

SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KR-05/04  
Sarajevo, 11 July 2006

## IN THE NAME OF BOSNIA AND HERZEGOVINA

Court of Bosnia and Herzegovina, in the Panel comprised of Judges Dragomir Vukoje, as the Presiding Judge, Richard Gebelein and Georges Reniers as the members of the Panel, with the participation of Legal Officer Šaćir Hadžić, as the record-taker, in the criminal case against the accused Boban Šimšić, for the criminal offence of Crime against Humanity in violation of Article 172 (1) (h) in conjunction with items a), d), e), f), g), i) and k) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC of BiH), deciding upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-2/05 dated 28 June 2005, confirmed on 8 July 2005, following the oral and public main trial a part of which was closed to the public, on 11 July 2006, in the presence of Ibro Bulić, the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the accused Boban Šimšić in person and his defence counsel Veljko Čivša, an attorney from Sokolac, rendered and publicly announced the following

## VERDICT

The accused BOBAN ŠIMŠIĆ, son of Slobodan and mother Jelena, nee Mosić, born in Višegrad on 17 December 1967, with permanent residence in ..., Municipality of ..., ... by ethnicity, police officer by occupation, completed secondary education - locksmith, married, father of two minor children, served the military in 1986 in Štip, registered in the military records of the Municipal Department of the Ministry of Defence in Višegrad, has not been decorated, indigent, no previous convictions, no other criminal proceedings pending against him, citizen of ..., personal ID number ..., held in custody since 24 January 2005

### I.

## IS HEREBY FOUND GUILTY

Because

During the time of a widespread and systematic attack of the Serb Army, Police, and paramilitary Serb formations directed against the Bosniak civilian population in the territory of the Višegrad Municipality, in the period from April to July 1992, he assisted in the enforced disappearance of persons and assisted in the rape, inasmuch as he

5.b) On an undetermined date, in the second half of June 1992, he assisted Milan Lukić and other members of the Serb Army, Police and paramilitary formations in taking away the imprisoned Bosniak civilian, namely Ismet Bulatović, Šemso Poljo, Eniz Smajić from the premises of the Elementary School Hasan Veletovac in Višegrad where the civilians were imprisoned, after which they have been unaccounted for;

5.e) During the second half of June 1992, at night time the accused singled out girls and young women who were unlawfully held captive in the premises of the Elementary School Hasan Veletovac and took them away in order to procure them to other members of the Serb Army, who carried out multiple rapes, beating and humiliation of several female persons, including Latifa Hodžić, Fata Šabanović, Naila Ahmetagić, nee Ramić, Amira Nuhanović a.k.a. Dada, Razija Hurem, Senada Hurem, Zineta Murtić, Mula Užičanin, Alma Hafizović;

Therefore,

By actions described under Counts 5.b) and 5.e) of this Verdict, as part of the widespread and systematic attack directed against the Bosniak civilian population, being aware of such attack, he assisted the members of the Serb Army in carrying out enforced disappearance of persons and assisted the members of the Serb Army in coercing another by force or by threat of immediate attack upon his limb to sexual intercourse or an equivalent sexual act (rape),

- whereby he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) of the CC of BiH in conjunction with item i) – in relation to the Section I.5.b) of the operative part – and item g) in relation to the Section I.5.e) of the operative part, all in conjunction with Article 31 (Accessory) of the CC of BiH, and therefore

pursuant to the quoted legal regulations and applying the provisions of Articles 39, 42, 48, 49, 50 and 56 of the CC of BiH, the Court is hereby

## S E N T E N C I N G   H I M

To imprisonment of 5 (five) years which shall include the time the accused spent in custody starting on 24 January 2006 onwards.

By virtue of Article 188 (4) of the CPC of BiH, the accused shall be relieved of the duty to reimburse the costs of the criminal proceedings.

Pursuant to Article 198 (1) of the CPC of BiH, the injured parties: Nail Ramić, Ibrumša Agić, Cura Gluščević, Hedija Hodžić, Naila Ahmetagić, Hasena Bajramović, Vasvija Gluščević, Hajrija Kapetanović, Almasa Ahmetspahić, Hamdo Ahmetspahić, Almir Aljić, Salem Ahmetspahić, Ibro Memić, Mula Užičanin, Fehima Čakić, Sajma Šabanović, Rusmira Bulatović, Fatima Poljo, Latifa Hodžić, Kada Spahić, Fata Šabanović, Ševka Šehić, Razija Hurem, Timka Kapetanović, Haša Hadžić and Ramiza Šabanović shall be referred to civil action concerning their claims under property law.

## II.

Pursuant to the provision of Article 284 (c) of the CPC of BiH, the accused Boban Šimšić

## IS ACQUITTED OF CHARGES

That

1. b) *On 17 June 1992, together with a group of several members of the Serb Army and Police, armed with rifles, he participated in the attack and unlawful arrest and incarceration of several dozens of civilians from the village of Žlijeb, amongst whom there were women, children and men, having first fired rifles at the Bosniak houses, after which they ordered them to leave their houses and property and gather at the location of Carina, where they crammed them into the trucks and transported to the premises of the Firehouse in Višegrad, where they held them captive;*

2. On 18 June 1992, around 10:00 a.m, together, in a group of several members of the Serb Army and Police, armed with rifles, he participated in the attack on the village of Kuka in the Višegrad Municipality, and the arrest and unlawful imprisonment of several dozens of Bosniak civilians, including women, children, and men, by suddenly opening fire from their rifles at the Bosniak houses, setting ablaze the residential and business facilities owned by the Bosniaks, killing Omer Karišik and Redžo Šabanović after they had previously beaten them up, killing Mirsad Karišik a.k.a. "Kemo" during the attack, and finally taking away all the inhabitants of the Kuka village and incarcerating them in the Elementary School Hasan Veletovac in Višegrad;

3. On 25 July 1992, together, in a group consisting of approximately ten members of the Serb Army and Police, he participated in the attack on the village of Velji Lug in the Višegrad Municipality during which they, armed with rifles, killed Mediha Ahmetpahić, Amela Ahmetpahić, Razija Ahmetpahić, Fata Sućeska, Safet Aljić, Latifa Ahmetpahić, Smaila Memišević, set ablaze the houses and business facilities owned by Bosniaks and took away several dozens of the Bosniak civilians, including women, children and men, and unlawfully detained them in the premises of the Elementary School Hasan Veletovac in Višegrad;

4. a) On an undetermined date in the second half of June 1992, he took five girls and five young women, including Hedija Hodžić, out of the room in the Firehouse in Višegrad where the Bosniak civilians were detained, and took them to the adjoining room, beating them first with batons and kicking them together with two Serb soldiers and then, after all the girls and women had stripped naked upon his order, they raped them by turns, which lasted for two or three hours, on which occasion Hedija Hodžić sustained injuries to her head in the form of haematomas and bumps as well as injuries to genitals in the form of bleeding;

4. c) On 18 June 1992, together with Milan Lukić, he singled out the following Bosniak civilians from the room in the Firehouse in Višegrad in which they were previously unlawfully incarcerated: Mujo Gluščević, Hasan Gluščević, Hasib Gluščević, Meho Agić, Emin Agić, Meho Softić, Samir Softić, Mustafa Šabanović, Avdija Nuhanović, Sead Hodžić, Adem Kozić, Dželal Hodžić, Dževad Hodžić, Salko Sućeska, Huso Bulatović, Husein Vilić, Hamed Kešmer, Ibrahim Kešmer and took them to a location in the immediate vicinity of the Firehouse, since when they have been unaccounted for with the exception of Mujo Gluščević, Ibrahim Kešmer, Hamed Kešmer, Samir Softić, Emin Agić, Hasib Gluščević, Sead Hodžić, Huso Bulatović, Dželal Hodžić and Adem Kozić whose corpses were found during the exhumation at the location of Slap-Žepa;

5. In the second half of the month of June 1992, while performing the duty of the guard in charge of the Bosniak civilians imprisoned in the premises of the Elementary School Hasan Veletovac in Višegrad, several hundreds of them, including women, children and men, on his own and together with other members of the Serb Army, Police and paramilitary formations, he participated in killings, torture, infliction of severe physical or mental pain, appropriation of private property, coercing girls and young women to sexual intercourse in as much as he:

5.a) In the night of 28 June 1992, he and Milan Lukić killed Ibro Šabanović, a Bosniak civilian, whom they took out of the big room in which he was unlawfully imprisoned with other civilians, into the corridor, where Boban Šimšić held his head while Milan Lukić slit his throat with a knife after which they threw his severed head among the other imprisoned civilians;

5.c) On an undetermined date, in the second half of June 1992, together with several members of the Serb Army, he entered the premises of the Elementary School Hasan Veletovac where the Bosniak civilians were imprisoned and singled out Hamed Hadžić whom they beat up by kicking him and stomping on his body while he was lying on the floor and when Haša Hadžić, Hamed's wife, ran to them to beg them to stop abusing him because he had a heart condition, the accused took a swing with his hand and punched Haša Hadžić hard on the face, breaking her jaw which caused her to stagger and fall on the floor and when the accused thereafter noticed that she was trying to get back on her feet, he ran to Haša, pulled her up by her braids and lifted her off the floor pushing her thus into the room with other imprisoned civilians, after which he kicked her with his foot in an army boot below her knee making Haša fall back on the floor and then continued kicking her all over her body, predominantly on the side of her ribs, rolling and dragging her body across the room;

5.d) On an undetermined date in June 1992, in the premises of the Elementary School Hasan Veletovac, after the accused together with a group of the Serb Army members, took a girl of minor age Senada Hurem out of the room in which the civilians were imprisoned, and, immediately after she had managed to escape, they singled out her mother Razija Hurem a.k.a. "Šuhra" into the corridor where one of the soldiers from the group, holding her rather long hair with both his hands, lifted her off the ground and turned her body several times, thus pulling out most of her hair after which he started beating her on the head, chest, legs, and back saying: "Why did you tell Senada to run away from us" and then led her into the room together with the accused and said: "Now we are going to rip your hearts out and fry them on these hot plates" pointing at the switched on and red-hot plates of the electric stove while the accused, laughing, said: "You will eat until you're full now", after which the unknown soldier kicked her again and broke her nose causing thus heavy bleeding while he attempted to break her arms and then both of them raped her;

5.f) In June 1992, while imprisoning civilians in the premises of the Elementary School Hasan Veletovac, the accused, together with other members of the Serb Army and Police, participated in the forcible appropriation of money and golden jewellery from several hundreds of imprisoned Bosniak civilians on which occasion they searched the civilians ordering them to strip naked and extorted money from the imprisoned civilians by leading a group of male prisoners out of the room and asking that their wives and mothers collect the ransom money if they wanted to see them alive again;

5.g) During the stay in the premises of the Elementary School Hasan Veletovac, in the second half of June 1992, the accused, together with other members of the Serb Army and Police, participated in beating of unlawfully imprisoned Bosniak civilians by singling out a group of about twenty prisoners, including Ramo Hurem, Ibrišim Hadžić, Amer Hadžić, Avdo Ferić, Mustafa Smajić, Nail Ramić, whom they would order to beat up each other all over their bodies with a wooden shaft (wooden handle of a pick) which caused many to fall on the ground and of all prisoners, on a nightly basis, they particularly used to beat up Nail Ramić whom they, on the first day he was imprisoned, placed under the basket while a group of Serb soldiers including the accused were playing basketball and targeted alternatively the basket and Nail's head with the ball so strongly that Nail kept on falling unconscious; on one of the subsequent evenings, the accused, together with several unknown Serb soldiers, took Nail Ramić and four other prisoners out of the room where they were confined and in another room beat them up by punching them and kicking them with their army boots and rifle butts on their head and back and pulled their hair out, which caused Nail to faint while his eyes were completely shut due to the blows he received on the eye area; during the search and appropriation of money from Mehmed Spahić, the accused beat him by hitting him several times with the rifle butt on the chest, head and between his shoulder joints due to which Mehmed Spahić was not able to walk by himself so that some prisoners carried him on their arms while returning to the room in which they were imprisoned;

5.h) During the night of 28 June 1992, the accused entered the room where the civilians were imprisoned and selected about twenty men ordering them to go to another room where he, together with a group of Serb soldiers, immediately started beating the following persons: Jusuf Poljo, Mehmed Bajramović, Ramo Hurem, Hamed Hadžić, Ibrišim Hadžić, Avdo Aljić, Avdo Ferić, Abid Alijašević, Ibro Memić, Nail Ramić, Ibro Šabanović on which occasion the accused cut off Mehmed Bajramović's tongue causing heavy bleeding and then took him out of the building of the Elementary School Hasan Veletovac since when he has been unaccounted for; when Mehmed's wife asked the accused on the following morning to tell her what had happened to her husband, he cursed "her Balija mother" and slapped her across the face so hard that she fell down half-conscious with her child;

By the actions described under Counts 1.b), 2, 3, 4.a), 4.c), 5.a), 5.c), 5.d), 5.f), 5.g), and 5.h) of the Indictment, as part of the widespread and systematic attack directed against Bosniak civilian population, knowing of such attack, he committed the persecution of Bosniak civilian population on political, national, ethnic, cultural and religious grounds in conjunction with murders, confinement, torture, rape, infliction of serious physical and mental injuries by which he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (h) in conjunction with items (a) depriving another person of his life (murder), (b) forcible transfer of population, (e) imprisonment, (f) torture, (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health (pillaging, self-willed large scale destruction and appropriation of property that is not justified by military needs) in conjunction with Article 29 of the CC of BiH.

### III.

Pursuant to the provision of Article 283 (c) of the CPC of BiH, concerning the accused Boban

THE CHARGES ARE DISMISSED

That

1.a) In mid-May 1992, together, in a group of several Serb soldiers armed with rifles, he came to the village of Žlijeb in the Višegrad Municipality where they found civilians Naila Ahmetagić, Džemail Karišik and three elderly bed-ridden women who did not manage to hide themselves until that moment and provoked and maltreated them, and afterwards kicked and punched them all over their bodies, trying thereby to extort from them the information on the hiding place of the rest of the Bosniak population from the village;

4.b) On 18 June 1992, together, in a group of several members of the Serb Army and Police, he participated in the forcible appropriation of money and golden jewellery from several hundreds of Bosniak civilians imprisoned in the premises of the Firehouse Višegrad on which occasion they searched the civilians ordering them to strip naked;

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

R e a s o n i n g

[1] In the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-2/05 dated 28 June 2005, confirmed on 8 July 2005, Boban Šimšić was accused that by the actions described in more details in Counts 1.a), 1.b), 2., 3., 4.a), 4.b), 4.c), 5.a), 5.b), 5.c), 5.d), 5.e), 5.f), 5.g) and 5.h) he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (h) in conjunction with items:

a) depriving another person of his life (murder),

b) forcible transfer of population,

e) imprisonment,

f) torture,

g) coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape);

i) enforced disappearance of persons;

k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health (pillaging, self-willed large scale destruction and appropriation of property that is not justified by military needs), all in conjunction with Article 29 of the CC of BiH.

[2] At the main trial held on 19 June 2006, the Prosecutor amended the Indictment by dropping the charges of the Indictment under Counts 1.a), 4.b), while under Count 2 he amended the wording of the Indictment by adding the following text after the comma in the sixth line down: “killing Mirsad Karišik a.k.a. Kemo during the attack, and finally taking away all the inhabitants of the Kuka village and imprisoning them in the Elementary School Hasan Veletovac in Višegrad, with the exception of Omer Karišik and Redžo Šabanović whom they took away from the village since when they have been unaccounted for”, under Count 4.c) he amended the wording by deleting the following text on page 3, in the first line down behind the word “Firehouse”: “where they beat them, and then transported them by a truck to the location of Vilina Vlas spa, where Miloje Joksimović singled out at least seven men: Meho Agić, Meho Softić, Samir Softić, Hamed Kešmer, Ibrahim Kešmer, Mujo Gluščević, Hasan Gluščević, whom the accused Boban Šimšić thereafter took in groups of three down to the Drina River which runs through in the vicinity of that place, ordered them to step into the river up to their waist, after which he deprived them of their lives together with two unidentified Serb soldiers by firing from their rifles”; and instead of which he inserted the following text: “since when they have been unaccounted for with the exception of Mujo Gluščević, Ibrahim Kešmer, Hamed Kešmer, Samir Softić, Emin Agić, Hasib Gluščević, Sead Hodžić, Huso Bulatović, Dželal Hodžić and Adem Kozić whose corpses were found during the exhumation at the location of Slap-Žepa” and under Count 5.c) in the thirteenth line down he deleted the text from behind the comma to the end: “after which Mitar Vasiljević and the accused Boban Šimšić ordered her to strip naked in front of all present prisoners, and once naked, continued beating her and when she began losing consciousness, they poured water on her”.

[3] The Prosecutor adhered to such an amended the wording of the Indictment until the end of the main trial submitting a proposal that the Court find the accused guilty and sentence him pursuant to the law, adding that no mitigating circumstances have been met on the part of the accused which would require the application of a more lenient punishment than the one prescribed for the mentioned criminal offence.

#### 1.1 – Background of the Proceedings

[4] Under the Decision of the Court of Bosnia and Herzegovina No. X-KRN-05/04 dated 13 May 2005 the criminal case against the then suspect Boban Šimšić has been taken over ex officio from the District Court of Istočno Sarajevo in accordance with Article 449 (2) of the CPC of BiH. Since the case was at the investigative stage, the case file was submitted to the Prosecutor’s Office of Bosnia and Herzegovina for further procedure. The Appellate Panel of the Section I for War Crimes of the Criminal Division of the Court of Bosnia and Herzegovina, under its Decision No. X-KRN-05/04 dated 15 June 2005, refused the appeal of the defence counsel as groundless and thereby confirmed the Decision of the Special 24.6 Panel to take over the case. Acting upon this case, the Prosecutor’s Office of Bosnia and Herzegovina submitted the Indictment No. KT-RZ-2/05 dated 28 June 2005 to the Court to be confirmed and the Court confirmed all of its Counts on 8 July 2005. Acting further upon this case, the Court of Bosnia and Herzegovina held a plea hearing on 14 July 2005 at which the accused pleaded not guilty. On 8 September 2005, the Court of Bosnia and Herzegovina held a status conference, while the main trial started on 14 September 2005 by reading the

Indictment. Thirty-one hearings were held since the beginning of the main trial, concluding with 11 July 2006 when the Verdict was pronounced.

## 1.2 – Custody

[5] Under the Decision of the Cantonal Court of Goražde No. Ki-12/02 dated 15 April 2003, custody was ordered against Boban Šimšić and it started on 24 January 2005 when the accused turned himself in to the competent Prosecutor's Office. The custody was extended pursuant to the Decision of the District Court of Istočno Sarajevo No. KV-08/05 dated 23 February 2005, and the Court of Bosnia and Herzegovina extended the custody by its Decision No. X-KRO-05/04 dated 14 July 2005 to last until the end of the main trial. The Court of Bosnia and Herzegovina carried out regular review of justification of the custody by its decisions. After the Verdict was pronounced on 11 July 2006, the Court rendered the Decision to extend the custody until the Verdict becomes final but no longer than the expiry of the punishment pronounced in the first-instance Verdict. The Court established the facts pertaining to the time the accused spent in custody as stated in the operative part contained in the convicting part of the sentence.

## 1.3 – Exclusion of the Public

[6] The main trial was public from the opening through the end. However, in one part of the main trial, the Court rendered procedural decision excluding the general public by virtue of Article 235 of the CPC of BiH but always after having heard the parties. Pursuant to Article 236 of the CPC of BiH, the exclusion of the public did not apply to the parties, official personnel of the Court, and in particular, to the observers of the OSCE Mission whose role was focused on observing the proceedings in order to ensure their compliance with the international standards and the rule of law, which is all closely related to the respect for the guarantees of human rights and fundamental freedoms; it also did not apply to the representatives of the Association of Women – Victims of War, Sarajevo, who showed interest in this case and whose presence throughout the main trial was enabled by the Court; the representatives of OKO (Criminal Defence Section) and the Humanitarian Law Centre, Belgrade.

[7] Specifically, the Court excluded the public from the part of the main trial held on 5 December 2005 based on the reasoned motion of the Prosecutor, to which the defence objected because the Prosecution witnesses gave their statements in public. The public was also excluded from the part of the main trial held on 15 December 2005 based on the reasoned motion of the Prosecutor, to which the defence objected as it believed there was no reason to exclude the public. In addition, based on the reasoned motion of the Prosecutor and for the purpose of the protection of the interests of the female witnesses, the public was also excluded from the parts of the main trial held on 22 December 2005, 3 February 2006, 8 February 2006, 9 February 2006, 14 April 2006; based on the motion of the defence counsel, on the occasion of reading the witness statement to which the Prosecutor did not object, on 5 June 2006; based on the motion of the defence the public was excluded on the occasion of reading the statement of the protected witness VG-105 who gave evidence in a case which was

pending before the ICTY, to which the Prosecutor objected because the ICTY was expected to lift the protective measures granted to the proposed witness; on 12 June 2006, based on the motion of the defence the public was excluded on the occasion of reading the witness statement given to investigators of the Office of the Prosecutor of the ICTY to which the Prosecutor did not object; on 5 July 2006 based on the motion of defence counsel the public was excluded on the occasion of reading the witness statement given to investigators of the Office of the Prosecutor of the ICTY, and the Prosecutor did not object; on the same day on the occasion of presenting the closing argument of the defence counsel, the public was excluded in one part and the Prosecutor opposed the motion, whereas, in what seemed a reasonable response, the defence underlined that there existed many complementary pieces of evidence, including those presented during the main trial upon the motion of the Prosecutor, as well as the evidence of the ICTY provenance, which are protected and whose preservation the Prosecutor called upon during the proceedings, that in order to evoke the entire picture of how he sees the events described, he found it necessary to integrally present the contents of evidence with the names of the witnesses included, which would not be possible by using initials, which for that matter, is not the practice used even before the ICTY, and in doing so, the defence did not want to get in the position of hurting anyone's feelings. In all these specific cases, the Court accepted the motions of the parties and the defence counsel and excluded the public because it concerned testimonies of women who claimed to have been victims of rape, abuse and other type of humiliation or the pieces of evidence to which the protective measures of the ICTY still applied. Although the prosecution and the defence occasionally opposed the exclusion of the public in the part of the main trial, the Court opined it could not expose to risk the protection of values of the injured female witnesses that fall within the sphere of their privacy, by rendering *a priori* the decision refusing the motion to exclude the public, in particular, since the Court did not know at that time what precisely they were going to say in their testimonies. In such situations, the Court could only reasonably expect that the testimony would concern rape which was quite sufficient to render the decision on the exclusion of the general public. However, beside the reason of protection of the personal and intimate life of female witnesses and their exposure to the repeated traumatisations in the presence of the public, which testimony before the Court almost inevitably includes, the Court was guided by the reason of protection of morality in a democratic society, having in mind the traditional position of a woman in the Bosnia-Herzegovina milieu, even where some female witnesses expressed readiness to confront openly with the accused during their public confession.

[8] On this occasion, the Court notes a distinction between the need to exclude the public during the presentation of the contents of some testimonies when it proved necessary for the purpose of the witness identity protection. During the proceedings there were no motions submitted either by the prosecution or by the defence to protect the identity of any of the witnesses proposed. In particular, due to the fact that protective measures are applied only with the consent of the witness as prescribed under Article 5 (a) of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses ("Official Gazette of BiH", issues 3/03, 61/04). None of the examined witnesses requested anything like that. After all, the names of the female witnesses who, as a rule, are injured parties, have been publicly read out by the prosecution and the Court sees no reason to depart from that on the occasion of announcing the Verdict.

[9] Given the constant presence of the representatives of the Association of Women – Victims of War at the trial, assertion of the prosecution stated in the closing argument is not true that the witnesses have been deprived of psychological support from the representatives of this Association. After all, these witnesses have constantly received effective and professional support from the Witness Support Section of the Registry of the Court of BiH.

#### 1.4 – Procedural Objections

[10] At the beginning of this trial, on several occasions, the defence submitted motions to delay the main trial for six months in order to prepare defence, as well as the motion to grant resources for funding their investigation in order to hire a medical expert witness and to visit ICTY indictees. However, since these motions lost their purpose during the proceedings and the main trial, the Court finds it pointless to discuss reasons for refusing the motions of the defence which mainly coincide with the beginning of the trial. At this point, it is sufficient to underline that this Court, *inter alia*, advised the defence counsel to use the deadlines stipulated in the CPC for the preparation of the defence, in exactly the same manner as the ECtHR took a stance in the *Union Alimentaria S.A. v. Spain*, according to which it is the duty of the applicant “to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings”.

[11] In the procedure of the presentation of the evidence by the Prosecutor during the main trial on 5 December 2005 and 9 February 2006, the Court examined the witnesses Naila Ahmetagić and Timka Kapetanović. During the cross examination, the defence presented uncertified copies of statements given by these two female witnesses to the investigators of the Office of the Prosecutor of the ICTY. According to the defence, these statements are in contradiction to the statements the witnesses gave at the main trial before the Court, and as such, they have a considerable effect on the credibility of these two prosecution witnesses. On several occasions during the proceedings, the defence requested that the Prosecutor’s Office of BiH obtain certified copies of the statements from the ICTY. On 6 February 2006, at the request of the defence, the Court issued an order to the Prosecutor’s Office of BiH to try to obtain original statements or certified copies of the statements from the Office of the Prosecutor of the ICTY. The Prosecutor’s Office of BiH was also requested to brief the Court on regular basis concerning the activities pertaining to the execution of the order issued.

On 27 February 2006, in accordance with items 3 and 4 of its proposal of evidence, the defence motioned that uncertified copies of statements given by the witnesses Naila Ahmetagić and Timka Kapetanović to the representatives of the Office of the Prosecutor of the ICTY on 12 June 2000 and 23 May 2001 be read out at a closed session of the Court (since at that time the protective measures have not been lifted from those statements by the ICTY), in the event that the Prosecutor’s Office fails to obtain original documents.

At the main trial held on 23 March 2006, the Prosecutor reported that he had had several contacts with the Chief Prosecutor, prosecutors and the ICTY Registry but that his efforts in obtaining the requested evidence within the reasonable time frame had been unsuccessful. The Prosecutor finally motioned that the Court forward an official request to the competent

authorities in the ICTY for the purpose of obtaining these pieces of evidence, to which the defence consented.

[12] On 27 March 2006, the Court forwarded a request to the Office of the Prosecutor to receive the two referenced statements. On 7 April 2006, David Tolbert, deputy ICTY Prosecutor confidentially informed the Court that the Office of the Prosecutor of the ICTY had already contacted the two mentioned witnesses, in accordance with the request submitted by the Criminal Defence Section on behalf of the defence counsel for the accused Boban Šimšić, and that the witnesses did not agree that their statements be delivered to the defence and that, finally, the Office of the Prosecutor of the ICTY was not able to provide the Court of BiH with the mentioned statements.

At the request of the defence presented at the hearing on 14 April 2006, the Court forwarded an official letter to the President of the ICTY requesting that the disputed statements be delivered. The President replied by saying that he was not in a position to grant such a request having in mind Rule 70(B) of the Rules of Procedure and Evidence of the ICTY and lack of consent of the witnesses.

[13] On 12 May 2006, the defence filed a motion to suspend the proceedings due to non-disclosure of evidence, requesting that the Court of BiH suspend the proceedings or present the evidence on the authenticity of the statements or exclude the evidence influenced by the statements and, also, sanction the Prosecutor's Office for the omission to execute the order of the Court. The defence claims that the Prosecutor's Office failed to fulfill its obligation to do its best in order to obtain these statements and deliver them to the defence, which constitutes the violation of the duties of the Prosecutor's Office to disclose the evidence in favour of the accused, and that the failure to obtain certified copies of the statements caused the violation of rights of the accused to a fair trial pursuant to Article 6 of the European Convention for the Protection of Human Rights, including the principle of equality of arms and the right of the accused to cross-examine the witnesses testifying against him.

[14] On 22 May 2006, the Prosecutor's Office filed its response to the motion of the defence to suspend the proceedings, with a proposal that the Court of BiH refuse the mentioned motion as groundless. In its response, the Prosecutor's Office underlines that the referenced witnesses are not "key witnesses" in the particular case as the defence claims, but only two out of twenty-seven witnesses who gave their statements as the prosecution witnesses, which altogether constitutes an important group of evidence against the accused. The Prosecutor's Office also asserts that it entirely fulfilled its obligation pursuant to Article 14 of the CPC of BiH, that it is not in a possession of nor has access to the certified copies of the requested statements and that after the Indictment has been filed, the defence was presented with all the pieces of evidence the Prosecutor's Office had at its disposal. With regard to the use of the disputed statements as evidence, the Prosecutor's Office believes that these statements do not meet the necessary legal requirements to be used as evidence before the Court of BiH, more precisely the requirements referred to in Articles 219, 78 and 86 of the CPC of BiH and that for that reason they cannot be accepted as evidence. Finally, the Prosecutor's Office claims that according to Article 273 (1) of the CPC of BiH stipulating that a witness must be given an opportunity to explain or deny a prior statement, the defence cannot request that such

previous statements be admitted into evidence by reading them out before the Court and that the defence already had an opportunity to examine these two witnesses on their previous statements on the occasion of their testifying during the main trial.

#### 1.5.1 – The Court of BiH is not bound with the limitations of Rule 70(B)

[15] Rule 70(B) of the ICTY Rules of Procedure and Evidence stipulates that if the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused. Based on this provision, the Office of the Prosecutor of the ICTY refused to disclose disputed statements to the defence in this criminal case, and finally, to the Court.

However, as it has been accepted in the ICTY practice, Rule 70(B) must be viewed in the context of the Rule 68(i) of the Rules of Procedure and Evidence which bounds the Prosecutor to disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. On several occasions did the ICTY underline the importance of the obligation of the Prosecutor to disclose any material which acquits the accused of the guilt for the purpose of Rule 68(i) which is essential for fair proceedings and equally important as the obligation of the criminal prosecution.<sup>1</sup>

With regard to Rule 70, the ICTY finds this rule necessary due to specific legal framework and equally specific circumstances under which the ICTY operates, and finds its function similar to the notion of immunity of public interest which exists in some legal systems. More importantly, with regard to the prosecutorial obligation to disclose exculpatory evidence and the principle of equality of arms, and in accordance with the relevant practice of the European Court of Human Rights, the ICTY recognised that “the exception to disclosure in Sub-rules 70(B) to (E) (...) in any event **does not** relieve the Prosecution of its obligation pursuant to Rule 68 to disclose to the Defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution evidence”<sup>2</sup>. The ICTY has in this way clearly underlined that the “exception to disclosure under Rule 70 does not include material that is subject of Rule 68”.<sup>3</sup>

[16] In general, the ICTY established on several occasions that the Prosecutorial obligation to disclose exculpatory material, regardless of whether the material originates from cases in

<sup>1</sup> See ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Judgement upon the Appeal, 29 July 2004, §264; ICTY, Appeals Chamber, *Prosecutor v. Radoslav Brđanin*, Decision on Appellant’s Motion for Disclosure pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3-4; ICTY, Trial Chamber, *Prosecutor v. Naser Orić*, Decision on Alleged Prosecution Non-compliance with Disclosure Obligations under Rules 66(B) and 68(i), 29 September 2005, p.2; ICTY, Trial Chamber, *Prosecutor v. Naser Orić*, Decision on Ongoing Complaints about Prosecutorial Non-compliance with Rule 68 of the Rules, 13 December 2005, §20.

<sup>2</sup> ICTY, Trial Chamber, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, dated 23 May 2002, §19.

<sup>3</sup> *Ibid*, §20.

relation to the given case, is the permanent obligation equally pertaining to both public and confidential evidence.<sup>4</sup> More specifically, the fact that a witness enjoys protective measures does not relieve the Prosecutor of his obligation and it is his obligation to request the Trial Chamber seized of the case impose those measures it deems necessary.<sup>5</sup>

In addition, having in mind the principle of equality of arms, the ICTY established that Rule 70 does not disrupt the principle of equality of arms but only because pursuant to Rule 70(F), the ICTY may upon an application by the accused order that the provisions of this Rule apply *mutatis mutandis* to specific information in the possession of the accused and Rule 70(G) provides the final legal remedy, should need be for its application, by delegating power to the Court to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.<sup>6</sup>

In practice, each time the ICTY judges receive an application of the Defence for disclosure of material under Rule 68, in accordance with Rule 70, they issue an order to the Prosecutor to request an approval for disclosure of this material, under the condition that appropriate witness protection measures are in force in cases where necessary.<sup>7</sup> In any case, the judges retain the right to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

[17] If the allegation of the defence in this case proves to be truthful, the disputed evidence will influence credibility of the evidence of the prosecution and as such will constitute material liable to mandatory disclosure for the purpose of Rule 68(i) of Rules of Procedure and Evidence. In its order dated 6 February 2006, the Court of BiH established that these statements are in favour of the defence of the accused Boban Šimšić. It is obvious that Rule 68(i) does not impose any obligation on the ICTY concerning persons accused before the Court of BiH (nor does it impose any obligation in that sense on the Prosecutor's Office of BiH). However, if Rule 68(i) cannot be applied to cases before the Court of BiH, the same should also be applicable for Rule 70(B). The ICTY practice implies that Rule 70(B) is in accordance with the rights of the defence only because of the exception of Rule 68(i) and as long as there exists balance between the application of Rule 70 and Rule 68(i). Calling upon Rule 70(B), regardless of the circumstances in this case and the fact that the requested piece

<sup>4</sup> ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Judgement upon the Appeal, 29 July 2004, §267; ICTY, Appeals Chamber, *Prosecutor v. Radoslav Brđanin*, Decision on Appellant's Motion for Disclosure pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p.4

<sup>5</sup> ICTY, Trial Chamber, *Prosecutor v. Tihomir Blaškić*, Opinion further to the Decision of the Trial Chamber Seized of the case *Prosecutor v. Dario Kordić and Mario Čerkez* dated 12 November 1998 of 16 December 1998, p. 4-5.

<sup>6</sup> ICTY, Trial Chamber, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, dated 23 May 2002, §22.

<sup>7</sup> E.g. see ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Decision on Paško Ljubičić's Motion for access to confidential supporting material, transcripts and exhibits, 4 December 2002; ICTY, Trial Chamber, *Prosecutor v. Milan Milutinović, Dragoljub Ojdanić and Nikola Šainović*, Decision on Defence Motion to require Disclosure of Rule 68 Material obtained pursuant to Rule 70, 10 February 2003; ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Decision on Second Supplemental Request of Dario Kordić and Mario Čerkez to access confidential material, 25 February 2003; ICTY, Trial Chamber, *Prosecutor v. Slobodan Milošević*, Decision on Defence Motion filed by the Defence of Franko Simatović for access to Transcripts and Documents, 20 October 2003.

of evidence is of exculpatory nature for the purpose of Rule 68(i), would suggest the violation of the rights of the defence in accordance with the ICTY practice, having also in mind that the Court of BiH cannot issue an order to the Office of the Prosecutor of the ICTY as the ICTY would usually do in similar cases. The argument of the Prosecutor's Office of BiH that the statements cannot be presented as evidence before the Court because the witnesses did not give their consent pursuant to Rule 70(B) of the Rules of Procedure and Evidence is therefore groundless. In any case, the Court of BiH is not and does not consider itself bound with Rule 70(B) of the Rules of Procedure and Evidence.

### 1.5.2 – Obligation of the Prosecutor to Obtain and Disclose all Exculpatory Evidence

[18] Pursuant to Article 14 of the CPC of BiH, the Prosecutor's Office is bound to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the accused. Articles 47 and 226 of the CPC of BiH give the right to the accused and his defence counsel to inspect the files and evidence of the Prosecution in particular those that are in favour of the accused.

In accordance with the practice of the European Court of Human Rights, the right to a fair trial referred to in Article 6 (1) of the Convention imposes an obligation to the prosecution authorities to disclose to the defence all material evidence in their possession for or against the accused.<sup>8</sup> Although the right to disclose relevant evidence is not an absolute right, any restriction in that sense would be lawful only if the following three conditions have been met. *First*, the restriction must be justified by the need to preserve the fundamental rights of another person or safeguard an important public interest. *Second*, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 (1). *Third*, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>9</sup>

The right to disclosure of evidence is also suggested in Article 6 (3) (b) of the European Convention on Human Rights (ECHR) according to which a person charged with a criminal offence is entitled to have adequate time and facilities for the preparation of his defence. The Court noted that non-disclosure of physical evidence containing details which can help the accused to be acquitted of charges or which can influence on reducing the punishment, constitutes denial of facilities necessary for the preparation of the defence, and thereby the violation of rights guaranteed by Article 6 (3) (b) of the Convention.<sup>10</sup> The right of the accused to have access to exculpatory evidence pertains to all relevant evidence that the

<sup>8</sup> ECtHR, *Rowe and Davis v. the United Kingdom*, Grand Chamber, Judgement of 16 February 2000, §60; ECtHR, *Fitt v. the United Kingdom*, Grand Chamber, Judgement of 16 February 2000, §44; ECtHR, *Jasper v. the United Kingdom*, Grand Chamber, 16 February 2000, §51; ECtHR, *Dawsett v. the United Kingdom*, Judgement of 24 June 2003, §44. See also ECtHR, *Edwards v. the United Kingdom*, Judgement of 16 December 1992, §36.

<sup>9</sup> ECtHR, *Rowe and Davis v. the United Kingdom*, Grand Chamber, Judgement of 16 February 2000, §61; ECtHR, *Fitt v. the United Kingdom*, Grand Chamber, Judgement of 16 February 2000, §45; ECtHR, *Jasper v. the United Kingdom*, Grand Chamber, 16 February 2000, §52; ECtHR, *Atlan v. the United Kingdom*, Judgement of 19 June 2001, §40; ECtHR, *Dawsett v. the United Kingdom*, Judgement of 24 June 2003, §42.

<sup>10</sup> ECtHR, *Lavrson v. Denmark*, Judgement of 28 February 2002. See also ECtHR, *Jespers v. Belgium*, Commission, Report of 14 December 1981, §59.

competent authorities obtained or *might* have obtained<sup>11</sup>, which means the obligation of the prosecution to take active steps in obtaining exculpatory evidence when the defence is not in a position to do so.

[19] This is also in accordance with the right of any accused to examine witnesses testifying against him, pursuant to Article 6 (3) (d) of the ECHR. This right requires that the accused be given an appropriate chance to challenge and examine witnesses against him either during their testimonies or at a later stage of the proceedings.<sup>12</sup> This right may be jeopardised if the accused is denied access to previous statements of witnesses against him, which can help his defence in challenging credibility of the mentioned witness.

Therefore, the Prosecutor's Office is bound not only to disclose all exculpatory evidence in its possession but also to do its best to obtain such evidence once it found out about their existence, i.e. when it is in a better position than the defence to do so. In that regard, the obligation to disclose evidence must be viewed in the light of the principle of equality of arms.

### 1.5.3 - Obligation to disclose evidence in the light of the principle of equality of arms, and special relations between the Prosecutor's Office of BiH and the Office of the Prosecutor of the ICTY

[20] In accordance with the principle of equality of arms, as one of the features of the wider concept of a fair trial pursuant to Article 6 (1) of the ECHR, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.<sup>13</sup> In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.<sup>14</sup>

[21] It is beyond doubt that since their establishing by the Resolution of the UN Security Council dated 25 May 1993, various bodies of the ICTY, in particular the Office of the Prosecutor of the ICTY, have gathered a considerable number of evidence which, due to geographical, temporal and material overlapping with the cases pending before the ICTY and the Court of BiH can be of importance for the proceedings before the Court of BiH.

This is the reason why the Law on Transfer of Cases contains several provisions allowing and facilitating the acceptance of the ICTY evidence before the Court of BiH. As Article 3 of the mentioned Law reads, as a general principle, evidence collected in accordance with the ICTY Statute and Rules of Procedure and Evidence may be used in proceedings before the courts in BiH.

In this light, the Office of the Prosecutor of the ICTY and the Prosecutor's Office of BiH have signed the Memorandum of Understanding in order to further cooperation between these two institutions and the work of the Prosecutor's Office of BiH, in particular because that would

<sup>11</sup> ECtHR, *Jespers v. Belgium*, Commission, Report of 14 December 1981, §57.

<sup>12</sup> ECtHR, *Kostovski v. The Netherlands*, Judgement of 20 November 1989, §41.

<sup>13</sup> ECtHR, *Ankerl v. Switzerland*, Judgement of 23 October 1996, §38; ECtHR, *Bulut v. Austria*, Judgement of 22 February 1996, §47; ECtHR, *Niderost-Huber v. Switzerland*, Judgement of 18 February 1997, §23; ECtHR, Grand Chamber, *Ocalan v. Turkey*, Judgement of 12 May 2005, §140.

<sup>14</sup> ECtHR, *Bulut v. Austria*, Judgement of 22 February 1996, §47; ECtHR, Grand Chamber, *Ocalan v. Turkey*, Judgement of 12 May 2005, §140.

enable the Prosecutor's Office of BiH to have privileged – although not absolute – access to documents, statements of witnesses, reports and other pieces of evidence collected by the Office of the Prosecutor of the ICTY (Articles 2 – 6, and Article 9 of the Memorandum). Under this Memorandum, the Office of the Prosecutor of the ICTY will file Motions to ICTY Trial Chambers and Appeals Chambers, on behalf of the Prosecutor's Office of BiH, on matters relevant to investigations and/or pending indictments in BiH (Article 7 of the Memorandum).

[22] In the preamble of the Memorandum, the Office of the Prosecutor of the ICTY and the Prosecutor's Office of BiH have acknowledged "that many of the events with which this court will be concerned have been extensively investigated by, and litigated at the ICTY and that in many instances ICTY is the sole repository of document collections which are vital to the prospects of successful prosecutions at the Court of BiH". In analogy to that, the Court believes that this extensive material can be of essence for the accused before the Court of BiH. It is extremely important that, when the Office of the Prosecutor of the ICTY is in possession of evidence which allegedly may challenge the credibility of the prosecution witness, as the case is here, the access to such evidence be given to the defence. However, for the time being, there is no agreement signed between the Criminal Defence Section and the Office of the Prosecutor or any other body of the ICTY.

Such a situation creates potential inequality between the prosecution and the defence which can be remedied only by effective and consistent fulfilling of the prosecution obligation referred to in Article 14 of the CPC of BiH and in accordance with Article 6 of the ECHR.

[23] After all, the existence, contents and the purpose of the Memorandum of Understanding, together with the fact, as underlined in the submission of the defence, that in his letter to the Court, Deputy Prosecutor of the ICTY mentioned on two occasions that the witnesses in question did not consent to their statements being given to the *defence* (which suggests that the Prosecution might get the statements), and the fact that that as a result of this lack of consent, the defence was denied evidence which might influence credibility of the witnesses against the accused, suggest the conclusion, at least at this stage of consideration, that the accused in this case would be denied a reasonable opportunity to present his case under the conditions not placing him at a disadvantage vis-à-vis the Prosecutor.

#### 1.5.5 – Admissibility and Evaluation of Evidence before the Court of BiH

[24] Article 6 (1) of the ECHR guarantees the right to a fair trial by an independent court in relation of the executive authority, but also in relation to parties to the proceedings.<sup>15</sup> The Court has the duty pursuant to Articles 14 and 262 (3) and based on its function in judicial practice to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory, and to ensure that the examination and presentation of evidence is effective to ascertain the truth. For this purpose, Article 268 of the CPC of BiH gives the authority to the Court to sanction the witness who refuses to testify without providing a justified reason.

<sup>15</sup> ECtHR, *Ringeisen v. Austria*, Judgement of 16 July 1971, §95.

If the Court accepted the current situation in which evidence potentially of use to the defence cannot be admitted due to the lack of consent of the two witnesses to present such evidence, it would be equal to allowing witnesses to control the ongoing criminal proceedings, which is in contradiction to the above-mentioned principles.

[25] Further, as a general rule in the jurisprudence of the European Court of Human Rights (ECtHR), it was established that national courts evaluate evidence and relevance of any piece of evidence a party wishes to introduce.<sup>16</sup> Pursuant to Article 15 of the CPC of BiH, the right of the Court to evaluate the existence or inexistence of facts is not brought into relation to nor is it limited by special formal rules of evidence. On the other hand, pursuant to Article 281 (1) of the CPC of BiH, the Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence. Finally, Article 5 (2) of the Law on Transfer of Cases gives the possibility to the Court to exclude evidence given by a witness with protective measures where its probative value is outweighed by its prejudicial value (For the purpose of comparison see the above-mentioned practice of the ICTY and Rule 70(G) of the Rules of Procedure and Evidence).

