

**X-KR-08/500****Sarajevo, 19 February 2009****IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, sitting on the Panel composed of Judge Davorin Jukić, as the Presiding Judge, and Judge Lars Folke Bjur Nystrom and Judge Patricia Whalen, as members of the Panel, with the participation of Legal Officer Emira Hodžić, as the record-taker, in the criminal case against the Accused Miodrag Nikačević, for the criminal offense of Crimes against Humanity in violation of Article 172(1) g) and e) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC B-H), upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina, No. KT-RZ-192/07, dated 14 March 2008, confirmed on 17 March 2008, amended on 31 January 2009, following the completion of the public main trial, in the presence of the Accused Miodrag Nikačević and his Defense Counsel, Attorney Izet Baždarević, and Behajja Krnjić, Prosecutor of the Prosecutor's Office of B-H, on 13 February 2009 rendered and on 19 February 2009 publicly announced the following:

VERDICT**ACCUSED:**

MIODRAG NIKAČEVIĆ, son of Veselko and Jelenka nee Kovačević, born in Čajniče on 23 July 1964, residing in ..., JMBG /Citizen Identification Number/ ..., ethnic ..., citizen of ..., literate with secondary school education, policeman, employed in the RS MUP / Republika Srpska Ministry of the Interior/ - Foča SJB /Police Station/, married, father of two underage children, completed military service in Sarajevo in 1986, holds no rank, decorated with the Medal of Merits for Serving the People, indigent, no prior conviction, no other criminal proceedings pending,

Pursuant to Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: CPC B-H):

HAS BEEN FOUND GUILTY**In as much as he:**

Between early April 1992 through late March 1993, as part of a widespread and systematic attack of the military, paramilitary and police forces of the Serb Republic of B-H and subsequently of Republika Srpska, directed against the Bosniak civilians in the Foča Municipality, having knowledge of such an attack and that his acts constituted part of the attack, as a member of the aforementioned forces, he knowingly committed the act of rape of another using force and threats and directly attacking

their life and limb and aided in unlawful imprisonment and deprivation of physical liberty, in as much as he:

1. (a) On an undetermined day in mid-April 1992, wearing a uniform and carrying an automatic rifle, a knife and several hand grenades, he came to Fatima Dervišević's apartment in Maršala Tita Street in Foča, where he found Munira Hodžić (the injured party), whom he told she had to accompany him to her apartment in the same building, so that allegedly he could take her household appliances from the apartment in order to keep them safe for her; she was forced to comply and she went with him, although she begged him not to take her there but to go to her apartment by himself; when they came to her apartment he immediately started touching her body whereupon she begged and implored him not to touch her, which made him angry and he cursed and shouted and forcibly dragged her into the bathroom and then turned her to face the bathtub and bent her over, pulled down her lower clothes and raped her in that position; she was crying and shaking during the rape; thereupon he left her apartment taking away some of her household appliances and leaving her alone in the apartment.

1. (b) On an undetermined day in late June or early July 1992, he came to the apartment of Fatima Dervišević that was opposite his apartment in Maršala Tita Street in Foča, and requested that Fatima's daughter Almira come to his apartment in order to purportedly clean it; he threatened Almira by saying that she would be crying for her brother if she failed to come. For that reason, she had to go to his apartment where she was first forced to wash several uniforms and then vacuumed the carpet while he was lying on a couch; at one moment she noticed that he was undoing his trousers, so she switched off the vacuum cleaner and started screaming, whereupon he got up from the couch and switched the vacuum cleaner back on and ordered her to bend over an armchair, which she did, whereupon he pulled down her tracksuit bottoms threatening her the entire time that something would happen to her brother and that he would bring her brother to watch what he was doing to her; as that position did not suit him, he pushed her onto the floor where he forced her to caress him and then raped her telling her that it would not last long and that it would be better and longer the next time; thereupon he stood up, got dressed and left the apartment.

2. On 2 August 1992, carrying an automatic weapon, together with two other armed members of the Armed Forces of the Republika Srpska, he came to the house of the Klapuh family in Humsko, Foča Municipality, looking for Rasim Klapuh; as Rasim was doing some farm work on a nearby meadow, one of them went there and brought him in front of the house, whereupon they apprehended him and took him to a meadow close to the place of Geuši, Republic of Montenegro, where they interrogated him; thereupon they took him back home and then took him and handed him over to the military police in the Army Command stationed in the place of Velečevo, Foča Municipality, from where Rasim was taken and unlawfully imprisoned in the Foča KPD /Penal-Correctional Institution/; he was detained there while no proceedings were ever instituted against him, nor did he ever receive any decision containing the reasons for his detention; after that, on an undetermined day

he was taken out of the KPD by unidentified persons and murdered at an unknown site.

Therefore,

within a widespread and systematic attack of the military, paramilitary and police forces of the Serb Republic of Bosnia and Herzegovina against the Bosniak civilian population in the Foča Municipality, having knowledge of that attack and that his acts constituted a component part of that attack, as a member of the aforementioned forces, he intentionally committed the act of rape of another by using force and threats and by directly attacking their life and limb, and aided other persons in confining and depriving another of physical freedom, in contravention of the rules of international law,

Whereby he committed the criminal offense, as follows:

Under Count 1 (a and b) of the Indictment – the criminal offense of Crimes against Humanity in violation of Article 172(1) g) of the CC B-H,

Under Count 2 of the Indictment – the criminal offense of Crimes against Humanity in violation of Article 172(1) e) of the CC B-H in conjunction with Article 31 of the CC B-H,

as read with Article 180(1) of the CC B-H.

Therefore, the Panel of the Court of B-H, pursuant to Article 285(1) of the CPC B-H and Articles 39, 42, and 49 of the CC B-H, hereby

SENTENCES HIM

TO IMPRISONMENT FOR A TERM OF 8 (eight) YEARS

Pursuant to Article 56(1) of the CC B-H, the time the Accused has spent in custody based on the Decision of this Court from 14 February 2008 until 20 January 2009 shall be credited towards the pronounced sentence of imprisonment.

Pursuant to Article 188(4) of the CPC B-H, the Accused shall be relieved of the duty to reimburse the costs of the criminal proceedings and the scheduled amount, which shall be paid from the budget appropriations of the Court.

Pursuant to Article 198(2) of the CPC B-H, the injured parties shall be referred to take civil action with their claims under property law.

Reasoning

I. PROCEDURAL HISTORY

A. Charges

By the Indictment of the Prosecutor's Office of Bosnia and Herzegovina, No. KT-RZ 192/07, dated 14 March 2008, amended on 13 January 2009, for the existence of grounded suspicion under Count 1 (a and b) and Count 2 respectively, Miodrag Nikačević is charged with having committed the criminal offense of Crimes against Humanity in violation of Article 172(1) g) in conjunction with Article 180(1) of the CC B-H and Crimes against Humanity in violation of Article 172(1) e) in conjunction with Article 31, as read with Article 180(1) of the CC B-H.

On 27 March 2008, the Accused pleaded not guilty of the criminal offense he is charged with.

B. Presented evidence

1. Prosecution

During the evidentiary procedure, the following Prosecution evidence was presented:

The following witnesses were heard: Munira Hodžić, Almira Čelegija, Fatima Dervišević, Emira Smajkan, Jasmina Fazlić, Fikreta Maslo, Ešrefa Divjan and Šefik Divjan as well as Primarius Dr Senadin Ljubović, forensic expert witness. Also, the Court inspected the following evidence: Record of examination of witness Munira Hodžić, Prosecutor's Office of B-H dated 8 August 2007 (**T1**); T 2 Record of examination of witness Emira Smajkan dated 21 August 2007 (**T-2**); Record of examination of witness Jasmina Fazlić, Prosecutor's Office of B-H, dated 21 August 2007 (**T3**); Record of examination of witness Almira Čelegija, Prosecutor's Office of B-H, dated 7 August 2007 (**T4**); Record of examination of witness Fatima Dervišević, Prosecutor's Office of B-H, dated 7 August 2007 (**T5**); Record of examination of witness Šefik Divjan, No. 17-04/2-04-2-141/07 dated 9 February 2007 (**T6**); Record of examination of witness Ešrefa Divjan, No. 17-04/2-04-2-676/06 dated 24 November 2006 (**T7**); Record of examination of witness Fikreta Maslo, Prosecutor's Office of B-H, No. KT-RZ: 192/07 dated 15 January 2008 (**T8**); Forensic psychiatric report by Primarius Dr Senadin Ljubović dated 10 March 2008 pertaining to Munira Hodžić (**T9**); Forensic psychiatric report by Primarius Dr Senadin Ljubović dated 10 March 2008 pertaining to Almira Čelegija (**T-10**); Letter of the RS MUP, Istočno Sarajevo CJB (Public Security Center), No. 13-02/2-59/08 dated 25 February 2008 referring to the participation of Miodrag Nikačević in the war (**T11**); Record of mass grave exhumation by the Cantonal Court in Sarajevo No. Kri-238/01 dated 6 June 2001 (**T12**); Record of exhumation by the Cantonal Court in Sarajevo No. Kri-238/01 dated 9 June 2001 (**T13**); Autopsy report by the Forensic Medicine Institute in Sarajevo No. Kri-238/01 dated 25 July 2001 (**T14**); Order on

re-exhumation of the Cantonal Court in Sarajevo No. Kpp-170/05 dated 12 October 2005 (T15); Order on re-exhumation of the Cantonal Prosecutor's Office in Sarajevo No. KTA-139/05-RZ dated 17 October 2005 (T16); Record of re-exhumation and identification No. KTA-139/05-Rz dated 17 November 2005 (T17); Book of Missing Persons on the Territory of Bosnia and Herzegovina, ICRC (T18); the document of the Ministry of Internal Affairs Bijeljina (MUP) dated 17 October 1994- proposal for decoration- marking the patron-saint's day of the Ministry of Internal Affairs (T19), document of the RS MUP- notification of decoration of Miodrag Nikačević dated 24 December 2008 (T20); Law on Decorations and Awards (Official Gazette of Republika Srpska, No. 4, dated 28 April 1993) (T21);

2. Defense

During the evidentiary procedure, the following Defense evidence was presented:

