SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KR/06/202
Sarajevo, 23 May 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel composed of Judge Hilmo Vučinić as the President of the Panel, Judge Shireen Avis Fisher and Judge Paul M. Brilman, as Panel members, in the criminal case against the Accused Željko Lelek for the criminal offence of Crimes against Humanity in violation of Article 172 (1) of the Criminal Code of BiH, deciding on the Indictment of the Prosecutor's Office of BiH number KT-RZ-89/06 following the public and main trial, from which the public was partly excluded, in the presence of the Prosecutor of the Prosecutor's Office of BiH, Božidarka Dodik, and the Accused Željko Lelek and defence counsel for the Accused, attorneys Fahrija Karkin and Saša Ibrulj, attorneys from Sarajevo, following deliberation and voting, on 23 May 2008, rendered and publically announced the following:

V E R D I C T

THE ACCUSED:

***ŽELJKO LELEK**, son of Čedomir and Stana, maiden name Radulović, born on 9 February 1962 in Goražde, residing in Višegrad, at Jove Jovanovića Zmaja Street, number 21/XIII, Serb, citizen of BiH, personal identification number 0902962133642, police officer by occupation, employed in the Višegrad Police Station, graduated from high school, married, completed military service in JNA in 1981, discharged from Čačak, no decorations, average financial situation, no previous convictions, no other criminal proceedings pending against him, deprived of liberty on 5 May 2006, at 0900 hrs.*

IS GUILTY

I. Because:

During a widespread and systematic attack by the Serb army, police and Serb paramilitary formations directed against Bosniak civilian population in the area of the Višegrad Municipality, knowing about the attack, throughout April, May, and June 1992, as a member of the reserve force of the Public Security Station Višegrad, he persecuted Bosniak civilian population on political, national, ethnical, cultural,

religious grounds by taking part in severe deprivation of physical liberty in violation of fundamental rules of international law, unlawful imprisonment, rape and torturing, and other forms of sexual violence, and forcible transfer of the population, whereby:

2. In June 1992, in a group of several armed members of the Serb army and police, he participated in the taking away of Bosniak civilian men from their homes in the settlement of Crnča, Hasan Ahmetspahić, and Nail Osmanbegović; whereas on the occasion of the abduction of Nail Osmanbegović they abused his family members by forcing his wife Zejneba Osmanbegović and her mother, an eighty-year old woman, to strip naked, extorting money from them; he then participated in the forcible transfer of the civilians - mainly women and children, from Višegrad to the areas under control of the Republic of Bosnia and Herzegovina, by escorting those buses, armed with a rifle, on at least one occasion.

3. By using force, he coerced Bosniak women to sexual intercourse or an equivalent sexual act, as follows:

c) In June 1992, he came to the "Vilina Vlas" spa where the protected witness M.H. stayed; she was brought there under threat and by force on a daily basis and raped by Milan Lukić, and other unidentified soldiers, including the Accused Željko Lelek who cursed and insulted her on national grounds.

d) In May or June 1992, he came armed to the house of the protected witness C and forced her to an act equivalent to sexual intercourse by forcing her to touch him on the genitals and stroke his penis, while he slapped and beat her, and cursed her "Turkish mother".

4. In May 1992, after the Bosniak civilians, including Suvad Subašić, Enver Džaferović, Safet Tvrtković, Nezir Žunić, Osman Kurspahić, Abid Murtić, Suvad Dolovac and his brother, and a young man, aka Saiko, had been brought and detained in the Višegrad Police Station, he assisted in their imprisonment.

Whereby he committed the criminal offence of

Crimes against Humanity - persecution in violation of Article 172 (1)(h) of the Criminal Code of Bosnia and Herzegovina, in conjunction with the acts referred to in:

- item e) severe deprivation of physical liberty in violation of fundamental rules of international law with regard to the injured parties Hasan Ahmetspahić and Nail Osmanbegović), f) torture with regard to the injured parties Zejneba Osmanbegović and her mother, and d) forcible transfer of population, all referred to in Count 2) of the Indictment;

- item g) rape and f) torture with regard to the injured party M.H with regard to Count 3c) of the Indictment, item g) coercing another by force to other form of sexual

violence of comparable gravity with regard to the injured party C, in conjunction with Count 3d) of the Indictment;

- *item e) imprisonment in violation of fundamental rules of international law with regard to the injured parties Suvad Subašić, Enver Džaferović, Safet Tvrtković, Nezir Žunić, Osman Kurspahić, Abid Murtić, Suvad Dolovac and his brother, and a young man, aka Salko;*

as read with Article 29 (Accomplices) only with regard to Counts 2 and 4 of the Indictment, all in conjunction with Article 180 (1) of the Criminal Code of Bosnia and Herzegovina.

Therefore, pursuant to Article 285 of the CPC BiH, applying Article 39, 42, and 48 of the CC BiH, the Panel of the Court of BiH hereby

SENTENCES HIM

TO 13 (THIRTEEN) YEARS OF IMPRISONMENT

Pursuant to Article 56 of the CC BiH, the imposed sentence shall include the time he spent in custody under the Decision of this Court, commencing on 5 May 2006, until his committal to serve the sentence.

Pursuant to Article 188 (1) of the CPC BiH, the Accused shall reimburse for the costs of the criminal proceedings in the convicting part of the Verdict, while in the acquitting part of the Verdict and in the part rejecting the charges, pursuant to Article 189 (1) of the CPC BiH he shall be relieved of the reimbursement of the costs which will be borne by the budget appropriations of the Court. The Court will render a separate Decision on the amount of the costs the Accused is obliged to reimburse.

Pursuant to Article 198 (2) of the CPC BiH the injured party Mirsada Tabaković, witnesses S, A, D and others are hereby instructed to take civil action to pursue their claims under property law.

II. Contrary to that, pursuant to Article 284 (1) (3) of the CPC BiH the Accused shall be

ACQUITTED OF THE CHARGES

that:

1. On an unspecified date, in the summer of 1992, in a group with Mitar Vasiljević and three other unidentified men, all armed, he brought four unidentified elderly Bosniak civilian men by a TAM truck from the direction of the "Vilina vlas" spa to a concrete plateau on the Drina river bank in the place called Sase, where they forced

them to step into the river up to their waist, cursed and insulted them by saying: "Step in, Balija, breathe a little longer" and then they shot them dead.

3a) In April 1992, he came to the "Vilina Vlas" spa where the protected witness A was staying for treatment; during her stay in the spa the protected witness A was raped on multiple occasions by Milan Lukić and other unidentified soldiers, including the Accused Željko Lelek, who also crudely insulted, cursed and beat her.

b) In June 1992, he came to the "Vilina Vlas" spa, where Bosniak women were unlawfully confined, including witness D who had previously been brought to the spa, raped on multiple occasions, and physically and mentally abused by Milan Lukić and other unidentified soldiers, while inter alia, she was raped by the Accused Željko Lelek.

Whereby he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (h) in conjunction with items a) and g) of the CC BiH.

III. In addition, pursuant to Article 283 (3) of the CPC BiH

CHARGES ARE HEREBY REJECTED

Against the Accused that:

- In early May 1992, in a group, together with Milan Lukić, Oliver Krsmanović and another unknown man, he brought five Bosniak men, among them Mirsad Mirvić from the direction of Varda company in Višegrad to the Drina river bank, and there they cut off the heads of the two of the men and killed the other three by firing shots at them from rifles.

- In early June 1992, in a group, together with Mile Joksimović, Vlatko Pecikoza, he brought two unidentified Bosniak women by car, one of whom was carrying a baby of up to six months of age, to the "Mehmed paše Sokolovića" bridge in Višegrad, and there, the Accused slit the throats of both women, however, before that Vlatko Pecikoza threw the baby in the air and the Accused Željko Lelek impaled it with the blade of his knife as it fell down, and he ordered the mother to drink the blood of her child, after which the Accused went to a nearby hotel and fetched two unidentified imprisoned Bosniak men, and ordered them to throw the bodies of the women and the baby killed into the River Drina, and when the prisoners did so, the attackers forced them to climb the fence of the bridge, and then all three of them killed the prisoners by firing at them from rifles, as a result of which their bodies fell in the River Drina.

As the Prosecutor dropped the charges at the main trial, whereby he committed the criminal offence in violation of Article 172 (1) (h) in conjunction with item a) of the CC BiH.

Reasoning

Under the Indictment of the Prosecutor's Office No. KT- RZ-89/06 dated 16 November 2006, and confirmed on 20 November 2006, the Accused has been charged with having committed the criminal offence of Crimes against Humanity in violation of Article 172 (1)(h) in conjunction with items a), d), e), f), g), i), k) of the CC BiH.

At the plea hearing held on 5 December 2006, the Accused pleaded not guilty.

On 31 March 2008, the Prosecutor's Office of BiH filed an amended indictment which was accepted by the Court, whereby the Prosecutor's Office of BiH dropped two charges, and amended the factual description of the Counts in the amended indictment.

During the proceedings, the Court rendered a decision granting protective measures for witness M.H. pursuant to Articles 12 and 13 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, since the witness requested it explicitly as she had been traumatized by the event of which she was the victim and did not want her identity disclosed. This witness testified with regard to the circumstance referred to in Count 3 c) concerning the rape charges.

Further concerning the protection of witness S it was decided during the proceedings that this pseudonym would be used when referring to her.

In addition, on 4 April 2007, a Decision was issued amending the protection measures ordered under the Decision of the Court of BiH No. X-KRN-06/202 dated 4 September 2007, and the witness was granted protection measures which include the pseudonym X, confidentiality of identity information, and testimony from a separate room with his picture and voice distorted.

The Court partly excluded the public on 19 March, 9 April, 23 April 2007 for the purpose of ruling on the mode of examining the protected witnesses S, A, C, D, and on 15 May 2007 for the purpose of ruling on the protective measures and mode of examining witness M.H. during the main trial. Witnesses S, C, D and M.H. were heard during the main trial, at a public hearing, while the public was excluded at the hearing held on 9 April 2007 during the testimony of witness A. Pursuant to Article 235 of the CPC of BiH, the Court may exclude the public for a part of the main trial if it is necessary to protect the personal and intimate life of the injured party. Considering that this witness testified about events which are an insult to human dignity and that this is a person who was psychologically traumatized due to the circumstances surrounding the perpetration of the criminal offense, the Court found it justified to make such a decision also bearing in mind that both parties agreed with this mode of examination of witness A.

In addition, during the proceedings and following the Motion of the Prosecutor's Office of BiH filed at the main trial on 23 April 2007, proposing the acceptance of established facts adjudicated in the case Prosecutor v. Milan Vasiljević (IT-98-32), of the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), the Court rendered a decision to accept the following established facts:

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. (para. 39)*

2. *In 1991, about 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. (para. 39)*

3. *In November 1990, multi-party elections were held in this municipality. (para. 40)*

4. *Two parties, the primarily Muslim SDA (Party for Democratic Action) and the primarily Serb SDS (Serbian Democratic Party), shared the majority of the votes. (para. 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. (para. 40)*

6. *Serb politicians were dissatisfied with the distribution of power. (para. 40)*

7. *Ethnic tensions soon flared up. (para. 40)*

8. *Serbs started arming themselves and organized military training. (para. 41)*

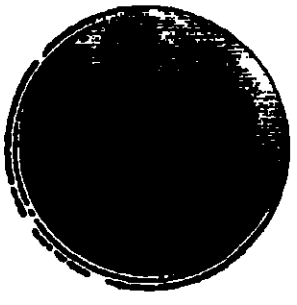
9. *Muslims also attempted to organize themselves. (para. 41)*

10. *From 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines. (para. 42)*

11. *Soon thereafter, both of the opposing groups raised barricades around Višegrad, which was followed by random acts of violence including shooting and shelling. (para. 42)*

12. *In early April 1992, a Muslim citizen of Višegrad, Murat Šabanovic, took control of the local dam and threatened to release water. (para. 42)*

13. *On about 13 April 1992, Šabanovic released some of the water, damaging properties downstream. (para. 42)*



14. *The following day, the Užice Corps of the Yugoslav National Army ("JNA") intervened, took over the dam and entered Višegrad. (para. 42)*

15. *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. (para. 43)*

16. *After securing the town, JNA officers and Muslim leaders jointly led a media campaign to encourage people to return to their homes. (para. 43)*

17. *Many actually did so in the later part of April 1992. (para. 43)*

18. *The JNA also set up negotiations between the two sides to try to defuse ethnic tension. (para. 43)*

19. *The Užice Corps was composed exclusively of Serbs. (para. 43)*

20. *Convoys were organized, emptying many villages of their non-Serb population. 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. There, they were searched for weapons. (para. 44)*

21. *Many people living on the right side of the Drina River either stayed in the town of Višegrad, went into hiding or fled. (para. 44)*

22. *On 19 May 1992, the JNA withdrew from Višegrad. (para. 45)*

23. *Paramilitary units stayed behind, and other paramilitaries arrived as soon as the army had left town. (para. 45)*

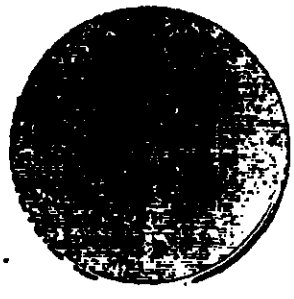
24. *Some local Serbs joined them. (para. 45)*

25. *Those non-Serbs who remained in the area of Višegrad, or those who returned to their homes, found themselves trapped [and] disarmed. (para. 47)*

26. *Many other incidents of ...killings of civilians took place in Višegrad during this period. From early April 1992 onwards, non-Serb citizens also began to disappear. For the next few months, hundreds of non-Serbs, mostly Muslim, men and women, children and elderly people, were killed. (para. 51)*

27. *Many of those who were killed were simply thrown into the Drina River, where many bodies were found floating. (para. 52)*

28. *Hundreds of other Muslim civilians of all ages and of both sexes were exhumed from mass graves in and around Višegrad municipality. (para. 52)*



29. *The number of disappearances peaked in June and July 1992... Most if not all of those who disappeared were civilians. (para. 53)*

30. *Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes or beatings. Many were deprived of their valuables. Injured or sick non-Serb civilians were denied access to medical treatment. (para. 54)*

31. *The two mosques located in the town of Višegrad were destroyed. (para. 55)*

32. *By the end of 1992, there were very few non-Serbs left in Višegrad. (para. 56)*

33. *Today, most of the people living in Višegrad are of Serb ethnicity. (para. 56)*

34. *Proportionally the changes (in ethnic composition) in Višegrad were second only to those which occurred in Srebrenica. (para. 56)*

Having considered the Motion of the Prosecutor's Office for the acceptance of the established facts, the Panel analyzed Article 4 of the Law on Transfer of Cases which provides that at the request of a party or proprio motu the Court, after hearing the parties, may decide to accept as proven those relevant facts that are established by a legally binding decision in any proceedings before the ICTY.

The first formal requirement of the mentioned provision has been met, requiring that the parties be granted a hearing, because the parties and Defense Counsel for the Accused were given a full opportunity to argue their positions on 24 June 2007.

Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence collected by ICTY in proceedings before the courts in BiH (hereinafter: Law on Transfer of Cases) leaves to the discretion of the Court the decision as to whether to accept the facts proposed. Neither the Law on Transfer, nor the CPC BiH, provide for the criteria upon which the Court might exercise its discretion. This Panel, in its Decision dated October 3, 2006, in the case of Miloš Stupar et al. (Number: X-KR-05/24), and in its Decision dated 26 June 2007 in the case of Tanasković (Number X-KR/06/165) set out the criteria it considered appropriate to apply in the exercise of its discretion under Article 4. Those criteria took into account the rights of the Accused under the law of BiH, incorporating as it does the fundamental rights protected by the ECHR. At the same time the Panel was mindful of the ICTY jurisprudence developed in interpreting Rule 94 of the ICTY Rules of Procedure and Evidence. The Panel emphasized that Rule 94 of the ICTY Rules of Procedure and Evidence and Article 4 of the Law on Transfer are not identical and that this Court is not in any way bound by the decisions of the ICTY. However, it is self evident that some of the issues confronting the Tribunal and this Panel are similar when considering adjudicated facts, and that therefore the considerations will likewise be similar. Upon review of these criteria in light of the

arguments in this case, the Panel continues to be of the opinion that the criteria fairly protect the interests of the moving party, the rights of the Accused, the purpose of the Law on Transfer, and the integrity of the trial process.

Therefore, in deciding as set out in the operative part, the Court took into account the following criteria:

1. *A fact must truly be a "fact" that is:*

   a) sufficiently distinct, concrete and identifiable;

   b) not a conclusion, opinion or verbal testimony;

   c) not a characterization of legal nature.