[26] Article 274 (1) (*sic!*) of the CPC of BiH referring to the Records on Evidence stipulates that in order to prove the content of writing, the original writing is required, unless otherwise stipulated by this Code; pursuant to Article 274 (2) of the CPC of BiH a certified copy of the original may be used as evidence. In addition, Article 219 (3) of the CPC of BiH stipulates that the records on gathered information from persons in the investigative phase may be used as evidence in the criminal proceedings if provisions of Articles 78 and 86 of the CPC of BiH have been complied with. However, evidence of the ICTY should be considered as evidence collected in accordance with the Law on Transfer which, as the Prosecutor himself underlined in his response to the referenced motion, constitutes *lex specialis* in relation to the CPC of BiH. Pursuant to Article 2 of the Law on Transfer of Cases, as a general rule, evidence collected in accordance with the ICTY Statute and Rules of Procedure and Evidence may be used in proceedings before the Court of BiH. Therefore, relevant provisions of the CPC of BiH, more precisely provisions pertaining to the examination of suspects and witnesses, do not refer to evidence collected by the ICTY. Further, having reviewed a copy of one of disputed statements the Court notes that the statement was taken by authorised official persons of the ICTY, that prior to giving the statement the witness was informed she should tell the truth and about the fact that her statement could be used in the criminal proceedings, that after she gave the statement it was read to her and that she confirmed that the statement included everything she had said to her best knowledge and recollection. In addition, the Court also wants to underline that pursuant to Article II (2) of the BiH Constitution, in the event of possible conflict of national provisions and rights guaranteed by the ECHR, the Convention shall have priority. The consequence of this is that the formal conditions stipulated by national legislation shall not be applied in cases where their application would influence the right to a fair trial and equality of arms, guaranteed by Article 6 of the Convention. Finally, at the main trial, the prosecution attorney did not base his objection to the presentation of the disputed evidence, i.e. uncertified copies of statements of the mentioned witnesses, on the suspicion as to the authenticity of their contents.

#### 1.5.6 – Conclusion

<sup>16</sup> E.g. see ECtHR, *Atlan v. the United Kingdom*, Judgement of 19 June 2001, §45; ECtHR, *Pelissier and Sassi v. France*, Grand Chamber, Judgement of 25 March 1999, §45.

[27] Based on the above-mentioned reasons, pursuant to Article 14 of the CPC, Article 6 of the ECHR, and relevant court practice of the ECtHR, bearing in mind Article II (2) of the BiH Constitution, according to which the rights and freedoms mentioned in the ECHR shall be directly applied in Bosnia and Herzegovina, and in relation to other laws, the Court acknowledged the motion of defence counsel to admit uncertified copy of the statement of Timka Kapetanović into evidence.

#### 1.6 – Evidence presented at the main trial

[28] During the evidentiary procedure, the Court heard the evidence of the prosecution, of the defence, as well as the evidence the presentation of which was ordered by the Court.

[29] The following witnesses have been examined by the Court at the main trial as part of subjective evidence:

Nail Ramić, Hedija Hodžić, Naila Ahmetagić, Hasena Bajramović, Ibrumša Agić, Cura Gluščević, Vasvija Gluščević, Hajra Kapetanović, Almasa Ahmetspahić, Hamdo Ahmetspahić, Ahmo Karišik, Almir Aljić, Salim Ahmetspahić, Ibro Memić, Mula Užičanin, Fehima Čakić, Sajma Šabanović, Rusmira Bulatović, Fatima Poljo, Latifa Hodžić, Kada Spahić, Fata Šabanović, Ševka Šehić, Razija Hurem a.k.a. Šuhra, Timka Kapetanović, Haša Hadžić, Ramiza Šabanović.

During the main trial, witness statement record for Muniba Gluščević was read out. The statement was given for the record to the Crime Police Sector in Goražde on 27 January 2005, and the reason for reading of this statement was the death of the witness.

[30] Upon the motion of the Prosecutor's Office of BiH, based on opinion and findings delivered in writing, in the capacity of expert witnesses the Court examined Dr Hamza Žujo, who carried out forensic examination and exhumation on the location of Slap near Žepa, Dr Zdenko Cihlarž who carried out forensic examination and participated in the exhumation in the territory of Velji Lug, the Višegrad Municipality, pathologist and forensic expert John Clark, who carried out pathological examination and identification of victims from the mass grave of Slap-Žepa, the Rogatica Municipality.

At the main trial held on 12 May 2006, witnesses Almasa Ahmetspahić and Slaviša Jovanović were confronted, as well as Professor Esad Bilić, an expert witness in graphology and graphoscopy and Sekula Mičić, graduate engineer.

[31] Further, the following documents tendered into evidence by the Prosecutor's Office of BiH have been reviewed at the main trial: Witness Examination Record for Nail Ramić made in the Crime Police Sector in Goražde No. 0702/3-1 dated 27 January 2004 and Witness Examination Record for Nail Ramić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 26 May 2005; Witness Examination Record for Ibrumša Agić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 26 May 2005; Witness Examination Record for Cura Gluščević made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 31 May 2005; Witness Examination Record for Hedija Hodžić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 30 May 2005; Witness Examination Record for Naila Ahmetagić made in the Crime Police Sector in Goražde No. 07-2/3-1 dated 9 April 2004; Witness Examination Record for Naila Ahmetagić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 25 May 2005; Witness Examination Record for Vasvija Gluščević made in the Prosecutor's

Office of BiH No. KT-RZ-2/05 dated 24 May 2005; Witness Examination Record for Hajra Kapetanović made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 30 May 2005; Witness Examination Record for Almasa Ahmetpahić made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 1 February 2005; Witness Examination Record for Almasa Ahmetpahić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 31 May 2005; Witness Examination Record for Hamdo Ahmetpahić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 3 June 2005; Witness Examination Record for Ahmo Karišik made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 7 January 2004; Witness Examination Record for Ahmo Karišik made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 3 June 2005; statement of Hamdo Karišik dated 29 October 1999; Witness Examination Record for Almir Aljić made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 1 February 2005; Witness Examination Record for Almir Aljić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 27 May 2005; Witness Examination Record for Salim Ahmetpahić made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 1 February 2005; Witness Examination Record for Salim Ahmetpahić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 27 May 2005; Witness Examination Record for Ibro Memić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 21 June 2005; Witness Examination Record for Mula Užičanin made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 31 May 2005; Witness Examination Record for Fehima Čakić made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 8 February 2005; Witness Examination Record for Fehima Čakić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 26 May 2005; Witness Examination Record for Saima Šabanović made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 19 November 2003; Witness Examination Record for Saima Šabanović made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 25 May 2005; Witness Examination Record for Nail Ramić made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 27 January 2004; Witness Examination Record for Nail Ramić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 26 May 2005; Witness Examination Record for Fatima Poljo made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 5 May 2004; Witness Examination Record for Fatima Poljo made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 24 May 2005; Witness Examination Record for Rusmira Bulatović made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 5 May 2004; Witness Examination Record for Rusmira Bulatović made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 24 May 2005; Witness Examination Record for Latifa Hodžić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 30 May 2005; Witness Examination Record for Kada Spahić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 26 May 2005; Witness Examination Record for Fata Šabanović made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 24 May 2005; Witness Examination Record for Ševka Šehić made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 5 May 2004; Witness Examination Record for Ševka Šehić made in the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 25 May 2005; Witness Examination Record for Muniba Glušević made in the Crime Police Sector in Goražde No. 07-02/3-1 dated 27 January 2005; Reference Letter of the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) for the accused Boban Šimšić No. RU 20050407-01 dated 13 April 2005; Death Certificate for Redžo Šabanović No. 04-202-7218/04 dated 30 November 2004; Death Certificate for Ismet Bulatović No. 202-5293/04 dated 21 June 2004; Record on Exhumation, Cantonal Court in Sarajevo No. Kri-364/00 with photographic documents, sketch of the scene and autopsy report (Mujo Glušević); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-358/00 with photographic documents, sketch of the scene and autopsy report (Ibrahim Kešmer); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-357/00 with photographic documents, sketch of the scene and

autopsy report (Hamed Kešmer); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-332/00 with photographic documents, sketch of the scene and autopsy report (Samir Softić); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-367/00 with photographic documents, sketch of the scene and autopsy report (Emin Agić); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-347/00 with photographic documents, sketch of the scene and autopsy report (Hasib Gluščević); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-448/00 with photographic documents, sketch of the scene and autopsy report (Sead Hodžić); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-335/00 with photographic documents, sketch of the scene and autopsy report (Huso Bulatović); Record on Exhumation, Cantonal Court in Sarajevo No. Kri-334/00 with photographic documents, sketch of the scene and autopsy report (Dželal Hodžić); Reports on forensic search of the scene, Ministry of Internal Affairs – Sarajevo (refer to evidence under No. 52-58), six (6) reports; Record on Exhumation, Cantonal Court in Sarajevo No. Kri-456/00 with photographic documents, sketch of the scene and autopsy report; Record on Exhumation, Cantonal Court in Sarajevo No. Kri-493/00 with photographic documents and autopsy report (Hasan Gluščević); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, Report on Forensic Expertise and DNA Analysis for Safet Aljić (case No. 608); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, Report on Forensic Expertise (case No. 609); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, Report on Forensic Expertise (case No. 610); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, Report on Forensic Expertise (case No. 611); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, Report on Forensic Expertise (case No. 612); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, report on forensic expertise (case No. 613); Photographic documents of the exhumation, Velji Lug, Višegrad, No. 15/03 with sketch of the scene No. 14/2003, Report on Forensic Expertise (case No. 614); Report on On-site Investigation, Cantonal Court Goražde No. Kri-4/03 dated 27 May 2003; Report on completed exhumation dated 19 May 2003 of the Federation Commission on Missing Persons; Official Note, Cantonal Court Goražde No. Kpp: 2/05 dated 28 January 2005; Receipt on Hand-over of a person deprived of liberty, Court Police No. Sp-10-19/05 dated 24 January 2005; Receipt on Take-over of a person deprived of liberty, No. Sp-10-19/05 dated 24 January 2005; Record on Depriving of Liberty, Police Administration Sarajevo No. 09-12/01-04-7-2808 dated 24 January 2005; Decision on Custody, Cantonal Court Goražde No. Ki:21/02 dated 15 April 2003; Decision on Extending the Custody, District Court Istočno Sarajevo No. Kv-8/05 dated 23 February 2005; Decision on Extending the Custody, Supreme Court of the Republika Srpska No. Kr-17/05 dated 12 May 2005; Decision of the Supreme Court of the Republika Srpska No. Kž-76/05 dated 9 May 2005; Decision of the Supreme Court of the Republika Srpska No. Kž-88/05 dated 14 June 2005; Official Note of the meeting held in the United Nations Mission in Sarajevo dated 11 May 2005; Official Note of an interview with Hazim Ahmetagić made in the Prosecutor's Office of BiH on 23 June 2005; Judgement – ICTY IT-98-32 “VIŠEGRAD” against Mitar Vasiljević; a photograph of the suspect Boban Šimšić; Sentencing Report Police Station Višegrad No. 13-1-11/02-234-60/05 dated 6 June 2005, Employment Record for Boban Šimšić, Memo of the Public Security Centre Istočno Sarajevo, Police Station Višegrad, No. 13-1-11/01-29-52/05 dated 17 June 2005.

[32] The Court examined the following witnesses as part of subjective evidence of the defence:

Almasa Ahmetspahić, Fata Šabanović, the accused Boban Šimšić in the capacity of a witness, Munir Ahmetagić, Samir Bulatović, Asmir Spahić, Stojan Papić, Dragoljub Papić, Zoran Šimšić, Milosav Šimšić, Stanimir Šimšić, Goran Miličević, Miloje Joksimović, Hana Softić, Ilija Gavrilović, Slaviša Jovanović, Slaviša Đurić and witness Mitar Vasiljević who gave his statement via video-link between prison unit in Graz (Austria) and the Court of BiH.

[33] In addition, during the main trial, the contents of the following documents of the defence were presented by reading and through presentation: audio and video reproduction of the statement of the witness Ismet Softić given on 10 August 2005 (preservation of evidence by the Court), review of documents of the State Commission for the collection of facts on war crimes committed in the territory of the RBiH No. 9067/95 and 4480/94; the statement of Fata Šabanović No. 9067/95 from 1995 given to the employees of the State Commission for the collection of facts on war crimes; the statement of Emin Spahić No. 4480/94 dated 21 June 1994 given to the employees of the State Commission for the collection of facts on war crimes committed in the territory of the RBiH; the statement of the witness Naila Ahmetagić given to the representative of the Office of the Prosecutor of the ICTY dated 12 June 2000; reading of the statement of the witness Timka Kapetanović given to the representative of the Office of the Prosecutor of the ICTY dated 23 May 2001; the statement of the witness VG-105, given in the case against Mitar Vasiljević (IT-98-32), Official Letter of the Prosecutor's Office of BiH No. KT-RZ-2/05 dated 18 August 2005; review of ICRC records on missing persons in the territory of BiH, issue of 1998, pages 355 and 357, official note of the Crime Police Sector Goražde No. 07-02/3-1-39 dated 6 June 2003; ICTY Judgement No. IT-98-32 in the Prosecutor v. Mitar Vasiljević case, photographic documents, Death Certificate for Dželal Hodžić No. 03-202-224/05 dated 11 July 2005 issued by the Registry Office of the Višegrad Municipality, marriage certificate No. 03-201-13399/05 dated 29 September 2005, issued by the Registry Office of the Višegrad Municipality; a memo from the Association – Woman Victim of the War No. 85/05 dated 9 May 2005 and No. 85/05 dated 11 May 2005; medical documents of the Health Institution in Užice for Slaviša Jovanović; Certificate No. 136/12 May 2006 of the Red Cross Stara Pazova on the place of residence of Slaviša Jovanović; certificate of employment No. 255/06 dated 11 May 2006 for Milosav Šimšić; Death Certificate No. 03-202-287/05 dated 7 September 2005 for Dragomir Šimšić; Death Certificate for Perka Šimšić No. 03-202-288/05 dated 7 September 2005.

On the motion of the defence, based on the findings and opinion submitted in writing, the Court examined the expert witness Sekula Mičić in the capacity of expert witness.

[34] The Court also used the legal possibility and pursuant to Article 261 (2) (e) of the CPC of BiH summoned Elbis Ahmetaš and Selmo Kilalić as witnesses, ordered graphology and graphoscopy expert analysis carried out by Professor Esad Bilić, and on 3 July 2006 conducted a crime scene investigation in the Firehouse Višegrad and the Elementary School Hasan Veletovac, currently named Vuk Karadžić in Višegrad on which occasion a record was made, whereas the State Investigation and Protection Agency (SIPA) made a video recording, photographic documents and the sketch of the scene under No. 17-02/8-04-1-13/06.

## 1.7 – General Evaluation of Evidence

[35] The Trial Panel evaluated evidence in this case pursuant to Article 281 of the CPC by evaluating every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, concluded whether a fact has been proven or not.

[36] As opposed to evidence reasoned in detail and based on which the Court derived factual and legal conclusions of the Verdict, the Court did not particularly explain, or at least not in detail, other pieces of evidence on which it did not base its decision or because it concerned the pieces of evidence which were not questionable to anyone throughout the proceedings.

[37] Operating within the provision of Article 2 of the CPC of BiH (Principle of Legality), the Trial Panel was mindful of the fact that between the holders of functions defined by the criminal procedure – prosecution and defence attorneys - huge differences and bitter confrontation developed concerning the compliance with the guaranteeing function of the criminal legislation, according to which no one who committed a criminal offence can avoid criminal responsibility, i.e. the criminal sanction prescribed for that criminal offence, in respect to which the matter is clear for the prosecution from the very beginning, i.e., there is no doubt in their mind that the criminal responsibility of the accused has been proven, on one hand, and the stance of the defence on the other hand, which takes quite the opposite position. In the opinion of the defence, pursuant to Article 3 (1) of the CPC, the accused enjoys the presumption of innocence. Due to that presumption, the burden to prove the guilt of the accused rests on the part of the prosecution, and in the opinion of the defence, the prosecution failed to prove the guilt of the accused throughout the evidentiary procedure.

[38] The Trial Panel will leave it to historians and social psychologists to measure the true depth of the episode of the Balkans' conflict and historical doom of peoples living in the area, including in the territory of the Višegrad Municipality, and to analyse deeply rooted causes concerning the context of the event which is mentioned in the ICTY Judgements in the *Prosecutor v. Mitar Vasiljević* case. The task given here is of a more modest character. Based on the evidence presented during the trial it is to be established what happened in the period described under the Counts of the Indictment and finally to establish in this case whether the accused is to be held criminally responsible for the participation in those events.

[39] Therefore, this Court will not consider the participation of other persons who were active participants in the described events or it will do that only to the extent to which it is related to the accused under the Counts of the Indictment, but it will consider the case of the accused for itself in a way that the accused can be convicted only if the evidence presented in the courtroom during the main trial (Article 281 of the CPC), beyond reasonable doubt shows that he is guilty of the offence which is the subject of the charges. Conclusions of the Trial Panel with regard to other individuals named during the evidentiary procedure are based on evidence presented during the trial and were made only for the purpose of this trial, in other words, such conclusions in no way bind those persons so that, without any limitation, they can contest any piece of evidence adduced in this case which concern them should it be presented in a court proceedings if conducted against them before this Court.

[40] The Trial Panel had in mind that the facts that are *in peius* for the accused must be established with certainty, meaning that the Court cannot have doubts as to their existence. If the presented evidence suggests the suspicion with regard to the existence of facts constituting elements of a crime or on which the application of a provision of the criminal code depends, the Court is obligated to resolve the criminal matter in the way more favourable for the accused *in dubio pro reo*. That principle as an expression of convenience afforded to the

accused means the establishment of the rule according to which the facts to the prejudice the accused must be established with full certainty (in the Anglo-Saxon law this represents the evidentiary standard “*proof beyond a reasonable doubt*”). Hence, if there is a suspicion in relation to those facts, they are to be considered undetermined. The second rule is related to the facts in favour of the accused and they are considered established, even if they are only probable or if there is suspicion as to their existence, even if the existence of the facts to the prejudice of the accused is more probable.<sup>17</sup> The Court was mindful of the jurisprudence of the Strasbourg Court according to which any situation bearing slightest suspicion in relation to evidence must be in favour of the accused.<sup>18</sup> In the case of *Flik et al.* the US Military Tribunal at Nurnberg took a stance that, *inter alia*, it would be guided by a standard according to which “if an authentic evidence can lead to two reasonable conclusions – one on the guilt and the other on the innocence – decision shall be made in favour of the innocence”.<sup>19</sup> Therefore, if there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.<sup>20</sup> It is exactly such a situation that the defence pleads for.

[41] In this case, the accused opted for testifying in the courtroom which does not mean that he assumed an obligation to any extent to prove his innocence. It also does not mean that the Panel needed to decide between his statement and the statement of the prosecution witnesses. The Trial Panel acted so as to establish whether the statements of the prosecution witnesses can be admitted as evidence which undoubtedly (beyond reasonable doubt) corroborate factual allegations, regardless of the statement of the accused and other defence witnesses. However, the Panel also considered the gravity of the fact that the accused in this case testified before the defence witnesses gave their statements and thereby at that moment the accused did not know what they were going to say in their statements. The Panel placed that factor in favour of the accused while considering the weight to be given to his statement. If he offers an alibi in his defence, the accused is not under the obligation to prove the alibi. The prosecution is under the obligation to eliminate any reasonable possibility that the evidence on the alibi is true. Given the circumstances in this case, if the Trial Panel was convinced that there existed reasonable possibility that the accused had been somewhere else and not, for example, in the villages of Žlijeb, Kuka or Velji Lug, that means that the prosecution failed to prove beyond reasonable doubt that he had participated in the commission of the criminal actions described under the Counts of the Indictment pertaining to the events in those places.

As regards the defence of alibi of the accused, the Court particularly considered the statements of the prosecution witnesses who saw the accused at the scene of the event mentioned in the Indictment. Generally speaking, while evaluating evidence on the identity of the accused the Trial Panel took into consideration factors such as: under what conditions – according to their own statements – did each of the witnesses see the accused, how long he was looking at him, how well the witness knew the accused before identifying him, the way in which the witness identified the accused, in particular the details concerning clothes – uniform and weapons, etc. The Trial Panel acknowledges that with the evidence determining the identity, consideration should always be given to a kind of uncertainty immanent to such evidence due to fickleness of human perception and memory, even if the witness providing

<sup>17</sup> See Commentary on the Criminal Procedure Code in Bosnia and Herzegovina, Joint Project of the Council of Europe and the European Commission, Group of Authors, Sarajevo 2005, p. 46-50.

<sup>18</sup> See *Pfunders* (Austria v. Italy), 1963, Yearbook VI, p. 740 (782-784), *Barbera, Messague and Jabardo v. Spain*, 1988, Series A No. 146

<sup>19</sup> See Antonio Casese, “International Criminal Law”, Belgrade Centre for Human Rights, Belgrade, 2005, p. 181

<sup>20</sup> See *Prosecutor v. Delalić et al.*, Second-instance Judgement of the ICTY, 20 February 2001, §458.

identification was deeply committed to telling the truth but also whether such evidence is objectively reliable. The Court had in mind that the prosecution tried to corroborate the identification of the accused with the identification by witnesses in the courtroom – which almost inevitably leads to recognising the person being tried, all the more because they could have seen a photograph in the printed and/or electronic media before the trial – therefore, no significant weight can be attached to such evidence.<sup>21</sup> The opposite conclusion can only be allowed in case when the witnesses such as Nail Ramić and Ibrumša Agić pointed at the identity of the accused during the trial since they knew him from the childhood as their neighbour.

[41] The Trial Panel also took into account the degree of consistency between the statements of witnesses in the courtroom and their statements made in writing before the trial. On that occasion, it noted that the statement of witnesses given in the courtroom in majority of cases did not correspond to that what they stated before the trial. The reason for this is that during the trial the witness might be asked some questions not posed earlier or that during the examination he/she could not remember details because he/she simply could not remember or due to the passage of time since the day of the event. Therefore, the Court did not consider minor discrepancies between the statements of witnesses given previously in writing and their statements in the courtroom as the reason to discredit the witness entirely. In somewhat a different light, an issue arises concerning the change of witness statements in relation to important facts, as well as in relation to characteristic details firmly structuring the framework of factual circumstances, which will be subject of the detailed analysis and evaluation of evidence that follows.

[42] Generally speaking, the Trial Panel was aware of the fact that the witnesses are the least reliable evidentiary means even when they are committed to telling the truth, and in this case exactly those subjective pieces of evidence prevail, which undoubtedly required additional effort of the Court while assessing their evidentiary value, having in mind lack of objective evidence which would be given a function of a test to verify the truthfulness of the statements. All the more, because “through a natural process of unconscious reconstruction even the most sincere witnesses can convince themselves that a certain event must have happened”. It is exactly this situation that, in the opinion of the Court, partly characterized the testimony of Almasa Ahmetspahić concerning the alleged participation of Boban Šimšić together with Slaviša Jovanović in the events that took place in the village of Velji Lug, taking the psychological evaluation of her statement as a starting point, which the Trial Panel directly ascertained.

[43] During his closing argument, perhaps being aware of the problem of inconsistency of the statements of witnesses he proposed to be heard, the Prosecutor tried to minimise it alleging that the noted inconsistencies pertain to irrelevant facts, which is not supported in the contents of the presented evidence, which will be the subject of a thorough consideration in the further elaboration. At this point, the Court notes that inconsistencies with regard to description of details by witnesses can generally change the overall picture of the subject of testimony, and due to that reason they should not be disregarded. The submissions of the Prosecutor used in an effort to clarify the inconsistencies of the witness by something that falls under forensic psychology is also groundless because the prosecution witnesses, who generally were also victims, received support before, during and after the trial, by psychologists of the Witness Support Section of the Registry of the Court, who advised them in detail about what they

<sup>21</sup> *Prosecutor v. Mitar Vasiljević*, Trial Panel II Judgement dated 29 November 2003, p. 3, item II.18.

were going to face during the main trial. Presiding Judge of the Panel also took an active role in that sense. Objections of the Prosecutor in his closing argument stating that during the cross-examination the voice of defence counsel “thundered” in the courtroom and thus confused the witnesses are entirely groundless. Audio recording shows that clear enunciation and sonorous voice of defence counsel can by no means have elements of shouting, as the Prosecutor tried to present it motivated by the needs of his case. The Court underlines this only in the context of demands of the regularity of the conduct of the proceedings. After all, some of the prosecution witnesses would not be confused and/or intimidated, even if had that been anyone’s intention, because during their testimony they were extremely hostile toward the defence counsel reaching the level of offence (e.g. “you work for money”) if not the aggressiveness. The testimony of Šeha Šehić bespeaks the best thereto, who despite the previous procedural warnings of the Presiding Judge of the Panel concerning the duties of a witness, fully obstructed answering the questions of the defence counsel. Contrary to this example, during the direct examination of the Prosecutor, almost all prosecution witnesses showed enviable level of concentration and cooperation which are the facts that the Court took into consideration while evaluating (im)partiality of their testimony. Finally, the fact of the passage of time generally applies to all testimonies and explains why the witnesses cannot remember certain sequences of events or some details. However, the Prosecutor’s bringing up of this argument does not resolve the issue of the inconsistency of testimonies of the witnesses in the major part. Otherwise, how to explain that some prosecution witnesses in their earliest statements, which were closest to the events of the critical period and when generally, by the nature of things, memory is the freshest, do not mention the accused or they do it in passing and marginally mentioning the name of Boban Šimšić, whereas they give details about the criminal role of Milan Lukić and others, while in their statements concerning the same events, given to the police or the Prosecutor in 2004 and 2005, they mentioned the name of Boban Šimšić either as an active participant in the events or an accessory, which is something that the Trial Panel had in mind in rendering the decision under Section II of the operative part of the Verdict. In pursuit of some of the reasons for such behaviour of some witnesses, the Court reached a logical conclusion, to which the defence rightly pointed as it seems, that between the two sequences in time when the statements were given, the activities interpolated about which, in the opinion of the Court, Ibrumša Agić convincingly testified and which were directed at changing their testimonies.<sup>22</sup> The testimony of Ibrumša Agić who at the main trial confirmed, although no such question was asked, that she had been pressured by the President of the *Association – Woman Victim of the War* to testify against Boban Šimšić as the other women did or otherwise she would no longer receive her pension, suggests an unambiguous conclusion that some of the prosecution witnesses had been instructed in which direction to testify before they gave their statements in the Prosecutor’s Office of BiH. That can be observed in the contents of their statements when they repeat as a stereotype the same answers to the questions of the Prosecutor, using the same expressions, for example the camp, that the accused was present in the school day and night or in that, while describing the conditions of their stay in the elementary school they said they had slept on the concrete, despite the fact visible in the photo-file, as well as in their testimonies, that they had been accommodated on the parquet of the basketball gym.

<sup>22</sup> Statement of the witness Naila Ahmetagić taken on 12 June 2000 and read out to the witness on 13 June 2000 and statement of the witness Timka Kapetanović taken on 23 May 2001 by investigators of the Office of the Prosecutor of the ICTY in The Hague, and statement of the witness Fata Šabanović taken by employees of the State Commission for the collection of facts on war crimes committed in the territory of the RBiH dated September 1995

[44] As regards the circumstance of exerting pressure on the independence of the Court, the defence submitted a proposal and the Trial Panel presented evidence by reviewing the request of the *Association – Woman Victim of the War*, Sarajevo, No. BiH 85/05 dated 9 May 2005, addressed to the Special 24.6 Panel of the Criminal Division, Section I for War Crimes, and No. 85/05 dated 11 May 2005. It is clear from the contents of the request dated 9 May 2005 that according to evidence at the disposal of the Association concerning the offences with which Boban Šimšić is charged, the case deserves to be labeled as “very sensitive” and therefore to be tried before the Court of BiH, whereas the motion regarding the case of Boban Šimšić No. BiH-88/05 dated 13 May 2005 reads that the Prosecutor’s Office of BiH did not examine a single victim or any eyewitnesses to the event prior to the submission of the documents, and that “someone” was considerate enough and scheduled the hearing for 10 May 2005 to take over the case. That occurred also due to rendering the Decision of this Court *ex officio* No. KRN/05/04 dated 13 May 2005 wherein the Court, while building a different standpoint concerning the sensitivity of the case in relation to the Prosecutor’s Office *inter alia*, in its arguments, calls for the correspondence of the said Association in which it is emphasized that the witnesses would present evidence only before the State Court (page 3, subparagraph 6). Therefore, it appears reasonable to conclude that if the said Association could act towards the Court being a professional, independent and impartial institution *per definitionem*, then it was all the more easier for it to act towards its own members – prosecution witnesses, who are usually the victims, so that their testimony be *in peius* for the accused. Therefore, while it is legitimate for the Association to direct their activities at finding witnesses to give evidence in this case, instructing them on how to give their evidence is not, whereof Ibrumša convincingly testified. With regard to this issue, indicative is the statement of Fehima Čakić, when asked a question by the Prosecutor, that she was fed up with everyone’s philosophising. That is why the Trial Panel, while evaluating statements of some prosecution witnesses, was considerably restrained in giving credence to their statements, but not only due to this fact.

[45] The Trial Panel noted that several prosecution witnesses (e.g. Nail Ramić and his daughter Naila) gave standardised and schematic statements such as “Boban was in charge” or “Boban was always present in the school when the worst things happened”, which actually represent their general conclusion on the role of the accused in the referenced events, without stating facts or at least not in a convincing manner, based on which such a conclusion could be drawn. Majority of the prosecution witnesses notably show the lack of verbal contents with regard to detailed and specific description of actions taken by the accused on the critical occasions, as charged with in the Indictment. In favour of such conclusion are statements such as: “they heard it from other women”. Those are actually stereotypes, without providing more details acceptable for the Court which would be used to describe events from the reality as a free narration presented graphically and thus with the necessary degree of credibility. In any case, in major part their statements lack such credibility in comparison to what the witnesses specifically and precisely stated with regard to the activities of Milan and Sredoje Lukić.

[46] The explanation of the Prosecutor that while giving their previous statements the witnesses were afraid because the accused was at liberty at that time is not valid since while giving their statements e.g. at the Security Centre in Goražde (FBiH) the same witnesses mentioned the names of the abovementioned Hague indictees who also were at large at the time and whose role in the events presented by the Prosecution, according to the testimonies of the witnesses themselves, was far more significant and responsible than the one of the accused Šimšić.

[47] The mentioned is additionally complicated by the existence of a negative emotional attitude of the injured parties, the prosecution witnesses, towards the accused, which is fully understandable and thus inevitable to a certain extent, but the Trial Panel is also aware that for that reason it needs to critically assess the evidentiary value of their testimonies. In other words, while analysing the statements of the prosecution witnesses who, as a rule, are also the injured parties in this case, in a propaedeutic approach the Court was focused on eliminating emotional and inadequate contents from their statements and dwelled on those parts which, in terms of their value, are relevant to establish whether a fact which is subject of the charges was proven or not. It was necessary to establish to which extent this negative emotional attitude towards the accused in the context of ethnic generalisation such as “they are all Chetniks” (although we should not forget the opposite attitude when the witness Fatima Poljo said: “not all Orthodox Serbs were guilty”) expands content-related, whether for the entire or just a part of the testimony, and depending on the answer to that question, to establish the credibility of the testimony. Having in mind the ICTY jurisprudence in cases where the Trial Chamber got the impression that the witness appeared to have considerable animus against the accused, the Trial Chamber is of the view that from the legal point of view it is unsafe to accept any of his/her evidence unless it is corroborated in a material aspect by independent evidence.<sup>23</sup> Entirely true are the averments of the Prosecutor stated in the context of (im)partiality of testimony that the defence witnesses were neighbours, friends and relatives of the accused and that by their evidence they wanted to help the accused, if not even themselves too, in avoiding or diminishing his criminal responsibility. It is also true that majority of the prosecution witnesses are mutually related or are neighbours, that as injured parties they are interested in the criminal prosecution and as severe punishment of the accused as possible.

[48] Concluding this level of consideration, the Court had in mind the thought of Thomas Aquinas who, speaking about beauty, which *mutatis mutandis* refers to the truth, says that three things are needed for that: wholeness, harmony and *claritas* or radiance.<sup>24</sup> Not much of that is identifiable in the statements of the majority of the prosecution witnesses in relation to the role of the accused in the said events. As the elaboration under Section II of the reasoning of the Verdict will show, neither wholeness nor coherence, and even least, clarity, were preserved in their statements.

1.8 - Facts established by final judgment of the ICTY in the *Prosecutor v. Mitar Vasiljević* case (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)

[49] Pursuant to 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 the Transfer), having examined the parties, the Trial Panel granted the motion of the Prosecutor’s Office dated 20 February 2006 to tender into evidence Judgements of the Trial and Appeals Chamber of the ICTY in the *Prosecutor v. Mitar Vasiljević* case, IT-98-32-A, Judgement dated 25 February 2004 and IT-98-32-T, Judgement dated 29 November 2002, and based on those Judgements the Panel accepted as proved the facts established by the mentioned final decision of the ICTY contained in Annex A of the motion pertaining to the existence of a widespread and systematic attack against civilian population in the Višegrad Municipality for the said period. Namely, under paragraph

<sup>23</sup> Case No. IT-98-32-T, footnote 190, p. 33.

<sup>24</sup> “History of Beauty”, Umberto Eco, Plato, Belgrade, 2004, p. 100.

58 of the first-instance Judgement, the ICTY Trial Chamber “*is satisfied upon the evidence before it that there was a widespread and systematic attack against the non-Serb civilian population of the municipality of Visegrad at the time relevant to the Indictment. The attack took many forms, starting with the Serb take-over of the town and the systematic and large-scale criminal campaign of murders, rapes and mistreatment of the non-Serb population of this municipality, particularly the Muslims, which eventually culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the Bosnian conflict. Within a few weeks, the municipality of Visegrad was almost completely cleansed of its non-Serb citizens, and the municipality was eventually integrated into what is now Republika Srpska*”. In the findings of this Panel, the motion of the Prosecutor’s Office was justified when it emphasized that the mentioned facts were of relevance, although they did not directly incriminate the accused for the criminal offences mentioned in the Indictment, in order to fulfill the elements of legal qualification of the criminal offences with which the accused is charged. The Court took judicial notice of these facts, in their nature rather being historical facts, since they appear as the key ones for the trials in war crimes cases. After all, the defence did not even contest them. In that regard, the Panel had in mind that the Prosecution needs to prove the truthfulness of the mentioned facts beyond reasonable doubt, that the Prosecution will use Article 4 of the Law on the Transfer in order to facilitate proving of facts while presenting its case and only if the Prosecution successfully presents its case, the defence needs to establish facts contesting the Prosecution evidence. Following this approach, the Panel granted the motion of the defence to consider as established the facts of the mentioned ICTY Judgements pertaining to the participation of Mitar Vasiljević in the events described in the Indictment.

[50] The Trial Panel also accepted as established the facts referred to by the defence which was not contested by the Prosecutor pertaining to the alibi of the accused Mitar Vasiljević. Namely, several prosecution witnesses and the Prosecution itself assert that Boban Šimšić acted as a co-perpetrator in the critical period, *inter alia*, together with Mitar Vasiljević. It is obvious in the final ICTY Judgement in the *Mitar Vasiljević* case that it was established that in the period from 14 to 28 June 1992 he had been in the hospital in Užice due to fracture of left lower leg and that “(141) The Trial Chamber is satisfied that the consistency of the medical records from different wards of the Uzice hospital with each other further reinforced not just their reliability, but also their authenticity, insofar as it further demonstrated the absence of forgery.” (Page 53 of the Judgement in the case No. IT-98-32-T ICTY). While considering the issue of the accused Mitar Vasiljević’s presence at the relevant time during the events in the Firehouse and the Elementary School Hasan Veletovac and in order to avoid circular arguments concerning the established fact that he was not present at the mentioned locations, implying that he could not be present there together with the accused Boban Šimšić, the Court at this point believes that the statements of all the witnesses pertaining to this circumstance are unreliable. In the further presentation of reasons, those places will be marked with the number of this paragraph.

## 1.9 – Relevant Law

### 1.9.1 – Application of substantive criminal law in a war crime case

[51] In his closing argument, the defence counsel for the accused raised an issue pertaining to the conflict of law in time, believing that Article 4 (a) of the CC of BiH cannot be applied, or otherwise the principle of legality, i.e. the prohibition of the retroactive effect of the criminal

code – *nullum crimen, nulla poena sine praevia lege poenali*, would be violated. Retroactivity is allowed only in favour of the accused in terms of the application of a more lenient law.

[52] Based on the Constitution as the fundamental legal document, or more precisely Article II (1) which stipulates that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols directly apply in Bosnia and Herzegovina and that these have priority over any other law, the Court considered the application of the substantive criminal code in the light of the European Convention.

[53] With regard to the application of the substantive criminal code, the Court finds the following two principles relevant: the principle of legality and the principle of time constraints regarding the applicability of the criminal code.

Article 3 of the CC of BiH provides for the principle of legality according to which no punishment or other criminal sanction may be imposed on anyone for an act which, prior to being perpetrated, was not defined as a criminal offence by law or international law, and for which a punishment was not prescribed by law. Article 4 of the CC of BiH (Time Constraints regarding Applicability) stipulates that the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence and if the law was amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

[54] The principle of legality is stipulated by Article 7 (1) of the ECHR which has the priority over any other law in BiH (Article 2.2. of the BiH Constitution). According to the mentioned Article of the ECHR “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed“. Therefore, it is prohibited to impose heavier penalty than the one that was applicable at the time when the criminal offence was committed. This provision, accordingly, stipulates the ban on pronouncing a heavier penalty, without establishing the mandatory application of a more lenient law on the perpetrator, in comparison to the penalty applicable at the time when the criminal offence was committed. Article 7 (2) of the ECHR stipulates that “This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.

Article 15 (1) of the International Covenant on Civil and Political Rights (hereinafter: ICCPR) stipulates: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”. Article 15 (2) of the ICCPR stipulates that: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.

[55] Finally, Article 4 (a) of the CC of BiH stipulates that Articles 3 and 4 of the CC of BiH shall not prejudice the trial and punishment of any person for any act or omission which, at

the time when it was committed, was criminal according to the general principles of international law, whereby, in fact, the provision of Article 7 (2) of the ECHR has been taken over, thus enabling exceptional departure from the principle set forth in Article 4 of the CC of BiH, as well as departure from the mandatory application of a more lenient law in the proceedings regarding criminal offences under international law, which is the case in the proceedings against the accused because, indeed, it concerns the incrimination which includes violation of the rules of international law. Such a stance was taken by Section I of the Appellate Panel of the Court of BiH in the verdict against Abduladhim Maktouf, No. KPŽ 32/05, dated 4 April 2006.

Article 172 of the CC of BiH stipulates Crimes against Humanity, as set forth in Article 5 of the ICTY Statute (Article 5 of the ICTY Statute defines Crimes against Humanity as specific offences “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”). In the critical period, Crimes against Humanity were not explicitly stipulated by criminal codes in Bosnia and Herzegovina.

[56] Customary status of punishability of Crimes against Humanity and imputation of individual criminal responsibility for its commission in 1992 were confirmed by the UN Secretary General<sup>(1)</sup>, International Law Commission<sup>(2)</sup>, as well as by jurisprudence of ICTY and International Criminal Tribunal for Rwanda (ICTR)<sup>(3)</sup>. These institutions have assessed that punishability of Crimes against Humanity constitute an imperative norm of international law or *jus cogens*<sup>(4)</sup> and it appears undisputable that in 1992 crimes against humanity were a part of the customary international law.

Article 4 (a) of the CC of BiH refers to “general principles of international law”. Since neither international law nor the ECHR recognise an equivalent term, it is actually a combination of “principles of international law” as recognised by the UN General Assembly and the International Law Commission and “general principles of law recognised by the community of nations” as defined by the Statute of the International Court of Justice and Article 7 (2) of the ECHR.

[57] The principles of international law as recognised by the Resolution of the General Assembly No. 95(I) (1946) and the International Law Commission (1950) refer to the “Charter of the Nurnberg Tribunal and the Judgement of the Tribunal”, therefore to the crimes against humanity. “Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal” adopted by the International Law Commission in 1950 and submitted to the General Assembly or Principle VI.c stipulates that crimes against humanity are punishable as crimes under international law. Principle I stipulates that “Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment”. Principle II stipulates that “The fact that internal law

<sup>(1)</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993, paragraphs 34-35 and 47-48

<sup>(2)</sup> International Law Commission, Commentary on Draft Code of Offences against the Peace and Security of Mankind (1996), Article 18.

<sup>(3)</sup> ICTY, Appeals Chamber, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 141; ICTY, Trial Chamber, *Tadić* Judgement dated 7 May 1997, paragraphs 618-623; ICTR, Trial Chamber, *Akayesu*, 2 September 1998, paragraphs 563-577.

<sup>(4)</sup> International Law Commission, Commentary on the text of the draft articles on state responsibility for international wrongful acts (2001), Article 26.

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”.

[58] Practice of the ECtHR underlines the application of the provision of Article 7 (2) in relation to the application of Article 7 (1) of the ECHR in several similar cases<sup>(5)</sup> in which the subject of the discussion was the existence and punishability of crimes against humanity as a criminal offence. Moreover, in the *Kolk and Kislyiy v. Estonia* case, the European Court “recalls that the interpretation and the application of national law in principle fall under the jurisdiction of national courts (...)”<sup>(6)</sup>. This is applied also when the national law relates to the rules of the general international law or international treaties.

Therefore, the criminal offence of crimes against humanity can in any case be subsumed under “general principles of international law” set forth in Article 4 (a) of the CC of BiH. In other words, regardless of whether it be viewed from the standpoint of international customary law or the standpoint of “the principles of international law”, unambiguous conclusion is that crimes against humanity constituted the criminal offence in the critical period, and therefore the principle of legality is satisfied.

[59] The fact that some criminal actions enumerated in Article 172 of the CC of BiH existed in the contents of the law that was in force at the relevant time – at the time of the commission of the offences, more precisely in Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186 of the CC of SFRY, in other words, that the actions referred to in the indictment were punishable by the then applicable criminal code, although a crime modeled in such a way was not recognised by the previous criminal legislation as a separate criminal offence, also contributes to the conclusion of the Court with regard to the principle of legality. Finally, with regard to Article 7 (1) of the ECHR, the Court notes that the application of Article 4 (a) is additionally justified by the fact that the prescribed sentence of imprisonment of minimum ten years or a long-term imprisonment is in any case more lenient than the death penalty which was in force at the time of the commission of the offence, which meets the application of the principle of time constraints regarding applicability or the application of “the law more lenient to the perpetrator”.

[60] Finally, it is impossible not to refer to the fundamental rights, more precisely “positive obligations” of the European Convention running through all the mentioned documents, starting with the right to life (Article 2), right that no one shall be subjected to torture or to inhuman or degrading treatment or punishment (Article 3) and right to respect for private and family life, including physical and moral integrity<sup>(7)</sup> (Article 8). Such positive obligations mean accepting the measures introduced for the purpose of ensuring efficient respect for guaranteed rights, even in the domain of relations among individuals<sup>(8)</sup>. When severe violation of these rights is in question, this includes the obligation of states to adopt criminal provisions

<sup>(5)</sup> E.g. See the ECtHR judgement in the *Naletilić v. Croatia* case, 51891/99 and the judgement

<sup>(6)</sup> See *Papon v. France* No. 54210/00, ECtHR 2001-XII and *Touvier v. France*, No. 29420/95, decision of the Commission dated 13 January 1997

<sup>(7)</sup> European Court of Human Rights, *X. & Y. v. the Netherlands*, judgement of 26 March 1985, item 22; *Stubbings v. the United Kingdom*, judgement of 22 November 1996, item 61.

<sup>(8)</sup> See in particular the European Court of Human Rights, *X. & Y. v. the Netherlands*, judgement of 26 March 1985, item 23; the European Court of Human Rights, *Stubbings v. the United Kingdom*, judgement of 22 November 1996, item 62; European Court of Human Rights, *M.C. v. Bulgaria*, judgement of 4 December 2003, item 149.

to efficiently punish such offences and apply them in practice through efficient investigation and criminal prosecution.

[61] Crimes against humanity constitute beyond any doubt the gravest criminal offences and the most severe violation of the rights guaranteed by Articles 2, 3 and 8 of the Convention. In general, crimes against humanity are essentially in contradiction to all basic rights and principles the Convention endeavors to protect, including the respect for human dignity. Therefore, the strict application of the principle of legality which would prevent efficient and appropriate punishment of such crimes would be in contradiction to the very goals of the European Convention. More precisely, it could be considered as the violation of the positive obligations of the state of Bosnia and Herzegovina pursuant to Articles 2, 3 and 8 of the Convention.

It is clear from the mentioned reasons that not only that the retroactive application of the principle of legality as currently defined would not violate Article 7 of the ECHR but, to the contrary, the application of the principle of legality effective in 1992 would be contrary to the mentioned Convention and constitute possible violation of its several provisions.

Therefore, regardless of the legal regulation of 1992, the principle of legality must be understood in the way so that it comprises not only national but also international law and general legal principles.