The following witnesses were heard: Zdravko Matović, Omer Bavčić, Smail Hadžimusić, Momir Čančar, Ljuban Vuković, Dr. Nuradin Aščerić, Dragica Milutinović, Hamdija Guhdija, Jadran Đuderija and expert witness Danilo Mihajlović as well as the Accused in the capacity as a witness. Also, the Court inspected the following defense evidence: Law on Internal Affairs, Official Gazette of Serb People in B-H, dated 23 March 1992 (O1); Instruction on Rules of Conduct and Mutual Relations of the Employees of the Ministry of Internal Affairs of the SR B-H, Ministry of Internal Affairs Sarajevo, 1991 (O2); Expert Opinion in the Dragoljub Prcać case (ICTY dated 23 April 2001) (O3); Information on Situation, Events and Activities in the ATDP Fočatrans Foča, Foča Municipal Assembly, working group of the Executive Council, Executive Board (O4); Interview with Halid Čengić, *Ljiljan* magazine, dated 18-25 May 1998 (O5); Decision on Establishment of War Presidencies in the Municipalities during the Immediate Threat of War or State of War, Official Gazette of Serb People in B-H dated 8 June 1992 (O6); Decision on Establishment of War Presidencies in the Municipalities during the Immediate Threat of War or State of War, Official Gazette of Serb People in B-H dated 30 June 1992 (O7); Camp torture and sexual violence as a part of the strategy of ethnic cleansing and genocide against Bosniaks in the period from 1992, excerpt from the book "I Begged Them to Kill me", Women-Victims of War, copied from the web page www.zzi.at (O8); Finding and Opinion of the Expert Witness in neuropsychiatry Danilo Mihaljević, referring to the injured party Almira Čelegija dated 17 October 2008 (O9); Finding and Opinion of the Expert Witness in neuropsychiatry Danilo Mihaljević, referring to the injured party Munira Hodžić dated 17 October 2008 (O10); certificate of the Secondary School Center Foča number 201/08 dated 15 August 2008 (O11); Excerpt from the Instruction for Work of Crisis Staffs of Serb People in Municipalities dated 1 February 1992- document of the Government of the Serb Republic of Bosnia and Herzegovina (O12); List of the detainees to be released from the KPD Foča dated 30 August 1992 (O13); List of the detainees to be released from the KPD Foča for exchange dated 30 August 1992 (O14); Order pertaining to regulation of arrest issues and release of the suspects from detention dated 7 September 1992 (O15); Clinical Center Istočno Sarajevo, Foča number 01-13/60 dated 15 August 2008, excerpt from medical documentation for Dragana Nikačević (O16); Birth certificate number 04-200-3-5866/2008 dated 23 June 2008, issued by the Municipality of Foča to the name of Dejan Nikačević (O17); letter of dr. Tahir Zatrić dated 5 December 2008 (O18);

C. Closing Arguments

1. Prosecutor's Office of BiH

In his closing argument, the Prosecutor stated that, based on the evidence adduced during the main trial, it can be concluded with certainty that the Accused Miodrag Nikačević has committed the criminal offense he is indicted for, that is, the Crimes against Humanity. The Prosecutor stresses that the Decision on the established facts clearly shows that in the period from the beginning of April 1992 up until at least February 1993, which is the time relevant to the Indictment, in territory of the Foča Municipality, there existed a widespread and systematic attack which was exclusively directed against non-Serb civilians of the Foča Municipality. In the opinion of the Prosecutor's Office, this conclusion also ensues from the statements of the Prosecution witnesses who were examined in the course of the evidentiary procedure as well as from the statements of some of the Defense witnesses. Their statements clearly indicate that the armed attack in the very town of Foča commenced on 8 April 1992, and that a couple of days later the town of Foča fell under the control of the Serb forces, after which men of Bosniak ethnicity who had not managed to escape by that time were expelled, killed, or simply went missing, while women of Bosniak ethnicity were raped, killed, incarcerated in various detention camps or were detained in their apartments without any right to move freely.

Further, the Prosecutor notes that the Accused had knowledge of such an attack which stems from his status, that is, from the fact that he was a member of the then armed forces of the Serb Republic of B-H, later Republika Srpska. As noted by the Prosecutor, the presented evidence results in the fact that the Accused was a police officer employed with the Ministry of Internal Affairs of Republika Srpska before the war in B-H but also during the war. He performed that duty at the relevant time period as well. Further, the Prosecutor states that police forces of Republika Srpska were a part of the armed forces of Republika Srpska, and given that the forces took part in a widespread and systematic attack directed against non-Serb civilians of the Foča Municipality, it can be clearly concluded that the Accused was aware of the existence of such an attack. The Prosecutor stresses that the acts committed by the Accused, as charged by the Indictment, concerned exclusively the attack directed against the non-Serb civilians.

Furthermore, the Prosecutor stated that the acts of the Accused described in the Indictment stem from all of the evidence adduced by the Prosecution and in relation to Count 2 of the Indictment, partially from the evidence presented by the Defense, as well.

In relation to Count 1 (a and b) of the Indictment, the Prosecutor notes that both witnesses-injured parties clearly and precisely indicated the facts and described the events identical to those that the Accused is charged with and that their statements are corroborated by the statements of other witnesses regarding the facts that they could have known about. In the opinion of the Prosecutor, the statements of the witnesses-injured parties indicate clearly that they were raped by the Accused at the time, in the manner and under the circumstances as stated in the factual description of the acts listed under subparagraphs 1.a) and 1.b) of the operative part of the Indictment and that all the essential elements of the criminal offense of rape have been fully met.

As deemed by the Prosecutor, based on the statements of the witnesses-injured parties it can be clearly and definitely concluded that the intention of the Accused was to achieve sexual penetration, and that he was fully aware of the fact that the referenced act was going on without the consent of the injured parties, whereby the willingness as a subjective element of the committed criminal offense was fully satisfied. The Prosecutor stated that the evidence adduced by the Prosecution entirely corroborates the credibility of the statements of these witnesses.

As stated by the Prosecutor, these facts are also corroborated by the fact that both witnesses-injured parties gave their statements in the course of the investigation that are fully consistent with their testimony given in the course of the main trial and are therefore credible. Also, the witnesses Fatima Dervišević, Emira Smajkan and Jasmina Fazlić in their statements fully corroborated the facts they had been aware of and which referred to the taking away of Munira by the Accused into her apartment, the taking away of Almira by the Accused into his apartment, and subsequent conduct of both injured parties. The Prosecutor pointed out that the act of rape as a criminal offense occurs in huge percentages exclusively in the presence of the perpetrator and his victim, so it is clear that the statements of the injured parties must be considered with due attention, as must the other evidence pointing to the credibility of such statements. Furthermore, the Prosecutor refers to the conclusion and opinion of Dr. Senadin Ljubović, expert witness in psychiatry, who in his opinion and findings concluded that the statements of both witnesses are absolutely authentic and convincing.

The only fact, which in the opinion of the Prosecutor's Office, could challenge the credibility of their statements, was relative to the termination of pregnancy of the injured party Almira. The Prosecutor stated that considering a lapse of time and deteriorated mental state of both witnesses they could be undecided during testimony at the main trial which was eliminated when the aforementioned witnesses testified again.

The Prosecutor states that based on the testimony of Munira Hodžić it can be clearly concluded that it was Dr. Tahir Zatrić, who recommended Dr. Nuradin Aerie, who had a private polyclinic in Novi Pazar, and it can be clearly concluded that Almira did not have any information whatsoever as to where she was going to have the abortion, nor did she know which doctor was going to do that, apart from hearing Munira's mention of Dr. Zatrić. It is also evident that Munira Hodžić in her statement mentioned Dr. Tahir Zatrić, but in relation to the termination of Almira's pregnancy she was speaking of a completely different person who terminated Almira's pregnancy. She mentioned a gynecologist that she saw on TV right after the war and she saw that he opened his gynecology practice in Sarajevo which clearly results in the fact that it is not Dr. Tahir Zatrić. Further, the Prosecutor notes that the witness Munira Hodžić subsequently remembered and found out about the name of that doctor working in Sarajevo and confirmed that it was Dr. Nuradin Aščerić and that the termination of Almira Čelegija's pregnancy was performed on the premises of his clinic. Moreover, the Prosecutor stated that Dr. Nuradin Aščerić confirmed that he owned a private polyclinic during the war in Novi Pazar and that many women from the territory of Eastern Bosnia came to the polyclinic where various types of medical treatments were offered, including abortions. As regards the termination of Almira Čelegija's pregnancy, he was unable to say anything as he did not possess any valid documents. All these facts, as stated by the Prosecutor, have no impact on the credibility of their statements.

The Prosecutor also states that the fact that the rape was reported late, which was pointed to by the Defense during the evidentiary procedure, that is, that both witnesses did not talk about the rape up until the end of 2006, that is, 2007, when they confided in and gave their statements to the *Women-Victims of War* Association, cannot affect the credibility of their statements, particularly considering the circumstances which existed in the territory of the municipality and town of Foča in the period concerned. That is, the witnesses as citizens of the town of Foča of Bosniak ethnicity were deprived of fundamental human rights, thus they were left to their own fate fearing for their lives on a daily basis and under these circumstances they could not ask for any protection because it would not be given to them. Keeping silent about rape, as stated by the Prosecutor, is not a rare case, which was also confirmed by the Defense witness Dr. Danilo Mihajlović stating that many women do not tell anybody that they have been raped, and they have reasons for remaining silent for many years following the rape.

The Prosecutor is of the opinion that based on the aforementioned the Court may give credence to the statements of witnesses Munira Hodžić and Almira Čelegija whose statements are entirely corroborated by the statements of the witnesses Fatima Dervišević, Emira Smajkan and Jasmina Fazlić, and by findings of Dr. Danilo Mihajlović, Defense expert witness. In order to accept the credibility of the statements of witnesses-injured parties Munira Hodžić and Almira Čelegija, the Prosecutor notes that it is very important to take into consideration the sincerity they demonstrated when giving evidence stating that the Accused did not undertake any acts of ill-treatment or torture against them except for the threats made. Furthermore, they noted that after the incriminating incident they kept seeing and contacting the Accused to the extent they had to and that the relatives of the Accused, in particular his mother-in-law and brother-in-law, had helped them in hiding. The Prosecutor also notes that both witnesses were on good neighborly terms with the Accused, which also corroborates the sincerity of the witnesses. In addition, the Prosecutor refers to the opinion and findings made by Dr. Senadin Ljubović, who in the findings speaks about psychological consequences for both witnesses and in particular for the witness Almira Čelegija, who due to severe psychological traumas cannot conceive a child in her current marriage. The Prosecutor also notes that the Defense evidence stating that Almira Dervišević was not a well behaved pupil in the secondary school has nothing to do with the relevant event, nor does the statement of the witness Dragica Milutinović who presented her assumptions and did not know anything about the event itself. As the Prosecutor stated, the Defense tried to challenge the credibility of the findings and opinion of expert witness Dr. Senadin Ljubović by the statement of Dr. Danilo Mihajlović, who finally stated that nobody but Dr. Senadin Ljubović could provide better medical history, that is, his conclusion and opinion pertaining to the mental condition of both witnesses-injured parties given that they were his patients. Moreover, the Prosecutor notes that there are no grounds for the claims by the Defense that Dr. Senadin Ljubović is a person whose professional judgment became affected by his long standing work with patients which resulted in subjective and biased findings directed to sympathize with the victims.

