. Members of his unit deprived those Bosniac civilians of liberty, incarcerating them in the school, thus restricting their freedom of movement.

It can be concluded beyond doubt from the testimonies of the witnesses A, B, Fatima Mujakić and the accused himself that the accused gave explicit orders for the holding and taking away of Bosniac civilians to the first location (Drinsko). Bearing in mind the referenced testimonies, as well as the overall circumstances described, the Panel finds that the accused gave the order for taking the civilians (who were previously captured on the Limski Most) to the *Hasan Veletovac* School, given that he was in command of those soldiers and actively participated in that action on 30 June 1992.

The Panel concluded on the basis of the above stated facts that the accused Savić is individually responsible, as the order-issuing authority, for the commission of the criminal offence of detention or other severe deprivation of liberty, contrary to the basic rules of international law referred to in Article 172(1) e) of the BiH CC which he committed within a widespread and systematic attack in the area of the Višegrad Municipality and beyond. Consequently, the Panel did not accept the argument of the Prosecutor's Office that this case concerns the command responsibility of the accused referred to in Article 180(2) of the BiH CC.

5. Persecution in respect of all Counts of the Indictment

The Indictment charges the accused that he, by the actions described above, committed the criminal offence of *Persecution* in violation of Article 172(1)h) of the BiH CC. The Panel had earlier established the criminal responsibility of the accused for the specific actions, so that in this part of the Verdict it will deal with the establishing of responsibility for the commission of those actions in connection with persecution.

According to legal definition, the criminal offence of *Crimes against Humanity* – persecution is defined as "*persecutions against any identifiable group or collectivity on*

political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina ". It is additionally explained in Article 172(1)g) of the BiH CC that "*Persecution means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity* ". Consequently, the elements of this criminal offence include:

- intentional and severe deprivation of fundamental rights
- contrary to international law
- by reason of the identity of a group or collectivity
- against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law,
- in connection with any offence listed in Article 172(1) of the BiH CC, any offence prescribed in the BiH CC or any offence falling under the competence of the Court of Bosnia and Herzegovina.

According to the ICTY case law, persecution may take diverse forms, and does not necessarily require a physical element. Additionally, under customary international law /…/, in the case of persecution, victims of crimes against humanity need not necessarily, solely and only, be civilians; they may also include military personnel (about which an explicit finding to this effect was made by the French courts in the *Barbie* and *Touvier* cases[98]). A key constituent element of persecution should be the carrying out of any prohibited conduct, directed against a civilian population, and motivated by a discriminatory *animus* (political, racial or religious grounds). The Panel refers to the conclusions of the ICTY Trial Chamber in the Judgment in the *Kupreškić et al.* Case which, *inter alia*, reads that under the understanding of the International Military Tribunal the notion of *persecution* involves a variety of (...) acts such as the adoption of discriminatory laws, exclusion of members of some ethnic or religious group from aspects of social, political and economic life, restriction on their freedom and movement. Therefore, *persecution* can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights[99]. In that connection, there must exist clearly defined limits of kinds of acts which can be qualified as persecution, for the reason that not every deprivation of human rights can be construed as a crime against humanity. Consequently, it can be said that acts of persecution must at least be equally grave or serious as the other acts listed in Article 172 of the BiH CC. The Trial Chamber in the *Kupreškić et al.* case does not exclude the possibility that a single act may constitute persecution, but in that event there must exist clear evidence of discriminatory intent. Further, the Trial Chamber in the same case finds that it is not necessary to show that the accused participated in the creation of a discriminatory policy or practice of some government authority.

[98] See: *Kupreškić et al.* Case, ICTY Trial Chamber Judgment, para 568.
[99] Ibid, para 615.

The Panel finds that a multiple commission of the act of persecution can be regarded as a single criminal offence under the name of persecution as a crime against humanity, even if those acts individually constitute other crimes against humanity, as established in other cases of this Court[100]. While reviewing the criminal responsibility of the accused, the Panel will have assessed whether each of the previously mentioned and established acts was committed with discriminatory intent.