#### 1.9.2 – Crimes against Humanity – Article 172 of the CC of BiH

[62] This offence defines conduct directed against civilian population violating basic principles of international humanitarian law, morality and humanity and is characterised by high degree of inhumanity and cruelty.<sup>25</sup>

According to Article 172 of the CC of BiH, the offence is committed by the one who perpetrates one of offences mentioned in paragraph (1), items (a) through (k), as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack, in other words being aware of the character of such an attack by the person perpetrating such offences. The act of the commission of this criminal offence is defined alternatively and consists of a complex of various activities (acts) by which this criminal offence can be perpetrated. That makes this offence a collective incrimination comprising a number of separate criminal offences such as murder, rape, torture, unlawful imprisonment, etc. while item (k) refers to the so-called general clause comprising all “other inhumane acts of a similar character” committed with the mentioned intention.

[63] Looking into the existence of general elements for this criminal offence, which pertain to the existence of: a) a widespread and systematic attack and b) that the attack is directed against any civilian population, having reviewed the presented evidence, the Court finds that beyond reasonable doubt the Prosecutor proved the existence of these facts concerning the events not only in Višegrad but also in the territory of Municipality of the same name. Namely, the existence of facts established by the ICTY judgments in the case against accused *Mitar Vasiljević*, which was admitted into evidence on the basis of Article 4 of the Law on Transfer of Cases, lead to such a conclusion but also the statements given by the witnesses of

<sup>25</sup> Criminal law – special part / Miloš Babić, Ivanka Marković, Faculty of Law, Banja Luka, 2005, p.469

the prosecution and the defence, including Hana Softić, Ismet Softić, Asmir Spahić, Munir Ahmetagić, and Stanimir Šimšić who confirmed in his statement that in May and June 1992, the Muslim population left their homes in the villages in the vicinity of Višegrad, that some Serb army “Orlići” (*translator’s note: “Young eagles”*) burnt their houses and killed the people. Therefore, it is undisputable for this Court that in the mentioned period the persecution and killing of hundreds of persons, non-Serb civilian population, occurred, as did the destruction of unprotected homes of Bosniaks, destruction of cultural and historical, mainly religious objects, pillaging and burning of private property of Bosniaks and other serious violations of the provisions of the international humanitarian law. In addition, the examined witnesses have confirmed that a great number of persons of Bosniak ethnicity who did not leave after the outbreak of war, were forced out of their villages and unlawfully confined in an organised way in facilities previously designated for that purpose such as Elementary School “Hasan Veletovac” and Firehouse in Višegrad which, on that occasion, were used as prisons. Bosniak civilians were taken to those prisons after the Serb troops, among whom, as stated by numerous witnesses of the prosecution, were their neighbours, had previously disarmed them and then rounded them up in the villages and subsequently transported them to Višegrad to the mentioned Firehouse and school by military trucks which were waiting at a designated place. That actually implies organised character of the attack against Bosniak civilian population who did not leave their homes voluntarily and spontaneously but under the threat of weapons, or their Serb neighbours told them that they should leave their village, which regardless of the motives of such statements and different meanings attributed to them – still does not make them devoid of coercion. The truthfulness of the above stated is corroborated by numerous testimonies according to which Bosniaks had no confidence in their Serb neighbours (although absolute significance cannot be given to that if the testimony of Munir Ahmetagić is taken into consideration) so they were hiding in the woods because they were afraid, and in various ways they crossed over to the territory controlled by the Army of the RBiH. The pattern of behaviour seen in the village of Velji Lug where 7 civilians were killed 5 of whom were women, one baby and one man, houses and commercial facilities owned by Bosniaks were burnt and their property destroyed whereas such devastation was not justified by military necessity, applied throughout the Višegrad Municipality which is witnessed by numerous mass graves. It indicates that the attack was directed against civilian population, in this case against Bosniak population, that criminal actions were taken against them as a collective protected value identifiable by their ethnic, cultural and religious affiliation out of discriminatory intentions, which characterise them as persecution.

However, from the point of view of actions proven as having been committed by the accused in the capacity of a perpetrator, co-perpetrator or alternatively as an accessory, in other words, his *reus actus* and causal nexus of the action and the consequences that occurred, and the existence of knowledge of the accused about the attack as the general element of the referenced criminal offence, and/or the existence of the discriminatory intention on his side, will be the subject of special consideration under sections I and II of reasoning of the Verdict.

[64] While considering the issue of the conditions of accommodation of the imprisoned civilians of Bosniak ethnicity in “Hasan Veletovac” school, prosecution attorney finds that those persons considered the school as being a detention camp because the conditions under which the imprisoned Bosniaks were kept, to put it very briefly, were inhumane. The prosecution said there was no food or water in the school, the imprisoned civilians had no possibility to go out, etc. On the other side, the defence saw that as a reception centre and not a detention camp. Being asked about the conditions of the stay of the imprisoned Muslim

civilians in the school, several prosecution witnesses gave evidence. Fata Šabanović, for example, states they had no water or food, which is again not corroborated by the statements of other witnesses who stated that they had food but not sufficient. In her statement given to the State Commission for Gathering Facts on War Crimes in September 1995, Fata stated that the food was of poor quality – which means that there was some food – that children were given 20 breads. Hasena Bajramović testifies that the children were given powder milk, whereas Sajma Šabanović confirms that they were each given a quarter of bread and a big can for four persons. Sajma also testifies that they were placed in a gym with two baskets and stands, that some of the inhabitants that were brought there found mats and used them, whereas others brought blankets with them. There were 150 men, women and children imprisoned in the school where they stayed for 10 days. With regard to security, she stated that two guards were there during day shifts and two during night shifts. As for water, Fata also does not tell the truth because the Court and the parties could see themselves on the occasion of the identification of the scene that two toilettes were in the immediate vicinity of the gym. After all, in the context of an event, Fata herself testified that she went to the toilette. Nail Ramić also stated they had water where the toilette was. Also, Sajma states that there was one room, probably a locker-room across the hall with water supply and in the gym they found several mats. If those mats were there and if parquet was laid in the gym, on the basketball playground where the civilians were imprisoned, then the assertion of those witnesses testifying that they lay on concrete, is not true. Latifa Hodžić states that people decided to go to the Red Cross and ask for help to be evacuated as they were sick of being hungry so a group of women went to the Red Cross where they were told to go whichever way they could, that Boban let those women go on that occasion. Latifa's statement indicates the truthfulness of the testimony of the accused according to which women went to the Red Cross and that the prisoners could move out of the school during the day, although not during the night. The evidence given by Goran Milićević was consistent with that. Moreover, Latifa stated that the accused let women go from the school to the Red Cross. Testimony of the witness Milićević, and the accused himself are in comfort with the testimony of Sajma Šabanović pertaining to the circumstance of duty roster of guards in the elementary school, but basically, also in relation to the circumstance of the number of the imprisoned Bosniaks and the time they spent in the school, and the Court, not only for that reason, finds her statement the most realistic in relation to those circumstances. Unlike the witness Fatima Poljo, Sajma in her statement given to the police in Goražde on 19 November 2003 stated that on 3 July 1992, two females arrived to the gym where they were imprisoned and introduced themselves as representatives of the IRC who advised them to go to SUP in Višegrad which was allowed by the guard, that the commander Perišić received them there and told them to go to Međeđa which was liberated by Murat, because they had no food for them, to go wherever they wanted, that they then returned to the school and that from the school she went to the village of Mala Gostilja and then to the territory controlled by the Army of BiH. Also, Timka Kapetanović testified that women could leave the school to fetch some food from home. The same is stated by Naila Ahmetagić who also said that they were released for a couple of days because those who imprisoned them had no food. Further, by interference, the Court did not give credence to other witnesses who stated that Boban Šimšić was present in the school day and night, with regard to the fact undoubtedly established by the Court pertaining to the existence of a duty roster for members of reserve police in shifts.

[65] Following the above stated, the Court came to a conclusion that Elementary School "Hasan Veletovac" cannot be considered as a detention camp for the imprisoned Bosniaks for the period of some 10 days that they spent there, because in the opinion of the Court, a detention camp includes a more strict regime of stay and security from technical and physical

aspects (e.g. the existence of barbed wire fence, watch-towers with search-lights, a rather great number of guards, patrolling on a daily basis, etc.) which evidently was not the case here. Also, the Court is not inclined to believe that it was a reception centre as the defence argues. What is important about this issue is the fact that Bosniak civilian population was not brought to the school on their own will, which means that they were unlawfully deprived of freedom, i.e. imprisoned on no valid legal ground, even if it were true that they could move during the day as several prosecution witnesses testified, in view of the fact that they could not do that at night.

#### 1.10 – Events

[66] Under Count 5.b) of the amended operative part of the Indictment, the accused was charged with the participation in bringing in and subsequently taking away of Ismet Bulatović and Šemso Poljo from the mentioned school, as well as in taking away of Eniz Smajić, Salem Žunić, Rasim Karahodžić, Jusuf Poljo and Mehmed Memić. The mentioned persons are officially registered as missing. The prosecution witnesses testified about this event describing, as the Prosecutor mentioned in the closing argument, that the accused was present each time when these persons were taken in groups out of the school as of when they have been unaccounted for.

The Prosecutor's Office proved this Count of the Indictment by the statements of the witnesses: Rusmira Bulatović, Fatima Poljo, Hasena Bajramović, Nail Ramić, Kada Spahić, Ševka Šehić, Hurem Razija and Naila Ahmetagić.

[67] At the main trial held on 18 January 2006, the witness **Rusmira Bulatović** (41) testified that she knew Boban Šimšić, as they were neighbours. She remembers she was at her farm until Bairam, it was spring, she cannot remember exactly but Boban Šimšić's "Chetniks" came, lined them up in front of the house to shoot them. After that, they were expelled from their house and taken to the school. She estimates that there were approximately 300 people detained in the school. Rusmira Bulatović stated that Žarko – the forester, was in the school and that he was fair to all the prisoners. Boban Šimšić, a police officer, also came to the school. The witness remembers very well that her husband Ismet, Šemso Poljo and another man whose name she did not know were taken by Boban Šimšić and Cvijović. Since that event, she has not found out anything about her husband to date. The witness also stated that her husband was on good terms with the accused, which was also stated by the accused during the testimony.

[68] At the main trial held on 18 January 2006, the witness **Fatima Poljo** (53) testified that until the war she had lived with her husband and their three children in Vlahovići. One day camouflaged soldiers suddenly came to the village and requested that they surrender weapons, money and gold. That happened between 15 and 20 June but she does not remember the exact date. In Višegrad (camp), her husband and children were with her. The camp was in the Elementary School Hasan Veletovac and 350 people were there. They stayed there for approximately 20 days and could not leave on their own will. They slept on the concrete and did not have enough food. They were maltreated from the first day they came to the school. Around 11:00hrs, her husband, Šemso Poljo, and her child were taken away by Cvijović, the accused Boban, Miloje, Sredoje Lukić, Dragan Lukić and Milan Lukić. She has not heard anything about them ever since. The witness remembers that Boban Šimšić was in police uniform when they visited the school; as she said, he was blond, tall and had receding hairlines. Having arrived to the school she heard about him from her sister Rusmira Bulatović, Nail Ramić and her sister Hajra who died. During the investigative procedure, for the record

made by the Prosecutor on 24 May 2005, the witness stated that on the second day, after the first night they stayed there, Boban Šimšić, Miloje and Sredoje Lukić, Miloje Joksimović, Dragan Lukić and Cvijović came to the school and took her husband away, whereas for the record made by the police in Goražde on 5 May 2004 she stated that after one hour upon the arrival to the school, Miloje and Dragan Lukić and a person named Cvijović entered the gym and ordered her husband Šemso, her brother-in-law Ismet Bulatović and Eniz Smajić to go with them to the Police Station in Višegrad for questioning but no one has heard about them ever since. Asked by the defence to clarify the difference in her statement concerning the different times of stay in the school before her husband was taken away, the witness could not give an explanation. She also failed to do so when, concerning the time spent in the school, in her statements given at the main trial, to the police and the Prosecutor she gave different information, i.e. 10, 20 and 25 days. Asked by the defence counsel why she did not mention the name of Boban Šimšić in the police, like she did in her subsequent statements, the witness said that she got confused because when Boban came to the school all their neighbours said “Here’s Boban, he will save us”.

[69] At the main trial held on 5 December 2005, the witness **Hasena Bajramović** (52) testified that before the war she had lived in the village of Velika Gostilja and that she knew Boban Šimšić and his parents. On 20-23 June 1992, their first neighbour came and told the Bosniak inhabitants that they should leave. The inhabitants were hiding in the woods for a while but then soldiers came in the three trucks, loaded the inhabitants into the trucks and drove them to the Elementary School Hasan Veletovac in Višegrad. Having arrived to the school, they all came off the trucks and a group of Serbs waited for them, among whom the witness recognised Boban Šimšić. The witness remembers that Boban Šimšić was clad in uniform and she described him as a skinny, blond, thin and tall man, well armed with a rifle, a pistol and a baton. The witness believed that Boban Šimšić was the chief guard in the school. Immediately upon the arrival to the school, not even five minutes after that, Milan Lukić and some other Serbs whom the witness did not know, came and they said that Ismet Bulatović, Šemso Poljo and Šemso’s son Enes should step out. The witness asserts that they were singled out by Boban Šimšić himself, who was accompanied by other Serb soldiers of whom she mentioned Mitar Vasiljević, Milan and Sredoje Lukić, Miloje Joksimović, Goran Miličević and one Milomir a.k.a. Ćiro. Since they took out the three mentioned Bosniaks, they were followed by Rusmira Bulatović, Ismet’s wife, to beg Boban Šimšić, as she knew him, to bring her son back which he did, but he took the others. The witness confirmed that she did not hear that herself, but a woman was telling that.

[70] At the main trial held on 13 October 2005, the witness **Nail Ramić** testified that he knew Boban Šimšić and that before the war they were neighbours because they lived in .... At the beginning of the war, he used to see Boban Šimšić in uniform and armed with a rifle coming with a group of people to the village. On one night, a group of soldiers, among whom was Boban Šimšić, came to his house and beat him up. Then he realised that he should no longer stay in the village and decided to hide in the nearby woods. He was hiding until mid-June 1992 but he is not sure, when he was arrested and taken to the Elementary School Hasan Veletovac. He stated that Ismet Bulatović, Šemso Poljo and Enez Smajić were also in the school but that they were taken out one night and never returned. He did not know who took those people away but he said that Boban Šimšić was on duty that night, as well as every other night.

[71] At the main trial held on 13 October 2005, the witness **Kada Spahić** (78) testified she was born in Mala Gostilja, the Višegrad Municipality and that she knew Boban Šimšić

because he went with her children to school, that on the critical occasion she was detained in the Elementary School Hasan Veletovac. The witness stated that Boban Šimšić was the most seen there, he was also at the entrance. She spent 13 days in the school and every night the same things happened. The witness pointed at Boban Šimšić in the courtroom and recognised him. She stated that the accused brought Ismet Bulatović and Šemso Poljo to the school, while the witness found Eniz in the school. They were brought to and taken out of the school on the same day.

[72] At the main trial held on 5 December 2005, the witness **Naila Ahmetagić** testified she knew Boban Šimšić well; they were school mates living in two neighbouring villages. The witness got married before the war but when the war started she came to Višegrad, the village of Vlahovići, to visit her parents. The first days of the war were disastrous to the witness because the conditions in the village of Vlahovići were very difficult. There were provocations, plundering, maltreating so the people fled and hid in the woods. The witness then stated that they also went to the woods and she was looking for her father; they returned to the village only at night time to take some food. The witness could not precisely state when they definitely left the village but she remembered that all the inhabitants of the village of Vlahovići were captured in the woods by Serb soldiers and then taken to Višegrad, the Elementary School Hasan Veletovac. Having arrived to the school, they were subjected to various kinds of maltreatment and she remembered that guards were Milan Lukić, Goran Miličević and Boban Šimšić. She estimates that some 150 men, women and children were detained in the school and among them was her father Nail Ramić. The witness believes that they spent approximately 15 to 20 days in the school and she described how the room looked like, what the food was like and conditions to stay there. Apart from Boban, there were other witnesses on guard; she remembered Goran Vasiljević who was always trying to protect the people. The witness further spoke about taking away of Ismet Bulatović, Huso Bulatović, Šemso Poljo and Ibro Šabanović, her mother's uncle. They were taken away by Milan Lukić, Boban and Momir Savić with another five soldiers, in the way that Milan pointed his finger at each one of them, they stood up and went to the corridor, and as to what happened later she did not know but they have never seen them again.

[73] With regard to the same event, **Šefka Šehić** (69) testified that she used to see Boban Šimšić in the Hasan Veletovac school. Asked by the Prosecutor whether she could leave the school, the witness stated: "Well, you know that a Muslim could no longer be walking around Višegrad". She also said that it seemed to her that neither the accused, nor the Lukićs, or Miloje or Mitar Vasiljević left the school. Having been asked by the Prosecutor, she said she knew Ismet Bulatović, Šemso Poljo and Eniz Smajić, that the accused and his men had found them near the barracks and forced them to the school where they had kept them for one night. She corrected her allegation from the statement given to the police when she said that the following day Eniz was forced to Vilina Vlas, because, as she then said, one man cannot be forced twice. Miloje Joksimović came to the school in the morning and told them to go to Bajina Bašta, Užice, that they were all together. Miloje and Sredoje Lukić told Ismet Bulatović, Šemso and Eniz to go to the woods to be asked some questions and as of then they have been unaccounted for. When the defence counsel asked the witness why she changed her statement given that on the record to the police in Goražde she did not mention Boban Šimšić's name among the people who took away Ismet, Šemso and Eniz, the witness said that it was not the accused who took those persons away but Miloje (Joksimović) and Sredoje Lukić, while Boban and many other soldiers were standing there. At the Prosecutor's Office of BiH, on 25 May 2005, the witness stated on the record that she had been present there when Milan Lukić, Miloje Joksimović, Boban Šimšić and others came to the prison, there

were 10 of them, that they singled out Ismet, Šemso and Eniz, took them away and they have been unaccounted for ever since.

[74] **Razija Hurem** (60) testified that the accused was a guard at the Hasan Veletovac school and that the commander of the camp, as well as the commander to his soldiers, was Milan Lukić, and among those soldiers she knew Sredoje and Miloš Lukić who came on a daily basis, around noon and mostly in the evenings. She saw that Ismet Bulatović and Šemso Poljo were brought to the school by Šimšić, Milan Lukić and Andrija Šimšić, approximately 2 hours after the people arrived to the school, whereas she found Enez Smajić in the school. Ismet, Šemso and Enez were there for one hour and they were taken away by Boban, Lukić and some others. The witness did not mention this episode while giving her statement to the police in Goražde dated 8 February 2005.

[75] In his closing argument and concerning the incident referred to in this Count of the Indictment, defence counsel emphasised that while giving her statement to the police on 5 May 2004, Šefka Šehić stated that on 24 June 1992 Miloje Joksimović and Sredoje Lukić entered the gym and took away Ismet, Šemso and Eniz, while she did not mention the name of the accused; that Hasena Bajramović stated that she arrived to the school on 21 June 1992 and that the mentioned Bosniaks – Muslims were taken away after 5-6 minutes. When her statement is brought into connection with the statements of Nail Ramić, Fatima Poljo and Rasmira Bulatović – as the defence counsel noted – who came to the school later, on 23 June 1992 together with Ismet Bulatović and Šemso Poljo, then it is clear that Hasena is not telling the truth. In addition, the defence counsel noted that Fatima Poljo stated that she arrived to the school on 26 June 1992, with her husband Šemso, her sister Rasmira Bulatović, her husband Ismet, Nail Ramić and his wife, that her husband stayed there overnight and was taken away the following morning, unlike her statement given to the Crime Police Sector in Goražde on 5 May 2004 when she said that her husband had been taken away only one hour upon the arrival of Miloje Lukić, Dragan Lukić and one Cvijović in the school, accordingly, not the accused.

[76] The Court finds that all the inconsistencies noticed in the statements of the prosecution witnesses pertaining to this part of the event which was factually described in the Indictment, only corroborate a different perception of each witness in regard to how they registered those events with their senses and interpreted the idea of the observed reality after a considerable lapse of time. Invoking the observed deficiencies of the mentioned testimonies of the prosecution witnesses in order to discredit them, the defence, as it does, using an idealistic approach is making an attempt to reconstruct the factual mosaic of the events according to its own view, trying to eliminate the presence of the accused and any role of his in that event. On the other hand, the Trial Panel carried out an overall analysis of these pieces of evidence and reached the factual conclusion on which all the witnesses concur, that with regard to the incident of taking away Bosniak civilians, Ismet Bulatović, Šemso Poljo and Eniz Smajić, from the Elementary School Hasan Veletovac in Višegrad, in the second half of June 1992, the accused Boban Šimšić was present at the event. That is an essential fact that the Court established beyond reasonable doubt. In that regard, the defence did not offer a single piece of evidence to question the presence of the accused at this event. In particular, due to the fact that the accused himself admitted and during the investigation of the identification of the scene showed the room where he usually stayed during the duty hours in the elementary school. In accordance with his statement was the statement of the defence witness Goran Milićević who confirmed that the accused had been in the school on two occasions and only during the day shift. This event, as presented by the prosecution and basically confirmed by

numerous prosecution witnesses, actually happened during the day. Although the presence of the accused was proven by the Prosecutor beyond reasonable doubt, the Court could not draw such a conclusion pertaining to the assertion of the prosecution with regard to his participation in the taking away of the detained Bosniak civilians from the school, i. e. regarding the fact of physical, immediate carrying out the action by the accused as being proven which would, moreover, be enriched with his intent. The reason for this is because the content of the prosecution witness statements lack the degree of credibility which would be sufficient for the Court to draw the opposite conclusion beyond reasonable doubt. Lack of credibility in the witness' testimonies with regard to active role of the accused, in the opinion of the Court, is manifested in simple adding of the name of the accused to other persons, without a more detailed description of his action, often in the first place in a sequence while enumerating the members of the group of Milan Lukić, which realistically does not coincide with the majority of statements of the prosecution witnesses when describing the actions of Milan Lukić and others from his group. Is this not best testified by those witnesses who stated that unlike the others, Milan Lukić always introduced himself and was never camouflaged, which demonstrates his actual role and importance in the described event. During her testimony, the witness Naila Ahmetagić appeared to be a hostile and thus a bias witness against the accused. It was similar with Hasena Bajramović in that regard, in particular because in one part her testimony constitutes an indirect account. The Court finds additional arguments for such a conclusion in the fact that the witness Nail Ramić did not confirm the participation of the accused in taking away of the named Bosniaks, except for his presence in the school at that time. After all, during the cross-examination, Šefka Šehić explicitly states that the accused did not take away the three mentioned Bosniaks but that he was present, which, in the opinion of the Court realistically, considering all the factual circumstances of the case, corresponds to the truth. *Ergo*, in the operative part under Section I of the Verdict, the Court omitted the word "separated" implying undertaking active actions of the accused together with Milan Lukić pertaining to the detained Bosniak civilians and their taking away from the school. In addition, since it does not follow from the testimonies of the examined prosecution witnesses that on the mentioned occasion, beside Ismet Bulatović, Šemso Poljo and Enez Smajić, taken away were also Salem Žunić, Rasim Karahodžić, Jusuf Poljo and Mehmed Memić from the Hasan Veletovac school, the Court left out the names of the latter persons from the operative part under Section I of the Verdict, believing that their taking away in this event was not proved beyond reasonable doubt by the prosecution.

#### 1.10.1 –Act Underlying the Crime – Enforced Disappearance of Persons

[77] Subsuming the established facts under the provisions of the substantive criminal law, the Court had in mind that under Count 5.b) of the amended Indictment the accused is charged specifically with the commission of the criminal offence of Crimes against Humanity in violation of Article 172 (1) (h) in conjunction with item (i) – Enforced Disappearance of Persons, in conjunction with Article 29 of the CC of BiH. Article 172 (2) (h) of the CC of BiH defines what is meant by Enforced Disappearance of Persons - *Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time.*

[78] Therefore, the charges assert that together with Milan Lukić on the given occasion the accused acted as an accomplice. Article 29 of the CC of BiH defines the complicity as

follows: if several persons who, by participating in the perpetration of a criminal offence or by taking some other act have jointly perpetrated a criminal offence. However, by evaluating the above-mentioned pieces of evidence the Court established the fact that the accused had only been present in the elementary school on the critical occasion when the detained Bosniaks had been taken away but not that he had physically committed the crime together with other person(s), in other words that he had not acted in a way which shows that he wanted the criminal consequence, that actually occurred, as his own (*cum animo auctoris*). Therefore, the Court will analyse of what importance, the fact of the presence of the accused can be from the aspect of criminal responsibility. In response to this issue, the Court established that the responsibility of the accused is linked to the status of aider and abettor (Fr. *complice*) under criminal legislation, who is aware that he/she contributes to the criminal enterprise but does not share its intent.<sup>26</sup> On this occasion, in terms of our language, the Court noted the distinction between the words abettor and inciter, because an inciter is the person who by his act instigates another to commit a criminal offence, unlike an abettor who, in the opinion of the Court, merely follows the perpetrator of the act in terms of approving and supporting his actions. In the ICTY case *Kvočka et al.* (Trial Chamber), 2 November 2001, paragraph 254 reads: "...aiding and abetting, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto." Definition of Accessory for the purpose of the provisions of Article 31(1) of the CC of BiH reads: "*Whoever intentionally helps another to perpetrate a criminal offence (...)*", whereas paragraph 2 of the same Article reads that in particular it will include "*giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.*" The expression "*in particular*" used in the Code while enumerating what is meant by Accessory makes this definition broader because it is not necessarily limited to the acts stated explicitly. Of course, mere presence of the accused at the crime scene does not entail criminal responsibility. However, if the same is viewed in the context of factual circumstances, in this case the Court reached a different conclusion. Namely, the accused is a reserve police officer. In that capacity, it is his moral and professional duty to protect citizens who are civilians, in this case from being taken away from the school by a group, which, in view of the witness statements, in its major part belonged to the paramilitary formation of Milan Lukić, even in the case when the stay of Muslim civilians in that school was *coercive*, and undoubtedly, without legally valid ground. While determining the objective element of accessory by aiding, the presence of the accused at this event, even his failure to act, has realistically been established as an encouragement or moral support which had a substantial effect on the perpetration of the crime by the principal offender, despite the fact that the aiding of the accused did not cause the act of the principal offender. In the opinion of this Court, this constitutes *actus reus* of the accused for the perpetration of this criminal offence.<sup>27</sup> Because if during the events in the Firehouse, following the taking away of the captured Bosniaks, the accused arrived just in time to help Ismet Softić and prevent his being taken away on a journey of no return, which the accused did despite the visible discontent of the

<sup>26</sup> See Judgement *Prosecutor v. Krnojelac*, ICTY case No. IT-97-25-A, date: 17 September 2003, p.33.

<sup>27</sup> See Judgement *Prosecutor v. Furundžija* (Trial Chamber), 10 December 1998, para. 235, 249; Judgement *Prosecutor v. Blaškić*, (Trial Chamber), 3 March 2000, para. 284, 285; Judgement *Prosecutor v. Vasiljević* (Trial Chamber), 29 November 2002, para. 70.

soldier who took Ismet Softić out of the Firehouse according to the statement of a female witness who was present during the event; given his capacity, the accused should and could have done the same in this case, too, or at least should have distanced himself actively from this action. Therefore, his failure to act cannot be viewed differently than as a considerable encouragement of the principal offender in the execution of his intent. The Court, hence, finds that on the critical occasion, the accused gave mental (intellectual) support to the perpetrator of the criminal offence by omission in this case, although as a police officer he had a positive obligation to act in order to prevent the action. Along with that, it is not necessary that the accused in his criminal capacity of an aider indeed had the possibility to prevent taking away of the mentioned Bosniaks by his act; sufficient condition is that by his act he could have aggravated the commission of the criminal offence. There is no doubt for the Trial Panel that the accused did not have the same *mens rea* as the principal offender, but having in mind all the factual circumstances of the case pertaining to the actions of the Milan Lukić's group, as an aider he was aware of the relevant intent and state of mind of the principal offender, or at least he was aware of a high risk of the consequence of taking away of the mentioned Bosniaks to an unknown direction. In drawing such conclusion, the Trial Panel had in mind the facts admitted as proven from the ICTY Judgement against *Vasiljević*, which, *inter alia*, refer to the ethnic cleansing of Bosniak civilians from Višegrad in the relevant period. While patrolling in the town and despite his denial, Boban Šimšić must have been informed about the facts subsumed under the term of ethnic cleansing of Muslims from Višegrad, including the facts pertaining to their killings. Did not a female witness state, in a form of a counter-question, that Muslims could not move freely through Višegrad? Having in mind the concurring and convincing testimony of Bosniak witnesses of both the prosecution and the defence while describing the personalities and activities of Milan and Sredoje Lukić and the members of their group, it is difficult to draw a conclusion that the accused was not familiar with their intent to commit a crime. The accused was surely informed about the events in Višegrad, which is not a big town, and thereby he was aware that taking away of three Muslims from the school for questioning by the mentioned group was merely an excuse for what was to follow, in other words that they would never return. His failure to act happened at the same time as the commission of the criminal offence so the Court finds that, judging by objective criteria, his awareness of aiding in the commission of the referenced criminal offence, which was part of a widespread and systematic attack by the members of Serb army and paramilitary force, was preserved. That this conclusion is correct is corroborated by the fact that all the witnesses whose close family members were killed and also those who do not charge him directly asked the accused the same questions: "where are our men, our husbands, sons and brothers, why did you take them away, can we find out where they were killed to find their bones and bury them with dignity".

[79] The above stated implies that the episode of enforced disappearance of three Bosniak civilians from the elementary school was carried out within a widespread and systematic attack or a conduct directed towards any civilian population, which, in this case means the persons of Bosniak ethnicity; guarding Bosniak civilians in the school, the accused knew about such a widespread, systematic or organised action. It is indicated by a massive scale of the crime which is reflected, among other things, in the number of at least a hundred and fifty persons detained in the school without a legally valid ground, enforced disappearance of a number of persons from the school, raping of women of Bosniak ethnicity (which will be the topic of the discourse concerning the reasons for the next item of the convicting part of the Verdict) and beatings of men. Those were definitely not isolated and individual acts. In order to establish the existence of "an attack directed against the civilian population" i.e. the type of behaviour which includes multiple commission of the criminal offences against the civilian

population, in addition to the objective condition, with regard to the other one set cumulatively, the subjective condition, it is not required that the accused be specifically aware of the detailed characteristics of the attack or the existence of a state policy or organisation; it is sufficient that the accused was aware of the objective manifestations of the attack, i.e. that the accused at least accepted the risk that his act would objectively become a part of such an attack. In the consideration of the fulfillment of general requirements for the existence of the criminal offence of Crimes against Humanity in violation of Article 172 (1) of the CC of BiH, in addition to what has been set out in this paragraph, relevant are also the considerations stated in paragraphs [62, 63] of this Verdict. However, in relation to the fulfillment of the requirement pertaining to the awareness of the accused of the character of the attack or the fulfillment of general requirements for Crimes against Humanity, in which case the degree of intent is set in a more general way, separately considered is the issue of the existence of a discriminatory intent in the act underlying the crime, which would give it the character of persecution, as the prosecution claims. Belonging to a certain group is of importance only with the forms of the commission of the criminal offence mentioned under item (g) of paragraph (2) in conjunction with paragraph (1) of Article 172 of the CC of BiH, i.e. only with persecution as the form of Crimes against Humanity. In the *Kupreškić et al.* case of 14 January 2000, para. 246, in the consideration of the issue whether the term “persecution” is used in order to describe a number of offences or only one offence, the ICTY Trial Chamber establishes a high standard of proving of the existence of the intent because “(...) in such a case there must exist clear evidence of discriminatory intent”. For a Crime against Humanity to be characterised as *persecution* the necessary subjective element is not limited to the intent as a part of the crime (enforced disappearance of persons) because another mental element is also required: the intent to conduct persecution or discrimination in relation to any criminal offence referred to in Article 172 (1) of the CC of BiH. Therefore, there must exist the intent to subject a person or a group to discrimination, abuse or harassment in order to inflict serious suffering or violation on religious, political or some other grounds. That additional element in the crime of persecution reaches the notion of *special criminal intent (dolus specialis)*.<sup>28</sup> In consideration of the existence of discriminatory intent pertaining to the context of this criminal offence, the Trial Panel had in mind the ICTY jurisprudence. In the *Kordić and Čerkez* case (Trial Chamber), 26 February 2001, para. 220 reads “...finds that in order to possess the necessary heightened *mens rea* for the crime of persecution, the accused must have shared the aim of the discriminatory policy: ‘the removal of those persons from the society in which they live alongside the perpetrators, or eventually from humanity itself’”. In the *Vasiljević* case (Trial Chamber), 29 November 2002, para. 248 reads: “The accused must consciously intend to discriminate for persecution to be established. It is not sufficient that the accused was merely aware that he is in fact acting in a discriminatory way”. Or, in the *Krnjelac* case (Trial Chamber), 15 March 2002, para. 435 the stance is taken according to which: “The crime of persecution also derives its unique character from the requirement of a specific discriminatory intent. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.” With regard to the criminal offence of Enforced Disappearance which constitutes a Crime against Humanity, which equally refers to the criminal offence of Rape which will be considered of the following section of the reasons of this Verdict, the Court believes that, within what was stated, the Prosecutor did not prove beyond reasonable doubt the existence of the discriminatory intent of the accused to perpetrate these offences which, in this case, would be directed against Bosniak civilian population. Therefore, the Court could not, beyond reasonable doubt, draw a conclusion that these offences synthesise in one criminal act –

<sup>28</sup> Antonio Casese, *International Criminal Law*, Belgrade Centre for Human Rights, Belgrade, 2005, p. 95

Persecution referred to in Article 172 (1) (h) of the CC of BiH as presented by the prosecution. In particular because the Court found as established the fact that, at least twice, the accused helped the following Bosniak civilians: Ismet Softić, during the event in front of the Firehouse, and Samir Bulatović and Munir Ahmetagić, during the event near the Višegrad Bridge. Those were the reasons why the Court omitted item (h) and the word “persecution” from the legal description of the offence under Section I of the operative part of the Verdict.

[80] In addition, since the Trial Panel established that according to this Count of the Amended Indictment the accused did not act in the capacity of an accomplice as the Court is not bound to accept the proposals regarding the legal evaluation of the act (Article 280 of the CPC of BiH), the Court established that under the Count 5.b) of the amended Indictment the accused committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (i) – Enforced Disappearance of Persons in conjunction with Article 31 (Accessory) of the CC of BiH.

#### 1.10.2 – Act Underlying the Crime – Rape

[81] In relation to item 5.e) of the convicting part of the Verdict the accused was found guilty because during the second half of June 1992, at night, he singled out girls and young women detained in the Elementary School Hasan Veletovac in Višegrad and took them to other members of Serb Army who raped them.

The prosecution tried to prove this Count of the Indictment through the statements of witnesses Latifa Hodžić, Sajma Šabanović, Fata Šabanović, Fatima Poljo, Kada Spahić, Naila Ahmetagić, Mula Užičanin, Timka Kapetanović and Muniba Gluščević.

[82] At one point in her statement **Sajma Šabanović** (50) stated that on one occasion before dark Boban Šimšić asked whether there was anyone to make them coffee, and when the witness herself and Šefka volunteered the accused responded to them: “Why do we need grandmas when there are girls”. /In her statement given to the OTP, Naila Ahmetagić stated similarly, although for Milan Lukić, who told her he did not need old but young women./ So, beside others, Dada and Razija Hurem went there and stayed for 2-3 hours, although it takes five or ten minutes to make coffee, and upon their return they did not say anything about what was happening to them because neither anyone dared to ask them nor did they dare to talk about it.

[83] **Hasena Bajramović** claims that she knew that together with a group of Serbs the accused would single out women saying “you, you, you” and they would leave only to be raped. That is how she knows that Naila Ahmetagić, Amira Nuhanović a.k.a. Dada, Zineta Murtić and Razija Hurem were taken away.

[84] At the main trial held on 3 February 2006 the witness **Latifa Hodžić** (38) testified she had not known Boban Šimšić until 1992. Before the war she lived in the village of Sendići, the Višegrad Municipality with her husband, a child and her mother-in-law. She remembers that on 30 June they came to the Hasan Veletovac school. Momir Savić’s soldiers captured them. Boban Šimšić was standing at the entrance and upon her arrival she found out his name. Boban Šimšić took her and other 3 girls away, but she was returned because she took a baby with her. The witness described Boban Šimšić as a medium-built man, blond, in camouflage outfit carrying a weapon and a knife. The witness spent 4 days in the school and Boban Šimšić was present all the time. She believes he was in charge because he was locking the doors, allowing persons to enter the school. The prisoners were constantly locked. The

witness got the confirmation about who Boban Šimšić was by Nail Ramić, his wife, his daughters Naila and Smaila and his sister-in-law. The witness was raped. On the first day when they arrived in the school, she was taken away with 2 other girls, but she was then returned because of her baby. After that, together with 3 other soldiers Boban Šimšić pointed his finger at women who he wanted to stand up and go with them. She was chosen with 2 other girls. The witness begged not to go because she had a baby. She had to leave the baby and then she was taken upstairs. She did not know the other two girls. Boban Šimšić assigned one girl and one soldier per classroom. She was raped by a soldier of “Bijeli Orlovi” (*translator’s note: “White Eagles”*). He threatened her not to tell anyone what had happened to her because he would kill both her and her child. She did not see whether Boban Šimšić entered a classroom with a girl. After that she returned to the gym. They were disheveled and tear-eyed. The witness stated she knew Zehra Zulčić who was also in the school. She was constantly taken out to be raped. She did not know the soldiers who did that. Senija Zulkić and her sister Naila Ramić were also taken out. Boban Šimšić was deciding which women would be taken out. When they would return they were all tear-eyed. Zehra was saying that she would kill herself for everything that was happening to her. The girls begged Boban Šimšić not to take them away. During the cross-examination the witness showed that she was unsure in relation to the circumstance of taking Naila Ahmetagić away since she first said that she did not know about that and later she said that she remembered that Naila was taken away. However, she is precise in her response when she said she did not know whether Naila was taken away by Boban Šimšić.

[85] **Mula Užičanin** stated she lived with her two children and husband in Višegrad until 18 June 1992 when they were forced out in front of the Red Cross building and from there they were taken to the Hasan Veletovac school. When convoy was to leave, there were two buses and several trucks, over 150 people. They were placed in a gym, from infant to old age. They could not leave the school at all. No one dared nor tried. She was in the school with her daughter (she was of age already) and her son (12 years old). Conditions of stay were of poor quality. She neither ate nor slept. She was so afraid she could not do anything. There were women and children in pyjamas and nightgowns. There was one Vuk who guarded them. He was always there. All the worst things happened to her in that school. In the evenings they would be deprived of their money and gold; that evening when they arrived. On the 19<sup>th</sup>, a man came looking for the Užičanin family from such-and-such street. Since she responded immediately he approached and told her to stand beside him, and then he added that his name was Milan Lukić. She said she only had a 12-year-old son. He told her he had killed her husband. “I will slit your son’s throat, too; he is also a Balija”. He invited her and a girl Alma Hafizović to go out with him, took them to a corridor and told them to wait. In the meantime, Lukić called: “Boban, come here to arrange something with me”. Boban said there was nothing to arrange and that those were his that evening. And Lukić said, ‘no those are mine this evening and be happy if I bring them back alive’. She saw this Boban and another one. Three in total. Asked to describe this Boban she said she had looked at him only once. Boban did not say a word after that. That is when they took them out, Milan and the other one. There was a car. They took them to a building. New buildings, called “on the tunnels”. Milan took Alma to one apartment, and this other man, whose last name, as she subsequently found out, was Andrić and who later got killed, took her to another apartment. That soldier raped her. She and Alma were later returned to the school. Vuk was at the door. The children were there. Her daughter heard about everything and her son was asleep. Did she see Boban again in the school? Yes, he came on several occasions, as did the others, they would come there, walk around. She never experienced anything like that afterwards. When she dared, she asked who this Boban was. She asked about Boban as she did not know him. Some people told her: that

is our neighbour Boban Šimšić. One evening a man entered the room and approached some girls from Žlijeb telling them: “Come on, neighbours, why did you wrap yourselves up that much, we know each other, we are school mates, why are you afraid”. They did not say his name. During the cross-examination, she stated she did not remember Boban’s looks because she was so afraid she could not remember him.

In the consideration of Mula’s testimony, the Trial Panel finds that she was very convincing while testifying about the persons who took her for rape whereas persuasiveness of such testimony is absent when it concerns the role of the accused, in particular having in mind the fact that it was obvious that she was not sure while confirming the identity of the accused.

[86] While testifying in regard to the same event, **Kada Spahić** claims that Lukić and the accused Boban took upstairs Dada Nuhanović who was detained in the school and that after two or three days they brought them and dressed them in military blouses and gave them submachine guns to put them across their chests, telling them how they dressed them up nicely just like soldiers and that they saw neither Dada nor Raza Hurem afterwards. Given the fact that her testimony stood alone in describing these circumstances, with no factual support in the statements of other witnesses, the Court finds it irrelevant in proving this Count of the Indictment.

[87] In her statement given to the Crime Police Sector in Goražde **Muniba Gluščević** confirmed that during her 7-day stay in the school all the time she was seeing Boban Šimšić together with other Serb soldiers and that the Serb soldiers occasionally took out women who, according to what they said, were raped and physically abused.

So, Muniba testifies that the accused was present in the school although her statement does not suggest that in any way he participated and assisted in the women being raped.

[88] During her testimony at the main trial on 8 February 2006 **Fata Šabanović** stated that when Boban Šimšić would come to the school with the others he would point his finger at women and girls saying: you, you, you; they would go somewhere, whereas the others did not dare to ask where. When they returned they were tear-eyed, some were as if they were insane, they entered the school shaking and that something like that happened to her as well. One evening, Boban came to fetch her, hit her in her arm and she followed him; she entered a room upstairs, blood was sprinkled all over, there were some bed sheets, she knew what was going to happen to her, she would either be raped or her throat slit. He told her to sit on a chair, take her clothes off, she begged him not to do that but he cursed her Balija mother; since she did not do that he hit her with something, she fell down, when she felt someone was splashing and when she opened her eyes she saw a soldier who splashed her with water and who helped her to stand up and leave the room. She had no clothes on her. When she entered the room, there were four of them and Boban was the fifth one. She suffered from strong pains in her stomach but she does not know whether she was raped and also, she cannot say whether she was abused. She knows that Naila Ahmetagić, Senada Hurem and Razija Hurem were also taken away.

While evaluating Fata’s testimony, the Court finds it ambivalent in relation to the circumstances of her alleged taking away to be raped. Finally, she could not confirm that so there is a logical question if the witness as the victim does not know that, who else could know it better. Therefore, that section of her testimony about the accused perpetrating the rape, was not admitted by the Court as convincing. It is different with the section of her

testimony when she explicitly stated that the accused was singling out girls and women. That part of her testimony was acceptable for the Court because it is supported by consistent statements of witnesses Latifa Hodžić, Hasena Bajramović and Sajma Šabanović.

[89] At the main trial **Fatima Poljo** (64) claims that there were approximately 350 people of various age and gender in the gym and that they stayed 20 days in the school (although she said 10 days in her statement given during the investigative phase); having been asked by the Prosecutor about the conditions in that camp she stated that they slept on their slippers and backpacks because they were on bare concrete, they could not leave the school, they never had any food and that she was telling that because she was neither ashamed nor afraid of anyone. She did not know the accused Boban before and when she came to Višegrad the neighbours said “Here is Boban, he will save us, thank God he is here”. She stated that Boban himself had taken away her cousins Naila and Smaila, that her late sister Hajra had told Boban not to take Smaila because she had had a 9-month-old baby; after that Naila, Latifa and another three women were taken for rape. In regard to these circumstances the witness testified in an identical way during the investigation (record of the Prosecutor’s Office dated 24 May 2005) but she did not do so while giving statement on the record with the police in Goražde on 5 May 2004 when she said in general that in the evening hours Chetniks would enter the gym to take young women and girls for rape. Having been asked by defence counsel why she changed her statement the witness said she could not remember. The defence counsel pointed to the witness at the change in her statement concerning her allegations at the main trial with regard to the accused taking away and maltreating her son Elevedin, which she did not mention during the investigation, and also that while giving her statement to the police she did not mention that her son had been taken away at all; after that the witness stated that she did not lie. Since the witness did not give relatively rational and acceptable explanation to the mentioned inconsistencies, the Court was satisfied that this witness who – as she herself said – is neither ashamed nor afraid of anyone, cannot be trusted in regard to this section of the event either.