Finally, the Prosecutor states that it can be clearly concluded that the Accused undertook all those actions under Count 1.a) and 1.b) of the Indictment. The Prosecutor also states that at the relevant period the Accused was a police officer of the Foča police station, and while performing his duties he was fully aware of the situation in the municipality and town of

Foča, he knew that Bosniak families, and in particular women, lived in abnormal conditions, deprived of fundamental human rights and in particular right to free movement, right to mutual communication and right to free access to the organizations or institutions which could provide protection to them. The Defense witness Danilo Mihajlović corroborated this fact as well and he clearly noted that at the relevant period the Bosniak women who remained living in Foča lived in constant fear, being detained in their apartments and exposed to daily ill-treatments.

As stated by the Prosecutor, the Accused was completely aware of those circumstances and fully used this kind of situation and he was also aware that the injured parties remained unprotected since they lived in their apartments without any support by men. In such circumstances the Accused was aware that he could rape the injured parties and not be held responsible for those acts. The Prosecutor referred to the Accused's conduct towards other female persons of Bosniak ethnicity at the relevant time, such as his conduct toward Vasvija Grbo, whom he forced to leave Emira Smajkan's apartment, threatening that he would take her to the camp so that Emira Smajkan could remain alone and completely unprotected in the apartment. Then, his conduct toward Fikreta Maslo whom he kept locked with himself in a room one night and thereafter let her go back home. In the opinion of the Prosecutor, such conduct of the Accused towards female persons of Bosniak ethnicity clearly indicates that he committed the acts of rape as a part of the widespread and systematic attack launched by the armed forces of the Serb Republic of B-H against the non-Serb population of the municipality and town of Foča, and that he was absolutely aware of the fact that his acts of rape constituted and were part of the attack.

As regards the acts stated under Count 2 of the Indictment that the Accused is charged with and which relate to the unlawful incarceration or depriving of liberty of the injured party Rasim Klapuh, which was conducted in contravention of the fundamental rules of international law, the Prosecutor notes that evaluating all the presented evidence it follows clearly and undoubtedly that the Accused, together with a group of other persons, took part in depriving the injured party Rasim Klapuh of his liberty, taking him away from the place where he lived and handing him over to the military police which escorted him later to the Foča KPD.

As deemed by the Prosecutor, it is necessary to consider the facts relative to the role the Accused had on the occasion when Rasim Klapuh was taken away, including the lawfulness of apprehension and handing over the injured party to the military police, and awareness on the part of the Accused of the future fate of the injured party after his handover. Furthermore, the Prosecutor points out that when testifying the Accused himself noted and admitted that he came on the relevant day with a group of police officers in Humsko in order to find Rasim Klapuh whom they were supposed to apprehend for interrogation. The Accused himself, states the Prosecutor, clearly noted that he was the leader of the group and that other members of the group had to obey his orders. The Prosecutor points out that there are inconsistencies between the statement of the Accused and statements of the examined Defense witnesses Zdravko Matović and Momir Čančar concerning the reasons and motives for the apprehension of Rasim Klapuh and the facts pertaining to the manner in which Rasim Klapuh was apprehended and handed over to the military police. The Prosecutor notes that pursuant to the statement of the Accused it follows that he, through the chief of the police station, received an order, following a previously made operational plan, to

apprehend Rasim Klapuh and Safet Klinac on the relevant day for the purpose of an alleged investigation in relation to planting mines and setting ambushes on the road used by the Serb army. However, as the Prosecutor states, witness Zdravko Matović does not remember the apprehension of Safet Klinac at all, but he remembers the apprehension of Rasim Klapuh and in a manner that he had visited certain web sites on the Internet before he came to testify before the Court.

The Prosecutor also mentions that there are discrepancies between the statement of the Accused and witness Zdravko Čančar pertaining to the number of persons who were on the patrol, the fact who was in the vehicle with Rasim Klapuh and who was the leader of the patrol. The Prosecutor states that pursuant to the adduced evidence it is obvious that on the occasion of the apprehension of Rasim Klapuh no document on his apprehension was given to him nor was he given the reasons for his apprehension. There was no written order for his apprehension but he was apprehended based on the elaborated operational plan. Then, the Prosecutor states that witness Momir Čančar was the only one who stated the real reason for the arrest of Rasim Klapuh and it was revenge for an alleged crime committed against the Serb civilian population. Pursuant to the presented evidence, as noted by the Prosecutor, it evidently ensues that the Accused was aware of the situation and knew that apprehended Rasim Klapuh would be handed over to the Foča KPD which was a detention camp for civilians of Bosniak ethnicity from the town and municipality of Foča. That is, being the police officer, the Accused knew well that the KPD was the most notorious place in the wider area of the Eastern Bosnia, that hundreds of civilians of Bosniak ethnicity were detained in there, that they were tortured and physically abused, and that they were killed while many individuals were taken from the KPD and subsequently killed. Also, his awareness of the situation in the Foča KPD was also corroborated by the statement of witness Omer Bavčić as well as by the statement of the Accused who testified in relation to the assistance that he provided to Bavčić.

The Prosecutor states that it can be concluded with certainty that by his acts the Accused aided in unlawful deprivation of liberty and incarceration of the injured party Rasim Klapuh, which is in full contravention of the rules of international law. Further, the Prosecutor, stresses that the acts of the Accused can be entirely qualified as providing assistance to other persons in unlawful deprivation of liberty of Rasim Klapuh. The Accused was entirely aware that his actions were part of a widespread and systematic attack and he entirely accepted that his act become a part of that attack. Therefore, argues the Prosecutor, pursuant to the aforementioned, it can be evidently and undoubtedly concluded that the Accused is entirely responsible for the commission of the acts stated under Count 2 of the operative part of the Indictment which entirely constitute essential elements of the criminal offense of Crimes against Humanity in violation of Article 172(1) e) of the CC B-H, in conjunction with the provision under Article 31 of the CC B-H.

The Prosecutor notes that during the evidentiary procedure the Defense focused on defining the personality of the Accused as an exemplary policeman who aided many people of Bosniak ethnicity. The Prosecutor also indicates that to that end the Defense hired expert witness Dr. Danilo Mihajlović, who stated that any person, even the most normal one, may rape another person depending on the circumstances under which that act of rape is undertaken. Then, he points out that, on the other hand, aiding Omer Bavčić, who was detained in the Foča KPD for a certain period of time, speaks of the dual character of the

Accused. Further, the Prosecutor states that the Accused was awarded with the Medal for Services to the Nation. This medal is awarded for meritorious service in the fight against the enemy for the liberation of the country and for the contribution to the development of Republika Srpska. Finally, the Prosecutor states that from the presented evidence it arises that the Accused committed the acts he is indicted for and moves the Trial Panel to find the accused guilty and punish him accordingly under the law.

As to the decision on a type and duration of the penalty the Prosecutor referred to the aggravating circumstances such as making Almira Čelegija pregnant, causing serious mental consequences to both witnesses-injured parties as well as the death of Rasim Klapuh, adding that a sentence of long term imprisonment can be just and adequate to the gravity of the committed criminal offenses.

2. Defense

In the closing argument the Defense of the Accused Miodrag Nikačević notes that the Prosecutor's Office failed to prove beyond reasonable doubt the criminal responsibility of Miodrag Nikačević for the offense that he was charged with pursuant to the amended Indictment.

In the opinion of the Defense, all the witnesses, both the Defense and the Prosecution witnesses, identified the Accused as the police officer who stayed in Foča after the beginning of the war who, under the impossible conditions, did his best to assist civilians regardless of their ethnicity. Also, the Defense notes that the witnesses, both for the Defense and for the Prosecution, agreed on certain facts which mainly refer to the situation in Foča in the period relevant to the Indictment. The Defense does not challenge the existence of the widespread and systematic attack against civilians in the municipality of Foča and, as stated by the Defense, the Accused himself confessed to the fact concerned during this testimony. Also, the Defense does not contest the degree of suffering inflicted on non-Serb population of Foča.

In its closing argument, the Defense stresses the arguments which deny the criminal responsibility of the Accused Miodrag Nikačević. In the first place, the Defense referred to the application of substantive law being of the opinion that it is necessary to apply the criminal code applicable at the time of perpetration of the criminal offense, and it is the Criminal Code of the SFRY, which was adopted and applicable in the Republic of B-H as well, following its recognition as an independent state. Further, the Defense refers to the decision of the Constitutional Court in the *Maktouf* case, stressing that it is the decision referring to a single case and cannot be applied to all the cases. Also, the Defense states that the Constitutional Court, upon the appeal filed in the *Maktouf* case, has not yet resolved the issue of mandatory application of a more lenient law. The Defense is of the opinion that during the presentation of evidence the Prosecution failed to demonstrate, in any single case, the existence of the intention of the Accused Miodrag Nikačević to discriminate, by any means, against anybody or that he has any negative feelings for any ethnic group in B-H.

Considering Count 1 of the Indictment, the Defense states that the rape of Munira Hodžić could not constitute a part of the attack against civilians of the municipality of Foča but it does not dispute the attack. Moreover, it points out that the Prosecutor's Office failed to prove that the Accused had knowledge of the attack against Bosniak civilians because he was merely a common traffic policeman with no authorities. The Defense also notes that it stems from the testimony of Munira Hodžić that she was not in the same position as the majority of the Muslim population in the territory of Foča municipality and that there are certain contradictions between her statement given during the investigation and at the main trial. These contradictions reflect in the description of the way Miodrag Nikačević was dressed the relevant day as well as what kind of weapons he had. The fact that Munira Hodžić was privileged, as stated by the Defense, is also corroborated by her unhindered going out and coming back to B-H. The Defense states that Miodrag Nikačević took her out of Foča and that at her own request she returned to Foča with Dragan Gagović, the then Chief of Police. Also, this witness was not positive about the identity of a doctor that she went to see together with Almira. Moreover, the Defense stresses that Munira Hodžić, as late as 2006, gave a statement to the *Women-Victims of War* Association, and that before that she had never told anyone that she had been raped. The Defense is of the opinion that her explanation is not credible and that the only reasonable explanation is the adoption of the Law on Civil Victims of the War in that period.