2. *A fact must contain essential findings of the ICTY and must not be significantly changed.*

3. *A fact must not attest, directly or indirectly, to the criminal responsibility of the Accused.*

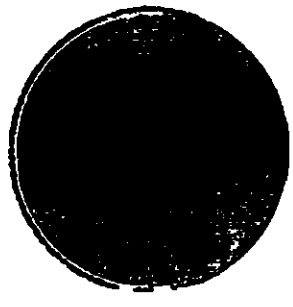
4. *Nevertheless, a fact that has gained such a level of acceptance as true that it is common knowledge and not subject to reasonable contradiction can be accepted as adjudicated fact even if it relates to an element of criminal responsibility.*

5. *A fact must be 'established by a legally binding decision' of the ICTY, which means that the fact was either affirmed or established on appeal or not contested on appeal, and that no further opportunity to appeal is possible.*

6. *A fact must be established in the proceedings before the ICTY in which the Accused against whom the fact has been established and the Accused before the Court of BiH have the same interests with reference to contesting a certain fact. Accordingly, the facts stated in the documents which are a subject of a plea agreement or voluntary admission in the proceedings before the ICTY shall not be accepted, given that the interests of the Accused in such cases are different, often contrary to the interests of those Accused who utilized their right to a trial.*

7. *A fact must be established in the proceedings before the ICTY, in which the Accused against whom the fact has been established had legal representation and the right and opportunity to defend himself. It is therefore clear that the acceptance of the fact deriving from the proceedings in which the Accused has not tested it by his evidentiary instruments is unacceptable for this Panel. Even more so because the accuracy of that fact is questionable, since the Accused did not have the opportunity (or had insufficient opportunity) to respond to it and try to contest it.*

All of the facts accepted as proven in the operative part met the requirements of the criteria. In particular, all of these facts are relevant to the Accused's case on the basis



that the crimes established in Vasiljević were committed at the same time and in the same geographical area as those with which the Accused is charged.

The legislative purposes for providing the Court with the discretion to accept 'as proven' established facts include judicial economy, the promotion of the Accused's right to a speedy trial, and consideration for witnesses in order to minimize the number of tribunals before which they must repeat testimony that is often traumatizing. The Law on Transfer's purpose of facilitating a speedy trial can be promoted in accordance with the right of the Accused to a trial without delay as prescribed by Article 13 of the CPC BiH and guaranteed by Article 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms. The purposes of judicial economy and consideration for witnesses, however, can put at risk the Accused's right to a fair trial and the presumption of innocence. Therefore the court may only promote those purposes in a way that respects those rights. The criteria are designed to do this. Otherwise, the evidentiary proceedings would de facto end to the detriment of the Accused even before the imminent presentation of all of the evidence in the case. The Panel had in mind Article 6 of the European Convention and Articles 3, 13 and 15 of the CPC when exercising its discretion under Article 4 of the Law on Transfer in this case.

The acceptance of established facts 'as proven', under the criteria outlined, does not relieve the Prosecutor of the burden of proof nor does it detract from the presumption of innocence under Article 3 of the CPC. The acceptance 'as proven' of facts established in the final judgments of the ICTY means only that the prosecutor has met the burden of production of evidence on that particular fact and does not have to prove it further in their case in chief. Admission of each fact does not affect in any way the right of the Accused to challenge any of the accepted facts in his defense, as he would do with any other factual proposition on which the prosecutor had produced evidence. Nor does it preclude the Prosecution from presenting additional evidence in order to rebut the Defense challenge. Likewise, Article 15 of the CPC is respected because the Court is not bound to base its verdict on any fact admitted as proven. The adjudicated facts herein admitted will be considered along with all of the evidence produced in the trial, and the Panel decided on the weight of each piece of evidence. The accepted facts met the criteria, while the facts in the remainder of the Motion of the Prosecutor's Office of BiH were not accepted as they did not meet the foregoing criteria.

The Court further presented evidence by examining Prosecution witnesses, including Zejneba Osmanbegović, Azemina Čelik, Nezir Mirvić, Mirsada Tabaković, Vezira Ţabaković, Mujesira Memišević, Azra Osmanagić, Amela Kadrić, Dženita Muhić, Zineta Kulelija, Haska Dudević, Bakira Hasečić, Suad Dolovac, Suvad Subašić, Enver Džaferović, and witnesses under pseudonyms A, C, D, S, M.H, (and H.D. to whom the Panel will refer using that pseudonym, given that she is a family member of one of the protected witnesses) as well as the anonymous witnesses K.B. and X. The Court also examined Dr Hamza Žujo, in his capacity as an expert witness in medicine.

The Court also reviewed the following documentary evidence of the Prosecutor's Office of BiH: Record on the Examination of Witness A dated 26 April 2006; RS MoI Certificate dated 4 April 1992; Military ID booklet, dated 21 March 1997, issued for Željko (Čedomir) Lelek; Order of the Court of BiH issued to SIPA to conduct the search and collect evidence No. X-KRN-06/202, dated 4 May 2006; Record on the search of dwellings, other premises and movables owned by Željko Lelek, No. SIPA 17-04/2-04-2-6/06 dated 5 May 2006; Record on the search of dwellings, other premises and movables owned by Stanko Lelek, SIPA No. 17-04/2-04-2-5/06, dated 5 May 2006; Photographic documents on the search of the suspect's apartment, No. 17-02/8-04-1-05/096; Photographic documents on the search of suspect's house, No. 17-13/1-7-16/06 dated 5 May 2006; Official report on acting upon the Order of the Court of BiH, No. X-KRN-06/202 dated 4 May 2006; Receipt on temporary seizure of objects, SIPA No. 17-04/2-04-2-18/06 dated 5 May 2006; Receipt on temporary seizure of objects, SIPA No. 17-04/2-04-2-19/06 dated 5 May 2006; Payroll List of Police Permanent Employees and Reserve Force of PSS Višegrad for June 1992, dated 1 August 1992; Decision of the RS Public Retirement and Disability Insurance Fund, branch office Sarajevo No. 9311767212 dated 2 December 1997 on defining work experience for the suspect Željko Lelek for the time spent in RS, that is, RS MoI; RS MoI Decision No. 08/1-134-2758 dated 20 October 1995 on establishing the facts of the Accused Željko Lelek; Record on exhumation at the site Slap-Žepa in the period 9-14 October 2000 with respect to exhumations carried out on several gravesites – Gravesite No. 37, person Ismet Memišević with photographic documents – sketch of the gravesite, Cantonal Court in Sarajevo; Record on exhumation at the site village Kurtalići, right bank of Drina river carried out on 4, 5, 6 December 2000 - sketch of the gravesite, Cantonal Court in Sarajevo; Death certificate for Izet Tabaković dated 4 May 2006; Death certificate for Ferid Tabaković dated 4 May 2006; Death certificate for Fehim Tabaković dated 4 May 2006; Death certificate for Fahrudin Čocalić dated 4 May 2006; Death certificate for Ismet Memišević dated 13 October 2006; Death certificate for Osmo Demir dated 4 May 2006; A photograph of the "Vilina Vlas" spa; photographs of the "Mehmed paše Sokolovića" bridge in Višegrad; A map of the Višegrad Municipality; Video recording and photographs of individual sites pertaining to the place of perpetration of the criminal offence, with clarification; Record on the examination of the witness A dated 27 April 2006; Record on the examination of the witness Suvad Subašić dated 14 April 2006; Certificate issued for Juma Tufekčić dated 14 May 1992; Certificate from the Book of Missing persons issued by ICRC for Razija Ustamujić; Certificate from the Book of Missing persons issued by ICRC for Muamera Ustamujić; Certificate from the Book of Missing persons issued by ICRC for Vasvija Turudić; Certificate from the Book of Missing persons issued by ICRC for Ibrahim Međuseljac; Certificate from the Book of Missing persons issued by ICRC for Muhamed Jašarević; List of members of the police reserve component in the PSS Višegrad; List of military conscripts who were deployed in the PSS Višegrad during the war No. 15-5/01-239/99 dated 7 June 1999; Certificate from the Register of the Prosecutor's Office of BiH dated 8 February 2008 on initiating investigations of Tomić Dobro, Savić Nikola and Joksimović Miloje; The rules of the road document: ROR 614 dated 17 January 2002; Slavko Tasić's witness statement given to SIPA on 16 January 2007.

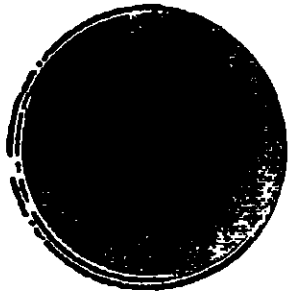
In addition, Defense witnesses for the Accused Lelek were examined, the Accused was examined as a Defense witness, as well as the following witnesses Zejneba Osmanbegović, Stanija Đurić, Miladina Uljarević, Radomir Stefanović, Nedeljko Stefanović, Mirko Sekulić, Obradin Šimšić, Zdravko Topalović, Solomon Janjić, Jovan Popović, Dragoljub Ivanović, Gojko Vidaković, Dušana Bukvić, Mile Joksimović, Boško Đurić, Mladen Živković, Nedo Ostojić, Nikola Savić, Jovo Planojević, Brano Tešević, Srđan Vučićević, Ljubisav Gladanac, Hašim Omerović, Milivoje Joksimović, Šemsa Sakić, Vukica Savić, Darinka Savić, Božo Tešević, Petar Mitrović, Slobodanka Mitrović, Milojka Trifković, Momčilo Andrić, Čedomir Vuković, Mladen Dragićević, Bakira Hasečić, Nedeljko Nikolić, Drago Božić, Mićo Maksimović, Srećko Ninković, Dobro Tomić, Nedo Savić, Ratko Božić, Rade Stanimirović, Željko Šimšić, Živorad Savić, Nenad Arsić, Milivoje Šušnjar, Nedžad Muhić, Mladenka Vilotić, Miodrag Zeković, Emir Sarač, Ismet Šepo, Dušan Nešković, Dejan Šimšić, Milan Komad, Rosa Šimšić, Mirko Pecikoza, Zoran Gačić, Ljubomir Krča, Miladin Nikolić, Milan Milićević and Milenko Gladanac.

The following documentary evidence proposed by the Defense was reviewed: Request to conduct investigation of several persons of Bosniak ethnicity No. KT-128/97 dated 19 December 1997; Request to conduct investigation of several persons of Bosniak ethnicity No. KT-5/93 dated 26 July 1993; Set of documents – request to collect intelligence No. 15-5/02-230-62/01 dated 2 March 2001; Request to conduct investigation No. KT-18/93 dated 1 July 1993; Request to conduct investigation of several persons of Bosniak ethnicity in relation to war crimes No. KT-17/93 of 19 June 1993; Request to conduct investigation of several individuals in relation to killings of civilians and burning of their property No. KT-8/93 dated 14 June 1993; Request to conduct investigation of several persons including Enver Džaferović as a person for whom the investigation is being conducted No. KT-129/97 dated 04 November 1997; Certificate issued by the Red Cross in Kraljevo No. 1054 dated 27 August 1997 with the birth certificate for Teodora Lelek; Certificate issued by the Višegrad municipality No. 03-835-5/07 dated 20 November 2007; Certificate issued by the MoI, PSC Eastern Sarajevo, PS Višegrad, No. 13-1-11/01-29-500/07 dated 03 December 2007; Certificate issued for Radmila Radosavljević No. 13-1-11/01-29-396/07 dated 21 September 2007; Certificate of the PS Višegrad No. 07-02/1-04-251 dated 12 November 2003, proving that Željko Lelek is not in the criminal records; Excerpt from the operative records of the PS Višegrad No. 13-1-11/02-234-310-51/03 dated 11 November 2003; Response of Mr. Uroš Pena, RS Police Director, sent to Željko Lelek, No. D/P-156/07 dated 04 September 2007; Decision on appointment of Željko Lelek to the position of a shift leader No. 09/3-120-5004 dated 22 December 1994; Decision on appointment of Željko Lelek to the position of a policeman in the PS Višegrad, No. 09/3-120-5005 dated 22 December 1994; Decision on ranks No. 08/1-134-2758 dated 20 October 1995; Decision No. 03/4-120-4251 dated 17 December 1997 on appointment of Lelek Željko to the position of a shift leader in the PS Višegrad; Decision No. 03/1-2-120-3190 dated 21 April 1999 on the appointment of Lelek Željko to the position of a traffic warden in the traffic police section of the station; Decision on employee assignment No. 05/2-120-3536/01 dated 1 November

2001 issued for Željko Lelek; Decision on ranks No. 05/2-134,1-109 dated 24 January 2003 for Željko Lelek; Decision on employee assignment No. 05/2-127,1-19/8 dated 26 June 2006 for Željko Lelek; Contract in the name of Željko Lelek No. 15-1/09-1598/93 dated 5 July 1993; Certificate No. 06-01-1141 dated 30 June 1993; Decision No. 9311767212 dated 2 December 1997; Certificate issued by the MoI – PSS Bijeljina, No. 15-5/09-132-4/2000-71 dated 15 August 2000; Receipt on temporary seizure of items issued by the PSS Višegrad dated 3 August 1992; Receipt on temporary seizure of items issued by the PSS Višegrad, dated 26 August 1992, issued to Milan Blagojević; Receipt on temporary seizure of items issued by the PSS Višegrad dated 29 August 1992 issued to Miladin Stanimirović; Receipt on temporary seizure of items issued by the PSS Višegrad dated 29 August 1992 issued to Željko Pecikoza; Receipt on temporary seizure of items issued by the PSS Višegrad dated 29 August 1992 issued to Radisav Savić; Receipt on temporary seizure of items issued by the PSS Višegrad dated 29 August 1992 issued to Miloja Karaklić; Receipt on temporary seizure of items issued by the PSS Višegrad dated 29 August 1992 issued to Zarko Simić; Receipt on temporary seizure of items issued by the PSS Višegrad dated 31 March 1993 issued to Glibo Manojlo; Receipt on temporary seizure of items issued by the PSS Višegrad dated 29 August 1992 issued to Radisav Savić; Receipt on temporary seizure of items issued by the PSS Višegrad dated 15 September 1992 issued to Boško Šimšić; Official Note of SIPA No. 17-04/2-04-2-92/06 dated 7 July 2006; Official Note of SIPA No. 17-04/2-04-2-70/06 dated 14 June 2006; Official Note of SIPA No. 17-04/2-04-2-79/06 dated 6 July 2006; Official Note of SIPA No. 17-04/2-04-2-78/06 dated 6 July 2006; Photograph from the second half of May 1994 (Lelek, his wife and a baby); Color photograph (Lelek, his wife and a baby); Interior of an orthodox church; Interior of an orthodox church 2; picture, landscape of the area along Drina river; Transcript from the case No. X-KR-05/04 dated 8 December 2005; Certificate on employment issued for Vlatko Pecikoza dated 10 December 1991, translated into Bosnian, Croatian, Serbian language; Certified copy of the passport and visa issued to Vlatko Pecikoza; certified copy of a page in the passport containing stamps of arrivals; Certificate issued by the Višegrad Hotel, No. 13/08 dated 10 march 2008; Certificate issued by the translation agency.

On 4 February 2008 the Panel visited the crime scenes in the territory of the Višegrad municipality, including the Vilina vlas Hotel: room 214, room 228, Bunker, Suite No. 200, the Orthodox Church in Višegrad, the Višegrad Hotel, the Višegrad Old Bridge, Dušče village, the Uzamnica barracks as well as the locations where a partial reconstruction of events was conducted, namely the settlement of Saze and the old Police Station, duty office, store room, and "a room used for detention".

In their closing, the Prosecutor's Office of BiH emphasized that the arguments of the amended indictment were proven entirely that the Accused committed the criminal offense he is charged with, and they proposed that a long-term imprisonment for a term of 25 years be imposed on the Accused.



The Defense stated in their closing argument that the Prosecution did not prove beyond reasonable doubt that the Accused committed the criminal offenses he is charged with and they proposed that a verdict of acquittal be pronounced.

Having reviewed all pieces of evidence individually and in their correlation, the Panel rendered the decision as in the operative part due to the following reasons:

The Indictment of the Prosecutor's Office charged the Accused with having committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) of the CC BIH. In the relevant parts, that article reads:

"Whoever, as part of a widespread or systematic attack directed against any civilian population, being aware of such an attack, perpetrates any of the following acts:

- *Depriving another person of his life;*
- *Forcible transfer of population;*
- *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- *Torture;*
- *Rape;*
- *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."

A. Pursuant to Article 172(1) and (2)(a) of the CC BIH, for an act to constitute a Crime against Humanity, the following chapeau elements of this criminal offence must first be established:

1.1. The existence of a widespread or systematic attack;

1.2. Directed against a civilian population;

1.3. "Nexus" between the acts of the Accused and this act, that is, that the prohibited acts were committed as part of this attack; and

1.4. That the Accused was aware of the attack.

1.1. The widespread character of an attack refers to the "scale of the acts perpetrated and to the number of victims"[1] and the systematic character may be inferred from the existence of discernible "patterns of crimes", that is, non-accidental repetition of similar criminal conduct on a regular basis.[2]

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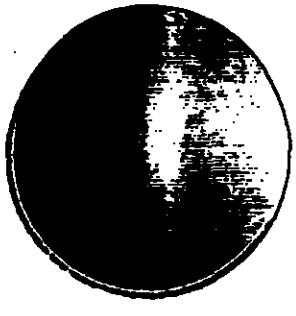
[1] *Prosecutor v. Blaskic, IT-95-14-T, Judgment, 3 March 2000, para. 206.*
[2] *Prosecutor v. Kunarac, et al., IT-96-23 and IT-96-23/1-A, Judgment, 12 June 2002, para. 94.*



Based on the presented evidence, particularly testimonies of witnesses who lived in Višegrad and surrounding settlements in early April 1992, and the facts the Panel accepted as established, the Panel concluded that there was an attack on the territory of the Višegrad municipality carried out by military and police formations from April through June 1992.