[90] **Naila Ahmetagić** (38) testified that there were approximately 150 persons detained in the school, she was raped there by Milan Lukić and others, and beside her other women were individually taken away and raped, and that on that occasion Boban Šimšić was a guard in the school. She knows that because she saw him in the room while she was waiting to be called for. She stated that he had participated in raping women because she used to see him in the room together with others, upstairs, where all had been happening. She was taken for rape every other night. When they took her to the room, they would first sadistically abuse her, in particular Milan Lukić, while others were laughing, hitting and beating her. She never asked Boban for help but her father Nail did but the accused never helped him. Beside being raped, the witness recalls that they were maltreated and beaten. She mentioned that Fata was also raped, as well as girls: Dada, Zineta and Razija. She also mentioned that Goran Milićević protected them when he stood guard by asking Milan Lukić not to touch the people, the children. At the main trial the witness stated she had been raped on several occasions and that she had been beaten, unlike her previous statements given to the police in Goražde on 11 January 1994 and 9 April 2004; the witness explained for the difference in the testimonies telling that she was keeping it to herself and that now was the moment to say it. In addition, asked by the defence counsel to say whether the accused ever singled her out by pointing his finger at her and then brought her, the witness said he did not. She also did not see that Boban Šimšić raped any woman. There were 4-5 men in the room where they were raped, she remembers Milan and Boban. The witness also confirmed she had one child born before the war, on 1 March 1991. The defence counsel noted that at the main trial she said she could not

have children any more as a consequence of the violence she had sustained. Asked by the defence counsel whether she was telling the truth while giving the statement to the representative of the Office of the Prosecutor of the ICTY in The Hague, the witness said she was. Then the defence counsel presented to her that on page 11 of the statement given to the ICTY investigator she said that in 1996 she gave birth to a baby-girl, and she took sick leave and officially retired from the army in 1997. To his question whether her daughter was born in 1991 or 1996 she stated “1991, and then my child died, that was 1996”. In response to the comment of the defence counsel, what one can say about her statement that after the event in the school she could not get pregnant, but that she gave birth to a baby girl in 1996, the witness said “with great difficulties”.

[92] In response to the defence counsel’s question, the witness Naila stated that she recently received a phone call from the brother of the accused in order to tell her to testify the best about Boban and that the price was not an issue, the witness stated that she was afraid of that. With regard to these circumstances the Prosecutor submitted and the Court presented as evidence – the UN Commission Report concerning the circumstance of the meeting with Bakira Hasečić and a delegation of women of the Association – Woman Victim of War and an official note of the Prosecutor’s Office of BiH dated 23 June 2005.

[93] In his official letter No. RU-20060425-01/A dated 2 June 2006, Deputy Prosecutor of the ICTY Mr. David Tolbert submitted to this Court the certified copy of the OTP statement of Naila Ahmetagić dated 12 June 2000 (in English and its translation to B/C/S) because, as he stated, it was in the interest of justice for the needs of the procedure before the Court of BiH.

[94] In the certified copy of the statement delivered by the ICTY under No. 01105831 given by Naila Ahmetagić to the investigator of the Office of the Prosecutor of the ICTY Rita Pradhan on 12 June 2000 and which was read to her on 13 June 2000, concerning the events in the Elementary School Hasan Veletovac in Višegrad, Naila states that there were approximately 300 people in the gym, that the Serbs/Milan Lukić’s group, who wore green camouflage uniforms gave them something to eat, and the children were getting powder milk, that the school had a small canteen where they made pancakes and gave children white coffee, that they slept on the floor; that on the same day when she arrived in the school the soldiers brought Dada and another three girls (one of them was Senada) who were guarded by the soldiers separately from other people. On that occasion she met her relative Senada Hurem from the village of Gostilja who was taken by a soldier from Serbia, which she concluded by his accent, and he told her mother that they were going to fetch some food and that soldier returned two hours later but without Senada. Senada later told her that the soldier stripped her naked by cutting her clothes by a knife and at one point Senada grabbed the scissors from the table and stabbed the soldier into his back and then managed to run through the window. The witness saw that soldier when he came together with Milan and Sredoje Lukić and other soldiers to the room where they stayed, to look again for gold and money. With regard to the event concerning the killing of Ibro Šabanović the witness could only individualise Milan Lukić for whom she says that he held Ibro’s head in his hand. Naila added that Boban Šimšić was always present when Milan Lukić was there but that Boban did not harm them. However, Boban was laughing while Milan was torturing them.

[95] When the entire testimony of Naila Ahmetagić concerning this and other Counts of the Amended Indictment is summarised, it can be noticed that not once does she identify the accused as an immediate perpetrator of any of the criminal actions. What she does testify about is the presence of the accused. The witness mentions this presence in a similar way as

her father Nail, in a general form – that the accused was in the school always when the bad things were happening to the detained Muslims. However, having in mind the fact that she stated to the investigator of the Office of the Prosecutor of the ICTY that Boban Šimšić did not harm them, nor did she mention his name specifically in relation to various events factually described in the Indictment, and having in mind the fact that during her testimony she was not telling the truth concerning the circumstance that she could have no more children because of the maltreatment she had suffered in the school while detained, the Court did not consider her testimony reliable in order to prove beyond reasonable doubt that the accused committed the described criminal offence not only under this Count but also under other Counts of the Indictment. Therefore, in order to have an overall consideration of this issue, it was necessary to consider other testimonies concerning this Count of the Indictment.

[96] At the main trial **Timka Kapetanović** (70) stated that during her detention in the school young females, twin sisters, were taken away but she could not tell who did that. When the Prosecutor showed her the statement she gave in the investigative phase on 30 May 2005 in which she stated that she saw Boban Šimšić entering the gym and singling out young girls to follow him, and when they returned they looked awful, they were speechless, disheveled, it was obvious that they were abused, and after the Prosecutor asked why she changed her statement, the witness said that she was younger then and knew better, that she was excited, and finally said that it was true what she stated before.

In her statement given to the investigator of the Office of the Prosecutor of the ICTY on 23 May 2001 concerning the events in the elementary school the same witness stated that they spent three days there upon the arrival, that approximately 100 of them were in the school, that she remembered Serb bringing them some food: three breads and some pâté cans and that after that they went to Bajina Bašta (Serbia) and then to Macedonia.

Having in mind that in the mentioned statement Timka does not mention the name of the accused concerning the rape of women in the elementary school at all, that she rudimentarily and superficially speaks about her stay in the school, that at the main trial in her narration she does not mention the name of Boban Šimšić concerning the circumstance of taking women away for rape at all, that she confirmed it only after the Prosecutor showed her the statement she gave during the investigative phase with the absence of a convincing explanation as to why she changed the statement, the Court could not base an affirmative response on her testimony concerning this Count of the Indictment being proved beyond reasonable doubt.

[97] Even though the Court could not be convinced of the allegations factually described under Count 5.e) of the Amended Indictment concerning the role of the accused in the mentioned events as being proved beyond reasonable doubt based on the testimony of either Timka Kapetanović, or Naila Ahmetagić, Mula Užičanin, Kada Spahić and Fatima Poljo, despite the fact that they confirmed the allegations of the Indictment, the Court was convinced on the basis of the testimonies of witness Sajma Šabanović, Latifa Hodžić, Fata Šabanović and Hasena Bajramović, considering that the statements of these witnesses taken individually are specific and mutually consistent in the essential parts of their testimonies regarding the manner in which the accused, by procuring young girls and women, aided other members of the Serb army to rape them. In making such an evaluation, the Court was not guided by the number of witnesses testifying in favour the guilt of the accused under this Count beyond reasonable doubt, but it was guided by the quality of their testimonies. The Court also underlines that denying credence to the mentioned witnesses refers to that part of their

testimonies concerning the role of the accused and not with regard to the facts pertaining to the rape, beatings and humiliation of the mentioned women.

[98] In view of the exposition set out in para. [62] concerning the fulfilment of the requirements regarding general elements of the criminal offence of Crimes against Humanity in violation of Article 172 (1) of the CC of BiH, i.e. with regard to the following: a) the existence of the attack, b) the acts of the perpetrator(s) must be part of that attack, c) the attack must be ‘widespread and systematic’, d) the attack must be ‘directed against any civilian population’, e) the knowledge of the perpetrator that his acts are part of the attack<sup>29 30</sup>, alternatively, the perpetrator must be aware of the attack and take the risk of his act becoming part of such attack<sup>31</sup>, *mutatis mutandis* refers to the consideration of this paragraph, too.

[99] In the *Kunarac, Kovač and Vuković* case (Appeals Chamber), 12 June 2002, para. 127-132 it was determined that: “*actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim/.../ The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.” ‘Resistance is not a requirement’ /.../ “A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force”. Therefore, the Court finds that the indisputable existence of *coercive* circumstances and a general pattern of soldiers’ behaviour to carry out sexual act, suggest the conclusion that such act was coercive. In other words, the injured parties had no realistic possibility to avoid being raped, which in itself implies grievous pain and suffering or otherwise their attempt to avoid the rape would involve high risks to their life or limb. At this point, the Court notes that indeed the witnesses did not mention details of the coercive sexual act. It is understandable, but following their consistent testimonies and the testimony of Nail Ramić concerning the physical description of their appearances upon the return to the gym, that they were disheveled, tear-eyed, in one word looking awful, and having in mind the statement of Haša Hadžić given in the investigative phase on the record to the Prosecutor on 25 May 2005 according to which, following Šefka Šehić’s volunteering to make coffee instead of the girls, the accused refused it by saying: “We don’t need you, we are not craving for old pussies”, and having in mind the description of the room to which they were taken, then such a conclusion is logical. Not only that the accused had an uncompromised knowledge about the fact that girls and young women will be raped, but he was also willingly committed to it given that he singled them out of the gym pointing his finger at them and for that purpose he not only aided the Serb soldiers to rape those women but also provided moral support to the direct perpetrators of the acts or misdeeds. At the same time, based on the already mentioned reasons, the accused was aware that his act, within the limits of his intent, objectively must be a part of the attack.

<sup>29</sup> *Blaškić* (Trial Chamber), 3 March 2000, para. 247: “The accused must ... have knowledge of the general context in which his acts occur and then of the nexus between his action and that context”.

<sup>30</sup> *Jelić* (Trial Chamber), 14 December 1999, para. 56: “The accused must also be aware that the underlying crime which he is committing forms part of the widespread and systematic attack”

<sup>31</sup> *Vasiljević* (Trial Chamber), 29 November 2002, para. 37: The perpetrator “must know ‘that there is an attack on the civilian population and that his acts comprise part of that attack’, or at least that he took ‘the risk that his acts were part of the attack’”.

[100] Since, due to the mentioned reasons while evaluating the testimonies of those witnesses who gave statements on those circumstances, the Court did not accept their assertions based on which the factual description of the amended Indictment reads that the accused singled out and took away for procurement young women and girls on a daily basis, beat and humiliated them, and took part in multiple rapes, the Court omitted the phrase “on a daily basis” from the factual description under item I.5.e) of the operative part of the Verdict, because what was the purpose of the shifts according to which the accused spent his duty hours in the school. The Court also made a change in terms of style of the factual description of the Indictment harmonising it with the results of the evidentiary procedure and the Court’s evaluation of evidence which implies that the accused did not take direct actions of rape, beating and humiliating Bosniak women, but aided the principal offenders in that.

[101] Based on the mentioned evaluation of subjective evidence to which the Court gave credence in their entirety or just a part of their testimonies, the Court established that by his acts the accused Boban Šimšić had committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (g) (Rape) in conjunction with Article 31 (Accessory) of the CC of BiH, the factual description is given in more details under item 5.e) of the operative part.

#### 1.10.3 – Criminal Responsibility of the Accused

[102] Since under items I – 5.b) and 5.e) of the operative part of the Verdict it was established that specific forms of basically one crime have been carried out, – the Crime against Humanity referred to in Article 172 (1) in conjunction with items (g) and (i) of the CC of BiH, all in conjunction with Article 31 of the same Code, the Court pronounced the accused criminally responsible thereof. Namely, the referenced criminal offence structures in itself the existence of criminal actions such as coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) and enforced disappearance of persons carried out in accessory.

#### 1.10.4 – Relevant Evidence of Importance while Meting Out the Criminal Sanction

[103] In addition to the witnesses of Bosniak ethnicity such as married couple Softić, and Ibrumša Agić, but also Ibro Memić, who as part of their testimony concerning Boban Šimšić affirmatively spoke about his personality with regard to the events in the relevant time in Višegrad and the territory of that municipality, other witnesses, also Bosniaks, testified *favour rei* about the accused. Thus, **Samir Bulatović** (32) confirms that when Bosniaks were leaving the village of Vlahovići he was in a group going towards Višegrad in mid-May 1992, they came to a bridge where two policemen were waiting for them and those were Boban Šimšić and Mitar Vasiljević who ordered them to stop, they searched them, Mitar told them to enter the “Fićo” car, the witness sat in the front seat and then Mitar, who was totally under the influence of alcohol, leaned his submachine gun against Munir Ahmetagić’s neck and said he wanted to kill him; Mitar was telling Sead to shut up the baby who was crying and the accused Boban approached them and said “you should let them go because I know those people”, Mitar cursed, then the accused stepped some 10 meters away, then returned and told Mitar that there was an order from the commander to let them go which he obeyed; since then he did not see Boban. **Munir Ahmetagić** (32) lived in the village of Vlahovići before the war, he did not know the accused personally but his mother did. One day in May 1992, he remembers that it was exactly 12:00hrs when Andrija Šimšić came to the village and told

them to leave the village, and that Andrija was crying; since they knew him, they believed him and left the village. When they arrived under the Višegrad Bridge they were stopped by a man clad in blue uniform (that detail is also corroborated by Munir) carrying an automatic rifle with folding butt which was pointed at the witness. A young man accompanying that man and who, as his mother later said, was Boban Šimšić defended them from that man who intended to take them to Vilina Vlas. The witness was in the company of Mirsad Bulatović whose name now is Samir Bulatović, Zibija Hodžić and Sead Karišik. Namely, Boban told him those were his neighbours and told him to let them go, to which he was told to go to hell with his fucking neighbours. Boban waved back to the other group of Bosniaks not to come that way because that drunken man would stop them. The unknown man pushed the witness' group into the "Fičo" and told them he would take them to the Vilina Vlas spa to see how Serbs slaughter which was a difficult moment in the witness' life, that Boban asked that man to wait until he asked the commander what to do with them and that during 5 to 10 minutes while Boban was away that man maltreated them and that Boban came back and said that the commander had ordered to let them go. The witness states that prior to his testimony he met Boban once because he simply wanted to thank him. The Court evaluated testimonies of Munir and Samir as being convincing, and besides, the Court finds no reason why they would provide false testimonies.

#### 1.10.5 – Punishment, Decision on the Costs of the Criminal Procedure and Claim under Property Law

[104] While meting out the punishment for the criminal offence to the accused Boban Šimšić, the Court took into account, by virtue of Article 48 of the CC of BiH the following circumstances as extenuating: that he is a family man with two minor children, with no previous convictions, that he behaved well before the Court, as well as the fact that on various occasions during the wartime events in the territory of Višegrad he helped his Bosniak neighbours in most difficult times, that his conduct after the committed act was exemplary including the fact that he surrendered himself to the law enforcement bodies when he found out about the issued warrant; whereas as aggravating circumstances the Court took into account the degree of threat or violation of the protected value. The Court also had in mind that the referenced criminal offence is punishable by the term of imprisonment of at least ten years or a long-term imprisonment; since he was an accessory in the perpetration of the offence, in which case, pursuant to Article 31 (1) of the CC of BiH, the offender may be imposed a more lenient punishment, the Court found that in the case at hand the requirements to mitigate the punishment for the accused exist pursuant to the law, by virtue of Article 49 (a) of the CC of BiH, and applying Article 50 (1) (a) of the same Code, the Court mitigated the punishment below the limit stipulated by the law for that criminal offence, and in view of the circumstances relevant to the length of punishment established in such a way, sentenced the accused to the term of imprisonment of five years. Applying Article 56 of the CC of BiH, the time the accused spent in the custody starting on 24 July 2005 onwards, was credited towards the punishment meted out in such a way. In doing so, the Court is satisfied that the punishment of imprisonment meted out, in terms of its length, is proportionate to the gravity of the committed criminal offence and the degree of criminal responsibility of the accused, as well as to all the mentioned circumstances which under general rules on meting out sentences, are relevant for deciding whether the punishment will be less or more severe, but also that it necessary to achieve the purpose of punishing, referred to in Article 39 of the CC of BiH.

[105] Pursuant to Article 188 of the CPC of BiH the Court relieved the accused of the duty to pay for the costs of the criminal procedure referred to in Article 185 (2) (a) through (h) of the

same Code according to the Bill of Costs in the case file because considering his poor financial status it concluded that paying of the costs would jeopardize the sustenance of the persons he is obliged to support.

[106] While ruling on the property claims, pursuant to Article 198 (2) of the CPC of BiH the Court referred the injured parties whose names are mentioned in the operative part of the Verdict under Section I to a civil action because establishing the facts with regard to the amount of the claim under property law would require considerable time and thus prolong this procedure.

## II

### 2. Events

#### 2.1 – Persecution of Bosniaks from the village of Žljeb / item 1.b) of the Verdict /

[107] At the main trial held on 13 October 2005 the witness **Nail Ramić** testified that he knew the accused well, that they were on good terms before the war as neighbours in the village of Žljeb, that at the beginning of the war he used to see the accused who was armed and in uniform coming with a group of people to the village; that the group consisting of people mainly unknown to him came to the village, harassed him and shot at his house; one night the group including the accused came to his house and beat him up. He then realised that he had to hide in the nearby woods which lasted until mid-June when he was arrested and taken to the Elementary School Hasan Veletovac. Upon the arrival to the school, he did not see Boban at first, but he heard he was in charge. He later got convinced that the accused was not in charge although Boban was supposed to guard them, but whoever wanted could enter the school. During the cross-examination the witness could not remember why he did not state to the police in Goražde (record of the Crime Police Sector in Goražde dated 27 January 2004) that he had been beaten at his home. That it was the “Šimišić’s” group that arrested him is his assumption. Beside him, arrested were also his wife Hajra, sister-in-law Tima, Šemso Poljo, Ismet Bulatović and their children. He stated that the following day upon the arrival to the school he had seen the accused, although during the direct examination he stated he had seen him that night. In consistence with the accused and Goran Milićević, Nail states that the accused was clad in police uniform. His testimony concerning the events in the elementary school will be addressed later. Concerning the circumstance of his hiding in the woods in the period from mid-April through mid-June 1992 Nail testified that some of the people fleeing towards Žepa told him that Boban Šimšić had inquired about him. He states specifically that the people started running down the cliffs shouting to him: “Run, Boban ambushed us up there, he doesn’t allow us to continue towards Žepa, whether he killed someone or not, the people threw things off in the woods, I was later hiding from those people, one man said ‘run, they are inquiring about you’, I got out of everyone’s way”. It is clear that this was made up by the witness because it is illogical and lacks motive that a group of Bosniaks which Nail did not know, running away from Boban’s group down the cliffs had time to inform Nail about Boban’s inquiring about him. In particular, the witness does not state where they knew Nail from or how they could have known that Boban enquired about the witness, if they were running away from Boban. In addition, the witness did not provide convincing explanation concerning the same circumstance why, on the record with the Prosecutor’s Office of BiH dated 26 May 2005, he stated that the inhabitants of the villages of Odžak, Kupusovići, Vlahovići and Unca told him about Boban’s inquiry about him while he stayed with them in

the school, unlike the statement at the main trial during the direct examination when he said that he had heard about that while hiding in the woods, and finally, during the cross-examination instead of eliminating the contradictions in his statements, he introduced the new assertion according to which he found out about Boban's inquiry from a patrol which arrested him in the woods and from the Muslims in the school (record from the main trial dated 18 January 2006, p. 19). The Trial Panel could not but take into account that Nail's credibility was prejudiced by the inconsistencies of his testimony. His explicitly negative and dissuasive attitude was visible during the cross-examination, when that witness gave confusing answers and often observations, unlike more cooperative answers given during the direct examination. In the evaluation of the entire testimony of Nail Ramić concerning the criminal acts with which the accused is charged, the Trial Panel notes that in his narration dominant parts are those resulting from his reflection and inference, then those parts pertaining to what he actually saw and remembered, which in addition to the above-mentioned, contributed that his testimony concerning the role of Boban Šimšić in the described acts be taken with a great degree of controversy.

[108] The witness **Cura Glučević** testified that until the war she had lived in the village of Žlijeb from which Muslims were persecuted on 17 June 1992. She remembers that on that day the armed persons arrived: Radoje Milićević, Goran Milićević, Spasoje Milićević, Miloje Novaković, Cvele and Ljubo, as well as Boban Šimšić, some of them wearing uniforms, others not. They started shooting at Muslim houses and said that within an hour they had to leave the village. All Muslim inhabitants gathered at the Carine site. Boban Šimšić was also there. From that place they went to Obranje where they loaded them into the trucks and from there they drove them in front of the Firehouse in Višegrad. At this point, the Court notes that only this witness enumerates the names of persons who persecuted the Muslim inhabitants from the village, although at one point she said she had been afraid, which is something that other witnesses stated concerning the same event. Also, it is illogical that almost at the same time the witness saw the accused at two different places.

[109] At the main trial the witness **Vasvija Glučević** did not confirm that she had seen the accused when the Muslim inhabitants had been persecuted from the village of Žlijeb under the threat of weapons, however although, as she said she did not recognise him then at the Carine site where they were ordered to gather, she heard about his presence at that place from Derviš Softić and Avdija Nuhanović who are dead now. Such allegations of the witness cannot confirm the presence of the accused on the scene beyond reasonable doubt.

[110] At the main trial the witness **Hedija Hodžić** testified that she had not seen Boban Šimšić, whom she did not know after all, on the critical day when she left the village of Žlijeb. At the main trial she could not identify him although until the war she had lived in the same village in which the accused lived. The part of her statement in which she stated that other inhabitants said that the accused had come to the village that day and that he had been the worst one, has no evidentiary value for the establishment of facts of this Count of the Indictment.

[111] At the main trial held on 8 December 2005 the witness **Ibrumša Agić** stated she knew Boban Šimšić well ever since he was a child, as well as his parents. Before the war, Boban used to walk her daughters to their house. At the beginning of the war, armed soldiers, whom she mostly did not know, used to come to the village of Žlijeb. On one occasion she saw the accused Boban passing by in a tractor by the house of Rasim Agić. The witness described that on one occasion a group of soldiers, among whom she did not see Boban, arrived and

gathered approximately 150 inhabitants and transported them in trucks to the Firehouse in Višegrad.

[112] At the main trial held on 14 April 2006, during the direct examination, the witness **Hana Softić** (73) stated that the Muslim inhabitants had left the village of Žlijeb when shooting started that night from all sides. They directed them towards Višegrad, the Firehouse, wherein they were detained for 5-6 days and then to Olovo and when the truck broke down on Ljeska they returned them to Višegrad, the elementary school. She is categorical in saying that Boban Šimšić was not present while taking them away from the village. As neighbours they had good relations with him and he made no harm to anyone. During the cross-examination, having been asked by the Prosecutor how she could claim that among those 15 armed soldiers she did not see the accused if she was afraid to look at them in their faces, in the opinion of the Court, Hana gave a logical answer when she stated she knew that Boban was in Višegrad at that time because as a neighbour he passed by her house every day.

[113] Her husband **Ismet Softić** (78), who was examined on 10 August 2005 in the capacity of a witness by the Preliminary Proceedings Judge within the preservation of evidence by the Court (Article 273/1 of the CPC of BiH) and whose statement was reproduced from a compact disc at the main trial since the witness deceased in the meantime, stated that the inhabitants of the village of Žlijeb were taken on 15 July 1992 first to Obranje where they were loaded into the trucks and then to the Firehouse in Višegrad. Boban Šimšić was not among the members of the patrol that took them out of the village. During the cross-examination, asked by the Prosecutor, the witness stated that he had not recognised any of the soldiers. Having been asked whether he did not recognise them because they were camouflaged, the witness stated it was correct and that the soldiers had some caps on their heads and that they had some paint. Answering the hypothetical question of the Prosecutor whether he could recognise some of his neighbours if he was camouflaged, the witness stated that in fear he could not recognise anyone. It is the finding of this Court that such an explanation of the witness does not diminish the importance of his assertion that Boban Šimšić was not among the soldiers who took them away from the village.

[114] In the evaluation of the above-mentioned witness statements, in particular following the statements of witnesses who confirmed the alibi of the accused [para. 228-231], the Trial Panel was not satisfied that the prosecution eliminated reasonable possibility that, at the time of the shooting at the Bosniak houses in the village of Žlijeb, the persecution of inhabitants of Muslim religion and their unlawful arrest, the accused was at some other place.

2.2 – The village of Kuka – arrest, enforced disappearance of Omer Karišik, Redžo Šabanović (Mirsad Karišik) / item 2 of the Verdict /

[115] In relation to this Count of the Indictment, during the main trial the witness **Fata Šabanović** (60) stated she had known the accused from before. Until the war, she had lived with her family in the village of Kuka. She left her home in June 1992 because Serb soldiers with accent from Serbia expelled her from there. She used to see Boban Šimšić during the war and she saw him for the first time when he was looking for her husband Redžo. The soldiers took out all household members and then went to the house of Omer Šabanović, from which they took Omer and Redžo away. When Redžo returned 6 hours later he was beaten and bruised. When she asked him who did that to him he told her it was Boban Šimšić. They were

beating him with rubber hose and dragged him on the floor. The following day Redžo went to Prelovo to the school to report upon the order of the accused because the accused threatened he would kill his family if he was hiding, whereas Omer ran into the woods. Upon the return from the school, upon Boban's order, Redžo reported on a daily basis to Andrija Šimšić in the village of Vlahovići. Boban Šimšić came to the village every day. As other soldiers, Boban Šimšić was in uniform carrying weapons and knives. One day the witness left her children with Omer Karišik while she was planting potato and after she heard shooting she returned to take her children and then she was told that her 11-year-old son had been taken to Miloje Joksimović's where they had beaten him and inquired about Muslim army. In the end, her husband decided to go to the woods where he stayed for two days. They were hiding in the woods until 18 June. They agreed with other people there to go to Žepa and then soldiers fired at them so they ran in all directions. At one point she saw that no one was around her. Above the house of Asim Šabanović she saw Redžo and Omer Karišik and a group of women and soldiers among whom was the accused who was beating Redžo and tied his hands with Omer's. Then the accused ordered that they go in front of him and threatened them if anyone tried to escape he would shoot him. After that they went to the house of Alija Junuzović, as of when she did not hear anything after the shooting and she saw the house burning. As of then the witness has not heard anything about her husband or Omer Karišik. It is approximately three-minute walking distance from the place where she saw all that to the place where it happened. Ramiza Šabanović told her that Redžo was taken away by Boban Šimšić and the same was confirmed to her by Šefka Šehić to whom, as she said, Redžo signaled with his eyes to leave the place. After that, they returned to Mala Gostilja where Mitar Ilić, Miloje Joksimović, Ćiro and Boban Šimšić came and promised they would take them to Macedonia. Trucks arrived, soldiers came out of them with dogs, and the Muslims were transported in trucks to the Elementary School Hasan Veletovac. However, instead of Mala Gostilja which she mentioned during the direct examination, the witness mentioned the village of Velika Gostilja, the hamlet of Ferići, during the cross-examination as the place where they loaded them into trucks and took them to Višegrad.

If the statement of this witness is carefully analysed, several illogical and even contradictory facts can be noted. First, the witness stated that the soldiers took away her husband Redžo and Omer and that her husband returned after 6 hours, her husband was beaten and allegedly told her that Boban Šimšić had done that to him, although while describing how Redžo was beaten, not mentioning the accused, the witness uses plural in an unspecified form. It is illogical that the soldiers first took Redžo and Omer away and then let them go, and that they do that again as of which moment they have been unaccounted for. The witness does not state where Redžo and Omer were taken on that occasion at all, and finally if her husband was beaten, what happened to Omer, and probably her husband would have told her about that if it had happened as Fata described it. During her further testimony we found out that Omer had run to the woods. Further, why would her husband need to report to the school upon the order of the accused Boban if he came to the village every day. Finally, why would Boban come every day if the factual description of this Count of the Indictment suggests that the attack on the village of Kuka and taking away of the inhabitants to Višegrad happened once, in one day. The witness does not explain how she could hear Boban's orders to Redžo and Omer after he had tied their hands together if she observed it from a place of three-minute walking distance, in other words from a distance of 50 m, as she said during the cross-examination. Finally, why would other witnesses – Ramiza Šabanović and Šefka Hadžić need to tell her about Redžo's being taken away if the witness saw that herself. Namely, the statement that Fata Šabanović gave to the employees of the State Commission for Documentation of War Crimes implies that Fata learned from Ramiza Šabanović that her husband and Omer Karišik had

been taken away by other persons and not Boban Šimšić. The same is also stated by Ramiza when mentioning that, in her mother's house, she had described to Fata what had happened to Fata's husband. The following also implies that Fata was not an immediate witness to the events in the village of Kuka: the witness states that after this event, they returned to Mala Gostilja and then were transported in trucks to the elementary school in Višegrad, although the Indictment reads that it was from the village of Kuka and not the village of mala Gostilja that in a group consisting of a number of members of the Serb army and police the accused took all the inhabitants to Višegrad, the Elementary School Hasan Veletovac. Why would Boban Šimšić promise to the witness and other women together with other persons in Mala Gostilja that he would take them to Macedonia if prior to that he had taken her husband and Omer to an unknown direction. Chronology of testifying of this witness implies that the accused was present in the village of Kuka for several days, he participated in taking away of Redžo and Omer on two occasions, after that the accused was also present in Mala Gostilja and finally in the elementary school to which place they transported them in trucks and where, according to her allegations, the accused was present every day. It is obviously too much, except in the case that her statement groundlessly charges the accused. The defence rightly noted that when the witnesses claimed that Redžo Šabanović and Omer Karišik had been taken to the Alija Junuzović's house which was later set on fire, it was logical to expect that, provided that the critical event had occurred in the way the witness presented, Fata or the members of the Commission on Missing Persons would later at least go to the house and check whether the remains of those people were really there. That was noticed by the Prosecutor when in the Amended Indictment he implicitly withdrew the statement of the witnesses who testified about the mentioned circumstance in a way that on that occasion he did not mention that the said persons were taken to Alija Junuzović's house which was subsequently set on fire but only mentioned that they were taken out of the village. It gives a different, compromising character to the testimony of the witnesses who testified about this circumstance which constitutes an important segment of their statements.

Fata failed to overcome the noted illogical facts of her statement in a way to convince the Court beyond reasonable doubt that the accused Boban Šimšić was in the village of Kuka and not somewhere else.

[116] In addition, it is striking that concerning the events in this and other villages the prosecution adds on a regular basis, "and members of the police" to the members of the Serb army, although that fact is not corroborated by any statement. The prosecution does it with an obvious reason to introduce the accused as a police officer, which is undisputed fact, into an action in which, pursuant to the statements of the examined witnesses, only army participated. During the cross-examination, Fata Šabanović herself stated that Boban Šimšić was in olive-drab uniform as the soldiers were wearing at that time, which is widely known, so if the accused was a member of the reserve police at that time whose members were wearing blue uniforms, he could not at the same time be a soldier wearing olive-drab uniform.

[117] The Court took special notice of the fact that in her statement given to the employees of the State Commission for Research of War Crimes in September 1995, Fata Šabanović does not mention the name of Boban Šimšić at all concerning the events in the village of Kuka or the charges from other Counts of the Amended Indictment.

[118] Since, during the main trial, the witness could not confirm the authenticity of her signature on the statement, the Court presented evidence pertaining to graphology expert analysis of the disputed signature and the undisputed signature of Fata Šabanović by the

expert witness, graphologist **Prof. Esad Bilić**, who at the main trial held on 8 May 2006 and during his testimony totally adhered to the results of his graphology expertise of the disputed signatures of the witness Fata Šabanović on the statement in writing No. 9067/95 dated 3 May 2006. On that occasion, the expert witness stated in his opinion that the contested signatures on the presented disputed document most probably were not personally affixed by Fata Šabanović. Since the purpose of the expert analysis in the criminal procedure that expert witnesses as professionals, possessing the knowledge and/or skills that the Court does not usually possess, assist the Court in establishing legally relevant facts during the evidentiary procedure, surely the Court could not be satisfied with such a conclusion of the expert witness Bilić, which remains in the domain of probability. The expert witness, graphologist **Sekula Mičić, graduate engineer**, hired by the defence, wrote the findings and opinion dated 7 May 2006 in which he gave diametrically opposite conclusion according to which both the disputed and undisputed signatures on the documents that were subjected to the expert analysis were most certainly affixed by one person, i.e. Fata Šabanović. The expert witness Sekula Mičić adhered to such a conclusion during his testimony at the main trial on 12 May 2006. Since both expert witnesses - graphologists adhered to their previous conclusions, the Court, trying to harmonise their opinions decided to examine Elbisa Ahmetaš and Selma Kilalić in the capacity of witnesses concerning the circumstance of taking the statement from Fata Šabanović. On that occasion, at the main trial held on 5 June 2006, **Elbisa Ahmetaš (35)**, an employee of the Court in Visoko, having been presented with the statement of Fata Šabanović, confirmed she recognised her own signature and that she had personally made that statement. She stated she had worked for the State Commission for the Collection of Facts on War Crimes in the territory of BiH in the period from 1993-1996. It was the rule that two persons take a statement from a witness without the presence of other persons in a way that the statements were given by free will of persons who gave them. The witness was categorical in saying that she put down word by word what a person would say and then that person would personally sign his/her statement in the presence of the witness, who wrote it down. It never happened that they made a statement without the presence of the person from whom the statement was taken. The witness **Selma Kilalić (38)** was basically consistent with what this witness said and she is sure that it was the statement of Fata Šabanović because it never happened that she or her colleague would forge signatures. Everyone giving a statement would affix their signatures on the bottom of the page and say what they wanted because the statements were given voluntarily. While evaluating the statements of the witnesses Elbisa and Selma, the Court gave them full credence, considering their testimonies as convincing and impartial, in other words, true. Such a conclusion is not affected by the circumstance that the witness Elbisa used to sign the names of her colleagues, which was the practice, and which is not disputed. Therefore, having in mind consistent testimonies of these witnesses which correspond to the testimony of the graphologist Mičić, the Trial Panel reached an undoubted conclusion that the statement with the disputed signature of Fata Šabanović is actually the one she gave to the employees of the State Commission for the Collection of Facts on War Crimes in the territory of BiH. Even after the authenticity of Fata Šabanović's signature and statement was established beyond a doubt, she denied its content without any convincing explanation. Still, at the main trial held on 9 June 2006, having been asked by the defence counsel whether she gave a false statement to the State Commission, the witness gave negative answer. When the defence counsel reminded her that in the statement the witness signed she stated that Ramiza Šabanović and 7 other women who had seen that told her that Cane and Jovan Lipovac had arrested her husband and taken him away, not mentioning the name of the accused at all, the witness stated that she heard about that Lipovac for the first time in the newspapers and that they (not specifying who) could take statements from everyone and give them to her to sign, that she does not know who gave her what to sign in

1995, etc. and therefore the Court finds the mentioned explanation extremely unconvincing. She also denies that her statement does not read that she was sexually or physically abused by anyone, although its content suggests the opposite conclusion.

[119] The Court does not find grounded the objection of the Prosecutor according to which Fata Šabanović's statement would be an unlawful piece of evidence. This issue cannot be viewed exclusively in terms of whether such statement was taken pursuant to the provisions of the CPC or not. This is evidentiary means which formally, as well as substantively meets the requirements which makes it acceptable so that the Court, in connection with other pieces of evidence, can draw a conclusion on the provability of the facts relevant to the case. Namely, the statement of Fata Šabanović was taken by official persons of the official state authority, and as it was said, voluntarily, without forcing or leading her, or briefly on her own will. In this particular case, it is an exculpatory or a favourable piece of evidence for the defence. It this piece of evidence, according to the Prosecutor's assessment, similarly as when he opposed the presentation of evidence by reading the statements of Naila Ahmetagić and Timka Kapetanović given to the investigator of the Office of the Prosecutor of the ICTY, although due to other reasons, is of no relevance to this case, a logical question is how come that there is so much enthusiasm of the prosecution attorney in opposing to the presentation of this evidence. In particular, having in mind the contents of the provision of Article 14 of the CPC of BiH to which the defence rightfully referred on several occasions, which applies to both, the Prosecutor and the Court in the concretization of the principle of equality of arms as a guarantee of a fair trial.

[120] Šefka Šehić (70) had to leave her village of Mala Gostilja because of Chetniks who wanted to cleanse it, and she states that she knew that all villages in Župa, on the right bank of the lake facing Serbia, had been torched and cleansed by Chetniks, and that they fled to Višegrad on the eve of May. When they decided to go to Žepa, there were more than 50 of them, and they reached Kuka and were watching with binoculars as the following 5 members of the Šimšić family were descending from the above: Boban who, unlike others, had beard, Andrija, Cane, Milosav and Zoran. They wore camouflage uniforms and were equipped with bombs and Kalashnikovs. She does not know how they captured Redžo and Omer. However, according to her, Boban was beating Redžo and Omer with his hands, which she saw being 2-3 meters away. Unlike Fata who was 50 m away, the witness did not hear the accused telling anything to them. The accused ordered the women to move downhill and when they set off, she came across Omer and Redžo (!) who were tied to each other. Boban torched Himzo Šabanović's house. Women were in front, followed by Omer and Redžo, and Boban and Andrija were behind them all. Some 4-5 meters bellow the house of Alija Junuzović, there was a water-well and they took a look and saw Mirsad Karišik-Kemura lying dead. Boban ordered them to wait at the school and he ordered Omer and Redžo to come in the house of Alija Junuzović, which they did. In response to the question as to how much time had elapsed before the house burst into flames, the witness said elliptically – a moment. In response to the question of the Prosecutor as to whether she saw Omer and Redžo leaving the house, the witness said she had not. When asked if she stopped watching towards the house, the witness obviously with a purpose, said – no, as she kept looking back all the time; she said that she had not been seeing anyone, including Boban, and that she saw him not earlier than in the school when his beard was shaved. In response to the question of the defence counsel as to how she could explain changes in her statement given that, in the Record taken at the Prosecutor's Office on 25 May 2005, she did not mention that Boban Šimšić and Zoran Šimšić had captured her unlike her testimony at the main trial, Šefka said that she was not illiterate and that what she stated today she had been saying all the time, and that she failed to mention

the name of Boban Šimšić because, as a criminal, he was rewarded by the Police, and that it was not true that she had stated that on the premises of the Prosecutor's Office and that the one who put that down was illiterate. When asked if it was true that, at the Police, she stated that she came to the school "Hasan Veletovac" on 23 July 1992, the witness stated that she had not said that. During the cross-examination, the Defence Counsel also presented to the witness her statement made at the Police in which she had not mentioned at all the presence of the accused on the occasion when money was forcibly appropriated, and then she said that that was not true as the accused was present there. She was asked how come that she was afraid of Boban Šimšić given that, at the time when she was making her statement on 5 May 200 (*trans.note.: the year incompletely stated in local version*), he was in custody, i.e. the witness was asked to explain how come that, while making her statement at the Police, she was not afraid to say that Boban had captured Redžo and Omer, including everything else she said at the main trial, and she was afraid to state that the accused had forcibly appropriated money. In addition, unlike her statement made at the main trial, she did not mention the name of the accused with regard to taking away of Ismet Bulatović, Šemso Poljo and Eniz Smajić while giving her statement at the Police. The witness responded that it was not Boban, but Miloje and Sredoje Lukić who had taken them away while Boban was standing there with many soldiers. The Defence Counsel also quoted her statement made at the Police, in which she did not mention the presence of Boban when Ibro Šabanović was killed, nor did she mention his involvement in the incident where, according to her, Mitar Vasiljević maltreated Haša Hadžić – to which the witness responded that she had mentioned Boban's name. Finally, having being presented her statement which was made at the Police and according to which Eniz Smajić was taken off the truck and forced to go to Vilina Vlas in the morning, and which differed from her statement made at the main trial where she said that he had been taken away from the school, the witness herself realised a lack of logic and blamed the Police of the mistake.

In view of her entire testimony and also having in mind her hostile attitude towards the defence, there are too many illogicalities and inconsistencies in Šefka's narration for the Court to give credence to her, who is evidently a partial witness in support of the Prosecution. If a witness has decided not to speak the truth in one segment of their testimony, then they can hardly be expected to act differently with regard to other parts of their statement. The truth may only be integral, not halfway, and particularly not halfway to the extent of anyone's convenience.

[121] **Kada Spahić** (78), who is illiterate, gave her testimony about the same incident and stated that she was in Mala Gostilja at the time when the war broke out and that "Bijeli orlovi" had come there first to collect weapons from people and then, later, they began to take people away and kill them. They were hiding in the woods from the Serb Army which used to come to the village to plunder and murder. When they torched two houses down there near the Drina River, some 50 women and children set off towards the woods to find shelter. At the time, they observed them and began to shoot. Then, Boban Šimšić appeared and asked them to stop running away as they would not hurt them. Then, they forced them to go to Gornja and then to Donja Kuka, where they found Mirsad Karišik murdered next to the well. Not much time had elapsed before Boban appeared taking with him Redžo Šabanović and Omer Karišik who were tied up. Cane accompanied him. Boban was hitting Redžo in the back and the head, and it was only Cane who did not hit them. They forced them to enter the house of Alija Junuzović and, after half an hour, when Boban came out to the veranda, the house burst into flames. While, on Boban's order, Cane and Andrija were forcefully taking them to Vlahovići, to school, the witness looked back (it is indicative that Kada uses the same

wording as Šefka) and saw that the house was already burning. Ever since, she has never seen Redžo again. However, despite Boban's order and after reaching Vlahovići, when it got dark they fled from the school to the woods above the school, and they did not chase them away at the time. One day, soldiers came there and, with three trucks, transported them to the primary school "Hasan Veletovac".

During the cross-examination, the witness initially could not describe how Redžo and Omer were dressed, which she explained by being struck with fear as an automatic rifle was pointed at her. However, it did not bother her to state that the accused was wearing a military uniform, a real Serb one, identical to that worn by the others, and that he was also armed with a saber (!). When the Defence counsel reminded her of her Record taken at the Prosecutor's Office of BiH on 26 May 2005, in which the witness stated that her first and frequent meetings with Boban Šimšić, whom she knew from the time when he was a child, took place at the time when she, as a detainee, came to the primary school "Hasan Veletovac" in Višegrad, witness Kada stated that it was not true given that Boban had captured them in the woods above the village of Gornje Kuke, and that there were no differences in her statement as she had stated that during the investigation as well and, finally, she stated that what had been entered into the Record made at the Prosecutor's Office was not true. However, the Court observes that, during the cross-examination and while stating events chronologically in the way she perceived them, the witness said that the accused appeared there while they were hiding in the woods. However, in her continued narration and at the time when they were taken out of the woods, she saw the accused taking Redžo and Omer, who were tied up with rope, in the village of Donja Kuka, which stands in evident contradiction. The Court also observes that, during the investigative procedure, the witness stated the number of approximately 30 women and children; that she said on that occasion that she observed Boban pushing Redžo and Omer, who were tied up, ahead of him. However, at the main trial, she stated that, from behind, Boban was hitting Redžo in the head; that Redžo and Omer were burned in the house of Alija Junuzović, while she did not state that at the main trial; that someone of three members of the Šimšić family killed Mirsad Karišik, but she did not see that in person; from a distance of 30 m, she was watching Boban Šimšić standing next to Redžo and Omer who were tied up, and then forcing them to enter the house of Alija Junuzović which suddenly burst into flames. However, at the main trial, she did not state precisely the distance from which she was watching Redžo and Omer being tied up; in the investigative procedure, she stated that Alija's house suddenly burst into flames, while at the main trial she alleges that it happened after half an hour. Given the observed defects in her testimony, the Court has not given credence to this witness. This is particularly so, given that the presence of this witness has not been mentioned at all in the testimonies given by Raza Šabanović, Šefka Šehić and her grandson Asmir Spahić, who stated that, at the time, Kada had not stayed in the village of Kuka but she had been with her sick husband in her house. Their concurrent testimonies, with regard to this circumstance, lead to a conclusion of the Court that, if she was not present during the incidents in the village of Kuka, she could not describe them either, unless she was instructed accordingly by someone else.

[122] **Naila Ahmetagić** (38) testifies that she was in the village of Vlahovići when the war broke out, that people were hiding in the woods, and that, on a daily basis, the Serb Army raided the village and maltreated its inhabitants, and that they enslaved women and men. On the last day of her stay in the village, the army came to the village with a van and raided the house of her father-in-law enquiring about the men. Among the soldiers, she recognised her neighbour Boban Šimšić who was armed and wore a military camouflage uniform and who asked how come that she had come there from Sarajevo. She said that, on that occasion,

soldiers were beating her and Džemail, an elderly man. The inhabitants of the village of Vlahovići were captured and taken away to the primary school in Višegrad.