The testimony of Milica Dragutinović, in the opinion of the Defense, challenges the statement of witness Munira Hodžić who described their relations which results in the fact that they were close friends. The Defense deems that it remains unclear why Munira did not tell Dragica about the alleged rape and to Dragan Gagović with whom she was on good terms and who was superior to Miodrag Nikačević. With regard to Count 1 b, the Defense is of the opinion that this witness too reported the rape after an extremely long period of time. The Defense holds that the statement of the witness-injured party Almira Čelegija also lacks credibility because this witness, before she was allegedly raped by Miodrag Nikačević, had also been raped by another person and she did not report that rape to the competent authorities, either. The Defense notes that after the rape this witness went to the Accused's apartment and gave bath to his child which, as stated by the Defense, is not reasonable. Then the Defense states that it is symptomatic that she told a neighbor about the rape but not her mother or best friend. Also, the Defense indicates that the other witnesses who testified pertaining to the circumstances under Count 1 of the Indictment did not offer any reliable information, because they did not have any knowledge about the relevant event. Moreover, the Defense indicates that witness Almira, during her testimony at the main trial, was not sure which doctor she went to see to have the abortion or in which institution and that the first time she told about the rape was to the *Women-Victims of War* Association after which she started receiving compensation. The position of the Defense is that a true rape victim has nothing to be ashamed of.

Finally, the Defense concludes that after the war none of the witnesses-injured parties reported the alleged rape to the police or a competent prosecutor, but they did it as late as in 2007 to a non-governmental organization. Both of them said that they were raped by the same person, that after that they stayed in his apartment, that they told nobody what had happened to them and that they were testifying for each other in order to regulate the status. Also, the Defense points out that both injured parties, after they testified at the Court, went to see Dr. Aščerić and requested medical documentation, which they did not get due to its

absence. Moreover, it is noted that there are contradictions in respect to the time of reporting the rape by both witnesses-injured parties, as well as about the doctor who did the abortion of the injured party Almira. That is, both witnesses, in their different statements, gave different information about the year of reporting the rape as well as the name of the doctor who did the abortion. The Defense points out that there are no grounds for the Prosecution arguments that assisting certain Bosniaks is a proof of his power.

With regard to Count 2 of the Indictment, the Defense stresses that the Accused testified at the main trial in order to explain certain facts. On that occasion, he stated that that the Chief of Police gave him the task to apprehend Rasim Klapuh and Safet Klinac, and the Accused was the leader of the patrol group. Rasim Klapuh was apprehended and subsequently handed over to the military police at Velečevo, and the Accused states that he personally saw when a military policeman took over Rasim Klapuh and drove him in a car. The Defense also states that the Defense witness Zdravko Matović said that the police structures could not refuse military requests and that Rasim Klapuh was taken to the KPD because the premises of the Foča Police Station were not adequate and that Miodrag Nikačević was ordered over radio to surrender Rasim Klapuh to the military police at Velečevo. As deemed by the Defense, the Prosecutor's Office did not offer a single piece of evidence that the Accused Miodrag Nikačević is responsible for taking away Rasim Klapuh.

The Defense states that it stems from the statement of witness Šefik Divjan that the orders pertaining to the entire event were issued by a person addressed as the commander which, as claimed by the Defense, results in the fact that it was a person who was a member of military structures. Further, the Defense reminds that Miroslav Pjano came to take Rasim Klapuh and that the Accused cannot be linked with the moment when they went to take him. Also, the Defense states that all Prosecution witnesses who testified about the circumstances indicated under this Count of the Indictment said that there was a certain list of names of the persons who were to be apprehended for interview in the Foča KPD. In the closing argument the Defense Counsel for the Accused referred to the role of the Crisis Staffs and particularly to their role at the beginning of the war activities, since, being the SDS branch, they represented a mechanism used by the Bosnian Serb leadership to take over and keep control over the territory. The Defense states that apprehensions to the Foča KPD were carried out by different units but that the Crisis Staff or the Military Command had the overall control in that moment. Furthermore, the Defense notes that all the exchanges or releases from the KPD were approved by the military command, which is apparent from the adduced Defense evidence and which results in the fact that the army had the exclusive power and authority over the detainees in the Foča KPD. Then, it points out that Accused, as a common policeman, had no authority to carry out any activities exceeding what was written in his patrol orders.

In the closing argument, the Defense referred to Article 33 of the ICC Rome Statute stipulating the requirements which have to be met so as to consider an order lawful. The Defense states that orders require certain conduct and that acts themselves without encouragement by the authorities are excluded from application of Article 33 of the Statute. The only possibility to exonerate a perpetrator exists if the person was under a legal obligation to obey orders.

Pursuant to the foregoing, the Defense is of the opinion that the elements required to prove the responsibility of Miodrag Nikačević have not been proven.

Finally, the Defense holds that the Prosecution failed to prove beyond reasonable doubt the criminal responsibility of Miodrag Nikačević and that verdict acquitting the Accused under both Counts of the Indictment is the only realistic decision pursuant to Article 284 c) of the CPC B-H

D. Procedural Decisions of the Court

1. Decision on protection of witnesses

On 13 May 2008, 10 June 2008 and 17 June 2008, upon the Motion of the Prosecutor's Office, pertaining to the witnesses who testified on the aforementioned dates, the Panel ordered the measure of prohibition of distribution of the particulars of the witnesses and of their photographs to media. The trial was open for the public. Article 235 of the CPC B-H sets forth that the Panel may exclude the public for the entire main trial or a part of it if that is in the interest of protecting the personal and intimate life of the injured party. When rendering this decision the Court was careful not to apply a stricter measure if the same purpose could be achieved with a more lenient measure, and, given that the aforementioned measure completely satisfied the interests of the witnesses with respect to not jeopardizing their and their families' safety, the Court decided to order this particular measure of securing the anonymity of the witnesses.

2. Decision on Exclusion of the Public

From the opening to the end of the main trial, the Panel excluded the public for a portion of some hearings in order to fully hear oral argument, consider and question the parties regarding the various motions of the Prosecutor's Office requesting protection measures for the witnesses. Keeping in mind the fundamental principles of proportionality and necessity the Trial Panel kept these periods short in order to resolve procedural issues as to protection or to hear from the witness and ensure his/her consent. Following the completion of the closed session, the Panel would, in general, inform the public about the subject of consideration and decision rendered.

3. Decision on Assignment of an Advisor to the Witness

The witness Dr. Nuradin Aščerić made an oral motion requesting the Panel to appoint an attorney to him. After it heard the arguments of the witness Nuradin Aščerić and parties to the proceedings, the Panel, in the case concerned, concluded that the witness needed an advisor-lawyer, given that it was obvious that the witness himself was not able to exercise his rights during the hearing and that his interests could not be protected in some other manner, therefore, pursuant to Article 84(5) of the CPC B-H, the Court assigned an advisor-lawyer to this witness during the hearing. At all times during his testimony the Doctor had a counsel available to him to answer questions regarding patient-doctor privilege, his responsibilities as a witness and any legal matter that arose from his testimony.

4. Decision to Accept as Proven the Facts Established by the ICTY

On 7 October 2008, the Court partially granted the Motion of the Prosecutor's Office of B-H No. KT-RZ-192/07 dated 30 April 2008 which was based on Article 4 of the Law on the Transfer of the Cases from the ICTY referring to the acceptance as proven of facts established by the ICTY. As deemed by the Court, the fundamental purpose of Article 4 of the Law is efficiency and economy of the proceedings. Irrespective of the aforementioned, the Court also took into consideration that one should apply this provision with caution, that is, that those facts do not challenge fairness of the proceedings and incriminate the Accused either directly or indirectly. If any of these requirements is not met, the established facts cannot be accepted as proven. That is, Article 4 of the Law stipulates that: "At the request of a party or *proprio motu*, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY...." The Law on the Transfer does not stipulate the criteria which must be satisfied in order for a certain fact to be considered "adjudicated". However, having reviewed the relevant facts and taking into account the right of the Accused to a fair trial, the Panel applied the criteria established by the ICTY.¹

Given that neither the Law on the Transfer nor the CPC sets forth criteria to be fulfilled for certain facts adjudicated by the ICTY to be accepted as proven, the Court, bearing in mind the duty to respect the right to a fair trial guaranteed by the ECHR and the CPC B-H, applied the criteria that the ICTY established in the *Prosecutor v. Momčilo Krajišnik* case (Case No. IT-00-39-T). In order to meet the established criteria, an adjudicated fact must be: 1) distinct, concrete and identifiable; 2) be restricted to factual findings and should not include legal characterizations; 3) be contested at trial and forms part of judgment which has either not been appealed or has been finally settled on appeal; or 4) be contested at trial and now forms part of judgment which is under appeal, but falls within the issues which are not in dispute during the appeal; 5) not attest to criminal responsibility of the accused; 6) not be a subject of reasonable dispute between the parties in the present case; 7) not be based on plea agreements in previous cases; and 8) not impact the right of the accused to a fair trial.²

All the facts proposed by the Prosecutor's Office and accepted by the Court meet these criteria.

Therefore, the Panel, upon the Motion of the Prosecutor's Office, accepted as proven the facts established in **the ICTY Judgment against Dragoljub Kunarac et al., number IT-96-23-T and IT-96-23/1-T dated 22 February 2001:**

1. On 8 April 1992, an armed conflict between the Serb and Muslim forces broke out in Foča. (para. 567) (F1)
2. It took about a week for the Serb forces to secure Foča town and about ten more days for them to be in complete control of Foča municipality. (para. 567) (F2)

¹ *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Decision on Adjudicated Facts, 28 February 2003.