Taking as established the above-mentioned facts numbered 2-7, 10, 33 and 34, it follows that ethnic tensions increased in the territory of the Višegrad municipality in April 1992. The attack was motivated by political goals because, as the mentioned established facts indicate, in November 1990 multi-party elections were held in the municipality. The primarily Muslim SDA (Party for Democratic Action) and the primarily Serb SDS (Serbian Democratic Party), shared the majority of the votes, and the results closely matched the ethnic composition of the municipality. Serb politicians were dissatisfied with the distribution of power, and from 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines. Ethnic tensions soon flared up, which finally resulted in drastic change in ethnic structure of the population, because proportionally the changes in Višegrad were second only to those which occurred in Srebrenica.

It was established that in early April 1992, there was an attack on and destruction of Višegrad and surrounding villages carried out by the Serb Army, paramilitary formations from Serbia, the so-called Beli orlovi and local Serbs. Soon thereafter, both of the opposing groups raised barricades around Višegrad, which was followed by random acts of violence including shooting and shelling, as indicated in the fact number 11 accepted by the Panel as established. In addition, the two mosques located in the town of Višegrad were destroyed. (Fact number 31 above).

Soldiers, especially members of paramilitary formations, and police gathered Bosniak males and females, taking them from their homes, some of whom disappeared without a trace, particularly military-aged men. There was a standard pattern of conduct, as testified by the Prosecution witnesses. All witnesses are former residents of Višegrad and surrounding settlements who were caught by the events which they experienced in the spring of 1992. From testimonies of Prosecution witnesses the Panel drew the conclusion that in the spring of 1992 a military unit came to Višegrad from Užice, Serbia, and stayed there for a short while. At that time, paramilitary groups, the so-called Šešeljevci ("Šešelj's men"), Arkanovci ("Arkan's men"), and Beli orlovi, came to Višegrad from Serbia.

Witness Mujesira Memišević stated that problems in Višegrad began in 1992 when paramilitary formations, the so-called Šešeljevci, and Arkanovci, came to town in March, April and May. Following their departure, Serb authorities, led mainly by the local Serbs, took power in Višegrad. First, the representatives of the army and police started coming to the homes of Muslims, taking them for interrogations. Some of them were returned, some killed, and some remain unaccounted for. The Court examined

some of the injured parties, witnesses who had been taken away, namely Suvad Subašić and Suad Dolovac. They were consistent in stating that they were taken from their homes and, without any explanation, brought to the police station, where a certain number of other Muslims had been brought. Dozens of unarmed Muslims, mostly men, were unlawfully deprived of liberty. This deprivation of liberty was often followed by arbitrary confinement during which civilians were mistreated and exposed to abuse on ethnic grounds. Violence by the military and paramilitary forces created an atmosphere of fear.

Witness Mirsada Tabaković stated that the Bosniak side was under attack in early April by paramilitary forces of local Serbs. Witnesses Zejneba Osmanbegović, Azemina Čelik, witness S, and Mirsada Tabaković stated that they left Višegrad in mid-June 1992 due to the state of war and fear for their security. Witness Memišević stated that she stayed at her home in Dušće until 12 July 1992. The witness stated she had no other choice but to leave Dušće, because there were lootings, killings, and sadistic abuses.

Witness Azemina Čelik, and witness Nezir Mirvić were employed at the furniture factory in Višegrad, the Varda company. They both worked until the end of May 1992. Witness Čelik stated that 28 May 1992 was her last working day at the factory, because armed persons came that day and started taking Bosniak men away from the factory. This testimony was confirmed by witness Mujesira Memišević, whose husband was also taken away from the factory.

Witness C stated that at 8 a.m. on 13 June 1992 the "cleansing of the settlement" commenced, and that there were around 50 members of Serb formations who took the men away. The taking away of Bosniak men from their homes in June 1992 was confirmed by many other witnesses, including Nezir Mirvić and witnesses Mirsada and Vezira Tabaković, and Mujesira Memišević, and this was indirectly confirmed by the established facts, above numbered 25, 26 and 29.

Muslim men were taken away from the Varda factory, and from their homes as well. Some were brought to the police station while some were killed on the town bridge or in the river and their bodies thrown in the Drina River. Witnesses Azemina Čelik, Nezir Mirvić, and witness C testified about these events.

The Vilina Vlas spa is a rehabilitation centre, which was turned into a female camp in which women and girls were brought and systematically mistreated. There is evidence that one of the confined girls committed suicide by jumping through a window. Witnesses A, M.H, C and D, victims of the crimes committed there, testified about the events in the Vilina Vlas spa. In addition, the Višegrad hotel served as a camp where men and women were brought and systematically mistreated. This was mentioned by witness Zineta Kulelija.

The described events occurred in the whole territory of the Višegrad municipality, including the surrounding villages and settlements of Dušće, Crnča, Bikavac, and

other places. It is therefore clear that the attack on the Muslim population was widespread and encompassed, in any case, the whole of the Višegrad municipality.

In addition, the described events led the Panel to conclude that the attack was systematic.

On many occasions there was a clear pattern in how the civilians were treated. For example, men who were taken out of their homes were routinely deprived of liberty, taken to the Uzamnica barracks or the SUP building and then interrogated and beaten. Further, the proportion of the subsequent incidents, such as those described in detail with respect to the Counts of the Indictment, indicates that by their nature, those were not acts conceived of by individual perpetrators, but were rather joint endeavors of the Serb Army acting together with paramilitary groups and police. As of the moment the Užice Corps entered the area, there was an organized effort by local Serbs to disarm and regulate the activities of the Muslim population.

Therefore, the described events led the Panel to conclude beyond doubt that between April and June 1992, a widespread and systematic attack against Bosniak civilians was carried out in the territory of the Višegrad municipality by the Serb army, Serb paramilitary formations and police.

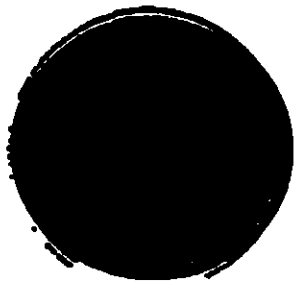
1.2. With regard to the status of persons for whom it was proved that they were subjected to the acts referred to in the Indictment, the Panel first invoked the general provision based on which the notion of a civilian person is defined.

Article 3(1)(a) of the Geneva Convention Relative to the Protection of Civilian Persons defines civilians as, "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause."

This Article requires that this category of persons shall in all circumstances be treated humanely, without adverse discrimination based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

The above-mentioned witnesses who testified about people being taken away from the Varda factory stated that Bosniak men were taken from work, when they regularly came to work. Further, witness Zejneba Osmanbegović stated that her husband Nail and neighbor Hasan Ahmetspahić had been taken from their homes in the late evening and early morning hours. Therefore, there is no doubt that they were unarmed and not in combat. The injured parties, witnesses Suvad Subašić and Suad Dolovac stated they had been taken out of their homes unarmed.

People were taken away at any time of day or night, most often from their homes. Men were forced to hand in all weapons they had in their homes. They were separated from women; some were killed immediately, and some taken away and have never been found. The Accused himself, in his testimony, stated that a group calling itself Beli



orlovi appeared at the same time as the Užice Corps. After the Užice Corps command moved out, this group was billeted in the Višegrad Hotel. The majority of the members of the Beli orlovi were from Serbia, while some were from Montenegro. Some local Serbs that the Accused knew by sight joined them. He also stated that Milan Lukić's group soon appeared in the town. He saw Lukić a few of times when Lukić came to the police station, but he never spoke to him, stating, "I did not even know him, but the others said it was Milan Lukić." The Accused stated that during all the time before the Užice Corps left, the Bosniaks handed in their weapons; the weapons were mostly hunting weapons, carbines, hunting rifles, "shot-guns" and some pistols. The witness himself stated that he personally issued proper receipts for their seizure.

On the other hand, women, children and the elderly were forced to leave their homes and were gathered in the town, where they were urged and intimidated into departing from the town and their homes, and transported in buses and trucks that were used to move them out and transfer them to the territory under control of ARBiH. Witnesses described these events in detail, stating that they were told to enter their names in the list for convoys and forced to surrender their entire property, facts to which witness H.D. testified.

All this confirmed the conclusion of the Panel that the attack was directed against the Bosniak civilian population. None of the injured witnesses or victims was armed, in uniform or at the frontline.

1.3. The Panel reached the conclusion beyond any doubt that the connection between the acts of the Accused and the attack was proven based on the Accused's membership in the formation taking part in the attack. That membership was proven by the following documentary evidence presented by the Prosecution: a certificate of the Republika Srpska MoI, Public Security Station Višegrad, dated 15 August 2000, establishing that the Accused Željko Lelek was a member of the Republika Srpska MoI from 4 April 1992 through 30 June 1996.

The Accused himself did not deny that fact. He stated he was a member of the reserve police force and worked with materiel and technical equipment. He worked in that capacity until September 1992. Working with materiel and technical equipment, he followed the orders of the police commander and received orders each day, mostly working on the route Višegrad – Vardište, and later Višegrad – Uzamnica. As he stated, they had two storerooms in Uzamnica. His tasks were to take care of the seized goods, the police strength, taking over of food and bread, and later military items, uniforms, ammunition, etc.

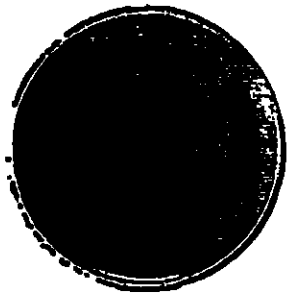
Lelek contested the starting date of his service; he stated he was mobilized on 20 April 1992. With regard to the specific allegations in the Indictment, the date he joined the reserve police force is not a decisive fact. What is important is the fact that the Accused was a member of the reserve police force in the period relevant to the Indictment. Witnesses Zejneba Osmanbegović and witness C, who had known the

Accused from before the war, stated they saw him on several occasions in uniform and armed.

All the acts with which the Accused was charged and for which he has been found guilty by the Panel occurred either in April, May or June, in other words, the time of the widespread and systematic attack. In addition to the fact that the Accused was a policeman in the relevant period, the Panel notes that there is evidence proving that the police forces were part of the attack, and they undertook activities from which one could undoubtedly conclude that their acts constituted part of the attack. Therefore, the events from this time period, which will be explained later, clearly suggest that the police went to Muslims' houses and took Muslims out, taking them to the police station for interrogations. Also, it was to the police station that the men were taken, and there they were interrogated and tortured, as specifically indicated in Count 4 of the Indictment. The police also participated in the forcible transfer of the population from Višegrad. The Accused took part in these acts, perpetrating them consciously and willfully. In addition, other acts which took place in Višegrad at that time fit into the criminal pattern and cannot be singled out from the context of the attack. Unlawful deprivations of liberty, forcible transfer of the population, rape, and acts of severe sexual violence against women are all acts mentioned by the witnesses as occurring during the attack. That these acts were committed solely against non-Serbs, primarily Muslims, is evident from witness statements, as well as from anti-Muslim rhetoric in connection with these acts. The mentioned acts are exactly those the Panel found the Accused criminally responsible for perpetrating. None of the Accused's acts can be singled out as separate or distinct from the overall events.

1.4. That the Accused knew about the attack is best supported by the fact that he was a policeman at the relevant time. He was a person who, when compared to an average citizen, was surely in a position to know what was happening. During the entire period relevant to the Indictment, the Accused was a policeman. In his testimony, the Accused stated that his headquarters was in the police station, but that he was tasked by the police commander to distribute food to checkpoints and supply fuel every day. Accordingly, he drove around the town and sites where many heinous deeds occurred by day and night, exactly at the time covered by the Indictment (killings at the bridge following which bodies floated in the river, taking men away, separation of non-Serbs and their transfer from the town, confinement in the police station, etc). In addition, the Accused perpetrated these crimes with other individuals who participated in similar crimes and with members of police, military and paramilitary groups who committed the widespread and systematic attack. All this clearly indicates that the Accused was completely aware of the attack occurring in Višegrad throughout April, May and June 1992, and that he knew that his actions contributed to the attack.

In light of the above, the Panel concludes that the relevant acts occurred during a widespread and systematic attack carried out by Serb army, police and paramilitary formations against the civilian population of the Višegrad municipality, and that the Accused acted as part of the attack and knew that his actions were part of the attack.



The Indictment sets the background of the perpetration, inter alia, within an armed conflict. However, the Panel did not engage in establishing the fact and special elaboration in that sense. Rather the Panel concluded that, for this particular criminal offence, it was required to establish the existence of a widespread and systematic attack, as a mandatory element of the criminal offence of Crimes against Humanity.

B. As for the very criminal acts constituting the offence, the Prosecution witnesses who testified with regard to the circumstances of the criminal acts referred to in the different Counts of the Indictment are mainly direct eyewitnesses to the events, and some are also direct victims.

1. Count 1 of the Indictment alleges that on an unspecified date, in spring 1992, in the morning hours, the Accused, in a group, together with Mitar Vasiljević, a Lukić (brother of Sredoje Lukić), and another two unidentified men, all armed with automatic rifles, brought at least four unidentified elderly Bosniak civilian men by truck from the "Vilina vlas" spa, where they had been imprisoned, to a concrete plateau on the Drina River bank in the place called Sase in Višegrad, where they forced them to step into the river up to their waist, and then they killed them by shooting them in the back with automatic rifles.

As for Count 1 of the Indictment, the protected witness K.B. testified with regard to the circumstances referred to in this Count. His personal details were not disclosed to the Defense, and at the main trial, the Defense waived the right to cross-examine this witness, which is why the Panel analyzed this characteristic of the evidence having in mind the rights of the Defense.

Therefore, there are two facts relevant to this testimony. The first one is that the identity of this witness was completely unknown to the Defense, and the second is that this witness is the only eyewitness to the acts of the Accused with regard to this Count. This piece of evidence, in terms of the procedural rights of the Defense, is different from other evidence presented.

The only evidence supporting Count 1 of the Amended Indictment was anonymous witness KB, who testified via video link from a separate room with face and voice distortion, in order to protect his anonymity.

The Law on Protection of Witnesses under Threat and Vulnerable Witnesses (Hereinafter: LoWP) and Article 91 of the CPC BiH provide that under certain extreme circumstances, a witness's identity may be withheld from the Accused and Defense Counsel and he/she may testify anonymously. The procedure for providing for anonymity for witnesses is set out in Articles 14 through 22 of the LoWP. That procedure contemplates that the Court, in private session, pose questions to the witness, whose identity is withheld from the Accused and his lawyer as well as the public, and that a transcript of the answers to those questions be read out in the main trial. Under this process, neither the Prosecution nor the Defense can question the

witness in direct or in cross examination, nor can either observe in any manner the witness while the witness is answering the questions. In order to proceed under Article 14 et seq., the Court must find that "exceptional circumstances" exist and that "there is a manifest risk to the personal security of the witness or the witness's family, and that the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony. If these conditions are met, the Court may conduct a witness protection hearing in accordance with Articles 15 through 23 of this Law."

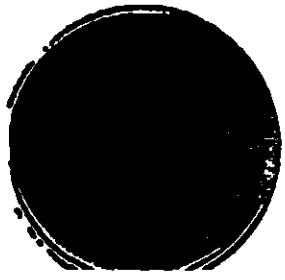
In this case, the Prosecution moved that the witness be allowed to testify anonymously on 18 June 2007. The Panel, after conducting a hearing in a closed session on the same day, concluded that there existed valid reasons for granting the Prosecution's motion that the witness's identity be withheld the Accused, the Defense Counsel and the public.

However, the Panel further found that, although anonymity as requested by the Prosecution was justified, that refusal for direct and cross-examination by use of the procedures set out in the LoWP was not necessary to protect the witness, and that a proportionate response to the danger found would be to grant anonymity, but to provide the opportunity for direct and cross-examination of the witness contemporaneously and in the main trial. The Court therefore ordered that the witness's identity be withheld from the Accused and Defense Counsel, but that the witness testify at the main trial, subject to direct and cross-examination by the parties and counsel. In order to protect anonymity, the Court ordered that the witness testify from a separate room with image and voice distortion. The Court was authorized to provide the protections that it did by virtue of Articles 14 through 22 of the LoWP, which grant the Court the authority to order the most extreme protective measures, in conjunction with Article 13(2), which provides:

"The Court may, after hearing the parties and the Defense Attorney, decide that the identity of the witness is not disclosed by allowing the witness to testify behind a screen or utilizing electronic distortion of the voice of the witness or the image of the witness, or both the image and the voice, by using technical means for transferring image and sound."

By so doing, the Panel complied with Article 4 of the LoWP: "The Court may order such witness protection measures provided for by this Law as it considers necessary, including the application of more than one measure at the same time. When deciding which of the witness protection measures is to be applied the Court shall not order the application of a more severe measure if the same effect can be achieved by application of a less severe measure."

Although provision was thereby made to preserve the confrontation rights of the Accused, nonetheless the Accused's right to full access to information relevant to exercising those rights was compromised by the order of anonymity requested by the Prosecutor and granted by the Panel. In rendering its verdict, the Panel will make



limited use of the evidence obtained from an anonymous witness. That use is limited to a corroborative role. Article 23 of the LoWP states: "The Court shall not base a conviction either solely or to a decisive extent on evidence provided according to Articles 14 through 22 of this law."