While judging Naila's statement, the Court has reached a conclusion that, with regard to her entire testimony, her testimony was inconsistent and she also denied the contents of her statement made to the Hague investigators on 12 June 2000. On the other hand, her demonstration of partiality to the detriment of the accused was very persistent. Therefore, the claims in the defence closing arguments are not ungrounded when stating that the Prosecutor abandoned the charges in the part based on Naila's statement according to which, at the very beginning of the war and jointly with Mitar Vasiljević, Stojan Papić and Dragoljub Papić, the accused was maltreating and beating her. While giving their testimonies, the said persons denied her allegations and, therefore, it appears that the defence's concern is grounded, i.e. if a witness lied in one segment of their statement, how could they be trusted to speak the truth in the remaining part of their testimony.

[123] **Ahmo Karišik**, in his statement dated 29 October 1999, stated that, a short while before the war, he happened to be in his village of Kuke where he used to see his Serb neighbours on a daily basis, who were demonstrating power by walking around armed and in military uniforms. Furthermore, the witness stated that, on 10 June 1992, Andrija Šimšić, from the village of Vlahovići, came there wearing a military uniform and being armed with an automatic rifle, and he ordered that all inhabitants round up in the middle of the village of Prelovo. He said to the inhabitants to let cattle loose and that they must report to the local community by the following day, and that he could not guarantee security to those staying in the village. The witness stated that, together with his brother Mirsad a.k.a. "Kemo", Karišik Omer, Ibrahim and Ibro, and with Redžo Šabanović and his wife and children, he stayed in the village. In the morning on 18 June 1992, he observed three members of the Serb paramilitary formations heading towards the centre of the village and, on the other side of the village, he saw a truck progressing towards them. The witness was watching all that with his brother and neighbours Ibro and Mustafa Memišević. His brother became frightened and began to run, but they caught him. He recognised three of them whom he knew from before. These were Cane Šimšić, son of Milenko, Dragoljub Papić and Ćiro Đurić. The witness was watching all of that from a bush and he saw Cane Šimšić approaching, taking his knife out and stabbing the witness's brother, who was then hit/stabbed by Papić, and who began to cry with pain and then Ćiro Đurić approached to him, took out his knife and slit his throat. The witness then went back deeper into the woods from where he was watching the said three Serb soldiers searching the houses... One hour later, Redžo Šabanović and Omer Karišik descended from the woods to the village and then, the aforementioned three Serb soldiers captured and beat them. Then the witness stated that, together with his neighbours, he attempted to flee towards Žepa. They were then noticed by the Serb soldiers who captured women and children, while he and some other people fled towards Žepa. Then the witness stated that, on that occasion, he recognised Boban Šimšić and Ostoja Karaklić who then separated women and children from Omer and Redžo, and forced them to head towards the school. They previously torched the houses of Omer and Redžo and the house of Alija Junuzović. The witness maintained his allegations which were also given to the MoI – Crime Investigation Sector in Goražde and entered in the Record on Examination Ref. No. 07-02/3-1 of 07 January 2004, except that now, when speaking about Boban Šimšić, the witness stated that he had recognised him and that he was dressed in military camouflage uniform, with a red beret with cockade on his head, and that he had been armed with an automatic rifle. In his statement made in the Prosecutor's Office of BiH on 03 June 2005, the witness mentioned Boban Šimšić at the very beginning of his statement stating that he knew him and that they

were neighbours living in two neighbouring villages 1 km apart. According to his description of the incident in the village of Kuka, shooting in the village began on 18 June 1992 and he saw Serb soldiers, policemen, and Boban Šimšić among them. Later on, the witness stated that, while hiding in the woods, he saw Boban Šimšić with a blue beret on his head, a badge on the side, and dressed in military uniform.

[124] The Defence noted with a good reason that, at the main trial, witness Ahmo Karišik made a completely contradictory statement about the scene of his brother Mirsad's alleged murder. Witness Ramiza Šabanović does not mention that she saw the body of murdered Mirsad Karišik. Mirsad Karišik is entered into the Missing Persons Register, under Ref. No. BAZ108925-01, and the month of July 1992 and Goražde have been entered as the date and place of his disappearance. The pieces of evidence presented by the Defence are adequate to contest truthfulness of the charges which are also based, among other things, on Ahmo's testimony about the scene of the murder of his brother Mirsad. Witness Ahmo provides different descriptions of the accused where, at some point, he states that he saw him wearing a blue cap and, at another point, the cap was red. The Court holds that it can hardly be expected from someone with a perception to testify about the details such as this one, to change his statement, unless he chose not to tell the truth. It is evident from the main trial where, unlike his statement made during the investigation, he did not mention the presence of other persons, including the father of the accused, that not only that Ahmo changed his statement with regard to details but he also did that with regard to other facts. In any case, the fact that the Prosecutor abandoned the charges /count 4.c/ in the part based on Ahmo's testimony speaks for itself about credibility of his testimony according to which the accused was charged with taking 7 Muslims away in the vicinity of the Vilina Vlas area (place of Sase) to the Drina River that flows in the immediate vicinity of that place and ordering them to step into the water up to the waist, whereupon he and two more unidentified Serb soldiers fired their rifles at them and killed them,.

[125] According to the testimony given by witness **Ramiza Šabanović** (49), until the war, she lived with her husband and two sons in the village of Kuka. Jointly with them and with Fata Šabanović and her husband and children, and also with Ibrahim Karišik, his daughter-in-law and grand-children, she was hiding in the woods. They all were Muslims who were hiding from the Serb Army, not to be killed by them. That Army was shooting at their houses. They were hiding from May to June 1992, and then they left for Žepa. One morning when they were about to get out of the woods, it was around 12:00 hrs, a truck with soldiers came to the village of Karišika and then it returned, and Omer and Redžo went to the village while the others came back to their homes. When they set off towards Žepa, the truck with soldiers returned. It was on 21-22 July 1992. Then the Army split them and began to shoot at them and there were 30 of them. Then, everyone fled to the woods. They killed her 13 years old son. Among the soldiers, she recognised Boban Šimšić and Cane. Boban was large and blonde and she recognised him as she had visited his mother, whose name she forgot, to have a sweater knitted by her at the location the name of which she forgot and which is situated under Janjac, one hour away from her house. However, Boban did not know her. In response to the Prosecutor's question referring to her statement according to which, at the time when they were split, Boban was blackened, as to where and by what he was blackened, Ramiza said that she did not know and that she knew him as a neighbour, that the soldiers called him and that he said to her that the people in the woods would be slaughtered and that they should go to Vlahovići. There were six of them – Šefka, Safka, Salka, Hajrija, her son and the witness herself. In response to the Prosecutor's question as to what exactly he said to them, the witness said that he had told them to go to Vlahovići and that they would collect those

people – this time the witness does not state the alleged Boban's word “slaughter” – and that they all would come down there to transport them. The witness states that she told Boban that her village (trans.note. possibly misprinted: *her son was missing*, instead) was gone and that she could not leave because her son was missing, and that the accused asked how old her son was. She told him that he was 13 and then he said that he was not a little boy and that he was fit for carrying a rifle. Then, Boban took over Omer and Redžo from some people. The two of them had an official look and their hands were tied together. Boban said that they would be transported to them to the school, he said that they should wait for them as they would come there, and he said that they were taking them towards Žlijeb. The witness's house was torched first by Boban and his Army, with a bullet. She saw that happening as she was in close proximity. The place from which the bullet was fired at her house was 10 m away, the flame appeared on the roof and the dog which was tied got loose. She states that, in addition to hers, the house of Alija Šabanović was also torched. When she addressed Boban, she was not allowed to address him by his name, and Boban asked when they had seen Omer and Redžo for the last time and that they said: “this morning”. While explaining what she did when Boban told her that they should head towards Vlahovići and to wait for him in front of the school, she said that they were waiting for one hour and, as nobody had arrived, they fled towards Gostilja through the woods, and that they found there Hamijeta Šabanović's daughter whom she asked about her son and husband. She told her that she had not (*translator's note: it should probably read “had not seen”*), but that she had (*translator's note: seen*) Omer, and then the witness fell down. In response to the Prosecutor's question, she said that she was Fata Šabanović's next-door neighbour, a house to house, and that, after that, they were seeing each other and talking to each other in Srebrenica and Žepa. In response to the Defence counsel's question, she stated that, on the day when they were expelled, they returned to Gostilja where she saw Fata Šabanović and she told her everything about her husband Redžo. She confirmed that, mentally, Fata was a healthy woman capable of remembering what she was told. When the Defence counsel presented to her data according to which, on page 168 of the Register of Missing Persons in the territory of BiH, VII Edition prepared on 15 December 2005, Omer Karišik disappeared in April 1992 and that it was stated in the footnote that the relatives of the missing persons have provided the IRC (International Red Cross) with all names of persons and details which have been published in the Register, the witness said that he had not disappeared at that time and that, on that occasion, they were the last ones who left of the village and that Fata and a group of people left for Višegrad, while the witness, among 14 persons, left for Žepa. Evaluating Ramiza's testimony the Court holds that it was not convincing given that her responses were vague for the most part and, in her perception, she stated a chronology of events with breaks which, in the Court's view, cannot be as much attributed to the absence of her capability to verbalise the things as to her insincerity. Otherwise, how to understand her claim that the accused does not know her although she visited his house to have a sweater knitted by his mother whose name, on top of all, she does not know either.

[126] At the motion put forward by the Prosecutor, the Court presented additional evidence – inspection of the Certificates of Death dated 11 July 2005, with regard to the following persons: Redžo Šabanović, in relation to whom it was stated that 18 June 1992, and the place of Kuka, Municipality of Višegrad, were the respective date and place of his death, and Omer Karišik – date of death: 18 June 1992, in the place of Kuka, Municipality of Višegrad. At that point in time, the Defence counsel made an objection against these pieces of evidence, which the Court holds to be logical, and stated that, on the occasion of giving her testimony, Fata Šabanović, wife of Redžo Šabanović, said that she had not had any information about her

husband up to that time and therefore, the Defence wondered with good reason how come that 18 June 1992 was entered as the date of death.

[127] The Court presented the Prosecutor's evidence – Certificate of Death of Dželal Hodžić, according to which he died on 6 June 1992 in the place of Kupusovići and, with regard to incorrectly stated date of death, the Prosecutor submitted two certificates of the State Commission on Missing Persons, i.e. one dated 7 March 2006 where it is stated that Dželal Hodžić disappeared on 20 June 1992 in Višegrad and was exhumed from a grave in the place of Slap-Žepa, Municipality of Rogatica on 4 October 2000, which was issued at the request of the family, and the other one related to the fact of death issued by the Pathology and Forensic Medicine Service – Visoko, Ref. No. 03/2002 NI, in which, with regard to this very person, it is stated that he died on 20 June 1992 from the consequences of injuries inflicted by a bullet fired into his chest. The Defence counsel made objection to both Certificates and stated that the Pathology and Forensic Service from Visoko, i.e. the pathologist, in no way whatsoever could have established an accurate date of death of Dželal Hodžić and that, in addition, the Register of Deaths represents a public document indicating that 6 June 1992 is the date of death of the aforementioned person, which is an official date which must be used as such. The Court finds the Defence counsel's objections grounded as, only the fact related to the exhumation of mortal remains of Dželal Hodžić may be deemed to be an unquestionably established fact, as evident in the Record on Exhumation issued by the Cantonal Court in Sarajevo, Ref. No. Kri-334/00 dated 9 October 2000. Also, at the proposal of the Prosecutor, the Court presented as evidence the respective Certificates of Death of Hasan Gluščević with regard to whom it was stated that the date of his death was 18 June 1992 in Višegrad, and of Samir Softić with regard to whom it was stated that he died in June 1992 in the place of Slap-Žepa. The Defence counsel also objected to them stating that it is not evident in the Certificate when and how death of Hasan Gluščević was reported and on the basis of which document his death was entered into the Register of Deaths, and that, with regard to Samir Softić, the Certificate does not indicate the accurate date of his death and, besides, the Defence counsel, regardless of these formal defects, could not see what these pieces of evidence had to do with his defendant.

### 2.3 – Velji Lug – Persecution, Murder of Eight Civilians, Arson /Count 3 of the Operative part of Verdict/

[128] Under count 3 of the Indictment, accused Boban Šimšić has been charged with participating, together with a group consisting of about ten members of the Serb Army and Police, in the attack on the village of Velji Lug in the Municipality of Višegrad on 25 July 1992, and during which they, armed with guns, killed: Mediha Ahmetpahić, Amela Ahmetpahić, Razija Ahmetpahić, Fata Sućeska, Safet Aljić, Latifa Ahmetpahić, Smaila Memišević, set fire to their houses and business facilities, and expelled several tens of Bosniak civilians. The charges have been based on the statements of Hamdo Ahmetpahić, Salem Ahmetpahić, Almir Aljić, and Almasa Ahmetpahić in particular.

[129] Witness **Almasa Ahmetpahić** (34), born in the village of Velji Lug, testified at the main trial of 16 December 2005 that she had lived in a household together with her father and mother and that, on 25 July 1992, she was at home with her mother Razija, Latifa Ahmetpahić and Tima Aljić. She recalled that there were other inhabitants in the village that night and she mentioned Osman Ahmetpahić, Mediha Ahmetpahić with her nine months old baby and some other female relatives from the Sućeska family. She woke up early, she heard shooting and rushed out of the house and then she saw Mediha and the baby. She went out of

the house barefooted and poorly dressed and, from some 20 meters distance, she spotted a soldier coming from the direction of the woods. The soldier shouted: "Stop"!, she stopped for a short while and then took to flight. There was an orchard between the witness and the soldier which made the soldier more difficult to take aim. Shooting was heard and then she hid herself in a bush next to the house, hoping that he would not find her. From that bush (raspberry plant) the house entrance could be seen well and her mother and Latifa came out through the very entrance and began to run. Immediately, shooting was heard, first a burst of fire and then single-shot fire as well and then her mother and Latifa's painful scream was heard. Then a soldier appeared and she recognised Slaviša Jovanović. She was about to get up and to address him. The soldier said: "Boban, I killed two women and one got away from me, to hell with them". Then she realised that she had escaped, and Boban was standing in front of her house and he had an automatic rifle with folding butt and so had Slaviša Jovanović. Boban then entered the house with a small can containing some green liquid and, a few minutes later he went out and immediately afterwards, smoke appeared from the house while Boban and Slaviša Jovanović were proceeding further into the village. On their way, they stopped by the house of Safet Aljić and then the voice of Safet's mother was heard and then a burst of fire was heard, and the house began to burn and, some 5 – 10 minutes later, other houses also began to burn. Then, Safet's voice was also heard and he was screaming in pains, then Smajila, Mediha's mother, was heard and Mediha and the baby were in the view. She also saw a soldier whose hair was trimmed short, in olive drab uniform and with a rifle in his hand, with his back to the witness. Mediha's mother begged the soldier to spare his daughter and the little baby telling him that she had already lost two sons. The soldier was pushing her away and, some 10-15 minutes later, a burst of fire was heard. The soldiers withdrew, they burnt everything down and left only ashes behind. Later on, after an hour, the witness left the raspberry bush and saw the bodies of those murdered. Terrified, she came to her house and took her mother's boots from under a metal sheet and set off to find her father. She stopped by Lenka Stanimirović who sent her to Budimir and his wife Radmila. After a short while, Radmila escorted the witness to the house of Rasim Ahmetpahić from where the path led through the maize stubble field towards the woods. Her father was above the village, in the woods, and they found each other and reached the place where her mother was lying all covered with blood. Then, they together withdrew deeper in the woods where other Muslim people were also hiding. The witness stated that she saw Boban Šimšić for the first time in February 1992 when they were stopped at a barricade for a check up. On that occasion, a driver, an Orthodox Christian who was her brother's friend, said to her: "That is Boban Šimšić". In response to the specific question as to whether she was certain that the person she had seen at the barricade was the same one she had seen in front of her house, the witness responded affirmatively, saying: "One hundred percent".

[130] During the cross-examination the witness confirmed that, on that morning of 25 July 1992, beside her, her mother Razija, Tima Alić and Latifa Ahmetpahić were also in the house, that she saw that, on that occasion, her mother and Latifa came out of the house while she did not see Tima leaving and that she did not find Tima's body next to her mother's body. However, when asked by the defence counsel as to how she could explain her different statements made at the Police (Record of the Crime Investigation Police Sector – Goražde dated 1 February 2005) on which occasion she stated that she had gone to the place where lifeless body of her mother Razija was lying together with the bodies of Latifa Ahmetpahić and Tima Agić and that, in addition to seeing that her mother had had the entry-exit wounds in the area of lower legs and a bullet entry-wound in the temple area, she could also have seen bullet wounds on various parts of the bodies of Latifa and Tima, she said that a typist had made a mistake as she had misunderstood her and that she had not spotted the mistake while

reading the statement. In response to the specific question of the defence counsel as to whether it was not the case that she had stated to the Police what she had just read, the witness said: “No“, although she previously confirmed authenticity of her statement made to the Police for the record. In response to a further question of the defence counsel as to how she could explain the difference in her statement made to the Police where she stated that, after getting into her house yard, from some 100 meters distance, she had seen a Serb soldier running towards her while, with regard to the same circumstance, she said at the main trial that some 20 meters distance was in question, the witness maintained her statement made at the main trial. The witness recognised Slaviša Jovanović after her mother had been killed and the witness explained that Slaviša ran by at which moment she could not recognise him straight away and only when he come back she could see his face as he was walking slowly and he was close to her. At that point, the defence counsel drew her attention to her statement given to the Police according to which, some 100 meters away from the place where she was standing she saw a Serb soldier whom she had known from before by the name of Slaviša Jovanović, who was running in her direction, and he asked her to explain the difference. Latifa said: “Suddenly, I am going to the Police to make a statement that is, before one even sits down and has the time to go back to 1992 and to think about the way it was...”. In response to the specific question as to how she explains that, on that occasion, Slaviša Jovanović murdered them, the witness responded: “He could have killed me. One must stand and take aim, and one cannot commit murder as they go”. When the defence counsel reminded her of her statement made during the direct examination according to which she intended to address Jovanović to ask him what had happened, and why she had abandoned the idea, she explained that she had done that because of Jovanović’s statement claiming that he had killed two women while he had lost the other one. At the main trial, the witness further stated that, at the time when she had seen Slaviša Jovanović she had run some eight meters away from the house, while she stated to the Police that she had run some 20 meters away from the house, wherein she confirmed that her statement made at the main trial was truthful. When asked if Slaviša Jovanović had shot at her mother, she responded that Slaviša Jovanović was the only person who had run after them. Finally, when asked to state whether she saw that Jovanović had murdered her mother, she responded negatively. While explaining how Slaviša Jovanović looked, she said that he had worn olive drab uniform and a short jacket, that he had had automatic rifle with folding butt in his hand, that his hair had been light brown, that he had been about one meter and sixty – seventy centimeters tall, and that she knew that person from before. When asked to describe the look of Boban Šimšić, Latifa gave a general answer stating that they all had the same uniforms – olive drab with those trousers with pockets, jackets and rifles, that they had no caps on their heads and that they all wore identical uniforms. On that occasion, she saw three or four persons in those uniforms. In response to the question as to what her explanation was regarding the circumstance that, at the time when she reached her house and found the boots, she did not look for the body of her mother, Latifa said, word for word: “I was looking for someone, yes, I was looking for either mama or someone, which means, I was looking for something –“. At the insistence of the defence counsel to say whether, upon her arrival at the charred remnants of the house the witness was looking for her mother to see if she had been shot, the witness responded affirmatively and, when asked why she had not stated that anywhere before, she said that she could not give the answer. Furthermore, given that the witness stated at the main trial that she first visited the Pecikoza and Stanimirović families and that she afterwards met with her father while, in her statement made to the Police in Goražde, she stated that, after spending a few moments with her father, she went to a nearby shelter and then to her neighbours the Pecikoza and Stanimirović families; asked if she had any explanation for these differences in the statements she said that she did not. With regard to the circumstance as to

when, prior to this incident, she saw Boban Šimšić for the last time, the witness stated that it was in winter, at the time of barricades, which means in February 1992, while for the record taken by the Prosecutor's Office of BiH on 31 May 2005, she stated that it was in the winter of 1991. The witness attributed the difference in her statements to her most likely slip of the tongue and said that she mechanically stated the year.

[131] On the occasion of her confrontation with Slaviša Jovanović at the main trial of 12 June 2006, witness Almasa Ahmetpahić maintained her statement given at the previous main trial; unlike witness Slaviša Jovanović who confirmed that, on the critical occasion, he had not been in the village of Velji Lug since, at the time, he was in Stara Pazova. During the confrontation, witness Jovanović said that he sympathized with the witness, although he did not know whom she had lost, and he repeatedly claimed that the witness was telling lies thus protecting those who actually had committed those murders and that she was putting responsibility on the wrong people such as him and the accused and, by acting so, not only that she was jeopardizing to them but their children as well. Just before their confrontation, the Court witnessed that Almasa was looking around the courtroom to see the witness she was about to confront with, although he was sitting across the table and it was only a table between them. When the Presiding Judge informed the witness that witness Jovanović was sitting in front of her, Almasa gave an honest comment that he was not the person who had been in Velji Lug on the critical occasion. Furthermore, in response to the Defence Counsel's question as to whether that was Slaviša Jovanović who was born in 1969 and about whom she spoke at the main trial, the witness answered affirmatively although it is evident in the available medical documents and the Red Cross documents, as well as in the personal details provided by Slaviša Jovanović himself, that Slaviša Jovanović, born in 1962, was in question. Also, at the main trial, Almasa stated that she met Boban Šimšić at a barricade in Višegrad before the incidents in the place of Velji Lug and that she could not state precisely at the time as to when it was and according to her, on that occasion Slaviša Đurić told her that that was Boban Šimšić.

[132] However, with regard to this very circumstance, at the time when this witness was making her statement at the main trial on 5 July 2006, **Slaviša Đurić** gave a definite answer that he had not known Boban Šimšić until 2003 nor had he had any meetings with him. Until that time, he only knew that Boban was a policeman whom he often saw in Višegrad. He also stated that he neither knew Almasa Ahmetpahić nor did he say to anyone before 2003 "This is Boban Šimšić". The Court evaluated his testimony as truthful as it could not see any reason whatsoever for which this witness would be partial to the benefit of the accused and, besides, no one had indicated anything of that kind at the main trial. Given that it was not supported by the presented evidence, the Court did not accept Almasa's claim that she had met the accused at the barricade in Višegrad. This is all the more so in view of the fact that a considerable time span of one year, with regard to her different statements concerning the incident (February 1992 at the main trial and winter 1991 when examined by the Prosecutor), can certainly not be attributed to her distorted perception of the time as much as to her unconvincing testimony.

[133] In the fact that, on several occasions and with regard to details, the witness provided inconsistent and unconvincing testimony, the Court finds additional reasons for not give credence to Almasa's statement with regard to the incidents in the village of Velji Lug which according to her were connected with the accused, and they are certainly of importance for the evaluation of Almasa's testimony, as a whole, to the detriment of her credibility.

[134] The Prosecutor objected to the presentation of evidence – Official Note Ref. No. 07-02/3-1-39 dated 6 June 2003 of the Crime Investigation Police Sector-Goražde produced by Amra Hendo with regard to exhumation of mortal remains of victims in the area of Velji Lug, which was used by the Defence during the cross-examination of witness Almasa Ahmetpahić. The Court refused the objection of the Prosecutor holding that unlawful evidence was not in question in this particular case, i.e. evidence that would be subject to exception from the case should it be obtained in a manner contrary to the basic legal principles, for example in violation of the basic human rights or through suspicious or fraudulent methods, in other words, evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, or evidence obtained through essential violation of this Code (Article 10 of CPC BiH).

[135] With this regard, the Trial Panel reminds that the fundamental principle on which the evidence presentation in international criminal proceedings is grounded, is common to all systems based on the adversarial model, and the basic structure of that model is built into CPC BiH. Under that principle, written or oral testimony, a document or other written materials, shall be considered as evidence *only if the Court accepts it as such* after hearing arguments of the parties in the proceedings. The second basic and common principle implies that the *Court shall not be limited to special formal evidentiary rules*<sup>32</sup>, as stated in Article 15 of CPC BiH. The Trial Panel notes that in no way whatsoever has it acted contrary to either the presented general principles of the international criminal proceedings or the provisions of the CPC BiH with regard to acceptability of this/or other pieces of evidence referred to in this Verdict. In other words, when admitting evidence, the Panel was guided by the idea that it would admit those pieces of evidence deemed to have the evidentiary value.

[136] The Trial Panel finds the additional arguments for such assertion in the fact that the said official person, Amra Hendo, took part in taking a statement from Ahmo Karšik which was made for the record to the Crime Investigation Police Sector in Goražde – MoI of Bosnia-Podrinje Canton of the Federation of Bosnia and Herzegovina on 7 January 2004, and from other Prosecution witnesses with regard to this case. Therefore, contradictory conclusions may not be derived from the same base in dependence on what the Prosecutor needs. Besides, if the Prosecutor used the statements of the witnesses made before the official persons-policemen in one phase of the proceedings to bring charges against the suspect, the Trial Panel holds that, from the aspect of observance of the principles of equality of arms and fair trial, it would not be just that the Defence does not use the same pieces of evidence when they are favourable for them.

[137] During the examination of witness Almasa, in the Prosecutor's Office on 31 May 2005, she stated for the record that she was present on the scene during identification of her mother's body and that she had identified her body on the spot where her mother was killed, and that she was also knew that Mediha's body had been exhumed and identified, therefore, exactly with regard to the reason for which the Official Note was produced. Anyway, no one objected the validity of the contents of this evidence nor did the Court have any reason not to believe what was stated in that Official Note. It may be discerned from its contents that, on the stated date, Almasa had a conversation with official person Amra Hendo with regard to the murder of her mother Razija Ahmetpahić. On that occasion, Almasa stated that, that morning on 27 July 1992, she saw a group of six uniformed Serb soldiers who were firing in a

<sup>32</sup> Antonio Cassese, International Criminal Law, Belgrade Centre for Human Rights, Bgd., 2005, page 497

rapid succession in her direction, from their automatic rifles that she then hid herself in an orchard, that her mother and a female cousin were running behind her, that the Serb soldiers were firing at them in rapid succession, in their backs and back sides of their lower legs, that Razija and Latifa fell down and that, afterwards, Slaviša Jovanović, whom she knew, approached to the bodies and fired a shot in the area of their respective temples. She also stated that Slaviša Jovanović torched her family house. From the place where she was hiding, Almasa could also witness the murder of Mediha Ahmetpahić (1962), her daughter Amela Ahmetpahić (1971), and Smaila Memišević (1932), the persons whose lives were also taken by Slaviša Jovanović. In addition, with a view to finding Almasa, Jovanović was searching the terrain and when he detected her, he again attempted to take her life and she then began to flee. She managed to reach the house of her neighbour Todor Stanković who did not allow her to enter his house and who took her to Budimir Pecikoza instead, and the latter was abusing her, both physically and mentally, by examining what she knew about the stated murders and he then instructed her to head towards the Serbia border and he gave her some money and then, upon her return with Todor Stanković, to his house, Almasa was taken by his wife to the place where she met with her father Hamdo.

[138] Therefore, the analysis of this evidence indicates that, while making her statement to the aforementioned official person, Almasa Ahmetpahić, in no word whatsoever, mentioned Boban Šimšić which would indicate that he took part in the incidents in the village of Velji Lug. Also, during his testimony, Salem Ahmetpahić did not state that Almasa had mentioned Boban Šimšić at all at the time when, on 25 July 1992, she was telling him about that day's incidents in the village. With regard to the circumstance of the participation of Slaviša Jovanović and unlike her statement made to Amra Hendo, she stated at the main trial that she had not seen Jovanović shooting at her mother but she rather concluded that he could have done that as he was the only person who run after her mother (page 14 of the Record taken at the main trial on 16 December 2005). It is stated in the Official Note that the incident had happened on 27 July 1992, while during the proceedings Almasa was stating that the critical incidents had happened on 25 July 1992. During her examination at the Police in Goražde on 1 February 2005, witness Almasa stated to the same official person Amra Hendo that her neighbours Budimir and Todor, after questioning her, gave some food to her. Based on her narration, why would someone, after abusing her physically and mentally, give her food or instruct her where to go to save herself? It is evident that credibility of her narration with regard to the factual circumstances of the incidents cannot be established through such illogicalnesses in her testimony about the subsequent factual circumstances of the incidents. Unlike her subsequent statements made either during the investigative procedure or at the main trial, she said to Amra Hendo that it was Slaviša Jovanović, not Boban Šimšić, who torched her family house. Indeed, if it is kept in mind that, during the proceedings, witness Almasa stated that, from the place where she was hiding, in the raspberry bush, she saw the accused Šimšić with a 5 l plastic jerry can and, in addition, she had seen green liquid in it, before he entered her family house, the question is how come that, under the circumstances of shooting in rapid succession and single-shot fire, running, fear, screams, as she herself admitted, and where, as she testified, Slaviša Jovanović fired in her direction, which all was happening in her vicinity, the witness managed to register details related to a small can and the colour of the liquid in it. Her allegations according to which she reached the charred remnants of her house barefooted and found unburned shoes under a metal sheet and put them on, can hardly be accepted as truthful as it is illogical that, given the developed temperature, the metal sheet would be spared of incandescence and the shoes of the destruction as a consequence. It is evident and not only for this reason but also due to a number of inconsistencies which the Defence meticulously registered during the cross-examination on

which occasion the witness did not respond satisfactorily to the posed questions and explain the differences in her narration but instead she provided answers which were general, illogical and incoherent or, instead of giving answers, she posed the questions herself; all of these led to the conclusion of the Court that, having evaluated the entire testimony of Almasa, being the key prosecution witness with regard to the incidents in the village of Velji Lug and the participation of Boban Šimšić therein, this witness by no means can be given credence.

[139] While giving his testimony with regard to the same incidents in the village of Velji Lug, **Hamdo Ahmetspahić** (57) stated that, on the critical morning, soldiers had burnt down everything in the village of Velji Lug, that he had hidden himself some 10 meters away from his house and seen Mediha and her baby and her mother passing by the house and that, at the moment, he had seen a woman running by and soldiers after her, and a “Stop“ followed by a single-shot fire was heard. At that moment, his wife Razija, daughter Almasa and neighbours Latifa Alispahić and Tima Aljić were coming out of the house and rushed behind the house and the witness could not see them any longer because of the fence. A shot and then a burst of fire were heard, then his wife and Latifa’s cries were heard. Terrified, the witness pressed himself close to the ground with his head facing the ground and then, after everything had become silent, he heard a male person saying: “Boban, I killed two women and one got away from me, to hell with them”. On that occasion, the witness saw that there were two soldiers who torched his house, but he could not recognise any of them. After they had left, he saw four more soldiers approaching and they were letting cattle loose and then torched the houses. He remembers that he heard a voice of his neighbour Safija Aljić who was 60 to 70 years old and her husband Safet, then he heard a painful cry and shooting.

One hour later, the witness went over the fence to the road and, on that occasion, he saw his wife Razija and Latifa lying on top of one another, then he was looking for his daughter Almasa and he told her that her mother had been killed and then, at her request, they went to the spot where her mother’s body was. He added that he had not known Boban Šimšić in person.

[140] In his testimony about the same incident, **Almir Aljić** (33) stated that, in the night on 25 July 1992, he happened to be with his neighbours Salem Ahmetspahić and Hamdo in front of the house, in the grass, while Razija Ahmetspahić, Latifa, Almasa and his mother Fatima Aljić were in the house. When at some point he heard shooting, he saw 2-3 soldiers, including Rade Lukić who attempted to arrest him but the witness took to flight. He and some other inhabitants, including his father, hid themselves in the maize stubble field and then he heard Rade saying: “Hurry up, Boban, I have to capture this man alive”, which referred to the witness’s father. There were other soldiers around as well and they managed to capture his father. He did not see that himself but he heard Radmila or Lenka’s voice saying: “Boban, do not touch Safet, he is our neighbour”. They took his father back to the village where the witness’s grandmother was, who begged them to release him. Then, nothing else was heard, the houses burst into flame. His father was killed in this incident and his body was also found next to the house at a later point in time. However, his grandmother’s body was not found. After these incidents, he saw behind the house four female corpses and a baby corpse while, on his way to the woods, he found corpses of Razija Ahmetspahić and Latifa. During the cross-examination and in response to the question of the Defence as to why he said to the Police that the incidents began on 27 July 1992, which differed from his statement at the main trial, the witness explained that a possible mistake was in question and that what he had stated at the trial was true. In response to a further question of the Defence, he stated that, on that day, he had seen Rade Lukić on three occasions and when asked why he had not stated that to

the Police, he said that he could not recall what he had said a year ago. Then, the defence counsel reminded him that it was in the same year when he gave statements. He presented to him that, on the occasion of giving a statement to the Police on 1 February 2005, he stated that Rade Lukić said: "Hurry up, we must catch this man alive", on which occasion, unlike his statement made at the main trial, the witness did not mention the name of Boban and, when asked to explain the changes in the statement, witness Almir asked him a counter question, if the defence counsel were him, whether he would listen who and where called whom. In response to a further question as to how Rade Lukić and a person he had addressed looked like, the witness stated that they had camouflage uniforms and caps on their heads and that they had beards. However, Lukić's beard was larger and he did not look closely at the other one as, unlike Rade, he did not know him. He added that he had not heard from anyone that Boban Šimšić participated in the attack on the village of Velji Lug. During his examination in both the Police and the Prosecutor's Office, as well as during the direct at the main trial, he did not state that Slaviša Jovanović had taken part in the attack. In response to the question of the Defence as to whether he knew Slaviša Jovanović, the witness stated that he heard from others telling that he also had been there but he had not seen him in person.

[141] **Salem Ahmetpahić** (39) testifies that he does not know Boban Šimšić and, just like Hamdo and Almir, he also stated that their neighbour Stanko Pecikoza was protecting them in the village of Velji Lug, until he was killed for protecting them, Muslims. The neighbouring villages with the Muslim population were cleansed by the uniformed army which attacked them, too, on 25 July 1992. At the time he, Hamdo and Almir were sleeping bellow the house. Shouts "Halt! Do not run away, I shall shoot!" woke him up. He saw about 10 soldiers in uniforms and with automatic rifles in their hands moving on, and a woman walking slowly until she turned behind the house at which point she began to run. He was running towards Osman's house, he heard shooting, cries and screams of women. He fled into a bush from where he saw two uniformed soldiers who stopped next to Osman's house. He could not see the soldiers across the fields, maize, but he heard that one of the soldiers who were running said that he must catch that man and he cursed his balia (trans. note: derogatory term for (BH) Muslims) mother. When he reached the Orthodox houses in the village, he heard a voice of a woman by the name of Radmila who said: "Boban, what are you doing?" and that person said to her to hold her tongue or he would kill her too. He stated that he had not known anyone by the name of Boban. Later, not in person, found out that it was possible that the said Boban had been a member of some paramilitary formations and that he had been in the village. After the army left the village, he came across female corpses - of Razija and Latifa who were initially wounded in the legs, as they were probably shot from distance, and then approached to and shot in the chests. He added that he had not seen soldiers coming closer to the women but he supposed that as he heard cries after subsequent shooting by soldiers. He also states that, on his passing by the house of Safet Asljić, he run into the body of Mediha Alispahić and her dead baby whom she held in her arms, the body of her mother Memišević, whose name he did not know, and of Fata Sućeska. The only man who was killed that day in the village was Tima's husband Safet Aljić. He confirmed that he knew that, on that day, Almasa Ahmetpahić was in the village and that she told him that, after the murder of her mother and Latifa, a soldier said: "Boban, I killed two women and one got away from me", cursing their balia mother. On that occasion, Almasa did not tell him that she knew the soldier she named Boban. In response to the Prosecutor's question as to whether, after that incident, he had heard anything about the person whose name is Boban Šimšić, he stated that he had found out that the latter had been a member of the paramilitary formations commanded by Milan Lukić, which were committing the most terrible atrocities and that the formation was called "Garavi sokak", and that he had heard about that formation from everyone in his village. During the

cross-examination, the defence counsel pointed out to the witness that, unlike his statement made at the trial, he said to the Prosecutor that the village was attacked on 27 July 1992, and the witness explained that, most likely, the dates were mixed up.

[142] With regard to evidentiary power of the testimonies of Hamdo Ahmetspahić, Almir Aljić and Salem Ahmetspahić in relation to the presence and involvement of the accused in the described incidents, all these witnesses have agreed that they did not see Boban Šimšić nor did they know him from before. The fact that they heard one soldier addressing the other one by the name of Boban or that Radmila mentioned the same name, does not necessarily mean that accused Boban Šimšić was in question. It is indicative that, at the main trial, witnesses Almir and Salem stated in a circular manner that the incident took place on 25 July 1992, while they had previously stated that it happened on 27 July 1992, which indicates that they were supposed to adjust their statements to the date on which the incidents in the village of Velji Lug actually happened. In response to the Prosecutor's question, Salem's allegations related to the membership of the accused in an armed paramilitary formation of Milan Lukić are but a speculation, given the statements of other witnesses stating that Boban Šimšić was a reserve policeman, which has also been objectivised by a material evidence presented by the Prosecutor himself – a payroll. His stating the name of Milan Lukić's paramilitary unit is also incorrect as all other witnesses have said that "Beli orlovi" were in question. It is evident that a functional testimony in support of the testimony of Almasa Ahmetspahić was in question here.

[143] A fact which did not escape the Trial Panel's attention is that witness Almasa, as well as other witnesses who described the incidents in the village of Velji Lug, only mentioned Serb soldiers by describing their weapons and stating that they were dressed in olive drab uniforms, while they did not mention at all the presence of the Police whose members, as testified by several prosecution witnesses, wore blue uniforms (which also includes camouflage blue uniform – Court Note). The Prosecutor was evidently aware of the problem as to how to fit reserve policeman Boban Šimšić into these incidents in which, according to the statements of his witnesses, only soldiers participated and, as a consequence, he attempted to resolve the problem by entering into the factual description of the charges with regard to the incidents in this village and in the villages of Žlijeb and Kuka as well, that the assault was also committed by members of the Serb Police, in addition to the members of the Serb Army, regardless of the fact that such a claim has not been supported by the testimonies of the prosecution witnesses themselves. Finally, several defence witnesses, in their testimonies with regard to the circumstance of the establishment of the accused's alibi such as, for example, the testimony of witness Goran Miličević, including the testimony of the accused, which has partly been accepted by the Prosecutor himself in the context of pointing out responsibilities of the accused as a policeman in the events which happened in the town itself, stated that the duty of the reserve policemen was restricted to providing security of facilities and communications in Višegrad itself, and not in the villages, as well. Defence witness **Dragoljub Papić** (55) is specific in his assertion that he did not know Naila by the second name of either Ahmetspahić or Ramić, that he has never been in the village of Vlahovići and that, therefore, he could not have been there in 1992 either, and that he was not in the village of Kuka that year, nor did he know anything about the incidents in that village. He has never had any meetings with Boban Šimšić whom he knows only casually. **Stojan Papić** (60) states that he knows Naila Ramić from the time when she was a little girl and that he met her in 1984 for the last time. As for Boban Šimšić, he did not know him in 1992, and he used to see him in uniform upon the establishment of law in 1995-96. In response to the question as to whether it is true that the witness, jointly with Boban Šimšić and other persons, maltreated

Naila Ramić in her native village during 1992, as she stated in her statement made to the Police in Goražde on 9 April 2004, Stojan said that that was a blatant lie and that he had never been in that village and that he was willing to confront with her with regard to that circumstance. He added that, in autumn 1996, Nail Ramić telephoned to ask him if there were refugees there and if plums gave good crops that year, and that he wished to have a glass of brandy with him. During the cross-examination, the witness stated that he was mobilised on 11 August 1991 and that he was issued with a weapon in the village of Rujšta where the Command Staff was situated. Therefore, given the defence evidence referring to the alibi of the accused, which the Prosecutor failed to successfully rebut, along with the assessment of the testimonies given by the prosecution witnesses and also having considered what has been stated under para. [228-231], the charges related to Boban Šimšić's participation in the described incidents in the villages of Velji Lug, Žlijeb and Kuka are seriously questionable.

[145] On that occasion the Trial Panel notes that it has no doubt at all that the facts presented by the Prosecutor were truthful with regard to murders and taking of civilians away in unknown direction and to torching of houses and business facilities in those villages, as stated by the prosecution witnesses, given that, with regard to these circumstances and in addition to others, there are objective pieces of evidence as well – results of exhumation and identification of murdered Bosniak civilians.

Therefore, the Court has examined the following pieces of evidence: Photo-documentation, No. 15/2003, Subject: exhumation of bodies, Site: Višegrad-Velji Lug, Date of photographing: 14 May 2003, Unidentified person 613 1, 2, 3 and 4. From both closer and farther perspectives, these photographs show the locality of the local cemetery in the village of Velji Lug, Municipality of Višegrad, where mortal remains of a body which most likely belonged to Razija Ahmetpahić were exhumed, numerated with 613.5 and 6. These two photographs present the parts of mortal remains of the exhumed bodies. 7<sup>th</sup> photograph shows the inward content of the grave; The drawing of the scene, No. 14/2003, Subject: body exhumation, Site: Višegrad-Velji Lug, Date of drawing: 14 May 2003, Unidentified person 613 and 614. The drawing of the scene presents the Ahmetpahić cemetery on the slope above Velji Lug, which is connected to the local village road. The assumption is that, in the said cemetery, about 20 meters away, in two graves the bodies of Razija Ahmetpahić and Lemana are located, marked with respective numbers 613 and 614. The Cantonal Prosecutor's Office in Goražde, No. Ktn-1/2004, Cantonal Prosecutor: Mirsad Bilajac, Report on Forensic Pathology Re-expertise, Gravesite: locality of Velji Lug, Municipality of Višegrad, on 14 May 2003, Date of Re-expertise: 27 February 2004, Site: Vitkovići, case number: 608-A, B, C, D, E. Conclusion: the examined and described skeletons are remains of human origin and belong to at least five (5) persons, 3 female adults, 1 male and 1 infant 608-E. There is a defect on a fragment of broken bones of the skull roof, which looks like a bullet exit perforation and, on the preserved skull, there is a diagonal defect on the frontal bone which was possibly caused by gunshot-tangential effect (Zdenko Cihlarž, Expert Team Leader). Photo-documentation, No. 15/2003, Unidentified person 60 1 and 2. These photographs show the locality of the village of Velji Lug in the municipality of Višegrad, where a mass grave was found with the remains of at least 5 victims, as follows: Mediha and Amela Ahmetpahić, then Smajil Memišević, Fata Sućeska and Safet Aljić. The 3<sup>rd</sup> photograph shows the content of the mass grave. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. On all aforementioned photographs, from closer or farther perspective, exhumed human bones are seen being marked with numbers A, B, C, D and E. On photograph 20, as marked with a black arrow, skull defects on one of the bodies in the described mass grave are presented under number A. It will be precisely identified through DNA analysis which bones

belong to what person of those who are supposedly in the mass grave. 21 and 22. These two photographs show a children's snow-suit found in the mass grave, which supposedly belonged to Amela Ahmetspahić, a baby girl born on 3 October 1991 in Foča, and a children's underwear (waterproof pants) and 1 toy can be seen next to it. The drawing of the scene: number: 14/2003, Subject: exhumation of bodies, Location: Višegrad-Velji Lug, Date of Drawing: 14 May 2003. The drawing of the scene presents a wider area of the place of Velji Lug in the municipality of Višegrad, where a mass grave was detected. The mass grave was found about 100 meters away from the ruined housing facilities where the houses of the Ramo Ahmetspahić, Omer Aljić and others were located. The assumption is that the bodies of Mediha and Amela Ahmetspahić, then Fata Sućeska, Smajil Memišević and Safet Aljić are in the drawn mass grave in the place of Velji Lug.

[146] However, what the Court has found to be extremely questionable, bearing in mind what was stated while assessing the prosecution witnesses' testimonies, i.e. that they were insufficient, if not even defective, is the role which is imputed to the accused in relation to the incidents in the village of Velji Lug. The Court could not establish beyond reasonable doubt that he had participated in those incidents.

## 2.4 - Firehouse – Incidents

### 2.4.1 – Count 4.a) of the Verdict – Rape

This count of the Amended Indictment is grounded on the testimonies of Hedija Hodžić and partly on the read statement of witness Muniba Gluščević.