Given the elements of the criminal offence of persecution, the Panel concluded in the first place that the previously described and established crimes were committed intentionally and they all constitute a severe deprivation of the basic human rights contrary to international law. The first and the second elements of persecution are thus satisfied. Further, the Panel concluded that victims of the committed criminal offences under all Counts of the referenced Indictment were Bosniacs (except in Count 6 where the victim was also insulted because of the victim's connections with a person of Bosniac ethnicity). Besides, because the above stated and established crimes constitute the criminal offences referred to in Article 172(1) of the BiH CC, the Panel concludes that the element "in relation with..." is also satisfied.

Each action perpetrated by the accused Momir Savić was committed with discriminatory intent, exactly for the reason of the other ethnic, religious, national and political identity of the victim (or rather, relation therewith). The Panel concludes that all of those actions had the intent of discriminating against the victims on the grounds of their identity, which beyond doubt is contrary to the rules of international law. Such conclusion is based on words and actions of the accused during the commission of the referenced criminal offences, which will further be detailed in the Verdict.

On the basis of the adduced evidence, the Panel found in Count 1 of the Indictment that the accused acted with specific intention to discriminate against Ramiz Gušo because of his Bosniac ethnicity, which in particular is reflected in the fact that the accused cursed at his "Alija's state", the SDA and "balija's mother" (which is a pejorative expression for Bosniac Muslims).

Under Count 2 of the Indictment (Section 4.2. of the Verdict) the accused participated in looting the property of Mehmedalija Topalović and in torching his house. In this part of the Verdict the Panel will deal in more detail with those actions of the accused for the reason that the committed actions are not included in some other action referred to in Article 172(1) of the BiH CC, so that they are not reasoned in section 4.2. of the Verdict. Consequently, the action of looting the property and torching the house is characterized as the act of persecution. In this regard, the question is asked as to whether specific property or economic rights can thus be regarded as fundamental ones so that their deprivation would

[100] See: Verdict of the Court of BiH in the *Radovan Stanković* Case, p. 34; Verdict in the *Nikola Kovačević* Case, pages 43-44.

constitute persecution. In the Judgment of the International Military Tribunal in Nuremberg several defendants were found guilty of discriminatory economic acts[101].

The criminal offence of plunder or pillage has long been known in international law and is forbidden in both conventional and customary law[102]. The ICTY defined the essence of that criminal offence in the *Čelebići* Trial Judgment as "*all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'*"[103]. To measure that importance, the Čelebići trial Judgment refers to "sufficient monetary value" of the property so appropriated as to involve "grave consequences for the victims"[104].

Prior jurisprudence of the International Tribunal has made clear that the destruction of property with the requisite discriminatory intent may constitute persecution. If the ultimate aim of persecution is the "removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself", the widespread or systematic, discriminatory, destruction of individuals' homes and means of livelihood would surely result in such a removal from society. In the context of an overall campaign of persecution, rendering a people homeless and with no means of economic support may be the method used to "coerce, intimidate, terrorise and forcibly transfer … civilians from their homes and villages". Thus, when the cumulative effect of such property destruction is the removal of civilians from their homes on discriminatory grounds, the "wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock" may constitute the crime of persecution[105].

Consequently, this Panel has also assessed that attacks on property may constitute persecution. The present case concerns the destruction of basic property and living conditions of particular population. This act, according to the Panel, constitutes a gross and flagrant deprivation of the basic human rights and, if it was committed on discriminatory grounds, may constitute persecution.

In the present case, the Panel established that Mehmedalija Topalović's house was torched on 29 April 1992 by members of the Army which was under Momir Savić's command. According to this Witness's averments, the remaining houses in the village were torched about one month later, which is also consistent with the testimony of the Witness Mirsad Hubić who, exactly at that time, in late May, saw "a black smoke over Meremišlje".