This provision of the CPC is entirely consistent with the European Convention on Human Rights. Under the European Convention on Human Rights, the Panel is unable to base a conviction solely, or to a decisive extent, on the testimony of an anonymous witness because that evidence cannot be tested by an adequate and proper opportunity to cross-examine, as provided by the ECHR, Article 6(1) (fair trial) and 6(3)(d), as in the cases of the European Court of Human Rights, Kostovski v. The Netherlands, Judgment of 20 November 1989, Doorson v. The Netherlands, Judgment of 26 March 1996, and Van Mechelen and others v. The Netherlands, Judgment of 23 April 1997.

Article 6 states:

"3. Everyone charged with a criminal offense has the following minimum rights: (d) to examine or have examined witnesses against him...."

The European Court has held that "as a general rule paragraphs 1 and 3(d) of Article 6 [of the European Convention] require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he makes his statement or at a later stage." Van Mechelen, para. 51.

In Count 1, the Defense was given the opportunity to cross-examine the witness, who appeared in the proceedings through video link from another room, with face and voice distortion, in order to preserve his anonymity. This comports with the obligation of the Panel to provide counterbalancing measures so that the Defense may have an "adequate opportunity" for cross-examination. The Defense declined to cross-examine, arguing that because of the situation, cross-examination would not be meaningful. Their position is consistent with the rulings of the European Court on what constitutes "an adequate and proper opportunity to cross-examine." In the Windisch case, Judgment of 27 September 1990, the European Court stated that "[b]eing unaware of [the witnesses'] identities, the Defense was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility." See also, Kostovski v. The Netherlands. Nevertheless, the efforts taken by the Panel to counterbalance the effects of anonymity on the right to cross-examine were sufficient to permit use of the testimony in a corroborative role, but, according to ECHR jurisprudence, not sufficient to allow a verdict to be based on that testimony to a "decisive extent".

The European Court considered a case where the Accused was convicted "to a decisive extent" on the basis of statements by anonymous police officers. The defense was both unaware of the identity of the witnesses and, though given the opportunity to

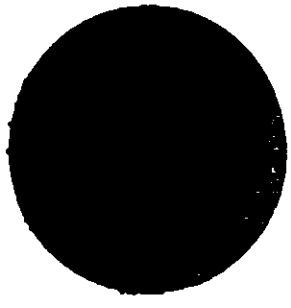
cross-examine, they were precluded from observing the witnesses' demeanor during the direct examination or cross because they were in separate rooms connected by an audio link. The combination of the anonymity of the witness and the inability to observe the witness while testifying was found to violate the Accused's right to a fair trial and to confrontation. The Court said, "These measures cannot be considered a proper substitute for the possibility of the defense to question the witnesses in their presence and make their own judgment as to their demeanor and reliability." Van Mechelen.

This is in accord with the rights protected by the International Covenant on Civil and Political Rights, Article 14, as interpreted by the United Nations Committee on Human Rights. UN Document CCPR/C/79Add.75, 9 April 1997, paras. 21 and 40. In that "observation" the Committee criticized the use of anonymous witnesses as violative of paragraphs 3(b) and (e) of Article 14.

In Count 1, the combination of the anonymity of the witness and the inability of the Defense to observe the demeanor of the witness because of the image and voice distortion necessitated by the anonymity make it impossible to base a conviction on the testimony of that witness to a "decisive extent". The testimony might be legally used to corroborate other evidence on which a conviction could be based. In that case, the anonymous testimony would be corroborative of other "decisive" evidence. However, in Count 1, the testimony of the anonymous witness is the only evidence that a crime was committed and that the Accused committed the crime. It is not corroborative of any other decisive evidence.

The Prosecutor argues that the anonymous witness's testimony was corroborated by the site visit, where she asserts the topography substantiates the description given by the witness and affirms that it would have been possible to see the faces and hear the voices of the perpetrators at the relevant time. Even if the site visit proved what the Prosecutor asserts, it still fails to provide any evidence of the crime itself, leaving the testimony of the anonymous witness as the only evidence of the crime. The issue is not whether there is corroborating evidence as to tangential issues (credibility, ability to observe and hear), but rather whether there is other decisive evidence on which to base the verdict. If such evidence existed, then the anonymous testimony, if believed, could be corroborative of that other evidence and therefore be considered and weighed when the Panel evaluates whether the Prosecution had met its burden of proof beyond doubt. The Panel does not need to determine whether other evidence corroborates the anonymous witness's testimony. What it must decide is whether there is sufficient other evidence on which to base a verdict, which the anonymous witness's testimony can corroborate. There is no such evidence in this particular case.

The Prosecution has failed to produce sufficient evidence upon which this Panel can base a verdict of guilt beyond doubt and therefore it finds that the Accused should be acquitted of the charges under Count 1.



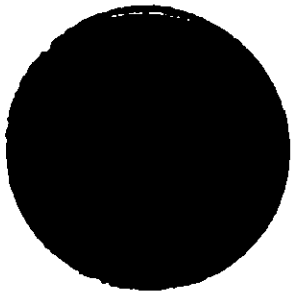
Under Count 2 of the Indictment, the Accused is charged with several separate sets of events. With regard to Count 2 of the Indictment, the following witnesses testified: Zejneba Osmanbegović, Mirsada Tabaković, Vezira Tabaković, Mujesira Memišević, Azra Osmanagić, Amela Kadrić, Zineta Kulelija, Haska Dudević, Bakira Hasečić, witnesses S and C and Dženita Muhić. Some of the witnesses who testified with regard to these circumstances are eyewitnesses, and some are not direct eyewitnesses to the event.

It was established based on the testimonies of all the examined witnesses that the allegations of the Prosecution are proved only concerning the charges of taking away Hasan Ahmetspahić and Nail Osmanbegović, and torturing Zejneba Osmanbegović and her mother, as well as concerning the forcible transfer of population by convoys from Višegrad, and that the event occurred in June 1992, in the settlement of Crnča, which is why the allegations of the Indictment were adapted in the operative part of the Verdict.

a). Witness Zejneba Osmanbegović testified with regard to the taking away of Hasan Ahmetspahić and Nail Osmanbegović and abuse of Zejneba Osmanbegović and her mother, and the Panel finds that her testimony is completely reliable and consistent. The witness was precise in describing the events in the settlement of Crnča where she lived and also provided convincing identification of the Accused as one of the perpetrators. The Panel had no dilemma concerning the participation of the Accused in these criminal acts.

With regard to this event, the injured party, witness Zejneba Osmanbegović, testified that on 1 June 1992, at midnight, Željko Lelek came to her house with Oliver Krsmanović and Gordana Andrić. When they arrived, they brought Hasan Ahmetspahić with them, all covered in blood. They asked for money and jewelry. They were all armed. The witness stated that Lelek took her husband out of the house at one point. He brought him back after some time. When he brought him back, she saw that her husband Nail was all covered in blood and his nose was broken. They left the house at around 03:30 taking Nail and Hasan with them. They gave no explanation then as to why Nail and Hasan were being taken away. The witness also stated that soon after they were taken away, Hasan was found in the Drina river, while her husband has not yet been found. After her husband was taken away, she stayed in the house, which was partly burnt on 15 June 1992, and after that, on 18 June 1992, she was expelled from the house and told to go to the square in order to leave Višegrad.

The Panel, however, was not bound by the legal definition of the offence as proposed by the Prosecutor. The Panel defined these actions as severe deprivation of physical liberty with regard to Nail and Hasan, although under this Count of the Indictment, the Accused was charged with the act of enforced disappearance concerning these two injured parties.



The elements of severe deprivation of liberty are provided in Article 172(1)(e) of the CC of BiH:

- *Imprisonment or other severe deprivation of physical liberty;*
- *In violation of fundamental rules of international law;*
- *With direct or indirect intent.*

Based on the testimony of witness Osmanbegović it was clearly established that these individuals were deprived of liberty against their will and taken from the houses. That the deprivation of liberty was severe is clear from overall circumstances under which the act occurred. That evening, in late evening hours, during the attack on Višegrad, these three individuals came armed to the house of the injured parties. In doing so, they acted in a way that surely caused the victims fear due to all those circumstances. That this deprivation of liberty was severe is clear from the condition of the individuals; they were beaten and covered in blood, whereas Hasan Ahmetspahić was stabbed and bleeding.

That the act was in violation of the fundamental rules of international law is clear from the fact that these individuals were civilians. None of the three individuals who came to the house offered any explanation for why the victims were taken away, nor did they corroborate the need to deprive the victims of their liberty.

In the Krnojelac case, the ICTY 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."[3] The individuals deprived of their liberty were not informed about the reasons of that deprivation of liberty. The justifiability of such a deprivation of liberty was not under consideration in a court or administrative proceeding. There were no legal grounds for the deprivation of liberty.

The Panel concluded that the Accused acted with direct intent based on the fact that he knew whose house he came to and what the task was. The manner in which the Accused participated itself, which witness Osmanbegović described, entering her house, asking for money and gold, taking out her husband and bringing him back covered in blood, and then ordering that the injured party and her mother be abused, clearly indicates that he was aware of his action and wanted the act to be done. Moreover, due to the fact that the Accused was a policeman and surely knew that when he deprives an individual of liberty, it must be with due process of law, and by no means can the deprivation of liberty include arbitrary treatment, and particularly not ruthlessness and mistreatment.

The Accused is not the one and only perpetrator of this offense. According to the testimony of this witness, he acted together with another two individuals and made a decisive contribution to the perpetration of the offence by entering the house with the two others, threatening the civilians in the house with weapons and physical abuse,

[3] *Prosecutor v. Krnojelac, IT-97-25-T, Judgment, 15 March 2002, para. 114.*

demanding money and gold from them and, together with the two other persons, he brutally deprived them of liberty, violating their rights protected under international law. The Panel concludes that the Accused thereby acted as a co-perpetrator in the commission of this criminal offense.

The acts of the Accused fulfilled the elements of this criminal act, whereby with regard to the taking away of the injured parties Hasan Ahmetspahić and Nail Osmanbegović, the Panel did not accept the legal characterization of enforced disappearance as proposed by the Prosecutor's Office. The relevant elements for the commission of the offence of "enforced disappearance" with which the Accused was charged are stated in Article 172 (2) (h), which reads as follows:

1) *Arrest, detention or abduction of persons;*
2) *By, or with the authorization, support or acquiescence of, a State or a political organization;*
3) *Followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons;*
4) *With an aim of removing them from the protection of the law for a prolonged period of time.*

Although these two persons have not been seen alive ever since, there is no evidence as to what the Accused specifically knew would happen to them once they were taken away, nor is there evidence that the Accused knew about the fate awaiting them at the time he unlawfully deprived them of liberty and took them away. Witness Osmanbegović stated he had merely taken them out of the house. In addition, it was not proven what specifically the Accused had thought the final outcome of such a taking away would be; in other words, whether his intention was to deprive the persons taken away of legal protection for a prolonged period of time or to refuse to give information on their fate or whereabouts after he had deprived them of liberty. This specific knowledge would point to a specific intent, the existence of which is required in the elements of this Article. Due to this deficiency, the Panel did not find that the elements of the criminal offence of enforced disappearance were fulfilled. However, as explained earlier, the act of severe unlawful deprivation of liberty, which is also a crime against humanity, was proven.

b) With regard to the injured parties Zejneba Osmanbegović and her mother, the Panel finds that the acts of the Accused fulfilled the elements of torture of the two injured parties, referred to in Article 172(1)(f) of the CC of BiH.

The elements of torture are defined in Article 172(2)(e) of the CC of BiH:

- *Infliction of severe pain or suffering, whether physical or mental;*
- *Upon a person in the custody or under control of the Accused;*
- *Intentionally ("intentional infliction").*

During the direct examination by the Prosecutor, witness Osmanbegović stated that the same evening she was ordered to get undressed. Having requested and received approval from Lelek, Gordana ordered her to undress her mother as well, pointed a rifle at the injured party, and then ordered her to sit on Hasan's stomach. Having done that, the witness saw that he had been stabbed in the stomach. While Lelek was with her husband, Gordana and Oliver mistreated them, but the mistreatment continued even when Lelek returned. The perpetrators left the house at around 03:30. The witness recognized Lelek in the courtroom as the person who had come to her house that evening. In addition, she has known the Accused ever since he was a young man, and she remembers him and his father Ćedo, whom she used to see together. She knew Oliver Krsmanović and Gordana Andrić well.

During the examination by the Defense Counsel for the Accused, witness Osmanbegović stated that the Accused had left with her husband Nail before she got undressed and that the two of them had stayed for about one hour in Hasan Ahmetspahić's house. This fact leaves no room for the Panel to doubt the conclusion that the Accused participated as a co-perpetrator in torturing the injured party Zejneba Osmanbegović and her 80 year old mother.

By his actions, the Accused made a decisive contribution to the torture of these two women. That evening, when the Accused, armed, came to the house of the injured party Zejneba, and ordered that the injured party and her mother get undressed, he was surely aware of his action and wanted it to be done. The fact is that both the injured party and her mother were completely helpless in that situation and quite reasonably feared for their lives, and the Accused, armed and a part of a violent group led by him, in such a situation surely had control over the conduct and actions of the witness and her mother. Once the Accused returned with Nail, the mistreatment of those present continued in the manner that their money and gold was taken away. Even though the Accused was not present in the room when the injured party Zejneba sat on Hasan's stomach, the Panel concluded that the Accused consented to all actions undertaken that evening by Gordana and Oliver, specifically because this violent group was led by the Accused and because the subsequent events took place after the Accused had ordered that the witness Osmanbegović and her mother undress.

This act to which the injured parties were forced in itself has no consequences as to the physical pain and suffering to the injured party and her mother. However, if viewed in an overall context of the events, the time of the events was between midnight and 03:30 a.m., it happened at the time of a widespread and systematic attack against Bosniak civilians, members of which were the two injured parties, they were terrified and uncertain about their lives and fate, as noted by witness Osmanbegović herself during her testimony. There is no doubt that they were subjected to severe suffering and mental pain at those moments, especially due to the fact that they were forced by the Accused and others to undress, which itself is a humiliating and degrading act, not only to the witness but also to her mother. Witness Zejneba stated that the Accused

ordered them to undress and said "get naked, you Bulas" (a derogative for Muslim women), which was seen by the witness as not being treated as humans and that she was afraid because all three of them were armed with rifles. This event has left an indelible imprint on the memory of this witness, who stated in her testimony that this event would be there for as long as she lives.

As regards his intention, there is no doubt that he acted with the intent to subject them to such treatment, which was concluded by the Panel based on the fact that he came to the house, inter alia, with the intent to abuse them and ordered both of them to get undressed, cursing and insulting them. Hence, it is clear that the acts of the Accused fulfilled the elements of the act of torture.

In addition to the above-mentioned elements, the ICTY and the ICTR have identified an additional element according to which, pursuant to international customary law, the infliction of severe pain or suffering with the act of suffering must be "for the purpose of obtaining information or a confession; punishing, intimidating or coercing the victim or a third person, or for the purpose of discriminating, on any ground, against the victim or a third person."[4]

An analysis of the committed acts makes it clear that the injured parties were abused due to the fact that they were Bosniaks and Muslims, and that such treatment of them was some sort of sadistic abuse for the purpose of discriminating against them on the grounds of their ethnic affiliation.

Therefore, although the existence of this element is not required under Article 172 of the CC of BiH, in this particular case this element has been fulfilled in accordance with customary international law.

The Panel concluded that credence can be given to this witness's testimony primarily on the basis of the fact that she knew the Accused as he resided in Višegrad for a long time. The witness also recognized him in the courtroom as the person who came to her house that evening. She also stated that she had known Oliver Krsmanović and Gordana Andrić well. The Defence noted that the testimony of witness Zejneba was inconsistent with Defence witnesses Bato Tešević, Željko Šimšić and Rade Stanimirović, who stated they knew both Oliver Krsmanović and Gordana Andrić but had never seen Lelek with them. However, the Panel finds that the testimonies are not in contradiction with the testimony of witness Osmanbegović and are not mutually exclusive. The particular event of interest to the Panel occurred after midnight and in early morning, hence it is highly unlikely that someone could have seen it. On the other hand, the testimony of witness Osmanbegović is clear and unambiguous, and the Panel does not question this witness's credibility.

c) As regards this Count, the Panel found the Accused guilty of forcible transfer of population as well, as witnesses Azra Osmanagić, Amela Kadrić, Haska Dudević,

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[4] *Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1998, para. 594; Prosecutor v. Kunarac, et al., IT-96-23 and IT-96-23/1-T, Judgment, 22 February 2001, paras. 485, 497.*

Zejneba Osmanbegović and others testified. The witnesses are consistent in the fact that the Accused was seen at least once armed and escorting buses that transported women and children from Višegrad to the territory under the control of the authorities of the then-R BiH. The Accused himself did not deny this fact, but he denied its unlawfulness. However, the Panel found that the acts of the Accused fulfilled the elements of the criminal act of forcible transfer of population.

Witness Azra Osmanagić stated that she left her home on the morning of 17 June 1992 with her father and two children, intending to join the convoy leaving Višegrad. When they got to town, Željko Lelek was there as well. She knew his father well; he was a traffic policeman. The soldier who took them threatened he was going to kill them by a hand grenade, but Lelek told him to take them away, whereupon the soldier took them towards the square. When they got there, buses were already full. There were some 7 buses and 4 trucks. They were all overcrowded; the trucks transported Muslims, women and children. There were several boys on her truck, as well as her father. Someone came and took her daughter into the bus, because she was pregnant. Lelek was also in the bus to which her daughter went. When they came to the place before Olovo, when they got out, she saw Lelek. When they arrived, shooting started and she saw Lelek shooting. Several people got killed there. Her daughter who was in one of the buses told her that a man named Gladanac drove the bus, and that Lelek was in the bus.