[147] Thus, witness **Hedija Hodžić** (43) states that, until the war broke out, she lived in the village of Žlijeb, with her father-in-law, husband and three children. Her husband got killed. She states that Boban Šimšić and some other persons came to the village, and that he told them to go away and that trucks were waiting for them. In response to the Prosecutor's question as to whether they were forced to do that, the witness said that no one had forced them to and that, instead, they only came there in the morning and told them that they had to leave the village. Everyone did that in the same way as she did – she gathered her children, father-in-law and her husband and left everything behind. She heard from her neighbours that Boban was the worst of all, although she does not know the names of the neighbours who said that to her. She did not see Boban on the day when she left the village but she saw him down there in Višegrad, in the Firehouse to where they were transported by trucks and imprisoned. In response to the Prosecutor's question as to how she knew that Boban Šimšić was there that day, given that she had not seen him, the witness responded – according to what was told, and as they said so did she conclude. When asked if there were people around who knew the accused, the witness responded – I guess so, how could I know? Before reaching the Firehouse, she did not see Boban Šimšić around and people said it was Boban Šimšić, and he stayed there for a short while and returned. She described him as being neither big nor small, she does not remember if he was armed or how he was dressed – as she was scared. She states that, apart from the accused, Milan Lukić was also in the Firehouse. In response to a direct question of the Prosecutor as to whether anything unpleasant happened to her in the Firehouse, the witness readily said that Boban Šimšić raped her and was beating her with some baton and that she suffers from consequences, in her head. She continues stating that the accused had repeatedly taken her to the upper floor, to a room which was unfurnished and

where one had to undress, and that he did what he wanted to. She adds that, on three occasions, he took them out, five women and five girls on each occasion, and that it was Boban Šimšić who took them all away and that, except for him, she did not see anyone else on the upper floor. She said that he had also beaten other women with a baton and raped them. He previously asked them to strip naked, which they did. She is certain that Boban Šimšić raped them. When he took them away for the second time, two other soldiers accompanied him and she could not recognize them. On that occasion, the accused ordered them to undress and to dance around him. In response to the question as to whether, during sexual intercourse, he had used a baton, the witness responded – yes, he had. In response to a further question as to whether those two soldiers also took part in the rape, the witness said – well yes, of course they did. When asked if they too stripped naked, the witness responded affirmatively. However, she cannot remember the names of the girls and the women except that they were from the villages of Kuke and Malović. She does not know if any of them knew him. They stayed in the room for two to two and a half hours. Her sexual organ was bleeding. He was beating her in the head whenever she refused to undress. While he was taking them to be raped for the third time, she did not see if anyone else was with him. When asked to identify Boban Šimšić in the courtroom, witness Hedija states that she cannot recall as she forgot his appearance. During the cross-examination, the witness responded that she had only recognised Boban in the Firehouse and that she had not recognised him in Žlijeb, and then she finally stated that she had not seen him before her arrival at the Firehouse – the School. By the way, she married a man from the village of Žlijeb and came to live there in 1984, and she had stayed there all the time until they left the village. She cannot remember any of the persons who took them away, including the way in which a person whom they called Boban Šimšić was dressed. She remembers that he was standing guard one whole day in the Firehouse. In response to the question as to whether she was angry with the Serbs from Višegrad after her husband's body was found, the witness responded affirmatively to that and to additional question of the Prosecutor as to whether she made a statement before him in the Prosecutor's Office on 30 May 2005.

Evaluating the statement of this witness, the Court holds it evident that a non-credible witness is in question. For such a conclusion to be reached, it is sufficient to state that, although she lived in the village of Žlijeb before the war, the witness does not know the accused who was her neighbour but she learned about his identity from other persons and, finally, she did not recognize him in the courtroom either. Also, the witness has not stated any name of the women who were allegedly victims of rape in the Firehouse, nor has she recognised any of the alleged perpetrators. There is no need for any comment on her allegations according to which the accused, on three occasions and within two and a half hours, raped 10 female persons.

[148] Based on the statement of witness **Muniba Gluščević**, which she gave for the record to the Police in Goražde in 2004, a conclusion may be reached that, during her imprisonment in the Firehouse in Višegrad, on the same evening when Mitar Vasiljević gave her a punch and after she regained conscious, she heard from other women that some of them had been raped, which was happening every evening during her seven-day imprisonment in the Firehouse. Therefore, on this occasion, Muniba does not connect the accused at all with the alleged rape of women.

[149] As unconvincing pieces of evidence are in question, the Trial Panel is hereby acquitting the accused of the charges for rape under Count 4.a) of the Indictment.

2.4.2 – Taking Away 18 Men – Civilians from the Firehouse / Paragraph 4.c) of the operative part of the Verdict /

[150] With this count of the Indictment accused Boban Šimšić was charged that on 18 June 1992 and together with Milan Lukić, in the Firehouse in Višegrad and from the room in which they were unlawfully imprisoned, he singled out 18 civilians of Bosniak ethnicity whose names are stated in the operative part of the Verdict and who have been unaccounted for ever since.

[151] This Court holds uncontested the fact that out of 18 men who were taken away from the Firehouse on the critical occasion, the corpses of the following have been exhumed: Mujo Gluščević, Ibrahim Kešmer, Hamed Kešmer, Samir Softić, Emin Agić, Hasib Gluščević, Sead Hodžić, Huso Bulatović, Dželal Hodžić and Adem Kozić, while the others, whose names are stated in the operative part of the Verdict, have been registered as missing. These facts have been irrefutably established through material evidence – Records on the Exhumations and Identifications and through testimonies given by the expert witnesses – forensic pathologists.

[152] Therefore, the Cantonal Court in Sarajevo, Number: Kri:3577/00 of 9 October 2000, produced an on-site Record on the Exhumation between 9 and 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with 10). The body exhumed from the gravesite marked with number 10 has been identified as Hamed Kešmer (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist)

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2515/00, Subject: exhumation, post-mortem examination and identification Kri: 347/00 G.S. 64, Site: Rogatica, Žepa, Slap, Date of photographing: 11 October 2000. Photograph 1 shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – the corpse photographed while in the grave. Photograph 3 – the corpse photographed after being taken out of the grave. Photograph 4 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 5 – the corpse photographed after the anthropological re-association of the body parts. No injuries on the bones of the corpse have been recorded.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. In the period from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 364/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 09 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with 88). The body exhumed from the gravesite marked with number 88 has been identified as Mujo Gluščević (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2526/00, Subject: exhumation, post-mortem examination and identification Kri: 358/00 G.S. 9, Site: Rogatica, Žepa, Slap, Date of photographing: 11 October 2000. Photograph 1 - shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – same as the previous photograph, taken from a closer distance. Photograph 3 – wedges found on the occasion of digging up the graves are marked with arrows. Photograph 4 - the corpse photographed while in the grave. Photograph 5 – the corpse photographed after being taken out of the grave. Photograph 6 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 7 – the corpse photographed after the anthropological re-association of the body parts. Photograph 8 – arrows on the photograph point at an injury on the right 8<sup>th</sup> rib and at dilacerated vertebrae T6 and 7.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. In the period from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 358/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 9 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with 9). The body exhumed from the gravesite marked with number 9 has been identified as Ibrahim Kešmer (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2532/00, Subject: exhumation, post-mortem examination and identification Kri: 364/00 G.S. 88, Site: Rogatica, Žepa, Slap, Date of photographing: 11 October 2000. Photograph 1 shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – the corpse photographed while in the grave. Photograph 3 – the corpse photographed after being taken out of the grave. Photograph 4 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 5 – the corpse photographed after the anthropological re-association of the body parts. No injuries on the bones of the corpse have been recorded.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. In the period from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 335/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 09 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites

(gravesite marked with 73). The body exhumed from the gravesite marked with number 73 has been identified as Huso Bulatović (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2616/00, Subject: exhumation, post-mortem examination and identification Kri: 448/00 G.S. 100, Site: Rogatica, Žepa, Slap, Date of photographing: 13 October 2000. Photograph 1 - shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – the corpse photographed while in the grave. Photograph 3 – the corpse photographed after being taken out of the grave. Photograph 4 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 5 – the corpse photographed after the anthropological re-association of the body parts. Photograph 6 – arrows on the photograph point at fractures of the 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> right ribs and fracture of 5<sup>th</sup> left rib inflicted by firearm. Photograph 7 – arrows on the photograph point at a semicircular hole, 1 cm in diameter, in the left 5<sup>th</sup> rib in the anterior axillary line coming from the inside. Photograph 8 – an arrow on the photograph points at two round bullet holes, 0,4 cm in diameter each. Photograph 9 – a close-up photograph of round bullet holes.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. In the period from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 448/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 9 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with number 100). The body exhumed from the gravesite marked with number 100 has been identified as Sead Hodžić (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2503/00, Subject: exhumation, post-mortem examination and identification Kri: 335/00 G.S. 73, Site: Rogatica, Žepa, Slap, Date of photographing: 10 October 2000. Photograph 1 - shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – same as the previous photograph – a photograph taken from short distance. Photograph 3 - the corpse photographed while in the grave. Photograph 4 – the close-up photograph of the gravesite number. Photograph 5 – the corpse photographed after being taken out of the grave. Photograph 6 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 7 – the corpse photographed after the anthropological re-association of the body parts. Photograph 8 – arrows on the photograph point at the fracture of the left transversal xiphoids from 2<sup>nd</sup> to 7<sup>th</sup> thoracic vertebrae.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. Within the period of time from 2 October 2000 to 14 October

2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 347/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 9 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with 64). The body exhumed from the gravesite marked with number 64 has been identified as Hasib Gluščević (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2525/00, Subject: exhumation, post-mortem examination and identification Kri: 357/00 G.S. 10, Site: Rogatica, Žepa, Slap, Date of photographing: 11 October 2000. Photograph 1 - shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 - wedges found on the occasion of digging up the grave are marked with arrows. Photograph 3 - the corpse photographed while in the grave. Photograph 4 – the corpse photographed after being taken out of the grave. Photograph 5 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 6 – the corpse photographed after the anthropological re-association of the body parts. The autopsy did not indicate the existence of any injuries on the bones of the corpse.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. Within the period of time from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 334/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 9 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with 72). The body exhumed from the gravesite marked with number 72 has been identified as Dželal Hodžić (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2502/00, Subject: exhumation, post-mortem examination and identification Kri: 334/00 G.S. 72, Site: Rogatica, Žepa, Slap, Date of photographing: 10 October 2000. Photograph 1 - shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – same as the previous photograph, taken from short distance. Photograph 3 – the corpse photographed while in the grave. Photograph 4 – the corpse photographed after being taken out of the grave. Photograph 5 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 6 – the corpse photographed after the anthropological re-association of the body parts. Photograph 7 – arrows on the photograph points at injuries of the right clavicle and of sternum. Photograph 8 – an arrow on the photograph points at the injury of 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> thoracic vertebrae.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 9 October to 14 October 2000. In the period from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 367/00, Sarajevo, 9 October 2000, produced an on-site Record on the Exhumation in the period from 9 to 14 October 2000, at the locality of the village of Slap-Žepa, with regard to the exhumation of several individual gravesites (gravesite marked with 91). The body exhumed from the gravesite marked with number 91 has been identified as Emin Agić (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2500/00, Subject: exhumation, post-mortem examination and identification Kri: 334/00 G.S. 72, Site: Rogatica, Žepa, Slap, Date of photographing: 10 October 2000. Photograph 1 - shows a broader view of the site where 1 corpse was exhumed in the place of Slap, Žepa, Municipality of Rogatica. Photograph 2 – the corpse photographed while in the grave. Photograph 3 – the corpse photographed after being taken out of the grave. Photograph 4 – the corpse photographed at the dissecting room prior to post-mortem examination. Photograph 5 – the corpse photographed after the anthropological re-association of the body parts. Photographs 6 and 7 – show the firearm skull injuries. Photographs 8 and 9– show a long-established Perthes disease of both hips, with extremely flattened part of femur heads. Photograph 10 – a bullet fragment in the remains photographed next to a ruler.

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Drawing of the crime scene, number: 2493/00 – 2625/00, Subject: exhumation, Site: Žepa Slap, Municipality of Rogatica, Date of photographing: from 09 October to 14 October 2000. In the period from 2 October 2000 to 14 October 2000, bodies of the murdered Bosniaks, who were buried in the place called Žepa Slap, Municipality of Rogatica, were exhumed.

The Cantonal Court in Sarajevo, number: Kri 493/00, Sarajevo, 14 November 2000, produced an on-site Record on the Exhumation on 14 November 2000 at the locality of Kameničko Točilo II, Municipality of Višegrad, with regard to the exhumation of mortal remains of unidentified persons. Mortal remains which have been marked with number 1 and which belong to a male skeletised corpse have been identified as Hasan Gluščević. Mortal remains marked with number 2, which belong to a male sceletised corpse, have not been identified. Mortal remains marked with number 3, which belong to a male skeletised corpse, have been identified as Kasim Fehrić. Mortal remains marked with number 4 (a skull only), have not been identified. (Ibrahim Hadžić, Investigating Judge) (Hamza Žujo, Forensic Pathologist).

MoI, Crime Investigation Police Sector, Unit for Crime Scene Investigation Techniques – Sarajevo produced the following: Photo-documentation number: 2863/00, Subject: exhumation, post-mortem examination and identification Kri: 493/00, Site: Višegrad, Točionik, Luke, Točilo; Date of photographing: 14 November 2000. Photograph 1 - shows a broader view of the exhumation site in the place of Luke Točilo, Točionik, Municipality of Višegrad. Photograph 2 – same as the previous photograph, a close-up photograph.

Photograph 3 – the grave photographed from another angle. Photograph 4 – a close-up photograph of the grave. Photograph 5 – the corpse marked with number 1 photographed while in the grave. Photograph 6 – the corpse skull photographed while in the grave. Photograph 7 – the corpse photographed in the dissecting room prior to post-mortem examination. Photograph 8 – shows fracture of 7<sup>th</sup> and 8<sup>th</sup> thoracic vertebrae. Photograph 9 – objects found during the post-mortem examination. Photograph 10 – appearance of the site where two corpses were found. Photograph 11 – a close-up photograph of the exhumation site. Photograph 12 – corpses photographed after detecting the grave – marking of corpses. Photograph 13 – skulls of corpses photographed while in the grave. Photograph 14 – a corpse marked with number 2 photographed while in the grave. Photograph 15 – a corpse marked with number 2 photographed after the anthropological re-association of the body parts. Photograph 16 – shows the injuries on the skull's forehead during the lifetime. Photographs 17 and 18 – show a perforating wound through the skull, entry wound on the left side of the temporal bone, and exit wound on the right side. Photograph 19 – a corpse marked with number 3 photographed while in the grave. Photograph 20 – a corpse marked with number 3 photographed in the dissecting room prior to post-mortem examination. Photograph 21 – a corpse marked with number 3 photographed after the anthropological re-association of the body parts. Photograph 22 – a pocket watch found with the corpse during the post-mortem examination. Photograph 23 – a part of the skull marked with number 4 found in the close vicinity of the grave. Photograph 24 – a skull photographed from another angle. Photograph 25 – a close-up photograph of the skull. Photograph 26 – a skull photographed after the marking. Photograph 27 – same as the previous photograph, a close-up photograph. Photograph 28 – a skull photographed prior to post-mortem examination. Photograph 29 – a close-up photograph of the skull. Photograph 30 – a skull photographed after re-association.

The Institute of Forensic Medicine, Faculty of Medicine at the University of Sarajevo, produced a Record on Autopsy, Višegrad, Točilovo No. 1, number: Kri:493/00, Judge: Ibrahim Hadžić, Date of exhumation: 14 November 2000, Date of autopsy: 25 January 2001.

Conclusion: Death was violent and caused by injuries of the thoracic organs. Destruction of 7<sup>th</sup> and 8<sup>th</sup> thoracic vertebrae was caused by a firearm missile. (Hamza Žujo, Forensic Pathologist).

[153] While giving his testimony at the main trial on 8 May 2006, John Clark (55), Forensic Pathologist from Great Britain (Scotland), in his capacity as Forensic Pathologist who performed his duty in various countries and who also gave his expert evaluation with regard to the ICTY cases on two occasions, maintained the stated results of autopsy at the locality of Slap. Stating his position on the cause of death of the exhumed bodies, he confirmed that the firearms wounds were in question in most cases. Also, Prof. Dr. Hamza Žujo, confirmed in his testimony the findings related to the exhumation of bodies at the locality of Žepa. The Court gave full credence to these forensic experts holding that their expertise and conclusions were scientifically grounded and that experienced forensic experts were in question. The Court identically assessed the testimony of the forensic expert Dr. Sci. Zdenko Cirklaž with regard to the forensic-pathology expertise of the exhumed bodies in the place of Velji Lug.

[154] What proved to be disputable in relation to this matter is the establishment of the causal nexus between those facts as a consequence of the criminal offence in question and the existence of the act of perpetration by accused Boban Šimšić in those incidents. A number of subjective pieces of evidence have been presented with regard to that.

[155] Therefore, with regard to this part of the incidents, witness **Hedija Hodžić** states that, on the said occasion, she saw that Boban Šimšić, as she specified during the cross-examination, singled out three men within one hour, came back and did that again, and that the taking of men away lasted for two days. When the time had come for him to take out her man (Court note: her husband Dželal Hodžić), whose mortal remains were found at a later point in time at the locality of Slap, her mother-in-law, now deceased, had said: “Boban, do not take my son out. Who will provide for their children?”, he responded by cursing their balia mother and by saying that it was not him who had made them. Previously, when the Prosecutor asked the witness if anyone had been taking away men from the Firehouse, the witness stated that she could not remember. In response to the Prosecutor’s question as to whether she could explain what the accused was doing after taking them away, the witness said: “He took them away and killed them”, and when asked how she knew that the accused had killed them, the witness said: “Yes he did, who else but him. He killed them all”.

In addition to what has already been stated in paragraph [147] about the value of her witness statement, the Court holds that the witness provided a naïve explanation regarding the event which the Trial Panel turns down as fabricated and therefore untruthful. Hedija thereby added her conclusions based on the assumptions to this thesis derived from the factual description of the charges, which provides insufficient grounds for the establishment of any of the stated facts under this count of the Indictment.

[156] **Cura Glušćević** (54) testifies that, upon their arrival at the Firehouse in Višegrad, on 17 June 1992, Milan Lukić and Sredoje Lukić made a list of them in front of the Firehouse whereby Sredoje was making a list of women and Milan was making a list of men, on two occasions. After imprisoning them in the Firehouse, they forcibly appropriated their money and golden jewellery – everything they had – on the occasion when Milan Lukić, Sredoje Lukić and Mitar Vasiljević, who was taking them out, were coming there. They were the ones who come by most often. Next day, on 18 June 1992, about 15:00 hrs., Milan Lukić, Sredoje Lukić, Mitar Vasiljević and Dragan Lakić came and took the men away, two by two, to interrogate them – as they said and, they have never seen them again. On that occasion, the witness enumerated 16 persons who had been taken away, as follows: her husband Mujo Glušćević, Sifet Glušćević, Hasib Glušćević, Hasan Glušćević, Meho Agić, Emin Agić, Sead Hodžić, Dželal Hodžić, Huso Bulatović, Husein Vilić, Hamed Kešmer, Ibrahim Kešmer, Salko Sućeska, Adem Kozić, Mustafa Šabanović and Avdija Nuhanović. Half an hour later, Boban Šimšić appeared at the door. Fata Kešmer and Vasvija Glušćević, but not the witness, asked him if he could bring their men back. He made a dismissive hand gesture and told them to get lost. Her husband Mujo’s body was found in Žepa, at a later point in time. He was thrown into the water and she was present at the identification of his body.

Therefore, it follows from the statement of this witness that accused Boban Šimšić was not present at the time when the aforesaid Bosniak civilians were taken away.

[157] Unlike Cura according to whom they stayed in the Firehouse for three days, witness **Timka Kapetanović** (70) states that they spent 10-12 days in the Firehouse. She states that she was born in the village of Žlijeb, that she knows Boban Šimšić from his childhood, and that he was her neighbour. From the time when the war broke out, she saw Boban for the first time in the Firehouse in Višegrad where more than 100 persons from Žlijeb were placed. Lukić and Vasiljević took 18 men from the Firehouse and after that they disappeared without trace. Female detainees begged Boban Šimšić to keep their men safe, and he only kept silent and did nothing to help them. In the night, Rakić, Milan Lukić and Vasiljević would come

there and forcibly appropriate money and jewellery from the detainees. Women had to strip naked so that they could check if they had hidden money somewhere. She stated that she was not afraid of Boban Šimšić.

During the investigation (Record of the Prosecutor's Office dated 30 May 2005) and with regard to the circumstance of taking men away from the Firehouse, this witness, unlike Cura Gluščević, stated that Milan Lukić, Mitar Vasiljević and Dragan Lukić used to come there every night and take men away, three by three between themselves, but she had not observed Boban Šimšić on that occasion. He appeared at the door not earlier than on the third day of their stay there, he said nothing and he was only watching them. 18 men were taken away in the night before the day on which he appeared at the door. When Boban appeared at the door, many women, including herself, approached him asking about the men, in terms of what happened to them, were they alive, imprisoned – and he only kept silent.

Notwithstanding the objection of the Prosecutor, upon the motion of the defence counsel, the Court presented evidence referring to reading of an uncertified copy of the statement of witness Timka Kapetanović which was given before the Investigator with the ICTY Office of the Prosecutor, Ib Jul Hansen, in the presence of interpreter Amra Kapetanović, on 23 May 2001, Ref. No. 03008660. On that occasion, the Court was guided with the reasons for the expeditiousness of the proceedings and the fact that the essence of the Prosecutor's objection was formal, rather than substantial and that, in his submission number: RU-20060425-01/A of 2 June 2006, which was marked as confidential, the ICTY Deputy Prosecutor in the Hague indicated that he would forward a certified copy of the statement of the remaining female witness to the Court of BiH, upon the approval of the President of the Tribunal to change protective measures, as it had already been done with regard to delivery of a certified copy of Naila Ahmetagić's statement. In that correspondence which was read at the main trial, it was stated that the statements contained "significant inconsistencies" compared to the statements which the witnesses gave before the Court of BiH and that it was in the interest of justice, that the statements of those witnesses be delivered to the Court of BiH, and that the OTP would also advise the witnesses accordingly. The following was also emphasised: had the OTP been informed in the earlier memos about the crucial information that the female witnesses had testified before the Court of BiH and that they had given different statements compared to the content of the OTP's statements, these statements would have been delivered earlier.<sup>33</sup>

At this point, the Court will not get into the issue as to how the Defence obtained the uncertified copies related to witnesses Naila Ahmetpahić and Timka Kapetanović which were, at that time, subjected to protective measures (which was the reason for the Court to partly sit *in camera* during the presentation of these pieces of evidence) although the timely efforts of the Defence cannot be denied in that they attempted, initially through the Prosecutor's Office of BiH and then through this Court and official channels, to obtain the certified copies of these witnesses' statements from the OTP, i.e. the Hague Tribunal. At this point, the Court reminds that, in the respective systems of ICTY and ICTR, the Prosecutor has to collect evidence against the accused, but he is also bound by law to file acquitting evidence as well, should he come in their possession, under Article 54(1)(a) of the Statute of the ICC –

<sup>33</sup> Indeed, the OTP provided the Court with a certified statement of Timka Kapetanović given to the Investigator, although after the completion of the main trial and prior to the operative part of the Verdict. Decision of the Appellate Chamber was also delivered in the case *Prosecutor versus Mitar Vasiljević*, upon the motion of the Prosecutor of 10 July 2006 for the change of protective measures which referred to the witness under the pseudonym VG-105. However, the State Court was ordered to operate with the disclosed information on a confidential basis.

the Prosecutor is entrusted with the establishment of the truth and “in doing so, he has to investigate incriminating and exonerating circumstances equally”. This situation corresponds to the provision of Article 14 of CPC BiH which contains the principle of “equality of arms”, which is binding for both the Prosecutor and the Court. The Court notes that had the Prosecutor been more enthusiastic in collecting acquitting evidence rather than only those incriminating, or at least had they not been so enthusiastic in rebutting the evidentiary motions of the Defence with regard to this matter, even though it is their right, the proceedings would have been much more efficient.

[158] In the aforesaid statement, in the relevant part related to the incident of taking away 18 men from the Firehouse, witness Timka Kapetanović states that it appeared to her that a young Serb, Milan Lukić, was responsible for what was happening during their stay in the building and that she also recognised Mitar Vasiljević in the building and that, one afternoon, a day or two upon their arrival to the building of the Firehouse, Milan Lukić, Lakić – first name unknown, and Mitar Vasiljević took 18 men and young men away. They all were in the room at the time when those three men entered. They did not have uniforms but were armed with automatic weapons, hand grenades and wore belts with ammunition. They only pointed at the men and took them away. The last one who was taken away was her brother Meho Agić.

Therefore, in this statement, with no word whatsoever, the witness mentioned that Boban Šimšić had participated in that incident. Had Timka seen Boban Šimšić among those who took her brother out, it is logical that she would have stated so in her statement.

[159] While evaluating Timka’s testimony as a whole, the Court noted that her statement differed from Cura’s and also from her own statement with regard to the facts related to the time of day and dynamics of the taking of the men away from the Firehouse in an unknown direction. However, what was common in their narrations in the course of the proceedings refers to an essential fact that accused Boban Šimšić did not take part in taking men away and that he afterwards appeared in front of the Firehouse. The fact that the women who were present there asked him about their husbands and their loved ones, is a circumstance which is in no way whatsoever connected with the participation of the accused in the incident.

[160] At the main trial on 5 June 2006 and upon the motion of the Defence, the Court presented evidence through reading a statement of the protected witness **V.G.105** in the case *Prosecutor versus Mitar Vasiljević*, given at the ICTY trial on 24 September 2001. The Prosecutor objected the presentation of this evidence because neither the protection measures for that witness had been lifted nor did the witness agree that their statement be read before the Court of BiH. The Court dismissed that motion given that Article 5 of the Law on Transfer of Cases allows the reading of such a statement. It is true that the protection measures for this witness have not been lifted, but that was exactly the reason for presenting this evidence *in camera*. The Court has presented the legal elaboration of this issue in paragraph []. The statement of the protected witness V.G.105 clearly indicates that, with regard to the relevant incident under this count of the Indictment, they did not mention either the presence or participation of Boban Šimšić in the Firehouse in Višegrad, in no way whatsoever. According to that witness, Lukić and Vasiljević, and nobody else, took 18 people away from the Firehouse. She confirmed that she had been taken to the Firehouse on 17 June 1992.

[161] The Court accepted as adjudicated the fact according to which it is stated on page 60, paragraph 158 of the first instance judgment IT-98-32-T in the Mitar Vasiljević case that the identification of Mitar Vasiljević by VG-105 was not reliable at all.

[162] At the main trial of 15 December 2005, witness **Hajra Kapetanović** stated that, after they had been imprisoned in the Firehouse, someone knocked on the door with a mallet and that, according to women who were next to the door, that was done by butcher Lukić, but she was so afraid that she could not look at that man as they entered, stockings on their head so that one could not see either their faces or eyes. She only recognised Lukić who was not hiding and who was taking out the imprisoned men, two by two, including Sifet Mufterić, Mujo, Emin Agić, Meho Agić and, as it appears to her – there were 18 of them in total. In response to the Prosecutor's question as to whether she knew Meho Agić, the witness said: "Of course that I know him. His wife Ibrumša Agić was also there when Meho was taken away". She heard that Hana had jumped to her feet and said: "Call Boban. Ismet had a stroke". They did not take her husband Ismet Softić away. When asked if anyone else had asked for their husbands not to be taken away, witness Hajra stated: "One did not dare to, as he had so many bombs with him and a saber shining in his hand, for throat cutting". In response to a further question as to whether she knew who helped Ismet Softić to stay there, the witness did not provide a precise answer except for repeating that Hana was asking for Boban. In response to the Prosecutor's question, Hajra confirmed that Boban Šimšić had not been entering the Firehouse and that he must have been at the door at the time when Hana was asking for help. As the Prosecutor's insisted that she recall Hana's words more precisely, the witness stated that Hana had said: "He had a stroke. Where is Boban to save him"? Boban must have come from over there. During the on-site investigation related to identification of the scene – Firehouse in Višegrad, accused Boban Šimšić pointed at the place from where he came there – from the street along which he was patrolling, as he testified about that at the main trial, and he only came to the entrance of the Firehouse, exactly to the spot about which Hajra testified (see Photographs....photo documentation). Therefore, testimony of Hajra Kapetanović confirms the statement of the accused which he gave in his capacity as a witness and according to which, on the critical occasion, he did not enter the Firehouse at all. True, in the course of giving her statement in the Prosecutor's Office on 30 May 2005, the witness stated that, on the first evening, she had seen Boban singling out younger girls and taking them to the upper floor. When asked by the Prosecutor why she did not say that at the main trial, the witness explained that she had heard that from those girls who had said that it was Boban and that he had been in a stocking mask for which reason she could not have recognised him. It is evident that her statement to the Prosecutor cannot be accepted as reliable given this explanation of the witness.

[163] At the same main trial, witness **Vasvija Gluščević** testified that she had not seen Boban Šimšić in the Firehouse on the occasion when the lists of the imprisoned persons were made, although she thought that she knew what persons were in question as they were neighbours. The soldiers were masked, in stocking masks and with blackened faces. She explicitly stated that Milan Lukić and Mitar Vasiljević were those who took men away and that her husband Hasib and her son Hasan were among those 18 men who were taken away.

[164] Unlike Vasvija, **Muniba Gluščević**, whose statement made to the MoI FBiH in Goražde in 2004, was read at the main trial within the meaning of Article 273, paragraph 2 of CPC BiH, states that the accused was present whenever 18 men were taken away from the Firehouse, including the time when they were ordered to come out of the Firehouse. She also states that, prior to that incident, a group of armed Serb soldiers came to the room and, among

them she recognised Boban Šimšić, Mitar Vasiljević, Milan and Sredoje Lukić, who ordered them to hand over their money and jewellery. The Court accepted her testimony with a reservation given that it was not supported by any of the numerous subjective pieces of evidence with regard to this count of the charges. Besides, the witness connects her arrival and the arrival of the inhabitants of, as she worded, occupied villages, to the Firehouse with the date of 17 June 1992, that is, with the time when Mitar Vasiljević, whom she mentioned, could not have been at the stated location, which is an incontestable fact established by a final ICTY Judgment in the *Prosecutor versus Vasiljević* case. It also follows from her statement that Boban Šimšić was one of the uniformed and armed soldiers, which is not true, as he was a reserve policeman. Consequently, in order to avoid circular arguments and in relation to this part of their statement, the Court shall not give credence to those witnesses who made identical statements with regard to this fact or, when assessing their respective testimonies as a whole, it shall evaluate that part of their testimony against the remaining part of their testimonies.

[165] At the main trial (8 December 2005) and in relation to the same event, **Ibrumša Agić** (67) stated that they had loaded them like cattle onto the trucks and transported to Višegrad, to the Firehouse and that, after getting out of the trucks, they had been previously entered in a list by their surnames, and Milan Lukić and several other persons had come there and cursed them, and then they had been taken to the upper floor where Lukić had placed one bag for money and another for golden jewellery. In response to the Prosecutor's question as to whether the accused was there, the witness responded negatively and she said instead that she had seen that Boban had come there on the second or third day and that Fata Agić approached him asking him to bring them some bread. She states that she did not see the accused save once; that Boban was going to school with her daughter; that she grew up with his father and that she does not know what Boban was doing with that Army. As for (Milan) Lukić, he has deserved to suffer for what he had done to them. In response to the Prosecutor's question as to why she changed her statement at the main trial compared to what she had stated when examined during the investigation, the witness stated that, on the first day in the Firehouse, at about 15:00 hrs. when the detainees were taken away to be searched and subjected to forcible appropriation of money and jewellery as ordered by Milan Lukić, she saw Boban Šimšić standing at the door, the witness responded that she had seen him once at that time. When asked again by the Prosecutor to precisely state what the truth is given that, at the main trial, she said that she had not seen him on the first day at all, Ibrumša stated that she did not know if she had seen him on the first or on the second day, as it was disastrous to her. The Prosecutor also reminded the witness of her statement during the investigation according to which, after the money appropriation, Milan Lukić, accompanied by Boban Šimšić, entered the sport hall and singled out 16 men, including her husband. In response to the question as to why she stated that in the investigation procedure, Ibrumša said word for word: "I did not see Boban. All women said that they had seen him". On that occasion, she said that Vasvija and other women said that they had seen him standing at the door. In response to the Prosecutor's further question as to why she stated during the investigation that she would ask Boban to say what had happened to her husband Meho, the witness responded that she had said that because Boban was shoulder to shoulder with Lukić, and Lukić was the one who took them away and that they had disappeared without trace. Consequently, I beg Boban Šimšić to say where the bones of my husband, my two daughters and my grandchildren are. If he does not want to say that, I shall not forgive him – if he is a believer. I could not say anything untrue about him. I only want him to tell me where they killed him. He knows where they all were murdered as he was with that Army". During the cross-examination, the defence counsel reminded that a few minutes ago the witness mentioned that she was making a statement

before a person Bakira and that the latter had told her - you must do this, you must do that and, in response to his question as to what that means and who the said Bakira is and whether she was persuading her what to state during her testimony, Ibrumša Agić said word for word: "I do not know, from TV. Yes, she was persuading me to have to say what other women stated. I said: "Bakira, I cannot say what I have not seen. Do not persuade me to do that". She said: "If you do not want to say that, I shall have your pension cancelled". "You can cancell my pension. I lost all my family, my loved ones". The witness also stated that the accused did not make any harm her and her husband and that Boban and Mušo Agić were taking her daughter Jasmina below the house when they were doing second shift and that he had never said a word to them.

[166] The Court took into account a fact that, in his closing arguments with regard to that count of the Indictment, the Prosecutor had a selective approach with regard to the testimony of Ibrumša Agić and referred only to the part in her statement which she made in the investigation procedure, while the Court has a complex approach with regard to evaluation of evidence, i.e. the Court must always estimate someone's testimony, Ibrumša Agić's in this particular case, as a whole. Therefore, having recapitulated the testimony of Ibrumša Agić which the Court holds to be honest and convincing in all elements of her examination and particularly when she explained in detail why she had changed her statement made during the investigation – which will be further elaborated in the reasoning of this Verdict – the Trial Panel, on the basis of the testimonies of this witness and other witnesses about this incident, holds that it has been proved that Boban Šimšić acted jointly with Milan Lukić in taking away of 18 men from the Firehouse who since then disappeared without trace, nor that he was connected with his group. Ibrumša's allegation that Boban was shoulder to shoulder with Milan Lukić, if considered in the context in which it was stated, that is that Boban (should know) knows where her husband's bones are, is understood by the Panel in a way that Ibrumša grounded her claim on Boban's belonging to Serb ethnicity and its armed forces being an enemy at that time which, given the way the mind of a simple village woman works, automatically means that he must have been familiar with that fact.

[167] Witness **Ismet Softić** (78), in his statement which was audio-visually reproduced at the main trial of 14 April 2006 within the framework of preservation of evidence by the Court, stated that, on 15 July 1992, jointly with the inhabitants of the village of Žlijeb, he was taken away from the village and brought to the Firehouse. There, they took away 18 men from his village. They wanted to take him away as well, but fortune favoured him and he stayed alive, as Boban Šimšić happened to appear on the door, grabbed him and asked if his neighbours were there. He states that he was only taken from the room to the door, that his wife addressed Boban, that Boban was nicely listening to her and then he said that nobody had anything to say against Ismet, and he also said: "Ismet, go back to your place. Nobody must touch you". In response to the Prosecutor's question as to whether any other women addressed Boban with regard to their husbands, the witness responded that there were many women and, in response to the question as to whether he had met their requests, the witness stated - yes, he said that they would be back. However, nobody had come back. In response to the Prosecutor's question as to whether Boban maltreated anyone, the witness responded negatively and said that he had only appeared on the door and that they had never seen him again. Also, the accused did not take part in forcible appropriation of money and jewellery. After the war, he came to the village of Žlijeb and gave a present to Boban because he had saved his life. By the way, they and Boban's family used to help each other as neighbours, they were doing mowing and other works together and lived in harmony as if they lived under the same roof.

[168] At the main trial on 13 April 2006, Ismet's wife **Hana Softić** (73) confirmed that Boban Šimšić was not present at the time when they arrived and during their stay in the Firehouse in Višegrad. She saw Boban when they took away 18 people. They took her husband as well and when they reached the door with the intention of taking him out, Boban came there and said: "Hello, my neighbours", Her Ismet held out his hand and they shook hands. The witness approached to them and said: "Boban, do you know my Ismet? Do you know that he has not hurt anyone"? Then, Boban said: "Ismet, go back to you place. Nobody must touch you". When the one who was holding Ismet released him he was not happy for letting him go. During the cross-examination by the Prosecutor, the witness confirmed that the accused came to the door of the Firehouse, that the women hurried to reach him and beg for their husbands, but it was too late. Boban told them not be afraid and that they would be back. In response to the defense counsel's question as to what she thinks about Boban Šimšić now, the witness said that he should be set free and that he had never hurt anyone.

[169] Having analysed the witness statements of the married couple Softić and correlated them with the testimonies of other witnesses (except for the testimony of Muniba Gluščević) with regard to the incidents under the this Count of the Indictment, the Trial Panel reached an uncontested conclusion that it has not been proved that the accused had entered the Firehouse nor had he taken out the imprisoned civilians – Bosniaks, and that he appeared in front of the entrance to the Firehouse after they had been taken away in an unknown direction (Cura, being an uninterested witness, was explicit in her testimony in that regard). Also, if Ismet's statement is taken into account indicating that, when they took Ismet to the door, "Boban happened to appear on the door", as well as the statement of witness Hana, according to which, when Ismet was brought to the door " Boban came", than it is clear that the appearance of the accused on the spot may be attributed to the situational circumstances rather than to his belonging to the group which was taking the imprisoned civilians away to journey with no return. During his testimony, the accused himself said that, and he also showed that on the site during the on-site investigation. At the time he pointed out that, at the moment he was patrolling along the street and saw the Softićs, his neighbours. The Court holds that when Boban told the women who addressed him asking for their husbands, not to be afraid and that they would be back, regardless of the ambiguity which may be attached to them, might have meant the expression of the neighbourly understanding and encouragement and not obligatorily the expression of the fact that the accused actually knew what would happen to their husbands and loved ones.<sup>34</sup> Hana's words, stating that it was too late, also point to such a conclusion.

[170] With regard to this incident, the accused who was examined as witness, explained at the main trial how he had happened to be in front of the Firehouse. According to him, during his regular patrolling around the town, that is, in the area 1 in Višegrad, he was passing by and saw familiar persons on the door of the Firehouse. He came up to the door and saw persons from his village: Hana Softić, Ibrumša Agić, Fata Kešmer, Vasvija Gluščević, Šuhra Gluščević, and a few others. There were children among them, as well. He stayed there for 5-10 minutes and exchanged several sentences with them. In response to the Prosecutor's question, he said that he had not noticed husbands of other women, save Hana Softić's husband who was on the door and who was being taken somewhere by some persons. He

<sup>34</sup> In the *Flick and others* case, the USA Military Tribunal in Nurnberg reached a conclusion that, among other things, they would be guided by the following standard: "if two reasonable conclusions may be reached based on credible evidence - one on guilt and another on innocence – a decision shall be rendered in favour of innocence". The same Tribunal accepted that principle in the *Krauch and others* case ( *I.G. Farben* case ) (§ 1108 ).

asked Ismet: “Where are you going, neighbour”?, and the latter answered that he was going to make a statement. Those two men, who were unknown to him and who were taking Ismet away, wore uniforms and were armed. He told Ismet not to make any statement and to go back and, Ismet immediately returned to the Firehouse. In response to the Prosecutor’s question as to whether he knew what would have happened to Ismet if he had been taken away, the accused said that he could not assume that, but he did not allow him to move away or anything to happen, as he did not want to leave anything to chance. He said that Hana begged him for Ismet and those ones obeyed him. He states that the other women did not ask him for help, that he was talking to Fata Kešmer and Hana Softić but he could not remember what they were talking about. He stopped in the Firehouse because he was patrolling in his area and, on that occasion, he did not know that people were imprisoned in the Firehouse and he quite accidentally dropped in and saw persons he knew.

[171] With regard to the episode of the saving life of Ismet Softić by accused Boban Šimšić, the Prosecutor, in his closing arguments, endeavoured to present that event in such a light as to indicate that, given that he saved Ismet’s life, the accused was so powerful to send other people to death, for the same reason. In other words, the Prosecutor, on the basis of that fact, was of the opinion that the accused, like a *Demiurge* was the true master of life and death. However, if that was so in regard to Milan Lukić, based on the identical statements of numerous witnesses of both Prosecution and the Defence, in this case (several of them stated that Milan Lukić, unlike others, had never masked himself and that he had always introduced himself with his full name), such reasoning of the Prosecutor in relation to Boban Šimšić represents the reaching of a logical conclusion based on speculations and abstraction rather than on the quantum of the presented evidence and facts and factual circumstances established on them. In addition, Hana’s testimony according to which it was too late when the women addressed Boban Šimšić, indicates that the taking away of 18 men took place prior to his arrival. The correlation between Hana's testimony and the testimonies of other witnesses, and the testimony of the accused himself, clearly indicates that their testimonies, in the decisive facts, are mutually consistent and therefore, the statement of the accused about the circumstances under which he found himself in front of the Firehouse and helped Ismet at the time when other Bosniak civilians had already been taken away – is truthful. The analysis of the presented evidence indicates that no witness whatsoever, save Muniba Gluščević who could not be subjected to cross-examination as she had passed away for which reason her statement remained in the domain of conditionality – confirmed the facts stated in the Indictment indicating that the accused, jointly with Milan Lukić, initially singled out and then took away the imprisoned civilians to disappear without a trace. Therefore, the Prosecutor has by no means whatsoever proved beyond reasonable doubt the existence of *reus actus* of the accused, therefore of the physical expression of his confirmed decisiveness to persist in his intention to persecute civilian Bosniak population in a form of a criminal offence corresponding to forcible disappearance of the detainees. That unsparing gap between the facts stated in the Indictment and the status of the presented evidence and the facts grounded on them, cannot be filled by the Prosecution theses, which has not been proved in any way, about the alleged position of the accused to make decisions about human lives.

## 2.5 – Incidents in the Primary School “Hasan Veletovac” in Višegrad / Count 5 of the Operative Part of Verdict)

[172] In this count of the Indictment the accused has been charged with the following: in the second half of the month of June 1992, while performing the duty of the prison guard in charge of the imprisoned Bosniak civilians accommodated on the premises of the school building, several hundreds of them, among which there were women, children and men, alone and together with the other members of the Serb Army, Police and paramilitary formations, he participated in murders, torture, infliction of severe physical and mental pains, appropriation of private property, coercing young girls and younger women to sexual intercourse.

#### 2.5.1 – Murder of Ibro Šabanović / Count 5.a) of the Operative Part of Verdict/

[173] The manner in which Ibro Šabanović was killed, as presented by the Prosecutor, is mainly grounded on the statement of witness **Hurem Razija a.k.a. Šuhra** (60). At the main trial held on 9 February 2006, that witness stated that she had been imprisoned in the camp “Hasan Veletovac” where the living conditions were poor and where about 300 persons from the villages of Gostilja Velika and Mala, Kuke and Žlijeb were imprisoned. Neđo Joksimović from the Serb Army had imprisoned them. In that school, Boban Šimšić was standing guard.

With regard to the alleged murder of Ibro Šabanović, the witness stated that someone had called her name after the flight of her daughter Senada, and after asking if she was Senada's mother and after she had come out, that person grabbed her hair, twisted it around his hand and pulled her and, at that spot, in the corridor, she saw how they were slaughtering a man with a knife, behind his neck. Milan Lukić, who had a knife in his hand, was slitting his throat while Boban Šimšić was standing next to him holding with his hands Ibro Šabanović's hair, his head. However, she did not watch the slaughter until the end as the unknown person took her in front of the school. She added that she had seen people lined up in the corridor, all of them old, and children too. At this point, the Court observes that, with regard to the circumstances of the murder of Ibro Šabanović, witness Šuhra is the only prosecution witness and although she herself stated that she had not witnessed the end of that cruel act (true, she did not tell about its beginning either), the question is how come that nobody else testified about that if she had seen so many people lined up in the corridor. Indeed, nobody else but Šuhra had made a statement about that fact.