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[101] See *Kupreškić et al.* Case*,* ICTY Trial Chamber, para. 871.
[102] Statute of the International Military Court from 1945, Article 6(b); The Trial of German Major War Criminals (Proceedings of the International Military Tribunal sitting at Nuremberg, Germany), Part 22, the IMT Judgment, str. 457; U.S. v. Carl Krauch, Law Reports of Trials of War Criminals, Volume x, pages 42-47, where the expression "pillage" is regarded as synonym of "plunder"
[103] See *Čelebić* Case*,* ICTY Trial Chamber Judgment, para 591.
[104] See *Kordić and Čerkez* Case*,* ICTY Trial Chamber Judgment, para 352.
[105] See *Kordić and Čerkez* Case*,* ICTY Trial Chamber Judgment, para 205.

The Panel further concluded that, before Mehmedalija Topalović's house was torched, it had been plundered. The intent of the accused to discriminate the victims on their national, ethnic and religious grounds is evident from the circumstances surrounding the relevant event, especially from the fact that Serb soldiers forced four persons of Bosniac ethnicity to kiss the cross and required that the leader of the "Green Berets" be found, and after that abuse the accused advised Vejsil Hota to leave Meremišlje (as was explained in detail in Section 4.2. of the Verdict). The Panel satisfied itself that the accused had the intent to have that group of people discriminated against, and he contributed to the commission of the criminal offences by the chief perpetrators in such a way that with his presence he encouraged the perpetrators to commit the particular actions.

Under Count 3 of the Indictment, referring to the forcible removal of the Bosniac population from Drinsko, the accused acted with intent, knowing that they were members of Bosniac people against whom the attack was carried out in those days. Additionally, the subject of his discrimination became clear when the accused addressed the gathered local residents saying that members of Bosniac and Serb ethnicity could no longer live together, and that the Bosniac residents had to leave Drinsko and leave behind all their property.

Under Count 4 of the Indictment, the special intent is reflected in the fact that all of the ten men were Bosniacs. The accused was aware that all of the ten men were taken away and killed solely because of the fact that they were Bosniacs.

The special discriminatory intent referred to in Count 5 of the Indictment is reflected in the fact that, at the time when he was shooting at Suvad Kurtić, the accused cursed at him his "Balija's mother" and he addressed him saying: "You think you can escape from a Chetnik". Besides, the overall behaviour on the relevant day under this Count of the Indictment clearly speaks about his discriminatory intent against the Bosniacs.

The discriminatory intent referred to in Count 6 of the Indictment is reflected beyond doubt in the fact that the Aggrieved Party was married to a Bosniac and had two daughters with him. The discriminatory treatment of the accused beyond doubt ensues from the manner in which he addressed the Aggrieved Party, saying: "You have had enough of giving birth to Muslim children, the time has come for you to give birth to Serb children". Therefore, it can beyond doubt be concluded from such treatment by the accused that his actions against the Aggrieved Party were caused by the fact that she is married to a Bosniac.

The discriminatory intent of the accused referred to in Count 7 of the Indictment ensues from the fact that he ordered the expulsion of only Bosniac population from Dušće. Specifically, all civilians who were expelled from Dušće on 13 June were members of Bosniac people and they were expelled from their homes solely because of their national, that is, ethnic identity.

Under Count 8, the accused expressed his discriminatory intent by halting the civilians who started moving towards the free territory of Međeđa and all of whom were of Bosniac ethnicity, in the manner as described above, and by returning them to the command post of

his unit, whereupon all of them were detained in the *Hasan Veletovac* Primary School, together with a large number of other civilians who were also of Bosniac ethnicity. The accused was fully aware of the fact that all the persons he brought back to the command post were Bosniacs, which he personally confirmed in testimony.

When all of those actions are viewed as a whole, and when they are brought into the context of a widespread and systematic attack on the civilian Bosniac population within which the actions of the accused were committed, it is clear that this criminal offence constitutes in its entirety a form of persecution of the civilian Bosniac population in the area of the municipalities of Višegrad and Rudo.