² *Ibid.*

3. Before the armed conflict had started, Muslim civilians were removed from their social and professional lives, their salaries remained unpaid or they were told that their services were no longer needed. (para. 571) (F3)
4. Most Muslim men were disarmed. (para. 571) (F4)
5. Complete ostracism of Muslims soon followed with their freedom to move about and to gather critically curtailed. (para. 571) (F5)
6. The SDS political propaganda grew more aggressive, and the outbursts of violence and house-burning more frequent. (para. 572) (F6)
7. Once towns and villages were securely in their hands, the Serb forces – the military, the police, the paramilitaries and, sometimes, even Serb villagers – applied the same pattern: Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up or captured, and sometimes beaten or killed in the process. (para. 573) (F7)
8. The women were kept in various detention centers where they had to live in intolerably unhygienic conditions, where they were mistreated in many ways including, for many of them, being raped repeatedly. (para. 574) (F8)
9. Some of these women were taken out of these detention centers to privately owned apartments and houses where they had to cook, clean and serve the residents, who were Serb soldiers. They were also subjected to sexual assaults. (para. 574) (F9)
10. All this was done in full view, in complete knowledge and sometimes with the direct involvement of the local authorities, particularly the police forces. (para. 576) (F10)
11. All traces of Muslim presence and culture were wiped out of the area of Foča. (para. 577) (F11)
12. All the mosques of Foča were destroyed. (para. 577) (F12)
13. In January 1994, the Serb authorities crowned their complete victory - their "gaining supremacy" over the Muslims - by renaming Foča "Srbinje", literally "the town of the Serbs". (para. 577) (F13)

Upon the Motion of the Prosecutor's Office, the Panel also accepted as proven the following facts **established in the ICTY Judgment against Milorad Krnojelac number IT-97-25-T dated 15 March 2002:**

1. According to the 1991 census, the population of Foča consisting of 40,513 persons was 51,6% Muslim, 43,3% Serb and 3,1% others. (para. 13) (F14)

2. Although ethnically mixed, individual neighborhoods in Foča town or villages in the municipality could be identified as predominantly Muslim or Serb areas. (para. 13) **(F15)**
3. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foča, and both groups established Crisis Staffs along ethnic lines. (para.17)**(F16)**
4. On 7 April 1992, following pressure from the SDS leadership, the local police were divided along ethnic lines and stopped functioning as a neutral force. (para. 17) **(F17)**
5. Immediately prior to the outbreak of the conflict, Serbs began evacuating their families and children from Foca, generally to Serbia or to Montenegro. (para. 18) **(F18)**
6. Although many Muslims had Serb friends, neighbors and relatives, few were warned about the coming attack. Even for those who did get away, leaving Foča was not easy, with frequent military checkpoints en route to different destinations. (para. 18) **(F19)**
7. On 8 April 1992, an armed conflict broke out in Foča town, mirroring events unfolding in other municipalities. (para. 20) **(F20)**
8. On 8 April 1992, roadblocks were set up throughout the town. (para. 20) **(F21)**
9. Sometime between 8.30 and 10.00 am, the main Serb attack on Foča town began, with a combination of infantry fire and shelling from artillery weapons in nearby Kalinovik and Miljevina. Serb forces included local soldiers as well as soldiers from Montenegro and Yugoslavia, and in particular a paramilitary formation known as the White Eagles. (para. 20) **(F22)**
10. During the conflict, many civilians hid in their houses, apartments, basements of their apartment buildings, or with relatives in other areas of town; others left Foča altogether, thinking they would be safer. (para. 21) **(F23)**
11. The attack continued for six or seven days, although the worst shelling and damage took place in the first few days. (para. 21) **(F24)**
12. Foča town fell to the Serbs somewhere between 15 and 18 April 1992, with many of the Muslims who had remained during the fighting fleeing at that time. (para. 21) **(F25)**
13. Following the successful military take-over of Foča town, the attack against the non-Serb civilian population continued. (para. 22) **(F26)**
14. Outside the town, Serb forces carried on their military campaign to take over or destroy Muslim villages in the Foča municipality. (para. 22) **(F27)**

15. Villages in Foča municipality sustained attacks until some time in early June. (para. 23) **(F28)**
16. After the Serb take-over in and around Foča, there was a noticeable presence of Serb soldiers and Serb paramilitary formations. (para. 27) **(F29)**
17. Immediately after the Serb take-over, restrictions were imposed on the non-Serb inhabitants. Muslims were referred to by Serb soldiers by the derogatory term "baliija", and cursed when being arrested. (para. 27) **(F30)**
18. The movements of Non-Serb population were limited. A police vehicle with a loud speaker was patrolling the town announcing that Muslims were forbidden to move around the town. A similar announcement was also made on radio. (para. 29) **(F31)**
19. In April and May 1992, Muslims stayed in apartments in Foča under virtual house arrest, either in hiding or at the order of Serb soldiers.(para. 29) **(F32)**
20. People wishing to leave Foča were required to get papers from the SUP (Secretariat of the Interior) permitting them to go. (para. 29) **(F33)**
21. Military checkpoints were established, controlling access in and out of Foča and its surrounding villages.(para. 29) **(F34)**
22. In April and May 1992, Muslim households were searched by the Serb military police or soldiers for weapons, money and other items. (para. 30) **(F35)**
23. Muslims were ordered to surrender their weapons while Serbs were allowed to keep theirs.(para. 30) **(F36)**
24. Muslim private businesses were looted or burned, or had equipment confiscated. (para. 30) **(F37)**
25. During the attack, neighborhoods were destroyed systematically. Muslim houses were set ablaze by Serb soldiers during the battle for control of the town as well as after the town had been secured. (para. 31) **(F38)**
26. Non-Serbs were arrested throughout the municipality of Foča. Muslim men were rounded up in the streets, separated from the women and children and from the Serb population. (para. 36) **(F39)**
27. The illegal arrest and imprisonment of non-Serb civilian males was carried out on a massive scale and systematic way. Hundreds of Muslim men, as well as a few other non-Serb civilians, were detained at the KP Dom without being charged with any crime. (para. 41) **(F40)**

28. Initially, there was a military order preventing citizens from leaving Foča. However, most of the non-Serb civilian population was eventually forced to leave Foča. (para. 49) (F41)

29. In May 1992, buses were organized to take civilians out of town, and around 13 August 1992 the remaining Muslims in Foča, mostly women and children, were taken away to Rožaje, Montenegro. (para. 49) (F42)

Therefore, the Motion of the Prosecutor's Office was granted and the facts accepted as proven. Further, these facts accepted as proven are taken by the Court as *presumptio juris et de jure* and they could be rebutted during the criminal proceedings if there is a strong reason and justified ground.

E. Applicable law

As regards the applicable substantive law, it is necessary to point out why the provisions of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), applicable at the time of the events concerned, are not applied.

Crimes against Humanity were not regulated in the CC SFRY, which, pursuant to the Decree Law dated 22 May 1992, was adopted as the Law of the Republic of B-H and entered into force on the day of publishing. However, the Criminal Code of Bosnia and Herzegovina (CC B-H), which entered into force on 1 March 2003, in Article 172, regulates Crimes against Humanity as a crime punishable by imprisonment for a term not less than ten years or a long-term imprisonment.

Taking into consideration the time of the alleged perpetration of the criminal offenses (April-August 1992) and the then applicable substantive law, the Court is of the opinion that it is important to pay attention to the principle of legality (to both sides: *nullum crimen sine lege* and *nulla poena sine lege*) and the principle of time constraints regarding applicability.

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

The principle of legality is also laid down in Article 7(1) of the ECHR. The ECHR supersedes all national legislation of B-H pursuant to Article 2(2) of the B-H Constitution. This provision of the ECHR contains the general principle prohibiting imposition of a heavier penalty than the one that was applicable at the time when the criminal offense was committed, but does not prescribe the imposition of the most lenient law.

However, Article 4a) of the CC B-H stipulates that Articles 3 and 4 of the CC B-H 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*".

Also, Article 7(2) of the ECHR gives the same exemption, providing that paragraph 1 of the Article "*...shall not prejudice the trial and punishment of any person of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations*". (See also, Article 15(1) and (2) of the International Covenant on Civil and Political Rights which contains similar provisions. The State of Bosnia and Herzegovina, as a successor of Yugoslavia, ratified this Covenant).

Therefore, these treaties are binding on the state of Bosnia and Herzegovina and the authorities of Bosnia and Herzegovina have to apply them. Article 4a) of the CC B-H codifies this principle and is not a prerequisite for their application.

This provides the possibility to depart, under specific circumstances, from the principles laid down in Articles 3 and 4 of the CC B-H and Article 7(1) of the ECHR and thus apply the current law in proceedings conducted for acts constituting criminal offenses under international law.

As stated above, the CC B-H regulates Crimes against Humanity in Article 172 that are punishable by imprisonment for a term not less than ten years or a long-term imprisonment. However, crimes against humanity were not recognized by the CC SFRY. Pursuant to the aforementioned, it has to be concluded that, at the time when the criminal offenses were allegedly committed, Bosnia and Herzegovina as the successor state of the SFRY, was the signatory party to all the relevant conventions on human rights and international humanitarian law.³

Also, customary status of criminal responsibility for war crimes (against civilians or against humanity), and individual criminal responsibility for these criminal offenses committed in 1992, was recognized by the UN Secretary-General⁴, International Law Commission⁵, as well as jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)⁶. These institutions have established that criminal responsibility for war crimes constitutes a peremptory norm of international law or *jus cogens*.⁷ That is why it appears

³ This includes in particular: Convention on Genocide (1948); Geneva Conventions (1949) and Additional Protocols (1977); Convention on Slavery, amended in 1956; Convention on Racial Discrimination (1966); International Covenant on Civil and Political Rights (1966); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); Convention on Apartheid (1973); Convention on the Elimination of All Forms of Discrimination against Women (1979); UN Convention against Torture (1984).

⁴ Report of the Secretary General pursuant to paragraph 2 of the Security Council Resolution 808 dated 30 May 1993, parts 34-35 and 47-48.

⁵ International Law Commission, Comment on the Draft Law on Crimes against the Peace and Security of Mankind (1996), Article 8.

⁶ *Prosecutor v. Duško Tadić*, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 151; *Prosecutor v. Dusko Tadić*, IT-94-1, Judgment, 7 May 1997, paras. 618-623.

⁷ International Law Commission, Comment on the Draft Law on State Responsibility under International Law (2001), Article 26.

undisputable that the criminal offenses committed in 1992 constituted part of customary international law.

This conclusion was also confirmed by the Study on Customary International Humanitarian Law⁸ conducted by the International Committee of the Red Cross. The Study concluded that "serious violations of international humanitarian law constitute war crimes" (Rule 156), "individuals are criminally responsible for war crimes they commit" (Rule 151) and "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects" (Rule 158).

According to the universal jurisdiction principle, customary international humanitarian law is binding for each state throughout the world, regardless of whether it has ratified the appropriate international legal instruments. Therefore, each state is bound to prosecute or extradite (*aut dedere aut judicare*) all persons suspected of having violated customary international humanitarian law. Any restriction imposed by a State in relation to the extradition, without prosecution, of the persons suspected of having violated international humanitarian law constitutes a violation of the international obligations of that State.

Principles of international law recognized in the UN General Assembly Resolution 95 (I) (1946) as well as in the International Law Commission (1950) refer to "the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal", hence to war crimes in general. "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" were adopted by the International Law Commission in 1950 and submitted to the General Assembly.