[174] However, even if these issues, which should be grounded on the reality of life which is missing, be disregarded, the truthfulness of her testimony is quite questionable in that when, in response to the defense counsel' question during the cross-examination, she said that Boban Šimšić stood up from the man he was slaughtering and moved toward her, and that he had previously put the stocking mask on and proceeded down the corridor. Therefore, the witness initially stated that Milan Lukić was slaughtering Ibro Šabanović, which could now refer to Boban, although, according to her, she did not see the very moment of slaughtering of Ibro. In her statement for the record in the Prosecutor's Office she claimed the opposite stating that she had seen the moment when he pulled over the knife and that she had seen the blood gushing forth and that she had immediately turned her head away as she could not look at that any more, and then they took her to a room with a group of soldiers who switched electric cooking stove on. Therefore, after the alleged slaughter of Ibro Šabanović, the witness stated two different sequences of events – one, according to which she was taken to a room where a group of soldiers were, which is the subject of Count 5.d) of the Indictment, and the other, when, in the corridor, the accused and another man who was also masked, moved toward her to take her out of the school and rape. Finally, why should the accused put

the stocking mask on and move toward her to rape her if she had previously seen his face and identified him as Boban Šimšić? These are major contradictions and illogicalnesses to which the witness did not provide convincing or any answer and, consequently, the Trial Panel has reached a conclusion that she fabricated both the entire incident which she allegedly eye-witnessed and the way in which she described it. In acting so, the Court does not claim that Ibro Šabanović was not murdered but it claims that it has not happened in the way in which the witness presented it. The truthfulness of this is supported by the fact that, during the main trial, she stated that she had inflicted injuries on her genitalia, while during the examination in the Prosecutor's Office (25 May 2005), she said that she had not inflicted such injuries; at the Police (8 February 2005) she stated that she was conscious during the rape while, at the main trial, she claimed the opposite; it follows from her statement on that occasion that she was raped in the corridor, while according to her statement made at the main trial, she had been taken out in front of the school, to the yard, and raped at that spot by the accused and an unknown soldier, which everybody knows; unlike her testimony at the main trial, she stated in the police that, all of a sudden, noise was heard as one of the Chetniks – therefore, at the time the witness did not state the name of the one who did it – in front of all those in the sport hall (not in the corridor) had cut off the head of Ibro Šabanović. The Court observes that illogicalnesses in the descriptions of various places and the time of the act about which the witness testified cannot be attributed to her being disoriented as much as to her untruthful testimony. Thus, for example, after allegedly being raped in the yard and after regaining conscious, the witness stated at the main trial that she had heard curses in the corridor and that a man had rushed in and broke the window through which all the people, including her, had jumped out. If she had been in the yard in front of the sport hall after being raped while it was raining, she could not physically be at the same time in the sport hall to see the breaking of the window and to flee through it.

[175] It is also evident that credence cannot be given to this witness from her testimony about the episode related to beating up of Hamed Hadžić by, according to her, Milan Lukić and Boban Šimšić. Namely, the witness stated that the school corridor was the scene of the alleged incident and that she was watching that while sitting in the sport hall given that the sport hall did not have the door. The insight into the photographs from the photo-elaboration produced on the occasion of the on-site investigation when the site was identified in the school "Hasan Veletovac", currently "Vuk Karadžić" in Višegrad, suggests that it is the truth that the sport hall does not have the door through which one could enter directly, but it is also true that a relatively narrow corridor leads to the entrance of the sport hall which cannot be seen looking from the sport hall. Namely, looking from the centre of the basketball playground in that hall towards the locker-rooms in front, there is a wall in one part of the left side which edges the corridor leading toward the sport hall entrance and there are two toilets on the opposite side of that wall. Therefore, the wall described in such a manner represents a physical obstacle due to which it was not possible for witness Razija to see Milan Lukić and Boban Šimšić beating Hamed by, as she stated, kicking him mostly in his kidneys with their shoes on.

In general, the impression is that witness Šuhra is inclined to exaggerate when, for example, she stated that half of the people imprisoned in the school died from poor conditions in those 10 days of imprisonment and based on other witnesses' statements, even less than that, of which, again, nobody else made any statement. Or, when Šuhra for instance, stated that Senada had jumped from the third floor of the school and landed on sand (it is evident on the photographs taken during the on-site investigation that the space in front of school is paved with concrete) and presumably stayed unhurt as she immediately fled to the woods.

There are too many inconsistencies and contradictions in her narration with regard to decisive facts to prove beyond reasonable doubt truthfulness of the allegations as stated under Count 5.a) of the Indictment on the basis of such a narration.

[177] Such a conclusion *mutatis mutandis* may also be reached with regard to the testimony of **Rusmira Bulatović**. With regard to this incident related to taking away and the execution of Ibro Šabanović, she stated during the investigation that **Boban Šimšić** entered the room where the Muslim civilians were placed and that he called her uncle Ibro Šabanović who stood up and Boban told him to come out. She remembers that Ibro was walking in front of Boban and that they were followed by Milan Lukić who wore a white butcher's apron and had a knife in his hand. Before long, as soon as they went out, a scream was heard which reminded of a roar of a cattle being slaughtered, and it immediately crossed her mind that they had slaughtered Ibro. Immediately after that, Boban Šimšić and Milan Lukić entered their room and, as she was two meters away from the basket in the sport hall, she could see Boban standing and Milan Lukić next to him, and it seemed like Ibro Šabanović was tied to the basketball pole. She saw blood spattering the walls and then she heard Boban saying: "Look at this man" and he pointed at the body of the man whose blood was spattering, "whoever try (to flee) from the school will share his destiny". Furthermore, the witness explained that it was dark in the sport hall and it was night but she could see the scene as they were clicking some lighters which provided a larger flame and which for a moment illuminated the space in the vicinity of the basket. While the accused was saying "look at this man...", a noise was heard that irresistibly reminded her of Ibro's head thrown on the floor among the detainees. Namely, she heard a sound, i.e. a thump of an object on the floor, and other detainees immediately said that it was a human head, the head of Ibro Šabanović. At some other point, the witness stated that they put (not threw) her uncle's head in front of the basket to which they tied his body. In response to the Prosecutor's specific question as to on what bases she concluded that the body tied up to the basketball poll and from which the blood was spattering, was the body of her uncle, the witness said that she could conclude that on the basis of the entire look and the clothing she knew. It can be seen that the witness does not speak the truth when making this phantasmagoric presentation, from the chronology of witness Rusmira's narration according to which the accused and Lukić entered the sport hall immediately after she had heard a shriek coming from the corridor and indicating that her uncle had been slaughtered, while introducing into the plot of her version of the events Ibro's body tied up to the basket in the sport hall, which logically means that his body was previously brought in and the witness made no statement about that at all. It has remained mysterious in her statement as to how she could perceive blood on the wall spattering from Ibro's dead body which was tied up to the basketball pole, and all of that was seen in a flicker of the light produced by the lighter clicking, even if the lighter had developed a larger flame as Rusmira attempted to explain, while she was claiming that Ibro had been previously slaughtered in the corridor, outside the sport hall. It is more than clear that the blood from Ibro's body could not spatter in two separate places. In order to intensify the effects of her testimony, Rusmira evidently and calculatedly persists on the dramatic impression and, therefore, on the credibility of her testimony as she presumes, by using properties such as butcher's apron, the white one (suggesting the contrast between red and white) and a big knife held by Lukić, combined with the sound effects such as a scream which was allegedly uttered by Ibro Šabanović and which reminded her of a roar of a cattle, and by frequent use of the adverb of time – "immediately". Not only that the Trial Panel observed these illogicalnesses in her testimony but it made a step forward and introduced a control evidence to check the testimony of Rusmira – a photo elaboration, a drawing of the site and a video recording

produced on the occasion of the site identification – a physical appearance of the sport hall in the aforesaid school which apparently has not changed considerably compared to the time when Bosniaks were imprisoned there, which both the Court and the parties might have seen for themselves on the spot. On that occasion, the Panel assured themselves that the baskets were fixed to the walls of the sport hall directly and that they were not fixed to the pole nor is the basketball system fixed to the ground. Consequently, Rusmira's allegation according to which Ibro's body was tied up to the basketball pole was not consistent with the physical evidence and therefore, her testimony with regard to the circumstance of the alleged slaughter of Ibro Šabanović has been fully rebutted by the Court as fabricated.

[178] With regard to the same incident, **Hasena Bajramović** confirmed that they were in darkness that evening as the light was switched off and that, at one moment, a fair-haired soldier threw the head of Ibro Šabanović into the sport hall and said: "You can play ball now". The witness identified that soldier as Boban Šimšić, which could have been seen in a few minutes when some light came on in the corridor, a flashlight torch. The Court has already evaluated credibility of this witness. On this occasion, the Court has not altered its evaluation nor reached a different conclusion. It is readily observable in this part of Hasena's narration that she noticed that a fair-haired soldier had thrown Ibro's head into the sport hall, although the sport hall was in darkness, which is illogical in itself. Her unconvincing testimony will support in no way whatsoever her allegation that, after a few minutes, she had allegedly recognised that the accused was in question, owing to the flashlight torch light. The light of a flashlight torch (it was a lighter according to Rusmira), which was switched on in the corridor, is certainly an inadequate source of light to illuminate the interior of the sport hall given that the corridor is physically separated. It is indicative that, unlike other female witnesses who testified about this episode of the incident, Hasena did not mention Milan Lukić at all in her testimony, but she rather individualised accused Šimšić only, which was evidently purposeful.

[179] **Fata Šabanović** (52), in her testimony about the same incident, stated that, on that night the electricity supply was cut off in the school, that they saw something burning somewhere, that a shadow was burning, that a shadow came to the door and asked for Ibro Šabanović and that, by his voice, she recognised accused Boban. When Ibro went out to the corridor, she heard something like a scream and if someone was crying for help. At that moment, a panic broke out and she heard that something fell down on the floor, as if an object entered among them flying, and then she heard a voice – "the head of Ibro Šabanović". Then she heard that something broke and she saw people rushing out and, in the morning, those who had fled were captured and returned to the school. Unlike previous female witnesses who "were capable of" perceiving the accused in the darkness, this witness has a more intelligent approach stating that she recognised the accused by his voice. However, if the general picture which, following her statement, could be reduced to shadows and shades, is taken into consideration during the evaluation of her testimony, it remains unclear as to how come that someone unknown, including Naila Ramić, could have identified the head of Ibro Šabanović as the object which was thrown in. In that vagueness of the witness's visual picture of that event, her precise statement is readily observable when she, similar to Hasena and not mentioning anyone else, identified Boban Šimšić by his voice. The Court holds that such a testimony of Fata may be grouped within those belonging to the prosecution witnesses who charged the accused as per the following model: if they did not see him, then they heard his voice; if they did not either hear or see him, or if they did not know him, then they heard about him from other persons (therefore, Kada Spahić recalls that they killed Ibro Šabanović,

but she stated that she did not know who had done that and she heard that Boban Šimšić had perpetrated that).

[180] In September 1995, with regard to this very incident, the same witness stated before the officers with the State Commission for the Documentation on War Crimes – Presidency of BiH: “While they were collecting money, a Chetnik slaughtered Ibro Šabanović (about 60) in the corridor. When the men returned to the school, they cut off electricity supply. We became frightened and the people began to break glasses and flee from the school”. Therefore, in her statement made before the officers of the official State authority, Elbisa Ahmetaš and Selma Kilalić, which is in terms of time closest to that incident and thus, her memories were most complete as well, the witness in no word whatsoever mentioned Boban Šimšić by either his stature or voice. Besides, she added that Chetniks who were coming to school were Serbians mainly. For this reason, the Court does not deem her testimony to be credible.

[181] With regard to the circumstance of the murder of Ibro Šabanović, in her statement made at the main trial on 8 February 2006, Šefka Šehić (70) stated during her impersonal narration that Ibro was taken out in the corridor, that it was raining cats and dogs, that a man was screaming, flailing his legs, slaughtered, they saw that he was murdered, whichever girls came she was raped. When asked by the Prosecutor to precisely state what she had seen at that moment, the witness stated: “I did not hear anything, just like a rabbit scream and when he trash with his legs and all people were crying for help, but his scream, I cannot sleep whenever I remember it”. Unlike her statement at the main trial at which she did not mention accused Šimšić, she stated for the record in the Prosecutor’s Office on 25 May 2005, during the investigation, that the accused, jointly with Milan Lukić, took out Ibro from the sport hall into the corridor and that she immediately heard screams and legs beating the tiles. In her third version of the same event, which she presented for the record to the MoI of Bosnia-Podrinje Canton, Administration of Police of the Crime Investigation Police Sector Goražde – FBiH, on 5 May 2004, Šefka claimed that Mitar Vasiljević, while maltreating Haša Hadžić physically, killed Ibro Šabanović. A conclusion which is the list bit reliable, let alone reliable beyond reasonable doubt, that it is proved that the accused, together with Milan Lukić, participated in the murder of Ibro Šabanović, cannot be grounded on such critical inconsistencies.

[182] Unlike Rusmira, witness **Naila Ahmetagić** (38) claims that Milan Lukić, not the accused, called Ibro Šbanović to come out of the sport hall and that, 10-15 minutes later, Milan brought Ibro’s head and said: “Balias, tonight is St. Vitus’ Day. You all will end up this way”. It was not difficult for her to recognise Ibro’s head as he was her uncle and, besides, he had very large moustaches. That could be seen because someone was holding torches. Also, unlike Rusmira, Naila did not explicitly state the accused as the one who killed Ibro Šabanović. The witness only stated that Boban accompanied Milan and even that was said in passing and, in her further factual description of the act related to this incident, she totally omitted him. She testified that Milan, after 10-15 minutes, brought in Ibro's head, while Rusmira stated that, immediately after Ibro was taken out, she heard a shriek. While Rusmira was talking about lighters, Naila was talking about the lit torches. Unlike her statement at the main trial when she precisely stated that Milan Lukić had brought in Ibro’s head, in her statement given to the Police in Goražde on 11 January 1994, she stated that it was done by an unknown person. On that occasion, she stated that Ibro’s body was brought into the sport hall. Her attempt to justify herself stating that she was allegedly scared at the time when she was making her statement to the Goražde Police, with which she explains the

differences in her statements, would make sense if, at the time, she gave the statement to the RS Police and not to the Police of RBiH. Given all these reasons and the assessment of the entire testimony of Naila Agić with regard to other circumstances and facts related to the incident, the Trial Panel has reached a conclusion that this witness did not tell the truth.

[183] The Court finds an additional support of the aforesaid estimate in a part of the testimony of **Sajma Šabanović**, a prosecution witness as well, with regard to the same circumstance. Unlike the other aforesaid witnesses, she does not testify at all about the detail according to which Ibro's head was thrown into the sport hall. She only stated that, after he was called, he stood up and left never to return. Therefore, the witness does not mention Boban Šimšić, whom she is not favouring in her statement at all. With regard to the episode of the incident of taking Ibro Šabanović out, the Court gave credence to Sajma, given that she belongs to the Šabanović family, and said that she was maltreated because of Murat Šabanović and that, if it had truly happened that Ibro's head was thrown in, as presented by some witnesses, Sajma, being the witness directly, would have stated that herself.

[184] **Ibro Memić** gave testimony identical to Sajma's, and he resolutely claimed that Ibro had only been taken out of the sport hall and that, after that, he disappeared without trace. This witness did not mention at all the name of Boban Šimšić with regard to this incident either. Even more so, he added that Boban had done nothing bad to anyone in the school.

[185] In essence, **Asmir Spahić** gave an identical testimony and stated that, at one moment, they said – they had slaughtered Ibro, a panic broke out, one man broke the side door leading to the stadium and that 40 persons jumped out on that occasion. Some of them were returned the next morning and some are still missing. Then they stopped to maltreat them. His family did not go anywhere until 7-8 hrs. when two policemen who were on duty told them that they were not allowed to go out into the corridor as many things had happened the previous night and the mess should be cleaned first. Those younger ones were called to clean and they saw blood but not the body. With regard to Boban Šimšić, he saw him on the third day of his stay in the school, during his day shift when he went over to the family of Nail Ramić to sit and talk with them. By the way, the witness explained that the policemen worked in two shifts, two policemen in each shift, from morning hours to 19:00 hrs. It cannot be stated that they were with them, as the policemen stayed at the reception desk, on the left from the school entrance (that place the accused showed during the identification of the scene) and two corridors were leading to the sport hall. They seldom saw policemen doing night shifts and when those ones came there during night to maltreat them and if it lasted the whole night, there were no policemen there. He was seeing the accused during the day shift only.

[186] It has been stated in the Indictment that 28 June 1992 was the date on which the incident happened. However, based on the statements of several witnesses who were present in the sport hall on that evening, a different conclusion has been reached, i.e. that it happened earlier. Therefore, not only that Fehima Čakić did not mention Ibro Šabanović at all, but she stated to the Police in Goražde on 8 February 2005, that it was 25 June 1992 when the window glass was broken and when they fled from the school. Having correlated this part of her statement with the statements of witnesses who testified with regard to the circumstance when Ibro Šabanović was taken away and allegedly slaughtered, it follows from her statement that the incident could not have happened on 28 June 1992 but at a previous point in time. Also, the accused could not be present at the time of the incident given that the witness claims that she saw him on 26 June 1992 for the first time. Witness Sajma Šabanović states that she was brought to the school on 23 June 1992, at about 10:00 hrs and that, the second evening

upon her arrival, therefore on 25 June 1992, someone called Ibro Šabanović. Poljo Fatima claims that she came to the school on 26 June 1992 and that, the other day upon her arrival (27 June 1992) Ibro Šabanović was slaughtered. However, during the examination at the Prosecutor's Office on 25 May 2005, this witness did not state the name of Ibro Šabanović at all, nor did she state that he was slaughtered.

[187] The aforesaid detailed analysis of evidence, on one hand, indicates a total lack of logic and contradictions in many details and thus it finally indicates that the witnesses' statements supporting the Prosecutor's version of this incident are ungrounded and, on the other, the existence of statements of another group of witnesses who are the Prosecution witnesses as well, which are completely opposite to the said ones with regard to the perception of the same incident in which, in no way whatsoever, the accused is connected with the incident, then, given that fact in itself, the serious question is on what grounds the representative of the Prosecution, in his closing argument, claims that it was undeniably proved that the accused participated in perpetration of the criminal acts which are thoroughly described under Count 5.a) of the charges.

#### 2.5.2 – Beating up of Hamed Hadžić and Haša Hadžić / Count 5.c) of the Operative Part of Verdict)

[188] Witness **Hasena Bajramović** (52) stated at the main trial that Haša Hadžić came out in the corridor after they had taken her husband Hamed away, to beg them not to beat him, and her daughter did the same, and accused Boban said that they would be back. Haša's husband was unconscious. They entered and Haša was ordered to strip naked. On that occasion, Boban and Mitar Vasiljević said: "My friend, bring the knife over to slaughter her. When she saw what they had done to her father, her daughter fainted. She was naked for half an hour, they were beating her, punching her, her jaws were swollen, they were pulling her around the sport hall by her hair.

Given that the witness explicitly states that, on that occasion, Boban Šimšić was with Mitar Vasiljević, she therefore compromises the whole statement of hers given that the prosecution party has also accepted as adjudicated the fact that Mitar Vasiljević could not be present in the school "Hasan Veletovac" at the time[50].

[189] **Šefka Šehić** testifies that, in addition to others, Mitar Vasiljević was also in the school. Mitar came there naked, with a white apron covered with blood and in white "Puma" trainers. She added that nobody had maltreated them in the school and, as for her, nobody had beaten her. With regard to beating up of Haša Hadžić, she states that, in the corridor, Boban was punching and Mitar Vasiljević was kicking her. For the record in the Prosecutor's Office on 25 May 2005, which she did not explicitly state at the main trial, she stated that she had seen Boban Šimšić and Milan Lukić beating Hamed Hadžić, that Hamed was yelling for help while they were beating him, and that his wife Haša approached to beg them to stop beating him as he had experienced two heart attacks. After being presented during the cross-examination that, when she made the statement to the Police for the record dated 5 May 2004, she did not mention at all Boban Šimšić with regard to maltreatment of Haša Hadžić, the witness claimed that, although it is stated in the Record that the statement was loudly dictated to her and that she did not object to it, nobody had read the Record to her and that, last year, she had said the same what she said today and, what, the defense counsel asked her, he should

ask two, three women and a man in Goražde who was coming in and out. Given that, during the cross-examination with regard to this and other factual circumstance of the incident the accused has been charged with, the defense counsel could not receive precise answers and he noted that the witness – “with her demagogical approach, wastes our time”, and that, for that reason, he would not examine that witness nor may he allow the witness to insult him – he abandoned the further cross-examination of the witness. In this regard, the Court notes that this witness was extremely hostile toward the Defence although she was previously, in the course of the trial, warned of her duties while making her witness testimony and, unlike the aforesaid situation, she was extremely cooperative while she was giving her answers during the direct examination. Consequently, the Court fully denies its credence to her testimony and holds that, in addition to the observed inconsistencies and to stating the presence of Mitar Vasiljević, it was bias to the detriment of the accused.

[190] At the main trial on 5 December 2005, **Naila Ahmetspahić** stated that Haša Hadžić and Šuhra Hurem were beaten by Boban Šimšić and Milan Lukić and their group. During the cross-examination and at the question of the defense counsel as to whether she had previously stated that as well, the witness responded that she did not remember and in response to his further question as to whether she had spoken about that in the Crime Investigation Police Sector in Goražde, she said again that she did not remember and, when asked if she was telling the truth before any authority when she was making her statements, the witness responded affirmatively. After being presented by the defense counsel that, when examined at the Police, on two occasions, i.e. on 11 January and on 9 April 2004, she did not state that the accused was beating Haša Hadžić and Šuhra Hurem, Naila provided a general and imprecise answer and, by doing so, she actually wanted to avoid to answer the posed question. On that occasion, Naila stated: “I have told you how difficult it was to even return to my own village, and how to get out of it from Goražde and where to go and the very meeting with those people“. When the defense counsel presented to the witness her previous statement according to which a soldier who had taken Senada Hurem away entered and asked for her mother and, after Šuhra responded, he took her to the corridor and immediately began to beat her as she heard yells of pain and crying; at the same time, Milan Lukić entered with a lit torch and called Haša Hadžić, about 40 years of age, whom he personally stripped naked in the middle of the sport hall saying: “My friend Mićo, bring a knife with you“. Then, a middle-aged man entered the sport hall. He was fattish and wore a white T-shirt and the tracksuit bottoms and trainers, and he began to kick Haša in her stomach and back area, calling her a Muslim whore, and then he took her away from the sport hall. When asked why she did not mention at the time that Boban Šimšić was beating Haša and Šuhra, the witness responded: “I do not know where all these pieces of evidence came from that I was providing evidence to be contacted at home”? With such confusing answers, witness Naila either expressed her opportune attitude toward the right of the Defence to efficiently perform cross-examination or she did not have a convincing explanation for changing her statement to the detriment of the accused – which provides the same effect with regard to credibility of her testimony which the Court hereby rejects as unreliable.

[191] At the main trial on 9 February 2006, **Razija Hurem** testified that they had taken Hamed Hadžić away from the sport hall and were beating him in the corridor and that his wife had come there to tell them that Hamed had heart troubles. According to her, Hamed was beaten by Lukić and Boban in a way that they had knocked him down and danced on his body. They were watching that from the sport hall through an opening, as there was no door. She precisely stated that she was sitting next to the exit as there was no other place for her. Lukić and Boban were kicking Haša Hodžić, Hamed’s wife, in the kidneys mostly, with their

shoes on. Consequently, Haša fainted and one soldier brought some water and splashed it over her and then she slightly regained consciousness. However, the witness stated for the record in the Prosecutor's Office on 25 May 2005, that someone of the two of them (either Milan or Boban) had splashed water over Haša. She also stated that they had beaten up Hamed in a premise where they were kept, and not in the corridor as she stated at the main trial. She made the same statement for the record at the police on 8 February 2005 when she said that Boban Šimšić had also been among those Chetniks who ordered Hamed to come out, and that Hamed's wife was telling Boban to leave him alone as he was a heart patient, when they began to beat Hamed in front of all of them, in the sport hall, i.e. Boban Šimšić, Milan Lukić, Sredoje Lukić, Miloš Lukić and some other persons. After that, they ordered Haša to strip naked in front of them all in the sport hall, which she had to do, and then they were beating her again until she lost consciousness.

[192] Having evaluated the statement of this witness, the Trial Panel has found that her testimony was also inconsistent, thus being uncertain as well. Just like she stated with regard to the incident related to the murder of Ibro Šabanović on which occasion, at the main trial, she said that it had happened in the corridor while, during her statement at the Police, she said that someone of Chetniks cut off Ibro's head in the sport hall and in front of all of them, she also stated at the main trial with regard to this very incident that it had happened in the corridor while, at the Police, she stated that it had happened in the sport hall in front of all of them. Besides, given the way in which the premises have been arranged in the primary school or, more precisely, the appearance of both the sport hall and the corridor, which has been already discussed, it is evident that Razija could not have seen from the sport hall who and how was beating Hamed and his wife in the corridor, particularly not that she was being kicked in the kidney area.

[193] In her perception of the incident in which she herself was a victim, **Haša Hadžić** (70) identified the accused by stating that, on the critical occasion, he wore a military, police uniform. In the school, they set apart men from women, 60 of them, by forcing them out in the corridor, while women and children remained in the sport hall. She could not see those who were calling them out. After Šefka Šehić said that they had slaughtered Ibro Šabanović, she went out in the corridor. Then, little Medina came there and said to Boban, she asked him for them not to beat her father, and he asked her who her father was. Medina cried that they had cut her father's tongue off. The witness stated that she moved on to defend her husband: Boban asked her to go back, Alija and Murat fuck her, and when she refused to come back, he gave her a punch and dislocated her jaw and later on he returned and gave her a punch in the other side, and she suffers consequences even nowadays. The punch knocked her down and Boban left her. She was lying in the corridor as she was unconscious. When she opened her eyes and when the accused spotted her braids, he grabbed them and took her into the sport hall. In the sport hall, he kicked her lower leg and she fell down. Then Boban came on the door and asked her if she was really still alive, and the witness said: "I may swear that there is no lie in this". Boban pulled her arm and told her to take all the clothing off and when one of them appeared, Boban asked for a knife on three occasions to slaughter the Muslim woman, and she was naked and an unknown person said to Boban that he could do that whenever he wanted to as that was all in his hands, and he threatened her not to put her clothes on when he was on his way to switch the light off. At that moment, Senada hit a soldier and they gathered around the soldier to take him to hospital to save his life and they forgot about them, and then men rushed into the sport hall, broke the window and fled. If not for Senada, they all would have been slaughtered. After they fled, the rain began and the people were captured in the cemetery area. She pointed out that she had not visited a doctor

for the jaw fracture but that she had treated it herself by pressing liver on the wound and it healed. During the cross examination she stated that they had been brought to the school on 20 February, that she did not know when they had left. In response to the defence counsel's question as to whether she had made a statement in the Prosecutor's Office of BiH, she said that she had not, and that only those from the Association (of Women Victims of War – the Court Note) used to visit her at home and examine her and ask her to appear on TV. She stated that they were in Goražde, from Goražde to Sarajevo and that she was making a statement before Judge Ibro (the Court Note: Prosecutor). In response to the defence counsel's question that, during the direct examination, she stated that she had seen Šuhra on a chair in the corridor, while Šuhra said in her testimony that, at the time, she was in the sport hall and watched how they were beating the witness, Haša said that Šuhra was in the sport hall indeed and when asked again by the defence counsel, the witness stated that Šuhra was defending her daughter in the corridor. The defence counsel presented to the witness that, during the investigation and for the record, she stated in the Prosecutor's Office on 25 May 2005 that it was Mitar Vasiljević (sic!) who had ordered her to strip naked, and not Boban Šimšić as she stated at the main trial and, in response to the defence counsel's question as to how she explains the difference in her statement, the witness said that the defence counsel should not contest her words as it was she whose body suffered from pain and not he, and that she could not answer that question. When told that, unlike her statement at the main trial, she had previously stated that Mitar was asking for a knife from a soldier saying: "My friend, give me the knife", the witness said that she had not changed her statement and what she claimed on that day, it would be valid the other day and the day after, and that she had never known the said Mitar. In the Prosecutor's Office she also stated that it was Mitar who had threatened her not to put her clothes on, not Boban as she stated at the main trial. In response, she asked the defence counsel not to try to persuade her and that Boban, not Mitar, was in question. In response to his further question, stating that, before the Prosecutor, she said that she had been strongly punched only once in the right side of her face while, at the main trial, she claimed that she had been punched in both sides, the witness stated that both sides of her face had been broken and that the Prosecutor made a mistake during the taking of her statement.

[194] While estimating the statement of witness Haša, the Court took into consideration that she did not provide logical explanations for the reasons why during her testimony, she contradicted herself with regard to the facts which the Court deemed to be essential. For example, if the statements of the witness related to the great inaccuracy in relation to the time of the incident (she stated the month of February 1992) may be attributed to her poor orientation in time, such understanding may certainly not refer to her statements related to the jaw fracture given that a direct witness, being the injured party herself, is in question and, due to that fact her answers should have been more convincing. Had the witness been determined to speak the truth, she should certainly have no need to state, without being asked, that she could swear that there were no lies. Given that, on several occasions during the cross-examination, she stated that she did not know Mitar Vasiljević, although she had stated during the investigation that he had ordered her to strip naked and, therefore, to perpetrate the act which was, at a later point in time, at the main trial, attributed to the accused, and if all these parts of her statement are correlated with her statement that those from the Association visited her at home and examined her, the Court does not exclude the possibility that her testimony was instructed. Even if such a possibility is put aside, the Court observes that, taking other testimonies into consideration with regard to the broader context of the chronology of the events, which are closely connected with this episode, there is no cause and effect linkage through which one act would result from another. Instead, the witness described the sequence of events through confusion of time and space, without a logical explanation. Consequently,

in the version of the events and without any motif, Haša introduced into the plot Senada who wounded a soldier whom they attempted to hospitalise to save him from dying (!), with no explanation as to how come that she knew the seriousness of his injury, which object caused it, where etc., and that, according to Haša, that, rather than the murder of Ibro Šabanović as most other witnesses stated, caused the imprisoned men to get into the sport hall from the corridor and, from there together with other people, to flee from school after breaking the window. It is also readily observable that no other witnesses stated that all the men had been taken out in the corridor in front of the sport hall. By all means, that was not physically possible given the previous finding of the Court that a relatively narrow corridor leading toward the sport hall was in question, and the Court assured itself accordingly during the on-site investigation. Furthermore, bearing in mind the statements of several female witnesses according to whom Senada was taken to the upper floor, and one of them even claimed that she had jumped from the third floor, how come that Haša, at the same time, being in the sport hall or in the hall corridor, therefore on the school ground floor, could see or learn about the incident of wounding a soldier which, in a flash, gave the men who had been taken out, a chance to flee from the school.

[195] However, witness **Fehima Čakić**, the first person who rushed towards Haša to help her, claims that the accused was not there when Haša was being beaten up, nor did she see him beating people. She learnt about the accused not earlier than 26 June 1992; the Court was satisfied that her claim was truthful in that that she could not state how Boban Šimšić looked like, given that when she was asked at the main trial to identify a person who might have been Boban Šimšić she pointed at Ervin Klempić, Assistant to Prosecutor.

[196] It is evident that the last testimony indicates lack of credibility of Haša's testimony and, in general to other testimonies being problematic as well, and therefore, that the Prosecutor has not presented quality evidence, based on which the Court could, beyond reasonable doubt, render a conclusion about the participation of Boban Šimšić in the events as described under Count 5.c) of the Indictment.

### 2.5.3 – Beating up of Razija Hurem a.k.a. “Šuhra”/ Count 5.d) of the Operative Part of Verdict/

[197] With regard to this Count of the Indictment, the Prosecution offered evidence through the examination of witnesses who eye-witnessed the incident, as follows:

[198] **Fatima Poljo** (64) testified at the main trial that a man had come there wearing an overcoat covered with blood and told Šuhra to strip naked. When she said that she would not do that, he began to beat her. In response to the Prosecutor's question as to who was beating Šuhra, Fatima said that she did not know as she was so scared that she could not recognise him. In response to the Prosecutor's repeated question as to whether she could have found that out in some other way, Fatima said: “Those women said – either the Lukić family or Boban, one of the two of them certainly did”. She also stated that Senada, Šuhra's daughter, told her that one man intended to rape her, that he came back from the bathroom with a knife and that he cut her dress, that Senada took away the knife from him and made him bleed and jumped out from the third floor. Senada told her that that one had not raped her but that she heard that he had beaten up her mother and that she would have rather had her mother beaten up than be raped by him.

What else to say about the testimony of Fatima Poljo, who directly witnessed the incident in which Razija Hurem a.k.a. Šuhra was allegedly beaten up, than that it is a mere hearsay testimony. In her free narration, the witness mentioned in no word whatsoever that Boban Šimšić had beaten Razija Hurem. She only mentioned his name at the insistence of the Prosecutor in order for him to receive any answer from the witness to charge accused Šimšić and, even after he succeeded in that, the witness, regardless of giving the testimony in her capacity as a direct witness, referred to indirect witnesses whose names she did not state at all, and she said that women were saying that the Lukić family or Boban were in question and that one of the two must have been in question. It follows from Senada's narration, which we have learnt only indirectly and based on Fatima's presentation, the same person who had beaten up her mother Šuhra, had attempted to rape Senada, but again, the name of that unknown man has not been mentioned. In no word whatsoever, this witness mentioned that the accused, jointly with other members of the Serb Army, led minor girl Senada out of the room in which the civilians were imprisoned, as the accused has been charged with. For the record at the Police in Goražde, on 5 May 2004, witness Fatima did not mention at all that Razija Hurem – Šuhra was beaten up by anybody. She stated the name of Šuhra as the girl who was taken to the upper floor by someone of the Lukić family to be raped, and she obviously had in mind Šuhra's daughter Senada. However, during the examination at the police and at the main trial, the witness did not explicitly mention that Boban Šimšić was beating Razija Hurem. She claimed that for the record in the Prosecutor's Office on 24 May 2005. On that occasion, she said that Boban Šimšić physically abused Šuhra by beating her with a rifle butt, and by kicking and punching her over her entire body in the room where they were imprisoned. Other witnesses who gave their testimonies with regard to the same circumstance stated that it had happened in the corridor and not in the sport hall. Also, with regard to other circumstances of the incident - which is important for the evaluation of her testimony as a whole - such as the episode referring to taking her son Elvedin to the upper floor to be maltreated, the witness, unlike her statement at the main trial, stated during the investigation that she had not seen Boban Šimšić on that occasion. With regard to the same circumstance, she claimed at the Police that they had not taken her son away at all, namely, she had managed to somehow protect him and afterwards she was hiding him in the blankets. Fatima stated for the record at the police on 5 May 2004, that they were taken to the school on 26 May 1992 while, at the main trial, she connected that incident with 15<sup>th</sup> or 20<sup>th</sup> June 1992. During the cross-examination, the witness could not reasonably explain the differences in her statements after they were presented by the Defence, and she most often gave excuses for herself by saying that she had been confused.

[199] **Hasena Bajramović**, whose testimony in terms of quality has already been assessed by the Court, confirms that Boban Šimšić, together with others, was beating Hurem Razija a.k.a. Šuhra after he had previously asked her about her Senada, in the sport hall in the presence of two hundred, three hundred people. Unlike her and witness Fatima Poljo, **Haša Hadžić** stated during the investigation (a Record of the Prosecutor's Office of BiH dated 25 May 2005) that she had seen Razija Hurem at the time when she went to check what had happened to her husband, not in the sport hall but in the corridor, on a chair. Razija's hair was ruffled hair and she was beaten up. Also, **Nail Ramić** stated that he had seen Šuhra in the corridor, but lying under the table. However, witness **Ibro Memić** who, just like Nail, was a victim of beating up himself, testified at the main trial that women had not been beaten up at all. Witness **Kada Spahić** (78) states that a day after Senada had been taken away, two soldiers came there and one of them had his arm bandaged, and they asked about Šuhra Hurem, and the latter was told that she gave birth to a whore as she had stubbed their soldier, and that they

then took her away, and that Kada's husband had seen Šuhra under a table, dressed in a slip only, and that those who happened to find her there said that, while they were beating her, one Đurić a.k.a. Ćiro said to them: "That is enough, you'll kill her". Later on, she could not ask Šuhra who had beaten her up as she could not be reached and because she was all black and blue and covered with blood. In response to a special question of the Prosecutor as to whether she had seen the accused at the time when they took Šuhra away, the witness said that he stayed for a little while on the door. It is indicative that the witness used the quantificative "a little" which the Court holds to be done for psychological reasons – the embarrassment for telling a lie. After that, witness Kada provided general answers according to which Boban had always been somewhere around them, together with Lukić, that he used to tell them not to be afraid as he would stand guard that night on the door, although that was the time when most of the beating took place. However, unlike Kada, her grandson **Asmir Spahić** (29) whom, as he himself stated, Milan Lukić wanted to execute, claimed that accused Boban Šimšić had never done a night shift during his stay in the school, nor had he done anything bad to the detained civilians. During the direct examination at the main trial on 5 December 2005, **Naila Ahmetagić** (38) stated that Šuhra was beaten by Milan, accused Boban and the whole group. They did it in a way that they firstly posed a few questions and then punches followed, first by her hair and then they knocked her down and were kicking and punching her and, as she said: "You know women, two, three kicks with military boots are sufficient". Previously, this witness testified that, as she said, they likely had beaten Haša because of her daughter Senada. It is evident that this witness, towards whose testimony the Court has extreme reservations in general, mixed Haša with Šuhra, the latter of whom is Senada's mother. During the cross-examination, this witness was presented that, in her two statements given to the police for the record, i.e. on 11 January 1994 and 9 April 2004, she did not state at all that Boban Šimšić, jointly with others, participated in beating up of Haša and Šuhra and, when asked how come that she made a different statement at the main trial, the witness did not provide the least reasonable answer. With regard to the circumstance of the murder of Ibro Šabanović, the same witness stated that, after they had brought his head in, they also brought in his dead body thus indicating that, on St. Vitus's Day, they all would end up that way until the next morning, while during the cross examination, a little while ago, she stated that she had not seen that as she had jumped through the window.

[200] Finally, what has been said about the very incident by injured **Razija Hurem** (60)? She testifies that, after Senada had fled, an unknown man came there and called her out. He asked her if she was Senada's mother and, after she confirmed and as she had a longer hair, he twisted her hair around his arm and pulled her. At that moment she came across Ibro Šabanović whom they were slaughtering on the floor, on his knees. The accused was assisting Milan Lukić in doing that by holding Ibro's head. They all were lined up in the corridor, old persons and children. Nail Ramić did not mention this detail in his testimony. Fire made of cardboards was burning in the middle of the corridor. A soldier brought her in a room where she saw electric stoves, one next to another and the heating plates were glowing hot. Boban appeared later, after finishing with the said man. A soldier asked her why she had instructed her daughter to run away, he cursed her gipsy mother and was hitting her head against a table. When asked by the Prosecutor to explain in which way Boban had joined the unknown person, the witness said that he also put a stocking mask on and came there to assist him. The former punched her, she fell down and the latter lifted her off the ground, and then it was happening all over again. Boban was kicking her with his boots, she inflicted injuries, her broken nose was bleeding and her mouth was bleeding, they tore out her hair. Then, the two of them took her out in front of the school and raped her in the rain. In response as to whether she can state that both of them raped her, the witness stated word for word: "Yes,

they did, as I could see that on my dress. I was unconscious”. She was ordered to take her clothes off by the one who took her out to beat her, she heard them cursing in the corridor, then a man rushed in and broke the window there and all people jumped through the window, including herself. Also, she saw in the corridor that Chetniks were kicking people with boots and hitting them with laths.

[201] During the cross-examination, the Defence presented to the witness her statement made to the Prosecutor on 25 May 2005 in which it is stated that the soldier who was beating her all the time said that they would take out their hearts and fry them on the heating plates, and Boban Šimšić was standing next to him and he was only laughing and saying that they would stuff themselves, and her head was hit against the table again and after that, they forced her to sexual intercourse and the unknown soldier was the first, and she noticed that both of them took their clothes off. However, she stated at the main trial that she was raped in front of the school. She stated to the Prosecutor that she did not experience injuries in her genitalia while, at the main trial she claimed the opposite. In response to the question as to how come that she knew that Boban Šimšić had raped her, she stated that she had seen him when he got up leaving the man he was slaughtering and moved toward her down the corridor, on which occasion he put a stocking mask on although, a few minutes ago she explained that, later on and after finishing with the man in the corridor, Boban entered the room in which the witness was with an unknown soldier. These inconsistencies have already been discussed. In addition, the Court observes that the witness is more convincing in concretising what the unknown soldier, did to her, in comparison with the accused, except for declarative mentioning his name which was always done in response to the Prosecutor’s question in which he mentioned Boban Šimšić. Given a huge number of inconsistencies and illogicalnesses in her testimony, the Court has reached a conclusion that she simply added the name of the accused to the acts of the unknown soldier. It follows from this all that Šuhra does not speak the truth with regard to the accused in this segment of her testimony either.

[202] In general, with regard to the chronology of the events in the primary school and if the statements of several witnesses who were also injured parties under the Counts of the Indictment are compared, the conclusion is that at the same time and at the same place – the corridor in front of the sport hall and/or in a nearby room where Šuhra was beaten up and raped, separate events occurred, such as: alleged slaughter of Ibro Šabanović, beating up of Nail Ramić, lining up of 50-60 persons in the corridor (although witness Nail Ramić precisely stated that only 6 persons were taken out in the corridor) and, according to some witnesses – Senada’s flight and the flight of those imprisoned from the sport hall, all of this was happening while there was no light. Analytically, the Court observes that in the testimonies of the witnesses examined, with regard to the aforesaid circumstances, except for the stereotyped answers, there is not a single witness testimony which, if not fully then at least in essence, is consistent.

#### 2.5.4 – Enforced appropriation of money and jewellery / Count 5.f) of the Operative Part of Verdict/

[203] According to this Count of the Indictment, accused Boban Šimšić, armed and together with Milan and Sredoje Lukić, participated in robbery of detainees in the primary school “Hasan Veletovac”, i.e. he singled out a group by group of women and men and took them to a room where they stripped them naked and forcibly appropriated valuable things they had on them.

[204] In her testimony, **Fata Šabanović** described the appearance of the school to which she had been taken together with other Bosniak civilians and, at the photographs presented by the Prosecutor, on photograph 2: she recognised the yard and the school entrance, and explained that, after entering the school, they went straight then turned right and went down the corridor to finally reached the sport hall. The school yard could not be seen from the sport hall, but it could be seen from the corridor (photographs 3 and 4). According to her, on that occasion, 320 persons, ranging from children to oldest persons, were imprisoned together with her in one premise. They were kept in that sport hall for 10 days, without food and water, and there were only tiles in the sport hall. She used to see Boban Šimšić every day and every night in the school. He was accompanied by Milan Lukić, Sredoje Lukić, Dragan Lukić, and whenever they came there, the first thing they would say was money, gold, foreign currency – everything they had – and if they discovered that someone had hidden something, they were going to kill them immediately. They had to give them their money but it was not sufficient and they had to strip naked. The most difficult for her was when her 6 years old little girl had to take her clothes off in front of Milan Lukić and Boban Šimšić.

It follows from the careful analysis of her statement that the witness correctly stated the line of movement toward the school premises, which is not disputable given that the Court has assured itself accordingly.

[205] The Court did not give credence to Fata's allegations according to which she used to see Boban Šimšić every day and night as, otherwise, what would be the purpose of day and night police shifts about which, in addition to others, Defence witness Goran Miličević, who was a reserve policeman present in the school, also talked. She states that Sanela allegedly told her that Boban Šimšić had also taken her away to rape her, although it does not follow from any other witness testimony, including the one made by Sanela's mother, Šuhra. However, what is important with regard to this Count of the Indictment is the fact that, in the aforesaid statement, Fata Šabanović mentioned only Milan Lukić, and not Boban Šimšić at all, with regard to the fact of forcible appropriation of money and jewellery. Fata said in the statement that, after taking away men to beat them up, Milan Lukić came back to the premise and told them to collect DEM 1,000 and the men would be released. However, for the record in the Prosecutor's Office of 24 May 2005, Fata uttered the same sentence word for word however, instead of Milan Lukić, the sentence was now said by Boban Šimšić. To which extent Fata could be trusted is evident in the fact that she changed her statement according to which, at the time when they were collecting money, a Chetnik slaughtered Ibro Šabanović and people got frightened and began to break glasses and flee from school, and that whoever jumped out of the school was killed (!), and that she inclines to exaggeration. She stated at the main trial that the accused asked her to take her clothes off and, after she disobeyed, he hit her with something and she fell down and from that moment on, she did not know what was happening to her until she felt that something was being poured over her and she saw a soldier pouring water over her head, she saw that she was naked, she felt severe pains in her stomach and, later on, that soldier took her downstairs and told her to run away. Previously, when she entered the room, there were four of them and Boban was the fifth, and it crossed her mind that they would rape her however, she finally stated that she could not conclude that she was raped. Nothing of this statement, even ambivalent as it is, was stated in her statement made before the officers with the aforesaid State Commission under Ref. No. 9067/95 dated September 1995.

[206] Witness **Rusmira Bulatović** stated that Boban Šimšić, jointly with Milan and Sredoje Lukić, asked her to give them her money, and that she had money, gold and jewellery on her which all were seized by them, and that they beat her sister Fata so severely that she lost her sight, because she was moneyless, that they took off earrings from the girls and that Boban Šimšić was doing that. At the main trial, she resolutely stated that accused Boban was kicking her sister Fatima in the back because she did not hand over money while, for the record in the police in Goražde, she said that she remembered that a soldier, unknown to her, kicked her sister Fatima Poljo in the back when she refused to give him money which she did not have. Her explanation of that change in her statement was that the one had a stocking mask and, with regard to her allegations at the main trial that it was Boban, she stated that she had learnt that from her sister when she asked her who had kicked her. The Court finds it evident that such Rusmira's explanation of the difference in her statements is the result of her finding a way around, rather than of her convincing answer.