For the actions referred to in sections 1, 3, 5, 6, 7 and 8 of the Operative Part of the Verdict the accused is responsible as an individual perpetrator of the criminal offence pursuant to Article 180(1) of the BiH CC and also as a co-perpetrator in the actions described in Sections 2 and 4 of the Operative Part of the Verdict, in the manner as established in this Verdict.

On the basis of the adduced evidence, the Panel decided as stated in the Operative Part of the Verdict. As for the other adduced pieces of evidence referring to all Counts of the Indictment, the Panel considered all of them, but found that they did not affect, to a decisive extent, the establishment of the state of facts.

6. Meting out the sentence

In meting out the sentence for the commission of the criminal offence of *Crimes against Humanity* described in the previous part of the reasoning of the Verdict, the Panel had in mind, *inter alia*, Article 2 of the BiH CC, under which the types and the range of criminal sanctions shall be based upon the necessity for criminal justice compulsion and its proportionality with the degree and nature of the danger against personal liberties, human rights and other basic values, which specifies the purpose of criminal legislation which consists of the protection of specific individual and general values, as well as of defining the mode of accomplishing that protection. In that context it is necessary to take account of the elements which refer to this purpose, that is, the suffering of direct and indirect victims of the referenced criminal offences, and members of their family and their community, as well as the participation of the accused Savić in the commission of the specific criminal offences.

Article 39 of the BiH CC prescribes the general purpose of prescribing and imposing criminal sanctions, which consists in the prevention of unlawful behaviour which violates or endangers the basic general or individual values. Under this Article, the purpose of punishment is to express the community's condemnation of a perpetrated criminal offence, to deter the perpetrator from perpetrating criminal offences in the future, to deter others from perpetrating criminal offences and to increase the consciousness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators, which as a

preventive measure to influence the awareness of citizens of the need for observing the law. The meting out of punishment for the perpetration of a specific criminal offence, in respect of the perpetrator of that offence, is exactly connected with achieving the purpose of punishment.

Fairness as a legal requirement must also be taken into account while meting out the punishment, as well as specific circumstances surrounding not only the criminal offence, but also its perpetrator (as was already stated). The law prescribes two purposes which are relevant to the person who has been sentenced for a criminal offence: to deter the perpetrator from perpetrating criminal offences in the future (Article 6 and Article 39 of the BiH CC) and rehabilitation (Article 6 of the BiH CC). Rehabilitation is not the purpose which is prescribed only by the BiH CC, but is the only purpose of punishment which is recognized and explicitly required by international law on human rights which must be observed by the court. Article 10(3) of the International Covenant on Civil and Political Rights reads: "*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation*".

It ensues from the previously stated reasoning of the Verdict that the Panel found it established that the accused Momir Savić, during the relevant time, first as a member of an unidentified paramilitary formation and then as the commander of the 3rd Company of the Višegrad Brigade of the RS Army, committed the above described criminal actions. Victims of his acts are civilians of Bosniac ethnicity in a large number. Specifically, almost all the Bosniac population of the settlements of Drinsko and Dušće was forcibly removed from those places. Further, victims of his actions and the actions of members of his unit are ten men of Bosniac ethnicity from the hamlet of Zeljača, as well as five Bosniac men from Dušće who have never been seen alive after the relevant event of 13 June 1992. Besides, as was previously established, the accused is personally responsible for the murder of Suvad Kurtić and the rape of T.B., and also for the physical abuse of Ramiz Gušo in the Secretariat of Interior Affairs. The accused in his role as commander of the 3rd Company certainly had the possibility to issue and carry out decisions. As was already stated, the above described behaviour of the accused indicates that he, in his capacity as commander of the 3rd Company, showed determination in the commission of multiple crimes in the area of the municipalities of Višegrad and Rudo.

Being guided by the aims of general and special prevention, the Panel had in mind all "*the circumstances bearing on the magnitude of punishment*" pursuant to Article 48(1) of the BiH CC.