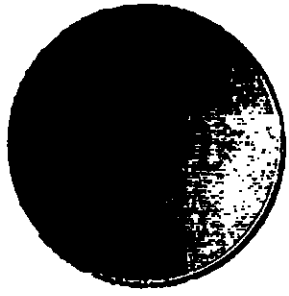
Witness Amela Kadrić is witness Azra Osmanagić's daughter. The departure from the town was organized at the square in Višegrad. In the column of vehicles that were supposed to take them out, they were about to board a truck because all the buses were full. There were a lot of passengers in her bus. Željko Lelek was escorting the buses all the time. Lelek was in camouflage uniform. He sat next to her female neighbor, and he was armed. The witness knew the Accused from before. He was her neighbor, and she knew where he lived. He had somewhat long hair then.

Witness M.H also stated she left Višegrad in a convoy. She stated she had seen Lelek escorting buses transporting Muslims out of Višegrad.

Witness Haska Dudević lived in Dušće, Višegrad before the war. She stated they were "thrown out from Dušće by the Chetnik". They were in the house, four men arrived and threw them out of the house. There were around 10 of them, because other women were there. When she saw the soldiers, she got scared. She only remembers they had weapons and military clothes. They were ordered to get out of the house, and they did so. They came to town, they were left there to board the buses and go away. She found only women and children there; no men were there.

Elements of the act of forcible transfer are defined under Article 172(2)(d) as follows:

- *Forced displacement of the persons;*
- *By expulsion or other coercive acts;*



- *From the area in which they are lawfully present;*
- *Without grounds permitted under international law.*

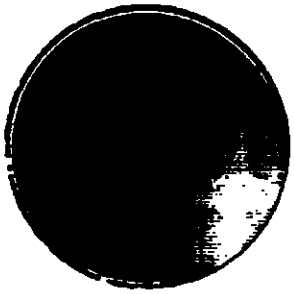
Therefore, analyzing these testimonies makes it clear that the civilians who were transported that day from Višegrad left their homes under constant threats and intimidation. This transfer occurred in June 1992. The Established Facts (from 26 to 30 above), accepted by the Panel from the ICTY judgments, clearly show that during this period there were a lot of incidents in which civilians were killed in Višegrad. People disappeared beginning in April, and in the following several months hundreds of non-Serbs were killed, mainly Muslims - men, women, children and the elderly. Many of the killed were simply thrown into the Drina river where a lot of bodies were found floating, while the number of disappearances peaked in June and July 1992. The majority of those who disappeared were civilians. Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes and beatings. Many were deprived of their valuables. Injured or sick non-Serb civilians were denied access to medical treatment. Under such circumstances it was quite understandable that, out of fear for their lives and survival, these civilians were forced to leave the town involuntarily.

All the witnesses mentioned above stated that they had lived in their houses and apartments in Višegrad from before the war. They had every legal right to remain there. This is the population who had lived in Višegrad for years. None of the witnesses left their homes voluntarily, and the example was given by witness H. D. who described how she had been expelled by soldiers from her house. The reason why these people were forced to leave the town and municipality supports the conclusion that the final purpose of the attack against civilians was to ensure that the territory would be populated only by Serbs. This is particularly evident because the Serb population remained in their homes and were not under the attack.

Based on the testimonies of witnesses, the Panel concluded that the Accused was in the convoy soon after it departed Višegrad. The Accused was in the convoy for the major part of the route and was a co-perpetrator of the criminal act. Given that it was impossible to organize such a large convoy without the assistance or armed guards and escort, who took part in the perpetration, by his acts the Accused decisively and considerably contributed to the perpetration of the forcible transfer.

Article 49 of the Fourth Geneva Convention prohibits forcible transfer regardless of motive. However, there are specific exceptions when total or partial evacuation may be undertaken under the obligation that persons thus evacuated are transferred back to their homes after the threat has abated. (To provide security for the population during military operations or the like)

That the forcible transfer was not justified under international law is clear when the acts of the forcible transfer are brought into the context of a widespread or systematic attack against civilians, and the aforementioned exceptions allowing for evacuation of people are not applicable to this specific situation.



Forcible transfer was not carried out for the reasons permissible under international law because, at the time these acts were committed, there were combat activities in Višegrad area and it is precisely such attacks that made the lives of Bosniak civilians hard and unpredictable. Certainly, the reason for their transfer was not to provide security to them, which would then require their evacuation in order to carry out necessary military operations, because these civilians were the targets of this attack, and the forcible transfer of the population was carried out by the forces who took part in the attack against them. In addition, there were no natural disasters or other circumstances which would allow for or require the organization of a humanitarian evacuation. Victims of this act committed by the Accused as a co-perpetrator were civilians who had been lawfully present in the territory of Višegrad, who left their homes against their will and who were transferred from Višegrad to locations not of their choosing.

Therefore, if the actions of the Accused are taken into account in this sense, it is clear that his actions satisfied the elements of the crime of forcible transfer as a Crime against Humanity in violation of Article 172(1)(d) of the CC BiH.

Also, it is clear that the Accused was aware of his actions and wanted their perpetration because it has been established that the Accused was aware of the fact that Bosniak people were leaving the town during the overall events and the circumstances surrounding the attack carried out by the Serb military and police formations against civilians.

International customary law also requires the intent to remove the population permanently.[5] If this segment of the Accused's conduct is also analyzed, i.e. his failure to take actions directed towards the return of those who had been removed, the Accused indeed did not take any action directed towards the return of those that had been transferred. The conduct of the Accused fits the pattern of behavior of the Serb Army and police whose objective was to have only the Serb population in the Višegrad area. The established facts No. 33 and No. 34 show that this objective had been largely achieved.

The Accused himself stated that Commander Tomić ordered that he and another 7 or 8 policemen join the convoy as the escort. The Accused stated that he once was in the bus driven by Ljubo Gladanac. The convoy had to be escorted towards Olovo to a place called Ilačević Brdo. Hence, the Accused himself does not deny his participation in this action, but he states that his conduct was never improper. However, the Panel could not accept this objection of the Accused because civilians

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[5] Article 33 of the CC of BiH: Prosecutor v. Blagojevic and Jokic, IT-02-60-T, Judgment, January 17, 2005, para. 601 ("As for the mens rea, the perpetrator must intend to remove the victims, which implies the intention that they should not return.... The fact that no step is taken by the perpetrator to secure the return of those displaced, when the circumstances that necessitated the evacuation have ceased, is among the factors that may prove an intent to permanently displace the victims rather than the intent to secure the population through a lawful – and therefore temporary – evacuation."). See also Prosecutor v. Naletilic and Martinovic, IT-98-34-T, Judgment, 31 March 2003, para. 520.

were expelled exactly because they were Bosniaks. Such a reason and ground are discriminatory and hence prohibited, and he knew that. The Accused was aware of who the people to be transported from Višegrad were, as well as their ethnicity.

d) Under this Count of the Indictment the Accused was charged, inter alia, with the taking away of the injured parties Tabakovićs and Fahrudin Cocalić, and Ismet Memišević.

There is no doubt that these abductions occurred, and that the people abducted are no longer alive. Using documentary evidence and testimonies of witnesses, the Prosecutor's Office proved that the mortal remains of these persons were found and exhumed from the mass grave. However, none of the witnesses, including the relatives of the injured parties Mirsada Tabaković, Vezira Tabaković, Dženita Muhić and others, saw the Accused involved in these particular acts. For a reliable conclusion concerning the participation of the Accused, it is necessary that there be clear observations and firm beliefs of the witnesses that the Accused was one of the perpetrators.

As for this incident, witnesses Mirsada and Vezira Tabaković are consistent in their testimonies when speaking about the injured parties Ferid Tabaković (witness Mirsada Tabaković's husband), Fehim Tabaković (witness Vezira Tabaković's husband) and Izet Tabaković being taken away in the evening of 19 May 1992, when they went missing, until their remains were found in the mass grave and exhumed.

Witness Mirsada Tabaković stated that in the evening of that day, around 7.30 a.m., Milan Lukić arrived by car in front of the house, calling her brother-in-law Izet. She saw that 4 or 5 other soldiers were there in uniforms, some in camouflage and some in olive-drab uniforms. A man with Montenegrin accent soon thereafter came to her door. That man took out her husband Ferid. Two soldiers entered her house then. Although during the Main Trial she stated that one of them was Željko Lelek, she admitted that she was not sure what the name of one of the soldiers, who looked familiar at the time, was. It was only several years after the war when she saw Lelek again in Višegrad that she concluded that it was in fact Lelek who perpetrated the offense. This identification is not sufficient for the Panel to be satisfied that the Accused is indeed responsible for these events. The witness Mirsada Tabaković herself said during direct and cross-examination that she knew well both the Accused's father and the Accused and that she had encountered the latter in the street where the witness' sister lived. If the witness knew the Accused from before, it is reasonable to assume that she would be able to identify him as a person involved in the event at the time. The absence of such an identification raises doubts about the witness' conclusion reached afterwards about the involvement of the Accused in the event, because the witness reached this conclusion eight years after the event.

Witness Vezira Tabaković stated her husband and sons were taken away by two young men, one with fair hair and in olive-drab uniform. They were taken away together with Fahrudin Cocalić, who was in their house. That evening, the witness did not

know who those two young men were. The witness remembers that that same night, Mirsada – the wife of her son Ferid – told her that her husband and sons had been taken away by a soldier from Višegrad whose name she did not know. After the war Mirsada told her it was Željko Lelek. During cross-examination she identified the Accused as one of the soldiers who took away the members of her family, however, just after that she indicated that the Accused had not been one of the two soldiers and that she only wanted the Accused to tell her who killed her children and husband. The knowledge of this witness of the responsibility of the Accused is indirect and it is a result of what Mirsada Tabaković had said about the involvement of the Accused in the taking away of the Tabaković family. As the Panel could not rely on the testimony of Mirsada Tabaković beyond reasonable doubt to find the responsibility of the Accused, it is all the more clear that the Panel may not find the Accused responsible on the basis of indirect evidence – the testimony of Vezira Tabaković.

Witness Mujesira Memišević who lived in Dušće saw, from a distance of about 50 meters, that her neighbors Fahrudin Cocalić, the Tabakovićs – father and two sons – were taken away from their houses. She admitted that she was not sure at the time that Lelek took part in the taking away of those people and that she did not see him in those incidents, but there were rumors that Lelek did take part in that. The mother of the Tabakovićs, as well as Kadira Cocalić, told her that Željko Lelek had been involved in taking away those people. When the Panel visited the location where this event took place, the witness indicated that she had seen Željko among the soldiers who were taking the men away. The testimony of this witness is inconsistent and some segments of it are contradictory with regards to the decisive fact: the potential involvement of the Accused in the event she is testifying about. At the main trial, the witness testified that she was unable to see directly the event, so she did not see the Accused. The Panel is convinced that, on the critical day, this witness did not really see the Accused taking part in this event and her assertion made during the visit to the location is, in the opinion of the Panel, a result of the stories told by other people. On such inconsistencies and in the absence of a reliable identification of the Accused, the Panel cannot base a conviction.

Witness C stated that, in May 1992, Ferid Tabaković and his two sons were taken away, as well as Faruk Cocalić, Džemo Zukić and his son. She did not witness that event but she heard about it from Kadira Cocalić. In the investigation, the witness did not say that Lelek had taken part in this incident, because she could not remember the name, but now she is sure that Kadira Cocalić told her she had seen Lelek.

This witness also stated that on 13 June 1992, at 8 a.m., 50 soldiers took away men from the settlement. Among others, Ismet Memišević was taken away, and she said he was beaten by Leka Krsmanović, Nikola Savić, Nenad Stefanović, Željko Lelek and many others whose names she could not remember. This witness first stated Memišević was beaten by the Accused, and then she said it was Leka. In this part of her testimony, the witness seemed rather confused with regard to the key detail of identification. Given that she was the only witness mentioning that Ismet Memišević had been taken away, and that her testimony is quite confusing in the relevant part,

the Panel could not beyond reasonable doubt conclude that the Accused was responsible for the taking away of Ismet Memišević.

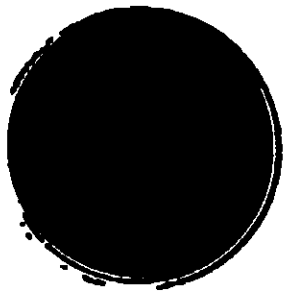
ė) This Count of the Indictment also covers the criminal act of physical abuse of witness S allegedly committed by the Accused. In that regard, the Panel does not find it proved beyond reasonable doubt that the Accused was the perpetrator of the acts for the following reasons.

During the trial, several witnesses were examined who linked the nickname of Leka to other individuals and not to the Accused.

With regard to testimony of the injured party S, she was rather confused when talking about the participation of the Accused in her mistreatment. She mentioned that one of the persons who took part was nicknamed "Leka". In the case, this nickname was mentioned by several witnesses, who linked it to some other persons, not the Accused, which raises reasonable doubt with the Panel that witness S really knows who the Accused Lelek is and can identify him with certainty as the perpetrator. In addition, the Indictment alleges that witness S was physically abused. Physical abuse in itself is not a crime against humanity or a crime against civilians. To establish criminal liability, it is necessary to prove that such physical abuse amounted to torture or other inhuman acts of similar nature. In the case at hand, there is no reliable evidence that the Accused's actions amounted to physical ill-treatment of the injured party S and that this ill-treatment amounted to torture or other inhuman acts of similar nature in relation to the injured party S.

For the reasons set out above, the Panel concludes that the identifications provided by the witnesses in the particular case represent retelling that one of the participants was the Accused Lelek. Therefore, due to incomplete and uncertain identification of the Accused as a participant, the Panel could not determine that the Accused was the person who perpetrated the offenses reported by the witnesses. Witness identifications linking Lelek to the taking away of Tabaković, Fahrudin Cocalić and Ismet Memišević and to the abuse of witness S were based on indirect knowledge about the perpetrator's identity and some of it was mentioned for the first time at the Main Trial but not in the previous statements. In addition, witnesses whose testimony was weak when it came to identification repeated the same information. Each of them used a formulaic recitation about not knowing the Accused at the time of the crime, but that they knew of his father, a traffic policeman, that Lelek's father's name was Čedo and that they were on good terms with his father. Repetition of such claims is not sufficient to identify the Accused as the perpetrator and to convict a person of a serious criminal offence.

<u>Under Count 3</u>, the Accused was charged with coercing Bosniak women by force to sexual intercourse or an equivalent sexual act. With regard to this Count of the Indictment, the Panel finds that it was proved that the Accused committed the criminal acts described under 3(c) and 3(d) concerning the injured parties M.H and C.



Article 172(1)(g) of the CC of BiH defines rape as:

- *Coercing another by force or by threat of immediate attack upon his life or limb (...);*
- *To sexual intercourse or an equivalent sexual act.*

Under 3(c), the Accused was charged with coming to the Vilina vlas spa in June 1992, where the protected witness M.H. was present. She was brought there under threat and by force on a daily basis and raped by Milan Lukić, as well as other soldiers, including the Accused Željko Lelek, who cursed and insulted her on ethnic grounds.

The injured party, witness M.H testified at the main trial. She stated she lived in Višegrad before the war. She was brought to the Vilina vlas spa by Milan Lukić who ordered and threatened her to come to the spa every day at the same time, and ordered her not tell anyone anything about that. Several days in a row she was brought there by Milan Lukić. She stated that she was first raped on multiple occasions and mistreated in the spa by Milan Lukić and another man, and later other soldiers came in camouflage uniforms, meaning that her mistreatment lasted for hours. The spa was under the control of armed Serb soldiers and paramilitary forces. She was later relocated to another room where she found witness D. Several other Muslim women were held in the spa. The witness stated that various mistreatment and rapes occurred on a daily basis. On one of the days when she was brought to the spa, the witness stated, Željko Lelek came to the room she was in with other women. He took her out to another room and coerced her to have sexual intercourse with him. When Lelek took her out of the room, he slapped her several times, insulting and cursing her "Balija mother". She also stated that while she stayed at the spa, she heard screams and crying from other rooms. Soon thereafter she managed to avoid having to again go to the spa. She left Višegrad in mid-June 1992 in an organized convoy. As for the Accused Lelek, she stated she had known him from before and that in addition to that one time at the spa, she saw him again when her convoy was leaving, as he was escorting her bus. He sat in the front, next to the driver, wore uniform, and had ammunition belts and an automatic rifle.

The Defence contested the credibility of this witness, stating that there were inconsistencies between her testimony at the trial and the statement given during the investigation. For example, concerning the fact whether she knew one Jasmina and how many times she saw the Accused during those events. In addition, Defence witness Dragoljub Ivanović, who often had been in contact with the witness, noticed no signs on her that she was subjected to violence or that something happened to her at the spa. In answer to his question whether she had ever experienced any "bullying", she stated only once but did not say where and when. Regardless of the Defence objections, the Panel finds that the testimony of witness M.H. contains no significant inconsistencies that would affect the credibility of her testimony. The Panel finds that such inconsistencies in testimonies, especially given by victims of such offences, can surely be attributed to the passage of time and, hence, to the poor

quality of recollection, and her traumatic experience preventing her from observing the details. However, the testimony of the witness in the key parts pertaining to the identification of the Accused and the overall account of the events is sufficient and reliable.