Principle 1 prescribes: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment". Principle II also prescribes: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

As said above, crimes against humanity were not foreseen in the CC SFRY, but they are included in Article 172 of the CC B-H. However, the criminal offense of Crimes against Humanity should in any case be placed under "general principles of international law" referred to in Article 3 and Article 4(a) of the CC B-H. That is why, regardless of whether viewed from the aspect of customary international law, international treaty law or "the principles of international law", it is indisputable that war crimes, including crimes against humanity, constituted a criminal offense at the relevant time. In other words, the principle of legality is complied with, in the sense of both *nullum crimen sine lege* and *nulla poena sine lege*.

Article 4a) of the CPC B-H refers to "general principles of international law". Article 7(2) of the ECHR refers to "the general principles of law recognized by civilized nations" and Article 15(2) of the ICCPR refers to "the general principles of law recognized by the

⁸ Jean-Marie Henchaerts and Louise Doswald-Becks; *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005, p. 568 onwards.

community of nations". Neither the ECHR nor the ICCPR recognizes the identical term to the one used in Article 4a) of the CPC B-H. In fact, the term "general principles of international law" constitutes a combination of "the principles of international law" as recognized by the UN General Assembly and the International Law Commission, on the one hand, and "general principles of law recognized by the community of nations", recognized by the Statute of the International Court of Justice, Article 7(2) of the ECHR and Article 15(2) of the ICCPR, on the other hand.

Furthermore, the jurisprudence of the European Court of Human Rights stresses the application of Article 7(2) in comparison to the application of Article 7(1) of the ECHR in several similar cases⁹ where the subject matter was the existence and punishment of Crimes against Humanity as a crime. Moreover, in *Kolk and Kislyiy v. Estonia*, the European Court "recalls that the interpretation and application of domestic law falls in principle within the jurisdiction of the national courts".¹⁰ This also applies when the domestic law pertains to the rules of the general international law or international treaties.

Therefore, as part of customary international law applicable in B-H in the relevant period, prosecution for Crimes against Humanity does not constitute a retroactive application of the Criminal Code, but, on the contrary, the rules of customary international law are applied in B-H automatically, even without being explicitly incorporated into the domestic law by means of specific amendments to the Code. Article 172 of the CC B-H sets forth, as contained in customary international law, that Crimes against Humanity consist of perpetration of a certain number of different criminal acts as part of a widespread or systematic attack directed against civilian population, with knowledge of such an attack, and the individual criminal acts listed in this Article can also be found in the 1976 CC SFRY, that is, its Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186. Therefore, Article 172 of the CC B-H only codifies the existing laws and principles and does not deviate from the existing definition of Crimes against Humanity.

Finally, the Court concludes that application of Article 172 of the CC B-H does not constitute a violation of the right of prohibition of a retroactive application of the Criminal Code.

Therefore, the criminal offense of Crimes against Humanity in any case is subsumed under "the general principles of international law" referred to in Article 4a) of the CC B-H and the principle *nullum crimen sine lege* is met.

⁹ See the judgment of the ECHR in the *Naletilić v Croatia* case, 51891/99.

¹⁰ See *Papon v. France* No. 54210/00, ECtHR 2001-XII, and *Touvier v. France*, No. 29420/95, Decision of the Commission of 13 January 1997.

II. FINDINGS AND REASONING OF THE COURT

A. General Considerations

The Court evaluated the evidence in this case in accordance with the Criminal Procedure Code of Bosnia and Herzegovina (CPC B-H) applying primarily the presumption of innocence, referred to in Article 3 of the CPC B-H, which embodies the general principle of the law according to which the burden of proving the liability of an Accused lies with the Prosecution which must do so beyond reasonable doubt.

Testifying in this case was extremely difficult for most witnesses. In addition, assessment of the credibility of the witnesses and the facts to which they testified was a major challenge for the Panel. However, this is the challenge that always faces the trier of fact. The Panel observed first hand the witnesses, their demeanor, their tone of voice, their attitude, their physical and emotional reactions to the questions, their nonverbal conduct in relation to the parties and counsel, and the atmosphere within which they gave their testimony. The Panel was always mindful that this case presented factors which made credibility decisions more difficult and was always aware that because of the seriousness of the charges, those assessments had to be made with diligence.

The Panel heard eight witnesses called by the Prosecution and nine witnesses called by the Defense. Many of these witnesses testified about the same incidents or facts, which each saw or heard from a differing physical, mental and sometimes chronological perspective. Rarely did two witnesses to the same event perceive that event identically, or relate it verbally in the same way. The Panel evaluated the credibility of the testimony of each witness, first by presuming that each witness intended to tell the truth. Where it was possible to reconcile the testimony of various witnesses, the Panel attempted to do so. Where such reconciliation was deemed impossible, the Panel assessed the testimony of each, first in terms of the likelihood that the differences were the result of honest mistakes in recollection or perception and then in terms of the likelihood that the witness was consciously attempting to mislead the Panel.

Some witnesses the Panel found to be both honest and reliable, often at some personal cost to the witness. The Panel found that some witnesses, though honest, were nonetheless unreliable regarding certain portions of their testimony because of limitations in their perceptions and memories, or because of biases that affected their conclusions about the meaning of what they saw or heard. However, those same witnesses were also found by the Panel to have accurately perceived, remembered and reported other facts. The Panel found that other witnesses were not honest regarding certain portions of their testimony, either for reasons having to do with their own self interest, because of friendship or loyalty to the Accused, or because they wanted to affect the outcome of the proceedings. However, those same witnesses were also found by the Panel to be honest and accurate in reporting other facts, sometimes because they were unaware of the significance of the fact or because they were unable to successfully maintain the fabrication. In reaching these findings, the Panel observed the manner and demeanor of the witnesses when testifying, tested the internal consistency of their evidence as given on the stand and in prior statements. Ultimately, the Panel found that even witnesses who were not reliable or truthful about some portions of their testimony were reliable and truthful about other facts about which they testified.

Therefore the Panel concluded that it would neither serve the interests of justice nor meet the obligation to freely evaluate evidence and find the truth, if it disregarded all of the evidence given by witnesses who gave some unreliable testimony. Rather, unreliability of the witness as to some of the testimony was a factor to be considered when determining the accuracy of the remaining testimony. The Panel, therefore, assessed the reliability and honesty of each witness and, in that context, calculated the reliability and truthfulness of each fact that witness reported. In short, for several witnesses, the Panel believed some of the witness' testimony without necessarily believing it all.

With respect to all the witnesses, the Court also considered the established facts and other evidence and circumstances concerning this case.

When considering Counts 1(a) and 1(b) of the Indictment, the Court had in mind the fact that only the witnesses who were the injured parties testified about the event that the Accused is charged with, given the fact that each was alone in the room with the Accused at the time the relevant event happened. Having this fact in mind, the Panel reviewed these witnesses' respective testimonies particularly carefully and considered their correspondence with the other evidence. The lack of contemporary forensic evidence of a crime is a reality of the state of armed conflict at the time. This puts an additional burden on the determination of credibility as it becomes the central issue. The Panel was of the view that minor inconsistencies among the respective testimonies of different witnesses or in one witness' testimony at the main trial in comparison with statements given in the investigation stage do not discredit a witness if the witness described the event referred to in the Indictment sufficiently. The Panel took into account the distance in time between the relevant event and the time of giving evidence. The Panel also concluded that certain inconsistencies in the testimonies with respect to peripheral issues would not tarnish witnesses' credibility.

In addition to this, pursuant to Article 15 of the CPC B-H, the Court is entitled to freely evaluate all presented evidence. The Court considered it necessary to be satisfied that such evidence was reliable in the sense that it was given voluntarily, that it was authentic and credible. Also, the probative value of the hearsay evidence depends on the context and the character of the particular piece of evidence, that is, on whether or not that piece of evidence is corroborated by other evidence and whether there is some other motive behind that piece of evidence.

The Court reviewed every document in this case in order to decide on its reliability and probative value and concluded that the Prosecutor's Office proved their credibility beyond reasonable doubt. However, it needs to be stressed here that the Court shall not deal equally with every piece of evidence from the case file, which is a matter of a Trial Panel's discretion, but shall explain only those conclusions on the facts that are important for establishing the guilt of the Accused.

In order to evaluate the credibility of the documents, the Court evaluated their correspondence with the other evidence. In addition to this, even when the Court concluded that a certain document was credible, it did not automatically accept that the statements contained therein constituted an accurate description of facts, but evaluated it in correspondence with all the other available evidence.

B. Evaluation of Evidence

After the presentation of evidence, the Panel evaluated every piece of evidence individually and its correspondence with all the other evidence and rendered the decision referred to in the operative part, for the reasons that follow.

By evaluating every presented piece of evidence individually and its correspondence with all the other evidence, the Court concluded beyond any doubt that the Accused was in the Foča municipality in the relevant period and that, as a member of the police force, he committed the criminal acts described in detail in Counts 1(a) and 1(b) and 2 of the Indictment, within a widespread and systematic attack of the Army of the Serb Republic of Bosnia and Herzegovina, members of the police and paramilitary formations against the non-Serb civilian population in the Foča municipality.

As the Indictment reads, the Accused Miodrag Nikačević is charged with having committed the criminal offense of Crimes against Humanity, in violation of Article 172(1)(g) and (e) of the CC B-H.

The burden to prove all essential elements of the relevant criminal offense was on the Prosecutor's Office of B-H.

C. Chapeau Elements of Crimes against Humanity

Essential elements of the criminal offense in the case at hand are the existence of widespread or systematic attack directed against any civilian population, the knowledge of the perpetrator of such an attack, and that the act of the perpetrator is part of the attack, in other words, that there exists the *nexus* between the act of the Accused and the attack.

According to the definition of a widespread attack, a crime may be widespread or committed on a large scale by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".¹¹

A systematic attack is defined as patterns of crimes, that is, the non-accidental repetition of similar criminal conduct and the improbability of their random occurrence".¹²

The Court concluded beyond doubt that there was a widespread and systematic attack of the Army of the Serb Republic of B-H, members of the police and paramilitary formations against the non-Serb civilian population in the Foča municipality at the time of the relevant events and, in the context of crimes against humanity under customary international law, such attack is not limited exclusively to the existence of an "armed conflict".

The Prosecutor stressed in the closing argument that it followed from the established facts that the widespread and systematic attack lasted from early April 1992 until February 1993 at least. The Panel established beyond reasonable doubt that the attack started in early April

¹¹ *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2, Judgment, 26 February 2001, para. 179.