[207] At the main trial, **Bajramović Hasena** stated that the accused had a bag, like the one used for wrapping shirts, in which he had put money and golden jewellery and, when it was her turn, she said that she did not have either money or gold and Boban ordered her to strip to her bare soul and to hand over money, which she had to do, in the presence of Milan and Sredoje Lukić and other Serbs. Sredoje said that given that the woman did not have money she should be allowed to go away, while Boban cursed her balia mother and arrogantly asked her to leave.

[208] Unlike Rusmira and Hasena, witness **Sajma Šabanović** testified that Sredoje Lukić was appropriating money and golden jewellery in the sport hall, holding a freezer bag and a pistol in his hand, while Milan Lukić was standing in the corridor. When she entered with her daughter and mother-in-law, Sredoje cocked the pistol and said – money and gold. As she only had earrings, she took them off and put them in the bag. Given that accused Boban was there on the first evening, she thinks that he was standing guard on that occasion as well. Just like Sajma, **Ibro Memić** claims that Milan and Sredoje Lukić forcibly appropriated money in a way that they were taking one or two persons into a room and asked them to hand over money within 5 minutes, and that he held a pistol in his right hand telling them that he would shoot. This witness however, does not mention Boban Šimšić at all. Like Sajma and Ibro, **Kada Spahić** testified at the main trial on 3 February 2006 that both members of the Lukić family collected money and golden jewellery from the detainees in a way that Sredoje had a pistol and Milan was holding a bag. Therefore, with regard to this part of the incident in the primary school, Kada did not explicitly mention the accused either, except that Sajma states that she thinks that he was on the door. **Haša Hadžić** states that they robbed them the first evening upon their arrival at the school and that that was done by Lukić who was holding a pistol and a plastic bag, and by an unknown person and Boban Šimšić. However, for the record in the Prosecutor's Office on 25 May 2005, she stated that Boban Šimšić was present on that occasion. Unlike other witnesses, **Šefka Šehić** claims that the accused robbed them at gunpoint, asked for money and gold and that Miloje said that Mala Gostilja was rich, and that they "stripped her to her bare soul" (the same wording was also used by Hasena), that her gold was put in a bread, that the news were circulating that they firstly robbed the Kurspahić family, and then raped and killed them and that it was left behind. She does not feel sorry for the gold but she is sorry for the footwear and pictures. However, during her examination for the record at the police in Goražde on 5 May 2004, this witness did not mention Boban Šimšić at all with regard to the episode of appropriation of money and gold and, even more so, she did not mention on that occasion any other person but she only stated that, in that room, they were putting gold, money and foreign currency into three bags on the table. She maintained

that statement during her examination in the Prosecutor's Office of BiH on 25 May 2005, on which occasion she repeated that, during the search, she was forced to strip naked in front of several Chetniks so that they could find money and gold, and at that time she mentioned in no way whatsoever that the accused had participated in that. It is not only due to the observed inconsistency in her testimony but also because of the incoherence and unclear thoughts in her answers, that the Court could give credence to this witness in no way whatsoever. **Naila Ahmetspahić**, whose testimony the Court holds to be tendencious toward the accused, states that, during their imprisonment in the school, they had to collect money and gold to have their male children back, those who had previously been taken away. Other witnesses did not make any such statement, at least not in the way in which Naila presented it. She states that Milan Lukić asked for that and that accused Boban and Momir Savić accompanied him.

[209] For all the aforesaid, the Court holds that the Prosecutor did not present convincing evidence in order to confirm beyond reasonable doubt, the truthfulness of the version of the incident as stated under Count 5.f) of the Indictment.

#### Count 2.5.5 – Beating up of men / Count 5.g) Operative Part of Verdict /

[210] This Count of the Indictment describes the beating up of unlawfully imprisoned civilians on the premises of the primary school "Hasan Veletovac" in the second half of the month of June 1992, about 20 of them, including: Ramo Hurem, Ibrišim Hadžić, Amer Hadžić, Avdo Ferić, Mustafa Smajić, Nail Ramić, who were ordered to beat up each other with a wooden stick (a wooden shaft holding a pick) over all the parts of their bodies due to which many of them were falling down. Every night they were particularly beating up Nail Ramić whom, the first day of his imprisonment, they placed under the basket when a group of Serb soldiers, together with the accused, were playing basketball targeting alternatively the basket and Nail's head with the ball so strongly that Nail was fainting repeatedly. One of the following nights, the accused and several Serb soldiers led Nail and four other prisoners out of the prison room and beat them up in another room, punching them and kicking them with their military boots, beating them with rifle butts in the heads and backs and tore out their hair due to which Nail fainted. Due to receiving punches in the area of his eyes, his eyes were completely closed. During the search and appropriation of money from Mehmed Spahić, the accused beat him up by hitting him repeatedly with the rifle butt over his chest, his head and the back between the shoulder joints due to which he could not walk and some detainees carried him on their arms back to the room in which they were imprisoned.

[211] Thus, **Latifa Hodžić** (38), at the main hearing on 3 February 2006, stated that Boban was in charge and that he was unlocking the entrance school door thus letting in whoever he wanted to, that he held the main door keys and that she, just like all other detainees could see him and that she learnt about his identity from other people in the school, that his hair was more fair than brown, black, that he was of medium height and dressed in military camouflage uniform. Boban was present during her 4-day stay in the school. She states that she used to hear that someone who was coming to the school asked Boban to open it up. Then, together with him, Serb soldiers were coming to the sport hall, and Boban pointed a finger at those who should be taken out by them or whom to beat, and they were kicking with military boots and hitting with rifle butts. It happened that they forced men to stand on one leg in the middle of the sport hall, that they beat them while they were lined in a circle, and they used to beat up Nail Ramić most. He was completely swollen, his eyes closed and he

was all black and blue and could not walk. Nail's wife and daughters begged Boban for protection, but nobody could expect that from him as he was the one who was ordering who would be taken away and beaten up.

[212] **Fatima Poljo** (64) learnt about Boban Šimšić from other people during her stay in the school. In response to the Prosecutor's question as to who was beating men of whom, according to her, Hasib Šabanović, Mehmed Hadžić and Abid Hurem, Ragib Hurem died due to the consequences of being beaten up, the witness stated that Boban was standing, as well as the respective members of the Lukić and Cvijović families, a person Ćiro from Loznica and Miloje, but they asked for men to hit other men and, if they did not give each other blows strong enough, then they would hit them with riffles in the head and the hit one would fall down unconscious. That was happening in the same room where they were imprisoned, blood was running as, they hit you with a bottle, with a jar containing red-pepper chutney, the blood was spattering down the sport hall. In response to the Prosecutor's question as to whether the men were taken out to the yard, Fatima provided an affirmative answer and stated that they were beating men in front of the door and that everything was seen as there were huge windows there. Unlike her statements during the investigation and at the main trial, she did not state for the record at the police in Goražde on 5 May 2004, that they were beating the imprisoned men in the gym, but that they instead took them out to other premises where they beat them during which time, those who stayed in the sport hall heard their wailing and cries for help.

[213] **Fata Šabanović** states that, on one occasion, all men, including her two children, were taken out to the yard, and that she herself moved after them to also be slaughtered, and she stopped in the corridor for a moment and looked through the windows. On that occasion, she could not see her children as it was dark, but she saw what was going on. They gave some sticks to the men to hit each other, she could see that Ramo Hurem fell down on the ground, she saw her father-in-law Hasib, and when she saw that they were coming back, she rushed into the sport hall to the place where she previously had been. Then the accused and Milan Lukić entered the sport hall and asked for DEM 1,000 to let them go. Having analysed the witness's perception of the event where she stated that it was dark outside and that for that reason she could not see her children but she did see what was happening in the yard and that, as she did not see her children but she did see her father-in-law and Ramo falling down on the ground, what else to state save that her statement is illogical (when it is dark, it is dark completely and selective visibility is not possible – someone to be seen and someone not). Besides, this is not supported by the presented objective evidence – the appearance of the corridor – passage with special glass through which it is not possible to clearly look even in a day light, let alone in darkness. Besides, in her statement given to the officers with the State Commission with regard to the same incident, Fata only mentioned Milan Lukić, but not Boban Šimšić.

[214] **Rusmira Bulatović**. Rusmira claims that the men were forced to beat each other with wooden sticks while they were in the premise, in the evening after the lights were switched off (!), and if one did not hit another strongly enough, Boban used to take over the stick and to demonstrate how they should hit each other. Basically, Rusmira also stated that during the investigation but, she did not state indeed a detail according to which Boban was demonstrating how they should hit each other. However, in her statement made to the police in Goražde on 5 May 2004, Rusmira did not make any statement about this incident at all. Rusmira also demonstrated inconsistency in her testimony with regard to another circumstance where, at the main trial, she stated that she was not fleeing from school together

with others after the window had been broken, unlike her previous statement in which she said that she fled from the school and hid on the Rodića hill etc., and that, on that occasion, she was avoiding to explain the difference in her statement in a convincing manner.

[215] **Razija Hurem**, at the main trial on 9 February 2006 confirmed that they used to take out older men to beat them, as there were no younger ones, and that half of the people died from the consequences. They were beating up Hamed Hadžić and his father (Ibrišim), Mehmed Bajramović, Ramo Hurem, Medo Liska, Jusuf Poljo. They were also beating up Hamed Hadžić, whom they took out to the corridor and Lukić and Boban were beating him by knocking him down on the floor and treading on his body. She was watching that from the sport hall as there were no doors. The Court holds that Razija could not watch that from the spot as she described it, for the reasons which have already been stated. **Haša Hadžić** testified that 60 men were taken out to the corridor to be beaten up and slaughtered. When the defence counsel, during the cross-examination, presented her statement to her, in which it was stated that she was beaten up initially in the corridor and then in the sport hall and that, while she was in the corridor she saw Šuhra on a chair while Šuhra stated at the same main trial that she was in the sport hall watching Razija being beaten up by them, witness Razija vaguely responded that Šuhra had been in the sport hall but that she, i.e. Razija, could have experienced worse things and then, at the insistence of the Defence, Haša stated that Šuhra was also in the corridor in order to defend her daughter. Besides, Haša's inclination to untruthful testimony is also evident in her statement during the investigation when she stated for the record in the Prosecutor's Office on 25 May 2005 that 30 men (therefore, not 60 men as she stated at a later point in time) were taken out from the sport hall into the corridor, that the lights in the sport hall were switched off but that there was light in the corridor and that everything could be seen which, as we have already presented, is not possible. During her testimony, **Kada Spahić** stated that her husband told her that Milan Lukić and Mitar Vasiljević were beating him in the school. She remembers that the following persons were beaten up: Nail Ramić, Ibro Memić, Ibrišim Hadžić, Hasib Šabanović, Ramo Hurem and others. Unlike her statement at the main trial, **Sajma Šabanović** made a more explicit statement about the beating up of the men in the corridor on the second evening upon the appropriation of money. On that occasion, they took them out to the corridor and beat them mentioning Milan Lukić and forcing them to sing Chetnik songs. Her son was also taken out with them. She is certain that Boban Šimšić was on duty that night but she does not state any circumstance whatsoever based on which she reached such a conclusion, although she did not see that he participated in beating them up. According to **Hasena Bajramović**, on the same evening upon their arrival at the school, Boban Šimšić, Milan and Sredoje Lukić, and a person Cvijeto came there and Boban called the names and after that, every person whose name was called had to stand up and go to another room. On that occasion the following persons were called: Ibro Šabanović, Avdo Ferić, Avdo Aljić, Hamed Hadžić, Ibrišim Hadžić, Mustafa Smajić, Mehmed Bajramović, Jusuf Poljo, Ramo Hurem, Nail Ramić, Ibro Memić, Abid Alijašević (witness Asmir Spahić claims that only Ibro Šabanović was called out that evening), and taken to a room from which they soon heard crying for help and yelling which lasted for 10-15 minutes and then they returned to the sport hall with injuries.

Therefore, on the statements of these witnesses, the Prosecutor has based the version of this incident as stated in the introductory part. However, let us see what has been said about this incident by its participants or, more precisely, by Bosniak civilians who were victims of the physical torture and whose testimonies, except for the one of Nail Ramić, which the Prosecutor, being guided by its selective approach, has lost from sight.

[216] Thus, **Ibro Memić** (78) testified that, upon their return to Višegrad, they were placed in the sport hall in which they were maltreated and beaten and that Nail Ramić, then Mustafa Smajić and he, the witness himself, had suffered most; they were mostly kicking them with boots and punching them. They were mostly beating them up during the night. The witness was beaten by Milan Lukić and, once, Sredoje Lukić hit him with a rifle butt in the back. He precisely stated that they had not beaten women in his presence. He describes that Milan Lukić, who introduced himself, came there and asked for caps to be taken off with left hands and immediately after that he was kicking people. Ibro stated that, upon arrival of the members of the Lukić family, one evening they took out all men in the yard and told the women that they would kill all the men if they did not give them every single mark (*Trans. Note. German mark*) they had. They began to beat Abid Hurem first. Milan took a cane from Ibrišim Hadžić, the oldest man among the Bosniak civilians, and gave it to him to beat other people, but he said that he could not do that stating that his arm was injured. He stated for the record in the Prosecutor's Office on 21 June 2005 that Milan had given the cane to Ramo Hurem who was hitting them in the head. During that time, they had to sing Chetnik songs while Milan used to turn a radio set on and asked someone on the line if they could hear them singing the songs. After that, they were told that they might return to the sport hall. With regard to Boban Šimšić, he states that he had heard about him before the war as his mother and the witness were from the same village, but he did not see him in the school. Also, he heard during the war that people mentioned Boban but, as to whether he heard anyone saying that Boban had done something – he did not, neither can he say anything of the kind.

The Court has estimated the statement of this witness to be convincing and truthful and fully consistent with what he had previously stated, including details as well. Besides, his statement preserved its proportionality and objectivity in the description of the events, unlike those made by the witnesses to whom the Court did not give credence. Although he himself was a victim of beating up and inhumane treatment, his testimony does not contain affectivity which necessarily reduces clearness of the witness's perception.

[217] The Court identically estimated the testimony of **Asmir Spahić** (29) who, with regard to beating up of the men, stated that upon their return to the gym from the locality of Sase, they called his family and Rifat Šabanović to come out to the centre, and a bearded soldier put the knife to his mother's throat, and then Milan Lukić and Sredoje Lukić came there and took away all men to be shot. However, they themselves were not taken away and they do not know what was happening outside but, whoever came back, he was beaten up. They also maltreated his grandfather Mehmed. He states that he was one among some 15 children younger than 14 years of age, for whom they asked the ransom to be paid. That was the night on which Lukić intended to shoot him. Lukić said that all men were to be shot, they lined them up two by two, forced them to sing Chetniks songs and they had to go through two corridors to come out in front of the school. There, they were lined up into three ranks on the stairs and Milan and Sredoje were standing in front of them. Apart from the two of them, he did not see anyone else there nor did he see anybody else while they were being taken through the corridors. Milan began to interrogate people who were older than 65 and then he began to hit them with a wooden stick. As some people still gave money and gold, children were spared from further troubles. In response to the Prosecutor's question, he said that there were several policemen in the school being on duty in shifts, and 7-8 and not more than 10 of them worked in shifts, and they did not wear camouflage uniforms. In response to the specific question, the witness stated the names of the guards he remembered: Goran Miličević, who did not allow anybody to maltreat them, Dragomir Šušnjak, Tomo Mosić, Boban Šimšić, a young man from the place of Trševina, a teacher from the place of Veletovo, brother who

used to come and talk to them – civilians, Ilija Gavrilović and a young man by the name of Zenga. That night, in the darkness when visibility was extremely bad, they only called out Ibro Šabanović and he went out never to return. He precisely stated that no one who did not go out of the sport hall could see what was happening there given that, upon leaving the sport hall one stepped into the corridor where people were maltreated and therefore, whoever stayed in the sport hall could not see what was happening in the corridor. At this point, the Court observes that this description of the witness is fully consistent with what the Court, parties and the defence counsel could have seen during the site identification, which situation has been fixed by the evidence of objective importance – the site drawing and photoelaboration. Consequently, the Court will not repeat the circular arguments with regard to this circumstance. This is one of the crucial reasons for which the Court did not give credence to the parts of the statements of those witnesses who, with regard to the same circumstance, made statements opposite to the one made by this witness. Witness Asmir does not have any need to hide himself behind anyone else during the presentation of his direct testimony. He, being committed to speak the truth, states what he saw and what he heard. In addition, the Court gave credence to this witness given that a younger man is in question who was physically at such age at the time of the incident at which, speaking in jargon, he had a photographic memory. Notwithstanding the fact a witness of the Defence was in question, witness Asmir has neither reasons nor need to make a false statement in favour of the accused given that he himself was, as a child, exposed to a traumatic experience by the members of the Serb Army, i.e. by the paramilitary group of Milan Lukić.

[218] Finally, witness **Nail Ramić** in relation to whom the Court has no doubt whatsoever that, as it follows from the concurrent testimonies of almost all examined witnesses, he was exposed to severe beating up and physical maltreatment in the school “Hasan Veletovac”, states that during his stay in the school he was beaten up daily by a group of soldiers and even by civilians who were coming there. One night when they took him out into the corridor with five more men, he remembers that Medo, Liska and Ramo were among them, the light was switched off and he could not see clearly those who were beating him. However, he recognised Boban Šimšić by his voice and he therefore believes that he was beating him as well. During the beating up, Milan and Sredoje Lukić were particularly cruel to him. They forced the witness to run in circles until he fell down and then they were beating him up. He also recalls his being severely beaten up in the sport hall while he was standing under the basket and a group that came to play basketball there was hitting him strongly in the head either deliberately or whenever they missed the basket. Boban Šimšić was among those in the group and he was only watching all that. However, when presented by the Prosecutor a part of his statement made for the record in the Prosecutor’s Office on 26 May 2005 in which he stated that the accused had also played basketball together with that group, and when asked to explain the difference in his statement, the witness avoided to give a precise answer stating that the accused came there with that group and that he allowed people to play the ball, that he held the keys and that he allowed such a thing to happen to the detainees. In response to the Presiding Judge’s question, he precisely stated that Boban was watching that from the sideline. In response to the defence counsel’s question as to how it could be possible to play basketball with so many people sitting on the parquet floor, the witness said that they were playing “half court” although, the Court observes at this point that some witnesses such as Hasena, for instance, stated that the people were placed under the baskets on both sides of the sports ground. When cautioned by the Prosecutor that, during the investigation, he stated that at the time of the incident he had heard Boban’s words: “Nail, you have entered where you should have”, while at the main trial he stated that the former said: “I am a big shot here”, and what his explanation for this difference in his statement is, Nail responded that he got

confused and that it was true that the accused said: “Nail, you have entered where you should have to. I am a big shot here”. In response to the Prosecutor’s question, his daughter **Naila Ahmetspahić** stated during her testimony that she had not seen that Boban Šimšić was directly hitting her father but, according to her, he was standing there laughing cynically. The witness stated that her father was hiding in a manhole next to the stands in the sport hall although the Court established during the on-site investigation that there was no such manhole there.

[219] If the Court did not have a dilemma with regard to the fact concerning physical torture of Nail, the Trial Panel did have considerable reservations towards the truthfulness of Nail’s testimony related to the physical participation of the accused in his torture. What else to state except that his testimony in that part is confused, imprecise, contradictory – in a word – unconvincing. Besides, at one point in time, Nail himself said that he thought, therefore he did not claim, that the accused was beating him. On such basis, the facts on which, without reasonable doubt, criminal responsibility of Boban Šimšić with regard to the described acts to which the testimony of Nail Ramić referred, could not be established in a reliable manner. The point of his testimony as a whole, with regard to both this very incident and the incidents in the village of Žlijeb in relation to the acts the accused have been charged with, is in fact Nail’s rationalization of the past events where, on the basis of logic rather than on the basis of what he had actually seen and heard, he reached his own conclusions about responsibility of accused Šimšić, particularly with regard to what the witness experienced during his imprisonment in the primary school “Hasan Veletovac“. In order to anyhow bring the accused into the sphere of criminal responsibility, given that he did not have a realistic basis to present him as a physical perpetrator, Nail used generalisations in his testimony. Therefore, he stated that Boban Šimšić had been present in the school all the time, particularly when nasty things were happening there, that he allowed Milan Lukić to come in to maltreat the imprisoned Bosniak civilians. Finally, unlike his initial claims, Nail admits himself that, at a later point in time, he assured himself that Boban had not been in charge in the school. In describing his arrival at school, Nail apodictically, at the very beginning of the incident, said that one of the Chetniks he found there eating and drinking had said to him: “Hello Nail, good luck, Boban Šimšić, your neighbour, is to blame for whatever is going to happen to you this night”. On that occasion, the witness does not state more precisely either the name of the person who told that to him, although he described his physical looks, nor where he knew him from, and the unknown person, without any motivation and straight away and in advance, individualised Boban Šimšić as the one to be blamed for all Nail’s suffering which would follow. The reasons for Nail’s animosity toward the accused, in which his daughter Naila joins him, should be sought in the fact that Boban, as his neighbour, did not help him. Nail is explicit in this when, in the context of another event, he said: “Later on, I reached a conclusion that it was certainly Boban who was setting me up and wherever I was hiding in the woods until they caught me, they did not give up on me and he was making enquiries about me, and when I asked him for help, he did not want to help me although he was able to”. Whether Boban could have protected Nail and to which extent, from the aspect of the life reality and the circumstances of the events, is the question which, under the assumption that the accused was present at the time of the events which Nail described, the Court could not get into. This is particularly so bearing in mind that several witnesses of the Prosecution consistently stated that Milan Lukić had killed Stanko Pecikoza, President of the local SDS party, for the reason that he was protecting his Muslim neighbours. It clearly follows from the aforesaid that a witness who is partial to the detriment of the accused is in question and that, even more so, he did not even attempt to hide his partiality.

Therefore, the Court is satisfied that under this Count of the Indictment also, the guilt of the accused has not been proved beyond reasonable doubt.

#### 2.5.6 – Beating up of approximately twenty men and cutting off the tongue of Mehmed Bajramović /Count 5.h) of the Operative Part of Verdict/

[220] The incident in which the accused entered the room where the civilians were imprisoned and selected about 20 men, whose names have been stated under this Count of the Indictment, and ordered them to go to another room where, together with a group of soldiers, he began to beat them, has been discussed in the reasons related to the previous Count.

With regard to the episode which refers to cutting off the tongue of detainee Mehmed Bajramović by the accused, which caused that Mehmed was heavily bleeding, and according to which the accused then took Mehmed out of the school building, from which moment he disappeared without a trace, and where the other day when Mehmed's wife asked the accused what had happened to her husband the accused cursed her bialia mother and slapped her in the face so strongly that she fell down half-conscious with her child – it has been based on the testimonies of Hasena Bajramović, Šefka Šehić and Fata Šabanović.

[221] Unlike the stated factual description in the Indictment according to which, the other day after the event in which Boban Šimšić had cut off the tongue of her husband, **Hasena Bajramović** claims that, on the same night, Boban Šimšić slapped her in the face so strongly that she immediately fell down and was barely conscious for a while. In the course of her more detailed testimony about the event related to the alleged cutting off her husband Mehmed's tongue, Hasena referred to what her step-daughter Medina told her upon Mehmed's entering the sport hall being beaten up and all covered with blood, i.e. that the one who asked her to go back, thinking of Boban Šimšić, had cut off her father's tongue. In her description of the continuation of the events, the witness stated that, in response to her question as to who was beating him, Mehmed unnoticeably looked at her and said that, among those who entered the sport hall, a blonde man, that Chetnik did that and, when the witness looked, using again the same word – unnoticeably, she saw that it was Boban Šimšić. Then her husband told her to give him a shawl or anything else to hang himself as they had been told that they all would be killed and slaughtered that night and that nobody would survive. If we consider the description of the events in the way in which the witness presented it, it is readily observable that someone whose tongue had just been cut off, entered the sport hall and began, according to her description, a sort of normal conversation with his wife which is, from the aspect of a normal logical and life reasoning, hard to believe particularly if that person, as claimed by the Prosecutor, bled heavily. It is also difficult to believe that, in case that Mehmed had truly sustained such a serious injury, Hasena did not ask him about that all. Consequently, the Court has reached a conclusion that an evident witness's fabrication is in question. The very manner in which she describes the event where she did not mention Boban Šimšić directly but she did that through Medina instead, and Boban's physical appearance, using the expression "unnoticeably" thus suggesting the atmosphere of fear, serves for her testimony to sound convincing. Hasena persists on such an approach when she described the alleged throwing in of the head of Ibro Šabanović in the event that followed after the light was off again (it was only this witness who stated that electricity supply was cut off on two occasions that night), when the blonde man cast the head of Ibro Šabanović he had cut off, and said that they could play the ball. The witness concluded *a posteriori* that that was Boban Šimšić as in a few minutes someone switched on some light – a flashlight torch in

the corridor. Unlike the factual description in the Indictment in which it has been claimed that the accused took away Hasena's husband from the school since when he disappeared without a trace, this witness did not state at all that Boban Šimšić had done that but, in an impersonal form, she only stated that Mehmed had been taken away.

[222] **Šefka Šehić** states with regard to the same circumstance that she saw that Mitar Vasiljević came there, that he was naked, with an overcoat/apron covered with blood, that a small girl came and said that there was her father whose tongue they had cut off, and the girl fell down, got disoriented, that Mehmed Šabanović, who could not be understood, came, of which she did not make any statement whatsoever during the examination in the police in Goražde on 5 May 2004, and that after that he disappeared without a trace. Therefore, if we analyse Šefka's testimony, her perception of the event is lapidary, without details to actually ensure a convincing content of the event. While doing that, she did not state at all the name of the person who allegedly cut off the tongue of Mehmed Šabanović. Thereby, her testimony remains along the line of summary of what Hasena stated and, as such, it is unacceptable. This is even more so as she mentions the name of Mitar Vasiljević for whom it has been established by the quoted ICTY Verdict that, at the time, he could not have been present in Višegrad.

[223] **Šabanović Fata** states that she did not see that they had cut off the tongue of Mehmed Bajramović, but she found that out from other women's telling, as well as that Boban Šimšić had done that. It is evident that such testimony cannot make a reliable basis for the Court to conclude that it is a proved fact that the accused had cut off the tongue of Mehmed Bajramović.

[224] With the aforesaid assessment of the presented evidence, the Court has acquitted the accused of the charges for the criminal offence under Count 5.h) of the Indictment.

2.6.1 Conclusions grounded on the established facts with regard to these Counts and responsibility of the accused.

[225] The Trial Panel has not assured itself that the Prosecution eliminated a reasonable possibility that, at the time of the expulsion of Bosniaks from the village of Žlijeb, arrest, dislocation, enforced disappearance of Omer Karišik, Redžo Šabanović (Mirsad Karišik) from the village of Kuka, and persecution, murder of 8 civilians and setting fire to houses in the village of Velji Lug, the accused was at some other place.

[226] In his testimony, the accused stated that the war had found him in his native ..., that he was mobilised on 19 April 1992 in the reserve police force tasked with securing of road communications and facilities of vital importance. He could not perform the duties of a regular policeman, such as public order, fight against crime and traffic security. They were not engaged in the work in villages given that they had too many problems in the town with regard to their regular duties. As for his relationship with his Muslim neighbours, he was on extremely good terms with them and with Nail Ramić and his daughters Naila and Smaila as well. With regard to the charges concerning his participation in the villages of Žlijeb, Kuka and Velji Lug, he thinks that complete fabrications are in question as, at the time, he was not in these villages at all but he was in Višegrad as a reserve policeman, nor does he know anything about those incidents. He has never been in the village of Velji Lug in his life, nor

does he know Almasa Ahmetspahić and he has never seen her before. As for the school “Hasan Veletovac”, he was in the school while being on duty on one or two occasions and only during a day shift, and once with Goran Miličević. Reserve policemen were uniformly dressed wearing blue camouflage uniforms and were only armed with automatic rifles with folding butt. With regard to the shifts, they lasted from 07:00 to 19:00 hrs., and their colleagues who were replacing them were on duty from 19:00 to 07:00 hrs. While he was on duty, persons of non-Serb ethnicity, about 100-150 of them in the school, could freely go out to visit their close relatives, to go to the shops, and to walk around the yard the whole day. He does not know what was happening at the time when he was not on duty. He states that he does not know anything about the alleged incident concerning Ibro Šabanović, nor was that name familiar to him. He did not spend even 10 minutes, let alone hours, with Mitar Vasiljević who was also a reserve policeman. He also does not know anything about the incident with regard to Senada Hurem and her mother Šuhra. Those are pure fabrications. The same refers to the charges related to the appropriation of money and the hitting of Bosniaks with a wooden stick, hitting of Nail with a basketball ball, beating up of Mehmed Spahić and to the taking men to another room and beating them up. He was on good terms with Bosniaks and such relationship has also continued after the war when he used to meet a few of them, and they had a positive opinion on him. During the cross-examination, the accused stated that he had been securing people in the school and not only the building itself, that while he was on duty, the number of people in the school had not reduced; that nobody used to come there during the day and maltreat the people during his shift; that he did not know that people had been killed in Višegrad, that he knew that people were leaving villages but he did not know as to who had forced them to leave. He was not with Mitar Vasiljević at the Višegrad bridge at the time when a Bosniak family was stopped.

[228] A considerable number of witnesses testified in support of the alibi of the accused – and they all, more or less, confirmed his statement. Therefore, witness **Zoran Šimšić** (28) said in his statement that, until May 1992, he had lived in the village of Vlahovići and that just before the war he went to his aunt in Kremna where he stayed until mid-June and that in May, he once came to Višegrad at his uncle’s and that he did not stay in the area of Višegrad in the month of June 1992. He came back to Višegrad only when he was informed that his parents had been killed on 11 July 1992, with regard to which circumstance and at the proposal of the Defence, the Court presented pieces of evidence by examining the Death Certificate issued by the Municipality of Višegrad, No.: 03-202-288/05 of 07 September 2005 which suggests that the name of Perka Šimšić, residing in the village of Vlahovići, Municipality of Višegrad, and 11 July 1992 as the date of death are registered under ordinal number 81, and the Death Certificate No. 03-202.287/05 which suggests that the name of Dragomir Šimšić, the place of death – Vlahovići and the date of 11 July 1992, are registered under ordinal number 82. In response to the Prosecutor’s question, the witness stated that his motif to testify was that he was advised by the defence counsel that it has been stated in the Indictment that he was in the village of Kuka together with the accused, which is not true, and that he had a moral need to give his testimony. **Milosav Šimšić** (46) testifies that he was born in the village of Žlijeb, that he finished secondary school in 1978 in Višegrad and that, in the same year, he had himself deregistered in Višegrad and went to Užice to work in the company “Raketa”, where he has been to date. He did not participate in the war activities in BiH in the period 1992-1995, and even more so, he did not dare to go there to visit his parents given that, if he had come to the territory of BiH, he would have been arrested as a deserter as he did not want to fight. He denies that he was in the village of Kuka together with Boban Šimšić in the month of June 1992 as, just like his parents, he did not see him for four years either. In response to the Prosecutor’s question, he stated that he was Boban’s cousin twice removed,

that injustice done to him but to Boban as well, motivated him to testify, that, unlike the village of Žlijeb, he does not know any Muslim from the village of Kuke except for Kemo, nor does he know a woman by the name of Šefka Šehić. Witness **Stanimir Šimšić** (44), born in the village of Vlahovići, states that, from Sarajevo where he lived, had to return to Višegrad with his sister-in-law and children as it “broke out” in Sarajevo where his brother stayed captured. When he reached Višegrad, he settled in a hut on the mountain of Dikava. He was not engaged with the RS Army until the end of 1992. He did not meet Boban Šimšić from the time when it was about to “break out”, i.e. from February-March 1992 until St. John Chrysostom’s Day in 1993 (20 January). In response to the Prosecutor’s question as to whether he used to meet the accused in June-July 1992, the witness responded negatively, given that the accused went down there (Court Note: to Višegrad) and he did not come back up there again (Court Note: to the village). He states that he did not have the chance to be in the same actions with the accused and his unit, as the accused was at the checkpoints as a member of the police. He knows where the village of Kuka is, given that it is a neighbouring village to the village in which he grew up. With regard to Ahmo Karišik, he knows what the inhabitants of both those villages know, i.e. that he is a slimy character who is not trustworthy, that he used to go from one house to another and to also be away from home even for a period of one year. He knew his brother Mirsad Karišik a.k.a. Kema, with whom he was on quite good terms. He did not meet Kema during the war. Nail Ramić is his next-door neighbour and he knows him and his entire family. After the Dayton, he was coming with his sons-in-law and he gave them brandy for their trip, and he is on good terms with him. They did not talk about the war except that Nail told him once that he had been severely beaten up in the school and that he did not mention Boban Šimšić. Also, he was visited by Hazim Ahmetagić who is Naila’s husband, son-in-law/brother-in law Mirso, Idriz Bulatović and others who visited their estates which were totally burnt down. No one of them mentioned Boban. They mentioned Goran Milićević who was good to them in the school. During the cross-examination by the Prosecutor, he stated that, perhaps in March 1992, Boban went down the village saying that they had called him to register in the reserve police, that he briefly said good-bye to him and the Muslims in the village saying that he had to go, he did not have either weapons or beard and even now if he would grow beard, it would not be noticeable. He was in the village until his Muslim neighbours were told that they would go to Olovo and Kladanj and that buses were waiting in Višegrad, that he did not have any idea of that as he was not down there, in the town. He states that younger Serbs were also leaving. There was mobilisation in the town, the village was burnt down by soldiers and “Orlići” (*Trans. Note.: Small Eagles*), some volunteers, were there. In response to the question as to what has made him to testify, Stanimir stated that he had not been at the site in relation to which his name is stated in the Indictment which was presented to him by the defence counsel and he did not know if Boban had been there. He precisely stated that he had never been in the village of Velji Lug which is 17 km away from his village.

[229] Witness **Ilija Gavrilović** (36), policeman, stated that, just like the accused, he was a reserve policeman during the war and, in that capacity, they were not engaged in military activities. He knows where the school “Hasan Veletovac” is, in which he stayed during June and July 1992 when they secured both the building and people. They worked in 12-hrs shifts. He believes that he was on good terms with the Muslims in the school. He stayed there for 2 to 3 shifts. The accused was not present during his stay in the school. During the cross-examination, he stayed at home for his 48 hours off. The Reserve Police Commander was Dragan Tomić to whom they reported. During his shift, nothing bad happened to the Muslims. He used to meet the accused in the Police, at the meetings. His motif to testify is his wish that the truth be told. He confirms that the defence counsel for the accused and his

cousin contacted him. During his shift, no third party could come to the school nor was there any failure in his work. During the day, the school was open while it was locked during the night. They did not keep record on the detainees. They mostly cooked coffee themselves and sometimes it was done by their acquaintances. Dragomir Gavrilović was with him in his shift.

[230] Witness **Goran Milićević** (40) states that he was mobilised in the reserve police force in April 1992, just like the accused whom he knows since the time when they went to primary school. They worked on securing buildings and persons. He did not participate in the combat activities against Muslims. He was securing the primary school "Hasan Veletovac". There was a rule that they report to the Police where they were given an assignment schedule, and they used to go to the school in twos. Their shift lasted for 12 hours. On one occasion, he was doing a daily shift together with the accused. He was entering the sport hall and asked the people if they needed anything, and he knew some of them. Accused Boban contacted Nail Ramić and they had a conversation like neighbours do. He confirms that the people who had been in the school could go out. Accordingly, the children were going out to play ball. The witness's, just like Boban's, relationship toward those people was correct. After a shift ended, other policemen came as shifts could not be merged together. Nobody maltreated the people during his shift. With regard to Boban's behaviour during the war, he can say all the best about him. He stated during the cross-examination that he had not heard that anyone was killed in the school. He spent 2-3 shifts in the school. There were about 80 to 100 people in the school, as listed by the Red Cross. Whoever wanted to, could have gone to the village as the door was unlocked. He did not consider the civilians in the school to be detainees, he used to give them cigarettes. People who were in the school only complained about the food. They did not flee during his shift nor did he know about that. During his shift, other persons (soldiers) did not enter the school. His motif to testify was to tell the truth and to help the accused.

[231] **Mitar Vasiljević**, person convicted in the Hague, stated in his testimony at the main trial on 19 June 2006 that, in the period from 15 June to 28 June 1992, he was in a hospital in Višegrad because of his leg fracture, and that he was confined to the bed by the injury he sustained on 14 June 1992. He confirmed that he had never been in the village of Žlijeb, nor had he ever participated in any military action with Boban Šimšić, given that accused Boban was a member of the Police, while the witness was in the army. The witness used to meet the accused while the latter was patrolling the town, in passing, and to his best knowledge, the accused was nothing but a policeman. The Prosecutor has accepted the witness's staying in the hospital in Višegrad as the adjudicated fact, given that the fact is contained in the final Judgment of the ICTY in the case *Prosecutor vs. Mitar Vasiljević*.

[232] The Trial Panel is aware that the defence witnesses, who made their statements, were cousins, neighbours or acquaintances of the accused and therefore, they could have told untruth to some extent in their attempt to help him. However, it is not disputable that most of them honestly said that they appeared to testify in order to help Boban Šimšić and some of them to testify in their own favour as, given that they have found out that their names were mentioned by the Prosecution witnesses, they wanted to remove any doubt that they participated in the described events.

[233] For this reason, the Court particularly analysed the objective pieces of evidence of serving as a test for verification of the testimonies given by the Defence witnesses on one hand, and correlated their testimonies with those given by the Prosecution witnesses.

Thereby, it is evident in the Užice hospital release form and epicrisis, that Slaviša Jovanović was receiving treatment at that hospital within the period from 9 July to 20 July 1992 for an entry-exit wound in the right hip which he sustained in the Višegrad front on the day of his admission to the hospital. It is evident in the remaining medical documents that he was treated by a medical specialist-physiatrist due to that injury and that, based on the presented certificate issued by the MCC (Medical Clinical Centre) Stara Pazova, he was at the reported address. These pieces of evidence, at the very least, indicate the reasonable possibility that witness Slaviša Jovanović was in the Užice hospital as stated, i.e. at home care in Stara Paova at the critical time, and it follows from that conclusion that accused Boban Šimšić could not possibly be with him at that time in the village of Velji Lug, as the accused has been charged. Also, the content of the Certificate of A.D. “Raketa-Autoremont” – Užice, No. 255/06 dated 11 May 2006 indicates that Milosav Šimšić has been permanently employed with that company since 25 February 1983 and that he spent the whole year of 1992 working in that company and consequently, the Trial Panel has not assured itself that the Prosecutor removed a reasonable possibility that the accused was not with witness Milosav Šimšić in the month of June 1992 in the village of Kuka, as indicated by the testimony of Šefka Šehić, one of the witnesses on whose testimony the Prosecution grounded its version of the incidents in that village.

[234] Truthfulness of the allegations of the defence witness Ilija Gavrilović, according to which the primary school “Hasan Veletovac” was closed during the night and opened during the day have also been confirmed by some prosecution witnesses and therefore, if that witness speaks the truth with regard to that circumstance, there is no reason whatsoever for the Court to mistrust him with regard to the remaining part of his testimony and particularly not because that content has not been brought into question by anyone and by anything concrete. Thereby, witnesses Gavrilović and Milićević, and well as the accused himself, gave completely consistent testimonies with regard to this and other circumstances related to their mobilization into the reserve police forces, the scope of their assignments, reasons for being there in shifts, regime of the stay of the Bosniak civilians in the school.

[235] Also, the alibi of the accused and the testimonies of Goran Milićević and Ilija Gavrilović, being consistent with regard to mobilization into the reserve police force in the month of April 1992, therefore, before the critical time related to the incidents in the villages of Žlijeb, Kuka and Velji Lug, and the staying of the accused as the reserve policeman only in Višegrad and not in the villages, i.e. not in the village of Žlijeb, have been confirmed by the testimonies of his neighbours: Ibrumša Agić, Hana Softić and Ismet Softić, but also by the testimony of Mitar Vasiljević who, due to serving time under the final Judgment of ICTY, has no reasons whatsoever to make a noncredible statement. Such amount of presented evidence that are not in mutual contradiction, nor has it been pointed at something like that at all, are sufficient for the Court to, even independently on the Prosecution witnesses who directly charged the accused through their statements which included numerous inconsistencies, sum up the the results of the evidentiary procedure with regard to this part of the Verdict and to reach a final conclusion that the Prosecutor has not proved beyond reasonable doubt the guilt of the accused.

[236] With regard to the application of the standard for proving alibi of the accused, given the circumstances in this case, the Prosecutor, at the very least, has not eliminated any reasonable possibility that the evidence in support of the alibi are truthful. Therefore, the Trial Panel has assured itself that there is a reasonable possibility that, in the stated period of time, the accused was at some other place and not in the villages of Žlijeb, Kuka and Velji

Lug, which means that the Prosecutor failed to prove beyond reasonable doubt that he participated in perpetration of the criminal offences as described under the stated Counts of the Indictment. In considering the application of the standard “beyond reasonable doubt”, the Court had in mind the reasoning of a Military Prosecutor (Judge Advocate) in the case *Heinz Heck and Others* (the *Peless* case), where he says: “You must be convinced that the accused is guilty beyond any reasonable doubt which means that, after you have rendered your decision you must not think that it might be wrong”. Or, the degree of knowledge required in the criminal proceedings before the accused is found guilty does not have to reach absolute surety but it must reach a high degree of certainty. In this particular case with regard to the charges under Count II of the Pronouncement, the Court holds that the Prosecutor has not offered a certain quantum of available pieces of evidence based on which the Court could without hesitation find the accused guilty; in other words, in order to find the accused guilty, the Court should not have any doubts which would make any reasonable and cautious person hesitate before reaching such a conclusion. Taking these tests for the application of the aforesaid standard as a starting point and, in this particular case – in the light of available pieces of evidence, the Trial Panel acted in the manner identical to the Court for Human Rights which had found in the case *Barbera, Messegut and Jabardo* “(that) any doubt must be in favour of the accused” (§ 77 ). The Court had in mind the words of a famous French lawyer Floriot: “If the Court is persuaded in the guilt of the accused, it shall pronounce a verdict to find him guilty. If it is persuaded in his innocence, it shall proclaim it. But, if the Court estimates that there is even a slightest doubt, it should act in favour of the accused and acquit him”.<sup>35</sup> Prior to pronouncing the acquitting verdict with this regard, the Trial Panel has considered all presented pieces of evidence of importance for the resolution of this matter.

### III

At the main trial on 19 June 2006, using his power of procedural disposition with regard to the Indictment, without stating the reasons, the Prosecutor dropped criminal charges against the accused with regard to Counts 1.a) and 4.b) of the Indictment.

Namely, Count 1.a) of the Indictment charged the accused with coming into the village of Žlijeb, together with a group composed of a number of Serb soldiers armed with guns, in which they came across civilians Naila Ahmetagić, Džemail Karišik and three elderly bed-ridden women and provoked and maltreated them and then punched and kicked them all over their bodies trying to extort from them an information about where the remaining Bosniak population from the village was hiding. It is described in Count 4.b) of the Indictment that, on 18 June 1992, together with a group of several members of the Serb Army and Police, the accused participated in the forcible appropriation of money and golden jewellery from several hundred Bosniaks imprisoned in the premises of the Firehouse, for which purpose he was searching the civilians ordering them to strip naked.

Given the aforesaid and pursuant to Article 283, subparagraph c) of CPC BiH, the charges against accused Boban Šimšić with regard to the offence as stated under section III in the operative part, according to which he committed a Crime Against Humanity as referred to in

<sup>35</sup> “Le juge est-il persuadé de la culpabilité de l’inculpé ? Il prononce une condamnation. Est-il convaincu de son innocence ? Il la proclame. Mais s’il estime qu’il subsiste un doute, même le plus fragile, il doit en faire bénéficier l’inculpé et l’acquitter.” René Floriot, „Les erreurs judiciaires“ Flammarion, 1968, page 9.

Article 172, paragraph 1 subparagraph h) in conjunction with subparagraphs f) and k) of CC BiH, had to be dismissed.

For all the foregoing reasons it has been decided as stated in the operative part hereto.

Record-taker:

Presiding Judge:

Šaćir Hadžić

Dragomir Vukoje

Legal Remedy:

An appeal against this Verdict may be filed with the Appellate Division of Section I of the Court of Bosnia and Herzegovina in Sarajevo, within 15 (fifteen) days upon the receipt of a written copy hereof. The appeal shall be filed in sufficient number of copies with this Court - the Appellate Division – delivered directly or via registered mail.