With regard to this Count of the Indictment, the Accused was charged with Crimes against Humanity committed by the act of raping M.H. According to Article 172(1)(g) of the CC BiH the criminal act of rape is committed by, inter alia:

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

The description of the offence about which the witness testified makes it clear that the acts of the Accused satisfy the elements of the act of rape as referred to in subsection (g) of Article 172(1) of the CC BiH if taken into account that this act was committed while the witness was on the premises of the Vilina vlas spa, which was completely under control of Serb formations, without any possibility of escape and that she was abused before and during the rape, which surely caused fear for and anxiety about her life. This is additionally emphasized by the fact that she heard screams and cries from other rooms and that the Accused beat and insulted her during the rape.

Raping the witness also constitutes torture, because the rape necessarily gives rise to severe pain and suffering.[6]

Pursuant to Article 172 (2)(e) of the CC of BiH, the elements of torture are:

1) *Intentional infliction;*
2) *Of severe pain or suffering, whether physical or mental;*
3) *Upon a person in the custody of the Accused.*

The International Criminal Tribunal for Rwanda (ICTR) and the ICTY have concluded that, according to customary international law, in order for rape to be an act of torture it is necessary that the infliction of the severe pain or suffering is for the purpose of "obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person."[7] *Some actions per se imply suffering on the part of those subjected to them. Rape is such an act; sexual violence inevitably leads to severe pain or suffering and thus the qualification of this act as torture is justified.*

This incident surely caused severe suffering, mental pain and disgust with the injured party. The very fact that non-Serb women and girls were forcibly brought to the Vilina vlas spa, by armed men, under physical threat against them and their families, and that they were imprisoned precisely to be sexually and physically abused surely

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[6] *Kunarac Trial Judgment, paras. 149, 150.*
[7] *Akayesu Trial Judgment, para. 594; Kunarac Trial Judgment, paras. 485, 497.*

causes terrible suffering and the feeling of helplessness with the victim who is placed there, completely helpless and without any possibility to protect herself or avoid sexual abuse. As the witness stated, she was brought to the Vilina vlas spa and was raped for the exclusive purpose of the perpetrator's sadistic abuse because of her ethnic affiliation and for purposes of illicit discrimination. The witness described multiple and merciless sexual abuse she was subjected to while she was in the spa and which resulted in internal and external physical injuries and bleeding. The Accused found her when her physical injuries were bad and made her suffering even worse by raping her despite her physical condition and beating and insulting her despite her obvious suffering. The intensity of her suffering is confirmed by the fact that several days after this torture she could no longer stand it and escaped from her home and hid, although she was certain that Lukić would make good on his threat made against her and her family if he found her.

The Accused himself committed the act of rape, which makes him an individual perpetrator. The Accused was aware of all prohibited goals due to which the witness was going to be raped and he wanted that outcome. Given that the Panel concluded that the rape constitutes torture as well his intent encompasses both effects of his act.

3d). In this subparagraph of the Indictment, the Accused is charged with perpetration of an act equivalent to sexual intercourse against victim C, pursuant to Article 172(1)(g) of the CC of BiH.

The victim C herself testified about this. She stated that she had resided in Višegrad prior to the war. She stated that around 13 June 1992, Lelek came to her house, with another person unknown to her, and asked for gold and money. He was looking for her daughter, son and husband, and she told him that they had been taken away. As he did not find anything, "He continued to sadistically abuse her," the witness said. He beat her and, as she says, he forced her "to fondle his sex organ." She said that during that time, he cursed her "Turkish mother" and asked her if she was "disgusted because he was a Serb." Soon after that, Ljubiša came and told him to leave her alone. Only then did Lelek leave, and she did not see him afterwards.

She said that she had known the Accused from before that time, that he was a nice young man, that she often saw him in town at his father's place who was a traffic policeman, and she identified him in the courtroom as the perpetrator of this act.

The Defense pointed to the fact that the Accused was not a member of Momir Savić's unit, whose members were Ljubiša Savić, Zoran Tešević and others, and this was confirmed by the witness for the Defense Nedeljko Stefanović. However, the injured party C never claimed that the Accused had been in this unit; she only stated that she had seen him at that time with the other persons she saw and identified as persons she had known before, and this turned out to be true, as one of those members recognized and saved her.

Therefore, it is true that the Accused was not a member of Momir Savić's unit, but the fact is that this witness identified the Accused as the perpetrator because he had lived in Višegrad for many years and she often saw him as a young man with his father Čedomir. So, if the fact that she is not only a direct eyewitness but also the victim of the perpetrated act is taken into consideration, her statement in terms of a description of the events is consistent and reliable.

In relation to this count of the Indictment, the Accused is charged with Crimes against Humanity committed by coercing another person to an act equivalent to sexual intercourse, in this case the victim C. However, the Panel finds that the actions of the Accused contain the elements of "coercing another person by force or by threat of immediate attack upon her life or limb... to [an]other form of grave sexual violence."

Article 172(1)(g) of the CC of BiH includes the following elements:

- *Coercing another by force or by threat of immediate attack upon his life or limb (...);*
- *to any other form of severe sexual violence.*

In international law, severe sexual violence is defined as any severe abuse of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity.[8] Unlike the act of coercing another to sexual intercourse or an equivalent sexual act, the ICTY defines sexual violence as "broader than rape and include[ing] such crimes as... molestation."[9] The acts of the Accused fit this definition precisely.

Witness C was coerced by force and threats against her life and physical security when the Accused, who was armed, came to the house of the witness with one more person, demanding that she give him money. Considering that she was alone in the house, facing uncertainty and afraid for her life and fate, and that the Accused cursed at her, physically assaulted her and generally acted in a violent manner, the Panel concludes that he took advantage of her situation to coerce her to a certain act of a sexual nature. Because of the special circumstances, – specifically, this event took place during the attack against civilians; the conduct of the Accused was part of that attack; and being an elderly woman coerced to such an act – she experienced humiliation and degradation of her human dignity and she felt afraid and ashamed. From all these circumstances, the Panel concluded that this act of the Accused was a severe form of sexual violence to which the victim was subjected. The Panel determined that "severe sexual violence" is a more precise way to describe the crime committed by the Accused against witness C than the wording "an equivalent sexual act (rape)" as initially referred to by the Prosecutor in the Indictment. Both acts constitute a crime against humanity as provided in Article 172(1)(g) of the CC of BiH, but severe sexual violence constitutes a more accurate charge, and the charge which

[8] *Prosecutor v. Stakic, IT-97-24-T, Judgment, 31 July 2003, para. 757.*
[9] *Prosecutor v. Kvocka, et al., IT-98-30/1-T, Judgment, 2 November 2001, para. 180.*

has been proven beyond doubt. In doing so, the Panel also considered that a sexual act equivalent to sexual intercourse implies penetration of a sex organ, an object or some other body part in any part of the victim's body. In this particular case, the Accused did not penetrate witness C.

In both sub-counts 3c and 3d, the Accused acted with direct intent and as an individual perpetrator, although in a wider context these acts took place in the presence of other members of the military and police.

With regard to the remaining two subparagraphs of Count 3 of the Indictment, the Panel concluded, based on the presented evidence, that witnesses A and D were in fact the victims of the acts described in subparagraphs (a) and (b) and that these acts, by their nature, represent grave violations of the rights of the victims, which most certainly caused horrible suffering to them that, as the witnesses stated, is felt even today.

However, without in any way diminishing the significance of the act and the suffering of the victims, the Panel concluded that there was insufficient evidence that the Accused is the person responsible for the commission of the described acts against them. Witnesses A and D are the only witnesses for each of these subparagraphs, and although their testimony on each of the incidents is to a large extent reliable so that no other witnesses are required to establish the facts on which they testified, their identification of Lelek as the perpetrator is insufficient and cannot be regarded as evidence beyond reasonable doubt, although they as victims cannot be blamed for that.

<u>In Count 3(a)</u> the Accused is charged with the crime of rape in violation of Article 172(1)(g) of the CC of BiH, perpetrated in April 1992, when he came to the Vilina Vlas spa, where the witness A was receiving medical treatment. Witness A, during the time she was in the spa, was repeatedly raped by Milan Lukić and other unidentified soldiers. Željko Lelek is also accused of raping her, insulting her harshly, cursing and beating her.

The injured party witness A testified about having had a car accident in January 1991, and coming to the spa for medical treatment. In late March or early April 1992, she was a victim of maltreatment and multiple rapes in the spa. Still suffering from injuries sustained in the previous incident, because of which she was under medication, she survived a horrible ordeal. She did not know Lelek before the war, but she knew his father. She stated she could not stand to look at the attackers, and she only remembered that one of them, whom she now believes to be Lelek, had protruding teeth. Her testimony, in which what she stated in the direct examination differs from what she stated in the cross-examination (and both are inconsistent with her previous statements), is contradictory in terms of the identity of the perpetrators of the rape. For example, witness A said in her statement given during the investigation to the Prosecutor's Office that Milan Lukić, who was alleged to have been there as well, called one of the rapists (who according to the Prosecutor was Željko Lelek) by

the last name Lelek, while during the direct examination at the main trial she stated that he referred to him as Željko and Žele and that it was Željko Šušnjar. Likewise, during the direct examination she stated that the Accused had raped her during the first two days she was assaulted, while in the cross-examination she stated that it was Željko Šušnjar who raped her during the first two days and not the Accused. In addition, during the investigation she stated that Duško Andrić raped her every day while at the main trial she stated that he raped her only on the second day. Furthermore, during the main trial she stated that, on the first day, the Accused came with an unknown soldier and raped her and that the soldier referred to him as Željko; while in the statement given during the investigation she stated he came only with Lukić and Lukić came on the second and third day and Lukić referred to him only as Žele; and then she stated again that Lukić came only the last two days before she left the spa. It follows from such evidence that the only thing linking the Accused with a crime is that one of the rapists was referred to as either Lelek or Žele or Željko; by either Lukić or the unknown soldier; that the rapist referred to had protruding teeth, but there is no other physical description because the victim, understandably, could not bear looking at her attackers, as she herself stated. Likewise, the victim could not identify the Accused in the courtroom when asked to do so by the Prosecutor. It was only after the Defense Counsel introduced himself and stood by the Accused that she pointed to the Accused as the perpetrator.

It is indisputable that Witness A is trying to tell the truth and that she survived the rape and torture she described. It is understandable that she cannot identify with certainty and consistency the perpetrators of the crimes she suffered. However, bearing in mind the standard of proof beyond doubt, this Panel cannot conclude that the evidence of identification is sufficient to establish that the Accused is guilty of the rape and torture of witness A.

<u>Similarly, Count 3b</u> of the Indictment also charges the Accused with having arrived in the Vilina Vlas spa in June 1992, where Bosniak women were unlawfully detained, including witness D. Witness D had been brought to the spa earlier, and she was repeatedly raped and physically and mentally abused by Milan Lukić and other unidentified soldiers; the Indictment alleges that, among others, the Accused Željko Lelek also raped her. Witness D stated that, at that time, she did not know Lelek. She thought that it was Lelek because after the incident another person had told her that her assailant must have been Željko Lelek. Witness D escaped the spa when she was saved by one of her neighbors and after that left Višegrad. After the war, when she visited Višegrad, she states that she met and recognized Lelek. The testimony of this witness is questionable from several aspects. First, in her statement given to the Prosecutor's Office the witness stated that she had known the Accused Lelek, whereas at the main trial she first stated that she had known him, but later on she said that she had not known who he was at the time of these events. Although she claimed that she had heard from another woman at the spa that one of the rapists was Lelek, she could not explain how that woman knew. Also, she did not disclose the name of that woman or any details accounting for this second-hand identification. While in her earlier statement she said that her neighbor saved her, she did not wish to talk about that at

[redacted]

the main trial. She demonstrated more confusion with regard to her statement that she had seen Lukić killing her son before she was taken to the spa. In her testimony during the main trial she stated that after she left the spa she went home to look for her son. Other witnesses confirmed as well that she had asked them about her son after she escaped from the spa. Her confusion can be explained by the torture she survived. However, this evidence is insufficient to conclude beyond any doubt that the Accused is indeed the person who committed this offense charged against him under this Count.

The confusion of the witnesses resulted in testimony that was inconclusive, and although that can be attributed to poor memory due to the trauma they suffered and the passage of time, the inconclusive testimony cannot be a basis for conviction, because in the key parts they do not point to a reliable recognition and identification of the Accused as the perpetrator.

<u>In relation to Count 4</u> of the Indictment, the Accused is charged with two acts committed in May 1992: assisting the imprisonment of Muslims in the police station and torturing a young man named Salko. With respect to this Count of the Indictment, the witnesses Enver Džaferović, Suvad Dolovac and Suvad Subašić were heard, and the Panel established the responsibility of the Accused only for his participation in the unlawful imprisonment of several persons of Bosniak ethnicity, and this was primarily based on the statements of the injured parties Subašić and Dolovac; whereas with respect to the allegations that the Accused tortured a young man called Salko, the Panel found that the testimony of witness Džaferović, who testified about the torture of the young man in the corridor of the police station, is too contradictory to support the charge of torture beyond any doubt.

Pursuant to Article 172(2)(e) of the CC of BiH the elements of torture are:

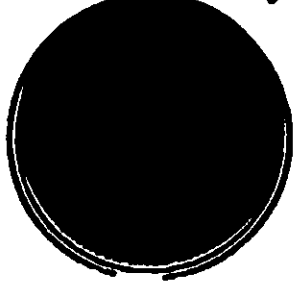
- *Intentional infliction;*
- *Of severe pain or suffering, whether physical or mental;*
- *Upon a person in the custody of the Accused.*

The statements of injured parties-witnesses Suad Dolovac and Suvad Subašić are consistent in stating that they were brought to the police station in late May 1992 and that they were detained there for several days. They were in a room which had bars on the door. The witnesses Subašić and Dolovac stated that one night they saw the Accused Lelek in the police station. They think that he was a policeman on duty, because the Accused had the key and controlled entry to their cell. The witnesses claim that Enver Džaferović, Čelik Ahmed, Nezir Žunić, Osman Kurspahić and Safet Tvrtković and others were also detained in the station during the same period. Suad Dolovac and Suvad Subašić stated consistently that one night during their detention, a young man named Salih or Salko was brought to the police station, though the witnesses did not use the same name when referring to this person. They stated that the young man was brought by Lukić and that he had already been beaten before that,

and that they heard him being abused in the corridor before he was thrown into their cell.

The witness Enver Džaferović stated that the Accused Lelek took the young man out to the hallway at one point after he was brought to the station and started beating him. The witness alleges that he saw the Accused forcing this young man to curse at himself, to say that it was all Alija's fault, and that the Accused took him by the head and knocked his head against the wall and kicked him with his knee in the crotch area. The witness stated that he was able to see all that as he was sitting near the door from which he could see down the hallway. The witness Suvad Subašić spoke differently of this event, testifying that the young man, whom he referred to as Salih, was beaten in the hallway immediately after being brought to the police station, and that the persons placed in that room could not see the hallway. He heard the Accused ordering the young man to slap himself, and he learned from another detainee, Nezir Žunić, that it was the voice of the Accused Željko Lelek, whom Nezir Žunić knew well. The witness Suad Dolovac stated that the young man was beaten in the hallway immediately after being brought to the station by a person they were not able to see, and that he was covered in blood and thrown into the cell where other persons were by Lelek, whom the witness recognized. Lelek came to the cell later on and ordered the young man to slap himself. Witnesses Subašić and Dolovac further stated that after this young man was brought back to the room, Milan Lukić came the same day, approached the bars on the door, grabbed the young man's head saying "This is how it's done," and slammed the young man's head several times against the bars, as a result of which the young man fainted.

This incident when Milan Lukić came, which is mentioned by both Subašić and Dolovac, is not mentioned by the witness Džaferović at all, even though there is evidence suggesting that Džaferović was in the cell throughout the time the young man was there. Even though all three statements concur at first glance, and in relation to the overall events, the Panel could not align the significant inconsistencies. According to Subašić and Dolovac, the young man was beaten up upon being brought to the police station, but the beating could not be seen from the cell. Witness Džaferović did not testify about this beating, but stated instead that the young man was in the room, taken out and then beaten up. Subašić and Dolovac only heard the beating, but were unable to determine that it was Lelek who did it, although they heard Lelek taunting him. Neither Dolovac nor Subašić testified about any subsequent taking away or beating of this man after he had been brought to the cell for the first time. Dolovac and Subašić are consistent in stating that Lelek ordered the young man to slap himself, although one of them claims that the incident occurred outside the cell while the other claims it occurred inside the cell. Džaferović did not testify about this. Finally, the most striking recollection of both Dolovac and Subašić is that Lukić grabbed the young man's head and slammed it several times against the bars. Džaferović never mentioned this incident in his testimony, although he was specifically asked about the presence of Lukić in relation to this young man. The witness denied this. All three witnesses were indisputably present in the cell throughout the time the young man was there. The Panel finds that the testimonies of



Subašić and Dolovac, which significantly support each other with regard to important details, are the most credible and reliable recollections, and, based on that evidence, the Panel concludes that the young man was brutally beaten by somebody, that Lelek was present in the police station when the young man arrived, and that Lelek taunted the young man and ordered him to slap himself. However, this evidence is not sufficient to conclude beyond any doubt that Lelek beat the young man or that the acts he undertook led to infliction of serious bodily injuries, an element necessary to establish that the crime of torture was committed, or that Lelek participated in an act of torture of the young man as co-perpetrator or accessory.