¹² *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23 & 23/1, Appeal Judgment, 12 June 2002, para.94.

1992 and that it was underway at the relevant time, which the Defense made indisputable. The Defense and the Prosecution witnesses alike testified about the situation in the Foča municipality in early April 1992. Prosecution witnesses Munira Hodžić, Fatima Dervišević, Almira Čelegija, Emira Smajkan and Šefik Divjan stated that the shelling of Foča started around 7 April. Defense witnesses Smajil Hadžimusić and Zdravko Matović stated that the Police force was divided into the respective Muslim and Serb components in early April 1992. It also ensues from the Court's Decision to Accept Established Facts that there was a widespread and systematic attack in the Foča municipality, which follows from the following facts: On 8 April 1992, an armed conflict broke out in Foča town, mirroring events unfolding in other municipalities, and on the same day, roadblocks were set up, the town and villages in Foča municipality sustained attacks, and sometime between 8.30 and 10.00 am, the main Serb attack on Foča town began. Before the armed conflict had started, Muslim civilians were removed from their social and professional lives, their freedom to move about was critically curtailed and most Muslim men were disarmed. All the mosques of Foča were destroyed.

The SDS political propaganda grew more aggressive. Once towns and villages were securely in their hands, the Serb forces - the military, the police, the paramilitaries – applied the same pattern: Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up or captured, and sometimes beaten or killed in the process. The women were kept in various detention centers and they were also subjected to sexual assaults. All this was done in complete knowledge and sometimes with the direct involvement of the local authorities, particularly the police forces.

It follows beyond doubt from the foregoing that there was a widespread and systematic attack against the non-Serb civilian population at the relevant time.

With respect to the elements of the criminal offense of Crimes against Humanity, it is also necessary to establish the civilian status of the persons against whom the Accused committed the relevant criminal offense.

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

This Article stipulates that these persons shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

It is obvious in the case at hand that both witnesses who were injured parties were civilians. They were women living at home and not militarily engaged. The Court concluded beyond doubt that Rasim Klapuh was also a civilian. In other words, he was found by the police at a meadow working in a field close to his family house, wherefrom he was arrested, and he wore civilian clothes, all of which indicates that Rasim Klapuh was a civilian. The fact that Rasim Klapuh had on him a hand-made rifle, which the Accused stated in his evidence and which was also partially confirmed by witness Momir Čančar, does not rule out his status as

a civilian pursuant to Article 3 of the Convention, given that Rasim Klapuh did not take any active part in the hostilities.

With respect to the other essential elements of the relevant criminal offense, the Court found beyond doubt that the Accused knew of the attack and that there was a *nexus* between his acts and the attack. That is to say, the Accused was a member of the police force and was present in the Foča municipality in the relevant time. In other words, during the entire proceedings the Accused did not deny having been a member of the police force and he stated in his evidence that in 1991 he was an active policeman in the Police Station in Foča in charge of traffic control and safety. He was present and testified to being there on 6 April 1992, on the eve of the armed conflict, aware of the division within the Police force.

The Court did not believe the Accused that in the period from 6 April 1992 to 25 April 1992 he left the Police and was hiding with his wife outside Foča. The Accused contests the date of reporting to the Police, stating that he reported to the Police on 25 April 1992 upon the Police Chief's summons. However, it follows clearly from the Prosecution evidence T11 (Letter of the CJB Head of 25 February 2008) that the Accused was registered as a participant in the war as a member of the MUP (Ministry of the Internal Affairs) from 4 August 1991 to 1 May 1995. Furthermore, Prosecution witnesses Munira Hodžić, Almira Čelegija and Fatima Dervišević stated in their respective evidence that in the first days of April, they used to see the Accused in the building, armed and in uniform, and that he used to come to Fatima Dervišević's apartment and tell them about his activities as a policeman. He also told them that women were being raped, taken to camps, he was aware of the dangers that the Muslim civilians in Foča were exposed to, since he actually helped some persons knowing they were in danger during the relevant period.

It also follows clearly from the Established Fact F7 that the Police made a component part of the Serb forces that systematically ransacked or burnt down Muslim houses and apartments and rounded up or captured Muslim villagers. That is why the argument of the Defense that the Accused had no knowledge of the attack and that his acts could not be made a part of the attack is unfounded. All the acts that the Accused was charged with and that the Panel concluded he was guilty of happened at the time of the widespread and systematic attack of which the police force was a part, as indicated above.

The Defense stated in the closing argument that the Accused did not have the intent to discriminate against anyone in any way or that he did not have any negative sentiment against any ethnic group in Bosnia and Herzegovina.

The Panel notes that discriminatory intent as an essential element in the context of crimes against humanity is necessary only in case of persecution, in accordance with the Criminal Code of B-H and the ICTY jurisprudence. For example, it was determined in the Judgment against *Kordić and Čerkez* that discriminatory intent is an indispensable legal ingredient of the offense only with regard to those crimes for which this is expressly required, that is, for various types of persecution.¹³

¹³ *Kordić and Čerkez* Trial Judgment, para. 186.

Based on the foregoing, the Court determined that the Accused knew of the widespread and systematic attack against the non-Serb civilian population and his acts were a part of that attack, whereby all essential elements of the Crimes against Humanity have been met.

D. Underlying Criminal Offenses

Finally, it is necessary to determine whether the Accused committed the criminal acts he is charged with in the Indictment, that is, the individual offenses as part of Crimes against Humanity, defined in Count 1(a) and 1(b) – rape, and Count 2 – imprisonment or other severe deprivation of liberty in violation of fundamental rules of international humanitarian law.

1. Elements of Crimes

a. Sexual Violence ("Rape")

Sexual violence, as a crime against humanity criminalized by Article 172(1)(g) of the CC B-H, requires proof of the following elements:

- 1) sexual intercourse or an equivalent sexual act ("rape"), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- 2) coerced by force or by threat of immediate attack upon the life or limb of the victim, or the life or limb of a person close to the victim.

As Article 172(1)(g) makes clear, "sexual intercourse or an equivalent sexual act" is a more accurate description of criminal acts referred to by the more commonly-used term "rape".¹⁴

Sexual intercourse or an equivalent sexual act consists of the invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim with a sexual organ, or any part of the body of the perpetrator with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body.¹⁵

"Coercion" as the second element of the crime of sexual violence is understood as the absence of voluntary consent.¹⁶ "Coercion" is considered to be proven when it is shown

¹⁴ Although the jurisprudence of both national and international criminal justice systems makes clear that the crime of "rape" applies more broadly than to sexual intercourse alone, the phrase "sexual intercourse or an equivalent sexual act" explicitly confirms this broader understanding of rape and more accurately describes the criminal act. Similarly, the formulation of the crime of "sexual violence" in the CC B-H, reflecting the definition of the crime in the Rome Statute, explicitly confirms that all serious acts of sexual violence constitute crimes against humanity.

¹⁵ *Elements of Crimes to the Rome Statute*, Article 7(1)(g)-1(1). The definition of "rape" provided in the jurisprudence of the *ad hoc* Tribunals is a more restrictive and less accurate description of the *actus reus* of the crime. See, e.g., *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 460; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, IT-96-23-A and IT-96-23/1-A, Judgment, 12 June 2002, paras. 127-128.

¹⁶ See *Kunarac* Trial Judgment, para. 460 (defining the element of coercion as when "sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."). See also *Kunarac*

that "[t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."¹⁷

The required *mens rea* for the crime of sexual violence is the intent to commit the act of sexual violence with the knowledge that the act occurs without the consent of the victim.

b. Imprisonment

Article 172(1)(e) of the CC B-H criminalizes "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" as a crime against humanity. Accordingly, the elements of the crime of imprisonment in violation of Article 172(1)(e) of the CC B-H are:

- 1) imprisonment or other severe deprivation of physical liberty; and
- 2) in violation of fundamental rules of international law.¹⁸

The *mens rea* necessary for this crime is the intent to deprive the victim arbitrarily of physical liberty or in the reasonable knowledge that the act is likely to cause arbitrary deprivation of physical liberty.¹⁹

Imprisonment or internment is the most severe form of deprivation of physical liberty.²⁰

The fundamental rules of international law to which the second element refers are the international legal norms established in customary and conventional humanitarian and human rights law, including: Articles 42 and 43 of the Fourth Geneva Convention, Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Those norms are violated when a person, regardless of the existence of a state of conflict, is arbitrarily deprived of his or her liberty. Arbitrary deprivation depends on a case by case analysis, but includes imprisonment without a basis established by law.

International humanitarian law, as expressed in the Fourth Geneva Convention, recognizes that the detention of civilians may be necessary during time of war, but places strict substantive and procedural limitations on such confinement of civilians.²¹ Article 42

Appeal Judgment, paras. 127-133 (upholding the conclusion that coercion equals the absence of voluntary consent and commenting, "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.").

¹⁷ *Elements of Crimes to the Rome Statute*, Article 7(1)(g)-1(2); *Commentaries on the Criminal Codes in Bosnia and Herzegovina*, p. 555.

¹⁸ See *Mitar Rašević and Savo Todović*, X-KR/06/275 (Court of B-H), First Instance Verdict, 28 February 2008, p. 66.

¹⁹ See *Rašević and Todović* First Instance Verdict, p. 66; *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 115.

²⁰ See, e.g., ICRC Commentary to Fourth Geneva Convention, Art. 31.

²¹ The following analysis should not be read as implying that the Fourth Geneva Convention is directly applicable to crimes against humanity. Indeed, as the *Krnojelac* Trial Chamber concluded, "as a crime against humanity, the definition of imprisonment is not restricted by the grave breaches provisions of the Geneva

provides that protected persons may only be detained or interned where "the security of the Detaining Power makes it *absolutely necessary*." (emphasis added). Article 43 details the minimum procedural guarantees such protected persons are entitled to if detained: "Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision, if circumstances permit." The conditions specified by the Fourth Geneva Convention cannot be satisfied by simply showing that the protected person is a national of or aligned with the enemy party.²² To the contrary, "It is perfectly clear from the provisions of Geneva Convention IV... that there is no such blanket power to detain the entire civilian population of a party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the State."²³ Similarly, that an individual is a male of military age is not sufficient, alone, to justify detention.²⁴

As to international human rights law, Article 9 of the UDHR states: "No one shall be subjected to arbitrary arrest, detention or exile." Article 9 of the ICCPR similarly states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." In addition, subparagraphs 2 and 4 detail important procedural aspects of this guarantee: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. ... Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 5 of the ECHR similarly prohibits the deprivation of liberty except in specifically detailed circumstances "in accordance with a procedure prescribed by law," and enumerates a number of critical procedural guarantees.