The accused Momir Savić, as a direct perpetrator, personally took active part in the commission of the criminal offences (as stated in individual counts of the Indictment) of which he was found guilty. According to the Panel, the aggravating circumstances in the present case include the degree of the criminal responsibility of the accused, his status at the relevant time, the number of the criminal acts committed, the great number of victims of his

actions, the circumstances under which those actions were perpetrated and the cruel treatment of victims by taking advantage of their state of helplessness and fear.

The fact that a specific number of witnesses stated that the accused helped them (in respect of Count 3 of the Indictment) constitutes the circumstances referred by the Panel as extenuating. However, as assessed by the Panel, the referenced circumstances are not of a decisive importance, having in mind that it concerned a few families whom the accused himself allowed to stay in Drinsko. Exactly the referenced circumstances point to the conclusion that the accused, given his position of the commander, showed that he could have affected more greatly and significantly the fate of the Bosniacs from Drinsko. Further, the Panel took into account as an extenuating circumstance the fact that the accused is a family man and father of one child, and that until now he has not been convicted. The behaviour of the accused before the Court was proper, and it met the expectations of the Panel, hence it is not regarded either as an extenuating or aggravating factor.

The Panel does not find that there exist reasons referred to in Article 49 of the BiH CC which could constitute the grounds for setting the punishment below the limit prescribed by the law.

Having in mind the established state of facts and the arisen consequence, as well as the causal connection between them, the Panel found the accused guilty and imposed on him a sentence of imprisonment for a term of 18 (eighteen) years. While meting out the type and duration of the criminal penalty, the Panel was guided by Article 39 of the BiH CC, in the belief that the imposed sentence is commensurate with the gravity of the offence committed, as well as the degree of the criminal responsibility of the accused. Further, the Panel regards that the imposed sentence will sufficiently influence the accused Savić not to perpetrate criminal offences in the future, and that the goal of general prevention will thereby be achieved. Finally, the Panel finds that the imposed sentence will also influence the citizens' awareness of the danger of criminal offences and fairness in punishing the perpetrators.

7. Decision on the costs of the criminal proceedings

Pursuant to Article 188(4) of the BiH CPC, the accused is relieved of duty to reimburse the costs of the criminal proceedings, so that the costs shall be paid by the Court of BiH. The Panel rendered such decision finding that the accused does not have any income, nor does his wife with whom he lives, so that he is not able to bear the costs of criminal proceedings.

8. Decision on the claim under property law

The aggrieved parties Medo Tabaković, T.B., Šuhra Gušo, Mehmedalija Topalović, Hafiza Gušo, Alija Mešanović, Medina Gušo and Ramiza Mustafić submitted claims under property law during the main trial, requesting the compensation of damage caused to them by the criminal offence committed by the accused. Given that the rendering of decision on

such claim would delay these proceedings considerably, the Panel refers the listed aggrieved parties to a civil action pursuant to Article 198(2) of the BiH CPC.

The remaining aggrieved parties (Bahrudin Gušo, Nizija Gušo, Ramiz Gušo, Latifa Hodžić, Fatima Mujakić, Šaban Ćato, Hajrija Kos, Fahra Ćato, Almasa Hadžić, Hasiba Mešanović, Kada Mešanović, Mirsad Hubić, Hasan Hubić, Husein Mujakić, Sabina Maslo, Omer Delija, Suada Logavija, A, B, Fadil Salić and Redžep Salić) are also referred to a civil action with their potential claims under property law, pursuant to Article 198(2) of the BiH CPC.

Pursuant to all the foregoing, the Panel handed down the Verdict as stated in the Operative Part.

Record-taker

Lejla Konjić

PRESIDENT OF THE PANEL
JUDGE
Šaban Maksumić

LEGAL REMEDY: This Verdict may be appealed with the Appellate Division Panel of the Court of BiH within 15 (fifteen) days of receipt of a written copy thereof.

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I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.

Sarajevo, 30 September 2009

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