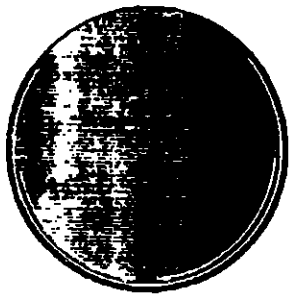
As regards part of Count 4, alleging the imprisonment of certain persons, witnesses Subašić and Dolovac state that they saw the Accused Lelek in the police station, that he occasionally performed the duty of a duty police officer and that he had the key and controlled the entrance to their cell. They are certain that it was Lelek they had the opportunity to see and identify during their detention. That the Accused Lelek committed these acts is clear primarily from the statements of injured parties-witnesses who were direct participants and eyewitnesses. The witness Džaferović was a member of the police in Višegrad in the pre-war period, and he says that Lelek was a reserve policeman in the period when this witness was detained in the police station. The witness Džaferović stated that he knew the Accused Lelek from earlier, and he also knew his father Čedo, who was also a pre-war policeman. The witness Dolovac also knows Lelek from the period before that time, as they lived in the same town and he knows people with whom the Accused socialized.

Analyzing the acts of the Accused, the Panel finds that the elements of a severe unlawful deprivation of liberty were mirrored in these acts, namely:

- *Detention or other severe form of deprivation of physical liberty;*
- *In violation of the fundamental rules of international law;*
- *With direct or indirect intent.*

Based on the evidence presented, the Panel finds that in late May 1992, Bosniaks Muslims were brought to the police station and detained there. The witnesses stated that they had been brought in to be interrogated about their activities and that they were often taken out and beaten. The Panel has in mind that all these events took place during a widespread and systematic attack against the civilian population. None of the detained persons were told why they were brought in. During the entire time they were in the police station, the injured parties were not informed why they were being held, nor was their imprisonment followed by regular procedures of apprehension and decisions on detention. These persons were civilians, without weapons or uniforms.

The Trial Chamber of the ICTY in the Kmojelac case concluded that the "deprivation of someone's liberty is deemed arbitrary, and therefore unlawful, if there are no legal



grounds to justify the initial deprivation of liberty."[10] Evidence proving that the persons deprived of liberty were not informed about the reasons for their apprehension or that the justification of custody was not the subject of consideration in a court or administrative proceedings may suggest that there were no legal grounds for ordering custody.

All witnesses in this case are consistent in saying that they were never informed of the reasons for their detention, and that no proceedings were ever conducted against them, nor were they brought before any court or sent to a police station based on a written order. The Accused, as a police officer who was present at the police station, had reason to know that these men were detained arbitrarily and without any legal procedure. The witnesses are also consistent in their testimony that they were held in a room 5 by 5 meters in size in which about 10 persons were detained for up to seven days and that the room was separated from the hallway of the police station by a locked door with bars. The witnesses further were in accord in stating that there was no proper toilet or possibility to use water; that the duty officer or a designated person had a key to lock and unlock the door and took the detainees escorted by armed guards through the hallway to the toilet; that the police officers at the Public Security Station, including Lelek, were armed; and that there was no way to get out of that room except when permitted to do so by the persons who had the keys. The Panel visited the site and assured themselves that the allegations regarding the size and location of the room were correct. The Accused Lelek, as one of the armed police officers who had the keys, absolutely knew that these men were deprived of their liberty.

Therefore, based on the statements of witnesses Subašić and Dolovac, the Panel concluded that, regarding the acts of the Accused, the elements of the criminal offense of detention, in contravention of international law, were satisfied and that the Accused took part as a co-perpetrator within the limits of his direct intent, and not as an accessory. The Panel came to this conclusion bearing in mind his presence in the police station in the critical period and the fact that he had control over the liberty of detained persons by possessing the key and deciding on when he would unlock the cell, when he would take someone out or bring someone in and when he would lock the cell again. By committing these acts, he jointly participated in the commission of the offenses and decisively contributed to the imprisonment, together with other guards and officers from the police station.

As for his intent, it is indisputable that the Accused was a policeman and that he often came to the police station and moved around the town. He certainly knew that the imprisonment of these persons, referred to in this Count of the Indictment, was not an isolated incident, and it was not justified by any military, combat or other legitimate objectives. The Accused was certainly aware of the unlawfulness of their imprisonment, especially if we take into account the fact that the police station was a smaller building, with small rooms and with relatively high rate of movement by people. The beatings described by witnesses took place right there in the police

[10] *Kvocka et al. Trial Judgment, para. 114.*

[redacted]

station; people were brought in and taken out of the cell. All these events could not have been done in secrecy. If one excludes the consideration of the arrival of the Accused at the police station and his presence inside on other days, except the day which is the subject of the Indictment, it is clear that the Accused could have been aware of the beating of the young man Salko or Salih, which undoubtedly happened in the hallway of the station, as was confirmed by witnesses, because they stated that the Accused was in the station on that particular day when the young man was brought in and that he was brought back to the cell by the Accused himself. Thus, the Accused was aware of the unlawfulness of the detention of these persons, as well as of his actions in that respect, and he wanted this to happen and therefore he acted with direct intent.

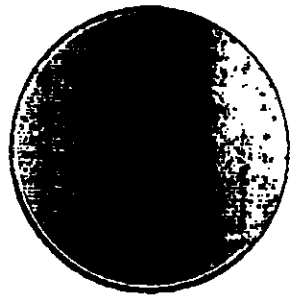
The Defense emphasized that witnesses for the Defense Srećko Ninković, the police commander at the time, and Božo Tešević, a policeman, stated that the Accused Lelek was working as the materiel and technical equipment officer and as such had no access to detention and could not control the imprisonment of people in the station, while the witness Miladina Uljarević, who worked in the police station even in the period relevant for the Indictment, stated that the Accused Lelek had never been a duty police officer, but rather was in charge of issuing goods from the warehouse.

First, the Panel concluded beyond any doubt, on the basis of reliable statements of witnesses Dolovac and Subašić who knew the Accused, that the Accused was in the station on the critical day. In addition, these two witnesses confirmed that he had the keys and that he was unlocking the cell as necessary. In the end, whether he was a de jure police duty officer and what his specific powers were is not relevant. The Panel finds that the fact that he was there, armed, and that he, as a practical matter, controlled entrance to and egress from the cell, he decisively contributed to the unlawful imprisonment of people who were held in the cell of the police station, knowing that their imprisonment was arbitrary and in contravention of internationally protected rights.

The ICTY Appeals Chamber stated in the Ćelebići Appeals Judgment:

> *"A person authorized to release a prisoner, who knows that prisoners are entitled during their apprehension to have their imprisonment revised and who knows that this right is violated, it is the duty of that person to release them from detention. Therefore, failure on the part of the person with such authorities to use his authority and release them... committed the offense of illegal imprisonment of civilians even if he himself is not responsible for observance of their procedural rights."*[11]

[11] *Prosecutor v. Delalic ("Celebici"), IT-96-21-A, Judgment, 20 February 2001, para 379.*



C. The Indictment charges the Accused with perpetration of the criminal offense of Persecution, in violation of Article 172(1)(h) of the CC of BiH, by committing the described acts that, the Panel notes, he was found responsible for, partly in Counts 2, 3(c), 3(d) and partly in Count (4).

According to the legal definition, the criminal offense of persecution as a Crime against Humanity consists of the following:

1) *Severe deprivation of fundamental rights,*
2) *Of any group or collectivity (including the attacks against individuals by reason of the identity of that group);*
3) *With the intention to commit this criminal offense; and,*
4) *Specific intention to discriminate on political, national, ethnic, cultural or religious grounds; and*
5) *In conjunction with any criminal offense referred to in Article 172(1), any criminal offense stipulated in the CC or any criminal offense within the jurisdiction of the Court of BiH.*

The Panel agrees with the reasoning of other Panels of the Court of BiH and the previous jurisprudence in other cases that multiple commissions of the crime of persecution can be considered as a single criminal offense defined as persecution as a crime against humanity, even if those acts individually constitute other crimes against humanity.[12] *When considering the criminal liability of the Accused, the Panel will analyze whether each of the above-mentioned and established offenses was committed with the discriminatory intent.*

First, the Panel generally concludes that all the above-mentioned and established crimes were committed with the intent to commit, and constitute, a severe deprivation of fundamental human rights in violation of international law, whereby the first and second element of the criminal offense of persecution have been met. In addition, considering that the above-mentioned and established crimes constitute criminal offenses referred to in Article 172(1) of the CC of BiH, the Panel concludes that the "in conjunction with" requirement has also been met. The Panel further concludes that the victims under all Counts are Bosnian Muslims, or non-Serbs, and that none of these crimes was committed against a person of Serb ethnicity.

The Panel concludes in addition that each incriminating act committed by the Accused was committed with specific discriminatory intent and behavior of the Accused towards the victims, and that this specific intent indicates that the intention for all the described acts was precisely discriminatory – treating a victim differently because of

[12] *See e.g., Rašević and Todović, X-KR/06/275 (Ct. of BiH), First Instance Verdict, 28 February 2008, pg. 101; Nenad Tanasković, X-KR/05/165, First Instance Verdict, 24 August 2007; Dragan Damjanović, X-KR-05/51 (Ct. of BiH), First Instance Verdict, 15 December 2006; Radovan Stanković, X-KR-05/70 (Ct. of BiH), First Instance Verdict, 14 November 2006, p. 34; Nikola Kovačević, X-KR-05/40 (Ct. of BiH), First Instance Verdict, 3 November 2006, pp 43-44.*

their different ethnic, national, religious or political background, contrary to the rules of international law. This conclusion is based on the actual words and acts of the Accused during the commission of these crimes.

Based on the presented evidence, the Panel concluded in Count 2 that the Accused acted with the specific intent to discriminate against the victims because they belonged to the Muslim-Bosniak ethnic group. With regard to the persons who were taken away, Ahmatspahić and Osmanbegović, and the forcible transfer of population, he acted with intent, aware of the fact that they were Bosniaks, against whom an ongoing attack was taking place in those days. In addition, the Accused ordered Zejneba Osmanbegović and her mother to take their clothes off, referring to them as "bulas".

In Count 3(c), this specific intent is reflected in the fact that while raping this victim, whom he knew was Bosniak, because in that period Bosniak women were brought from Višegrad to Vilina Vlas and systematically abused, he cursed her "balija's mother", which is a derogatory term for Bosniaks-Muslims.

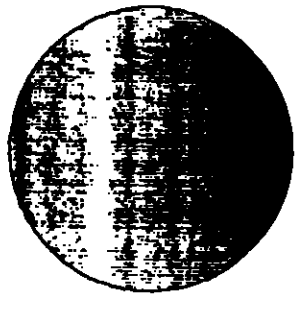
In Count 3(d), this specific discriminatory intent is reflected in the fact that the Accused, while sexually abusing the witness C, asked "if she was disgusted because he was a Serb" cursing her "Turkish mother", which showed his intent to and awareness of treating her differently because of her ethnicity.

Also, in Count 4, the discriminatory intent is reflected in the fact that the Accused knew that, while he was there, Muslim men were being brought into the PSS Višegrad, who were interrogated and beaten there just because of the fact that they were Muslims. The Accused knew at least one of the detainees, Enver Džaferović, and he knew the ethnic group to which this detainee belonged.

When all these acts are analyzed as a whole, and when they are put in the context of a widespread and systematic attack against Muslim civilian population, part of which the acts of the Accused were established to have been, it is clear that this criminal offense in its entirety assumes the form of the persecution of civilian Muslim population in Višegrad.

The Accused is responsible for all the specified acts as an individual perpetrator of the criminal offense, pursuant to Article 180(1) of the CPC of BiH, and as a co-perpetrator in the acts described in Counts 2 and 4 of the Indictment, in the manner as established in this Verdict.

Therefore, based on all presented evidence, the Panel decided as stated in the operative part hereof. As for the other presented evidence with respect to all Counts of the Indictment, the Panel evaluated them, but found that they did not decisively affect the decision.



D. As for Counts 1 and 2 of the previous Indictment, the Panel applied Article 283(3) and delivered the verdict dismissing charges, considering that the Prosecutor's Office BiH dropped these charges by filing an amended Indictment. The Prosecutor orally confirmed that these charges were dropped at the main trial held on 18 April 2008.

Application of substantive law

As for the substantive law to be applied to this criminal offense, in the context of the time when the criminal offense was committed, and bearing in mind all objections of the Defense in this respect, the Panel decided as stated in the operative part hereof while applying the following provisions:

Article 3 (2) of the CC of BiH – principle of legality – which pertains to the principle of legality reads: "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."

The actions constituting the criminal offense in this particular case were committed during 1992, at the time when the then CC of SFRY was in effect which did not provide for the criminal offense of a specific title – Crimes against Humanity – as a separate offense. The new CC of BiH defines it as a separate criminal offense. According to the legal theory, the law which is in effect at the time of perpetration of an act and which does not qualify such an act as a criminal act should be considered as a more lenient law. In that case there would be an obligation to apply a more lenient law, because if the law has been amended since the time of perpetration of the criminal offense, it would be necessary, according to the principle of legality, to apply the previous criminal code and it would be prohibited to use the criminal code retroactively to the prejudice of the perpetrator.

However, when there are cases of the criminal offenses of Crimes against Humanity which were not defined in the laws that were in effect in Bosnia and Herzegovina during the conflict between 1992 and 1995, the Panel is of the opinion that this criminal offense is contained in the customary international law which was in effect during the perpetration, and in addition to that it was defined in the then Criminal Code of SFRY in individual criminal offenses stipulated in Article 134 (Inciting national, racial or religious hatred, strife and animosities), Article 142 (War crimes against civilians), Article 143 (War crimes against the wounded and sick), Article 144 (War crimes against prisoners of war), Article 145 (Organizing a group of people and instigating the perpetration of genocide and war crimes), Article 146 (Unlawful Killing or Wounding of the Enemy), Article 147 (Marauding the killed and wounded on the battlefield), Article 154 (Race discrimination and other forms of discrimination), Article 155 (Establishment of slavery and transport of slaves) and Article 186 (Violation of inequality if citizens). Therefore, even though Article 172 of the CC of BiH now prescribes this act as a separate criminal offense, it existed anyway, even at the time of the perpetration of the criminal offense, as an act

prohibited by international norms and indirectly in the abovementioned criminal offenses which were in force at the time.

The customary status of punishability of crimes against humanity and holding individuals criminally responsible for the commission of these crimes during the period of 1992 was confirmed by the UN Secretary General[13], International Law Commission[14], as well as the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)[15]. These institutions found that punishing crimes against humanity is an imperative norm of the international law or ius cogens[16], and therefore it is undisputable that the crimes against humanity were part of the customary international law in 1992.

Article 4a) of the CC of BiH refers to „general principles of international law". As neither international law nor the ECHR have an identical term, this term represents the combination of "principles of international law" on the one hand, as recognized by the UN General Assembly and International Law Commission and "general principles of the rights recognized by the community of peoples" contained in the Statute of the International Court of Justice and Article 7 (2) of the ECHR.

Principles of international law, as recognized in the Resolution of the General Assembly No. 95 (I) (1946) and International Law Commission (1950) pertain to the "Nurnberg Charter and Verdict of the Tribunal" and therefore crimes against humanity, as well.

„Principles of international law recognized in the Charter of the Nurnberg Tribunal" and the verdict of the Tribunal which was adopted in 1950 by the International Law Commission and submitted to the General Assembly, the principle VI.c. provides for Crimes against Humanity punishable as the crime in violation of international law. Principle I reads: „ Any person who commits an act which constitutes a crime under international law is responsible, therefore and liable to punishment". Principle II provides that _ „ The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." Thus, regardless of whether we look at it from the customary international law point of view or the "principles of international law" viewpoint, there is no doubt that Crimes against Humanity constituted a crime in the period relevant to the Indictment, that is, the principle of legality has been satisfied.

Legal grounds for trial and punishment for criminal offenses under general principles of international law are provided in Article 4a of the Law on Amendments to the

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[13] *Report of the UN Secretary General regarding the paragraph 2 of the UN Security Council Resolution No. 808, dated 3 May 1993, paragraphs 33-34 and 47-48;*
[14] *International Law Commission, Comment on the Draft Code on Crimes against Peace and Security of Mankind (1996), Article 18*
[15] *ICTR, Trial Panel in Akayesu case, 2 September 1998, paragraphs 563-577*
[16] *International Law Commission, Comment on the Draft Article on the Responsibility of States for Internationally Wrongful Acts (2001), Article 26*

Criminal Code of BiH ("Official Gazette of BiH" No. 61/04) which prescribes that Articles 3 and 4 of the Criminal Code of BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. This Article has entirely taken over the provisions of Article 7 (2) of the ECHR and it allows for extraordinary departure from the principles set forth in Article 4 of the Criminal Code of BiH, as well as the departure from the mandatory application of a more lenient law in the proceedings for a criminal offense under international law, such as the proceedings against the Accused, because these charges specifically include violation of the rules of international law. In fact, Article 4a of the Law on Amendments to the Criminal Code of BiH is applied to all criminal offenses related to war crimes, because precisely these criminal offences are contained in Chapter XVII of the Criminal Code of BiH, titled as Crimes against Humanity and Values Protected by International Law, and crimes against the humanity have been accepted as part of the customary international law and they represent a non-derogating provision of international law.

When these provisions are related to Article 7 of the European Convention on Human Rights (hereinafter the ECHR) which has priority over any other law in BiH (Article 2.2. of the Constitution of BiH), it may be concluded that the principle of legality referred to in Article 3 of the Criminal Code is set forth in the first sentence of Article 7 (1), of the ECHR, while the second sentence of Article 7 (1) of the ECHR prohibits that a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. Therefore, this provision prescribes the prohibition of imposing a heavier penalty but it does not prescribe mandatory application of the law more lenient to the perpetrator in relation to the penalty that was applicable at the time the criminal offence was committed.

However, Article 7(2) of the ECHR contains the exception to paragraph (1) and it allows for the trial and punishment of any person for any act or omission which, at the time when it was committed or omitted, was criminal according the general principles of law recognized by civilized nations. The same principle is contained in Article 15 of the International Covenant on Civil and Political Rights. This exception is included with the specific objective to allow the application of national and international legislation which came into effect during and after the World War II regarding war crimes. Accordingly, the case law of the European Court of Human Rights (Naletilić vs. Croatia No. 51891/99, Kolk and Kislyiy vs. Estonia, No. 23052/04 and 4018/04) emphasizes the applicability of paragraph (2) rather than paragraph (1) of Article 7 of the European Convention when dealing with these offenses which also justifies the application of Article 4a of the Law on Amendments to the Criminal Code of BiH in these cases.

This issue was also discussed by the Constitutional Court of BiH in the appeal of A. Maktouf (AP 1785/06, and in its decision of 30 March 2007 it stated: "Paragraph 68. In practice, no country of former Yugoslavia in their legislations provided a possibility of imposing lifetime imprisonment or penalties of long ter[redacted]risonment

which was often done by the International Criminal Tribunal for former Yugoslavia (cases of Krstić, Galić etc.). At the same time, the concept of the CC of SFRY did not prescribe long term imprisonment or lifetime imprisonment; rather, it prescribed death penalty for the most severe criminal offenses and prison term of not longer than 15 years for less severe forms of crime. Therefore, it is clear that one penalty cannot be separated from the overall objective which was to be achieved with the penal policy at the time that Code was in effect. "Paragraph 69. With regard to that, the Constitutional Court is of the opinion that it is not possible to simply remove one sanction and apply other, more lenient sanctions, and thereby basically leave the most severe criminal offenses inadequately sanctioned."

The principle of compulsory application of the more lenient law, in the view of the Panel, is excluded in prosecuting those criminal offenses which at the time of their perpetration were absolutely foreseeable and generally known to be in contravention of general rules of international law.

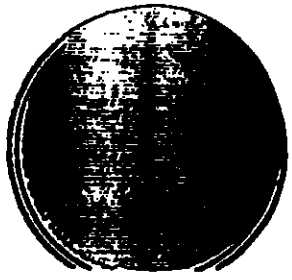
Analyzing Article 172 (1) of the Criminal Code of BiH, it is evident that this act is a part of a group of criminal offenses against humanity and values protected under international law (Chapter XVII, CC of BiH). This group of acts is specific because it is not sufficient to perform a specific physical activity and commit the criminal offense, but it also requires the awareness of the fact that international rules are violated by committing those acts, and the assumption that the perpetrator must know that the period of war, conflict or animosity is critically sensitive and especially protected under principles of international law, and as such this act becomes even more significant and its commission has more severe consequences than if the crime was committed in some other period or under different circumstances. Therefore, the application of the CC of BiH, in the view of the Panel, is justified and in accordance with normative regulations which set the standards for observance of human rights.

Related to that is the meting out of the penalty, because Article 7 of the European Convention on Human Rights also includes the regime of criminal sanctions. Article 172 (1) along with the listed items of the CC of BiH, prescribes imprisonment for a term of not less than ten years or a long-term imprisonment.

I Sentencing that is Necessary and Proportionate to the Gravity of the Crime

In regard to the criminal act itself, the Court considered the punishment that was necessary and proportionate to the following statutory purposes, and the relevant statutory considerations.

(A) The sentence must be necessary and proportionate to the danger and threat to the protected persons and values (Art. 2 of the CC of BiH). *In connection with this the Court will also keep in mind the statutory consideration which specifically affects this purpose, that is, the suffering of the direct and indirect victims (Art. 48 of the CC of BiH). The direct victims of this offence were Hasan Ahmetspahić, Nail Osmanbegović, Zejneba Osmanbegović, the mother of Zejneba Osmanbegović, Protected witness*

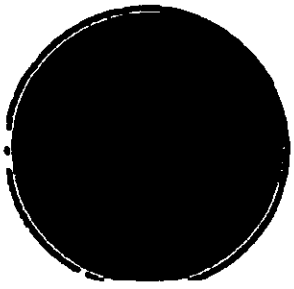


M.H., Protected witness C, Suvad Subasic, Enver Dzaferovic, Safet Tvrtkovic, Nezir Zunić, Osman Kurspahić, Abid Murtić, Suvad Dolavac, the brother of Suvad Dolovac, and a young man, AKA Salko, and the women and children separated from their husbands, fathers and brothers and forced to join convoys to illegally expel them from their homes.

The suffering of the direct victims was significant. Hasan Ahmetspahić and Nail Osmanbegović were arbitrarily deprived of their liberty by Lelek and two other people and while illegally in their custody Nail and Hasan were beaten and terrorized, Nail to the point of speechlessness. Hasan was also stabbed. Zejneba and her mother, an 80 year old woman, were terrorized and threatened and caused extreme emotional injury by having their homes forcibly entered by Lelek and two others in the middle of the night, robbed, and forced to strip naked and remain that way for nearly an hour. In addition they were caused the anguish of witnessing the suffering of Nail and Hasan, and Zejneba was forced to contribute to that suffering by being ordered at gun point to sit on Hasan's chest, an act which made his stab wound spurt blood. That anguish was compounded when the two men were taken away by Lelek and the other two co perpetrators and never seen alive again. Zejneba testified that ever since, she experiences suffering from the emotional injuries inflicted on her that night, on a daily basis. In addition, although Hasan's body has been found, Zejneba continues to search for the remains of Nail, unassisted by any information as to where he was taken.

The suffering to rape victim MH is also ongoing. Although it may not be possible to establish the percentage to which Lelek's crime contributes to that suffering, and the witness testified that others who raped her at Vilina Vlas Spa were more brutal than Lelek, it is sufficient to note that it did in fact contribute significantly. MH was already in an obvious mutilated physical condition when Lelek raped her having been sexually and physically brutalized by several others in the days and hours preceding. MH was also a woman Lelek had known since his childhood, and his act was both a violation of trust in their acquaintance as well as infliction of severe mental and physical pain. The suffering of severe sexual violence experienced by protected witness C was both physical and psychological. Lelek's attack of her occurred in her own home, where she was terrorized at gunpoint, endured physical beating, robbed of her possessions, insulted, and forced to witness Lelek exposing his genitals to her and to physically touch and stroke his exposed penis, which Lelek forced her to do until ordered to stop by Ljubiša Savić.

The men detained in the police station endured physical suffering when they were forced to spend several days crowded into a small room, the dimension of which was 4m by 4m. Many had been beaten before their detention and were suffering from injuries for which no medical help was provided. In addition, Salko, a young man in his teens, experienced beatings both before his illegal detention in the police station, and during that detention as well, to the point that he was covered with blood and lost consciousness. Lelek, as one of the armed officers whose presence assured the continued illegal imprisonment contributed to the suffering of all detainees. He



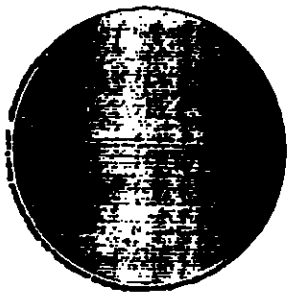
contributed to the suffering of Salko directly by threatening him, taunting him, and ordering him to slap his own face which was already bleeding profusely from wounds recently inflicted.

The suffering of those transported from Višegrad in the convoy on which Lelek acted as an armed guard included the anguish caused by enforced separation from male family members, the fear from threats made directly and indirectly against them which coerced their leaving, the despair of having no choice but to leave home, possessions, community and personal ties, and the hopelessness of being forced to a strange community with nothing to sustain them but the few possessions they were able to carry.

The suffering directly inflicted on all these victims caused suffering to their families and their communities as well. The families of Hasan and Nail never saw them alive again and, although Hasan's body was found, no one has ever told his family where he was taken or how he died. In addition, Lelek's actions against the direct victims also negatively impacted on the communities in which they lived because it reinforced the larger effort to ethnically cleanse the Muslim population from the Višegrad area and confirmed to the families and neighbors of these victims that they could not continue to live in their homes and communities. As a result, the culture of the villages, hamlets and wider community of Višegrad was changed and these families and neighbors suffered the deprivation of their homes, community and way of life.

The sentence must be proportionate to this degree of suffering, and in addition, it must be sufficient to (B) deter others from committing similar crimes (Arts. 6 and 39 of the CC of BiH). In times of violent conflict, non combatants are most vulnerable. Crimes committed during these times that are directed at the civilian population as part of the widespread or systematic attack designed to benefit a party to the conflict cannot be tolerated. By punishing sufficiently those individuals who commit such acts, others involved in future conflicts will be put on notice that there is a serious price to pay for engaging in these crimes. The sentence must reflect that in times of conflict, the persons involved continue to have the legal responsibility to obey the law. Without the willing criminal involvement of individuals, it would be impossible for those superiors who conceive of widespread or systematic attacks against civilians to successfully persecute and terrorize an entire population.

In addition, this sentence must reflect (C) community condemnation of the Accused's conduct (Art. 39 of the CC of BiH). The community in this case is the people of Bosnia and Herzegovina, and the international community, who have, by domestic and international law, made conduct of this nature a crime against humanity. However, criminalization of this conduct is insufficient alone to show condemnation of it. Appropriate penal sanctions must be imposed on those who commit these crimes in order to confirm that norms established by international humanitarian law are not merely abstract or aspirational, and that violations of international humanitarian law will not be condoned with impunity.



The sentence must also be necessary and proportionate to the (D) the educational purpose set out in the statute, which is to educate to the danger of crime (Art. 39 of the CC of BiH). Trial and sentencing for this activity must demonstrate not only that crimes perpetrated in time of war will not be tolerated, but that the legal solution is the appropriate way to recognize the crime and break the cycle of private retribution A sentence that fully reflects the seriousness of the act can contribute to reconciliation by providing a legal, rather than violent, response; and promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved. The crime of persecution creates a danger not only to the immediate victims, but to society as a whole in that it contributes to an atmosphere of lawlessness, and promotes and perpetuates inequality and discrimination.

All of these considerations relevant to the criminal acts committed by the Accused led the Panel to believe that the necessary and proportionate sentence reflecting the gravity of the crime itself should be 13 years.

II Sentencing that is Necessary and Proportionate to the Individual Offender

Sentencing considerations must also take into account the statutory requirement of fairness (Art. 39 of the CC of BiH) and the individual circumstances not only of the criminal act but also the criminal actor. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again (Art. 6 and 39 of the CC of BiH); and (2) rehabilitation (Art. 6 of the CC of BiH). Rehabilitation is not only a purpose that the Criminal Code imposes on the Court, but it is the only purpose related to sentencing recognized and expressly required under international human rights law to which the Court is constitutionally bound. ICCPR Article 10(3) provides: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

There are a number of statutory considerations relevant to these purposes as they affect the sentencing of the individual convicted person (Art. 48 of the CC of BiH). These include: degree of liability; the conduct of the perpetrator prior to the offence, at or around the time of the offence and since the offence; motive; and the personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts warrant. The point of these considerations is to assist the Court in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community, but to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

(A) The Degree of Liability

When Lelek committed the offenses of forced transfer and unlawful detention in the police station he was acting under orders of others. However, in the crimes involving Hasan Ahmetspahić and the Osmanbegović family, Lelek acted as a leader, giving orders to the to the other two co perpetrators. Also as a reserve police officer, his duty

was to protect the citizens of Višegrad of all ethnicities, a duty he violated in the commission of all the crimes and particularly those in which he committed violence, both sexual and physical, against others. The degree of liability is an aggravating factor.

(B) The conduct and personal circumstances of Lelek prior to, during and after the commission of the offence present facts both in aggravation and mitigation, and are relevant to considerations of deterrence and rehabilitation.

(1) Before the Offense

Most Prosecution and Defense witnesses, in particular, Witness C, attest to the fact that Lelek was from a respected family in Višegrad, that his father was a well known and generally liked police officer in the town and that Lelek was married to a young woman of a respectable family and in the words of Witness C, he was by all accounts a 'nice young man'. He had positive social interactions with members of the community of all ethnicities. His life before the war is a mitigating factor.

(2) Circumstances Surrounding the Offense

The acts themselves and their persecutory nature have already been calculated in the consideration of the elements for persecution and in the consideration of the gravity of the offense. The circumstances of the offense offer no additional information of either an aggravating or mitigating nature.

(3) Circumstances since that Time

Lelek has served as a police officer since the war. Although there was some testimony that he made ethnically discriminatory comments and gestures to Muslim returnees on two occasions, the Panel does not find such evidence verified or credible. The credible evidence establishes that he served honorably until his arrest on these charges, and that no complaints were filed against him during this time. He contributed to the support of his wife and two minor children, with whom he resided. The circumstances since the commission of the offenses are mitigating factors.

(4) Conduct during the Case

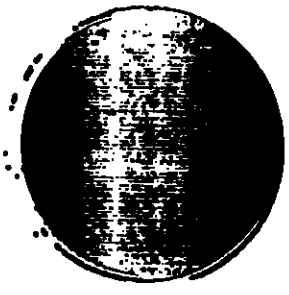
The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Court. His conduct met the Court's expectations and presented neither aggravating nor mitigating factors.

C) Motive

Motive in this case is synonymous with the intent to discriminate on ethnic and religious grounds, and has already been calculated as an element of the offence, and therefore will not be calculated again as an additional factor of aggravation.

(D) Personality of the Accused

The Panel has no evidence regarding the personality of the Accused other than that revealed by his actions before, during and after the offenses, that which could be



observed from his behavior in the courtroom, the nature of the offenses themselves. The first two have been discussed above.

Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with general rehabilitation: an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, to make amends for his criminal actions, and consider the ways to improve his life when released so as not to have to ever return to jail in the future.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, especially if they have individual rehabilitative needs. The nature of the crimes of torture perpetrated against the women in the Osmanbegović family, the rape/torture of MH and the sexual violence against C raise issues for individual assessment. The Law of Bosnia And Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures[17] requires that prisoners be assessed as to their individual needs and treatment plans be designed to meet those individual needs.[18] This statutory requirement is consistent with BiH's international human rights obligations under ICCPR Article 10(3).

III Sentence

In evaluating the relevant "circumstances bearing on the magnitude of punishment" set out on Article 48 (1), for the reasons explained above, the Panel concludes that both extenuating and aggravating circumstances exist. The degree of injury to the protected object was already calculated in Part One of this sentencing analysis when considering the gravity of the offence itself and will not be 'counted' twice. When balancing the extenuating and aggravating factors, the Panel concludes that the sentence of 13 years is appropriate.

Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody pending trial, under the Decision of this Court as of 5 May 2006, shall be counted as part of the pronounced sentence.

Considering that the Accused was found guilty in one part of the verdict the Panel, pursuant to Article 188 (1) of the CPC of BiH obliged the Accused to reimburse the costs of the proceedings in that part. In doing so, the Panel took into account the fact that none of the parties to the proceedings proved the facts set out in Article 188 (4) of the CPC of BiH which would relieve the Accused of the duty to reimburse the cost of the proceedings pertaining to the convicting part of the verdict. On the contrary, pursuant to Article 189 (1) of the CPC of BiH the Accused is relieved of the duty to

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[17] *Official Gazette No. 13/05*

[18] *Article 106 Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures*

reimburse the cost of the proceedings pertaining to the acquitting part of verdict as well as in the part of the verdict dropping the charges. Considering that the Panel at this point does not have all information of the amount of the cost of the proceedings pertaining to the convicting part of the verdict, a decision on that will be made subsequently in a separate decision after the Panel obtains the necessary data.

The injured parties Mirsada Tabaković, witnesses S, A, D, filed a claim under property law seeking reimbursement of damage that arose because of the commission of the criminal offense by the Accused. Considering that deliberation on this motion would considerably prolong these proceedings, the Panel referred the injured parties filing a claim under property law to a civil action, pursuant to Article 198 (2) of the CPC of BiH.

Based on all of the above, the Panel decided as stated in the operative part hereof.

RECORD TAKER
Dženana Deljkić Blagojević

PRESIDING JUDGE
Hilmo Vučinić

LEGAL REMEDY NOTE:
This Verdict may be appealed with the Appellate Panel of the Court of BiH within 15 (fifteen) days after the service of this Verdict.

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

Sarajevo, 16 September 2008

[redacted]

Certified Court Interpreter for the English Language