On the basis of these provisions, the Trial Chamber in *Kordić* concluded that imprisonment as a crime against humanity should be defined as "*arbitrary imprisonment*, that is to say, the deprivation of liberty of the individual without due process of law."²⁵ Considering the requirements of due process of law, the Trial Chamber in *Krnjelac* concluded that "a deprivation of an individual's liberty is arbitrary, and therefore unlawful, if no legal basis can be called upon to justify the initial deprivation of liberty."²⁶

Conventions." Rather, the Geneva Conventions and other instruments of international humanitarian and international human rights law are used to elucidate the concept of "fundamental rules of international law" referred to in the definition of the crime of imprisonment. For a similar analysis, see *Krnjelac* Trial Judgment, paras. 110-115.

²² *Prosecutor v. Zejnil Delalić, et. al* ("*Čelebići*"), IT-96-21-T, Judgment, 16 November 1998, para. 577.

²³ *Prosecutor v. Zejnil Delalić, et. al* ("*Čelebići*"), IT-96-21-A, Judgment, 20 February 2001, para. 327. See also ICRC Commentary to the Fourth Geneva Convention, Art. 42 ("To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.").

²⁴ *Čelebići* Trial Judgment, para. 577.

²⁵ *Kordić and Čerkez* Trial Judgment, para. 302.

²⁶ *Krnjelac* Trial Judgment, para. 114.

The Panel agrees that imprisonment as a crime against humanity includes, at a minimum, imprisonment or other severe deprivation of liberty without legal justification. The rules of international humanitarian and human rights law detailed above are clear that imprisonment or deprivation of liberty may only be imposed upon grounds established by law. The absence of legal grounds to justify the imprisonment or severe deprivation of liberty may be established by the totality of the circumstances, including the indiscriminateness of a pattern of deprivation of liberty, the absence of indications of individualized reasons for the deprivation of liberty and consideration of the apparent grounds upon which the persons were in fact deprived of liberty.²⁷ The Panel also considers that the absence of legal grounds justifying the deprivation of liberty can be established through evidence that the procedural safeguards described above were violated. Evidence that persons deprived of liberty were not informed of the reasons for their detention or that the justification for detention was not considered in court proceedings can, in context, circumstantially demonstrate that the detention was not, in fact, instituted on legal grounds.

2. Findings and Conclusions

a. Count 1(a) – the rape of witness Munira Hodžić

Having reviewed all presented evidence, the Panel concludes that the Prosecutor proved beyond reasonable doubt that, as alleged in the Indictment, the Accused Miodrag Nikačević coerced Munira Hodžić to sexual intercourse, thereby perpetrating the crime of sexual violence and rape pursuant to Article 172(1)(g) of the CC B-H. The Panel concludes that the Accused had sexual intercourse with the victim, thereby penetrating her body with a sexual organ. The Panel further concludes that the Accused used physical force, threat of violence, psychological oppression, and a coercive environment to coerce the victim to sexual intercourse, and that the victim did not freely and voluntarily consent to sexual intercourse. The Panel finally concludes that the Accused intended to have sexual intercourse with the victim and that he had sexual intercourse with the victim in full knowledge that the victim did not freely and voluntarily consent.

In reaching these conclusions, the Panel relied on the credible testimony of the victim as corroborated by the testimonies of other witnesses. In particular, as the victim was the only witness to the rape itself, the Panel carefully analyzed the testimonies of other witnesses regarding the circumstances before and after the incident. The Panel concludes that the testimonies of witnesses Fatima Dervišević, Almira Čelegija, Jasmina Fazlić, and Emira Smajkan credibly and consistently described the circumstances in which the Accused took the victim away and the serious behavioral changes the victim evidenced following her return and afterwards. The Panel also considered that the testimony of Dr. Senadin Ljubović strongly corroborated the victim's testimony. The Panel, while recognizing the variety of responses rape victims may have,²⁸ concludes that this evidence established that

²⁷ See, e.g., *Kordić and Čerkez* Trial Judgment, para. 800; *Krnojelac* Trial Judgment, para. 118.

²⁸ For an example of a different response to sexual violence, see generally De Fabrique, N. et al "Understanding Stockholm syndrome," (July 1, 2007) *The FBI Law Enforcement Bulletin*. The Panel refers to this article to show that there are different possible responses by sexual violence victims and does not make a correlation or conclude that the victims in this case had Stockholm syndrome.

the victim's testimony was credible, and that the evidence proved the allegation beyond reasonable doubt.

Furthermore, in assessing whether the victim could freely and voluntarily consent to sexual intercourse, the Panel considered all circumstances, including the Accused's acts prior to the incident, his behavior during the incident itself, and the general context of events in Foča at the time. While recognizing that certain facts, when viewed in isolation, are subject to multiple interpretations, the Panel concludes that it was proven beyond reasonable doubt that the victim could not and did not freely and voluntarily consent to sexual intercourse. In particular, the Panel concludes that the Accused, through his actions, created an atmosphere of extreme violence, fear, and psychological oppression, and further that he took advantage of a violent and coercive environment, to break the victim's will. The Panel further concludes that the Accused also used physical force during the rape itself. Accordingly, the Panel concludes that it was proven beyond doubt that the Accused coerced the victim to sexual intercourse and that the victim did not freely and voluntarily consent.

Finally, in determining the Accused's *mens rea*, the Panel relied primarily on the Accused's acts and behavior before and during the incident. In particular, the Panel considered that the Accused intentionally described to the victim the horrific rapes and violence occurring in Foča at the time, knowing that the victim would not consent to sexual intercourse, but using fear and psychological oppression to coerce the victim. The Panel further considered the Accused's use of physical force during the rape. Accordingly, the Panel concludes beyond reasonable doubt that the Accused intended to have sexual intercourse in the full knowledge that the victim did not freely and voluntarily consent.

In the case of sexual assault the Panel must evaluate the credible evidence initially from the perspective of the woman who was raped. In this case, Munira Hodžić stated in her evidence at the main trial that before the war and at the time the conflict in Foča broke out, she lived in her apartment with her daughter. When the conflict broke out she had one major concern -- the safety of her only child, her daughter. Munira was divorced and self supporting. Her father was a prominent member of the SDA political party. She had good friends, and like other Muslims at the time, she had many Serb friends. The Accused Miodrag Nikačević lived in the building where she lived, at the entrance number next to her entrance number. She had known the Accused before the war by sight, but had not had any contact with him. One of her last clear memories of him prior to the war was him listening loudly to Serb nationalistic music in his car parked in front of the bus station. On 8 April 1992, when the armed conflict broke out in Foča, the fear began.²⁹ Roadblocks were set up throughout the town.³⁰ The established facts tell the story. It took about a week for the Serb forces to secure Foča town and about ten more days for them to be in complete control of Foča municipality.³¹ Of course, even before the armed conflict had started, Muslim civilians had been removed from their social and professional lives, their salaries remained unpaid or they were told that their services were no longer needed.³² Following the outbreak of the

²⁹ Established Fact F1.

³⁰ Established Fact F21.

³¹ Established Fact F2.

³² Established Fact F3.

armed conflict, complete ostracism of Muslims soon followed with their freedom to move about and to gather critically curtailed.³³

The SDS political propaganda grew more aggressive, and the outbursts of violence and house-burning more frequent.³⁴

All this was done in full view, in complete knowledge and sometimes with the direct involvement of the local authorities, particularly the police forces.³⁵ All traces of Muslim presence and culture were wiped out of the area of Foča.³⁶ Eventually, all the mosques of Foča were destroyed.³⁷ It was in this environment that the women living in the apartment building in front of the Foča Ministry of the Interior gathered together for safety and solace.

According to Munira Hodžić, some shells were initially fired on 7 April but nevertheless she went to her place of business. By the evening of 8 April, the shelling really began and she went with her neighbors to the basement of their apartment building. Many Serb families having earlier notice of the attack had already left. Some Serb families remained and she turned to them for help. By the fourth day she heard that Arkan's group, the White Eagles, had moved into town. Both military and paramilitary formations started searching the apartments looking for weapons, so out of fear, she moved together with her daughter to the apartment of her neighbor Fatima Dervišević. Fatima Dervišević lived on the same floor as the Accused Miodrag Nikačević, who was a subtenant in one of the apartments there. She was able to get to Fatima's apartment through a basement tunnel which connected the two parts of the building. Fatima lived in the apartment together with her daughter and a minor son. Her husband and older son (both being of military age) had already fled. Munira spent approximately 7-10 days there. The facts relative to the time and manner in which Munira Hodžić and her daughter moved to Fatima Dervišević's apartment were also confirmed in the statements of witnesses Fatima Dervišević and Almira Čelegija.

Although the Court noticed some inconsistencies in these witnesses' respective statements regarding the issue of who took Munira through the basement to Fatima's apartment, the Court considered these inconsistencies to be irrelevant for the case and that they did not undermine these witnesses' credibility.

Witness Munira Hodžić stated that the first night upon her arrival in Fatima Dervišević's apartment, the Accused, armed and in uniform, came. The witness stated that in that period she always saw the Accused in uniform and armed, which was also confirmed by witnesses Fatima Dervišević, Almira Čelegija and Emira Smajkan. According to Munira, on that occasion the Accused talked about the paramilitary units' activities in the Foča municipality. He told them some women had been raped. This is a comment indicating that the rapes were part of an organized attack on the women in that area.³⁸ In a further cruelty he told them he heard that two girls had been raped and that apartments were being searched and looted. The Accused characterized this as providing helpful information to the women. He

³³ Established Fact F5.

³⁴ Established Fact F6.

³⁵ Established Fact F10.

³⁶ Established Fact F11.

³⁷ Established Fact F12.

³⁸ Established Fact F8 and F9.

indicated this was for their safety. The apartment is filled with women and children. They have little or no means to protect themselves. Their lives have been uprooted and destroyed overnight. They are responsible for young children. The armed conflict had quickly destroyed trust among neighbors. Their neighbor, the Accused, a police officer, who should represent trust and security, comes to the apartment. They are not in a position to turn him away and he informs them the rapes have started. All four of these witnesses tell the same story. The Accused used fear and intimidation cloaked as protection to control these women.³⁹ After this first interaction, he asked Munira to go with him to her apartment so that he could allegedly take her household appliances in order to save them from potential pillaging. She said that she did not want to go with him, especially after the story he had told them. She offered him the keys, but the Accused insisted she should go with him. Having no choice, she went with him to her apartment. The witness averred that they went to the apartment through the basement, that he did not physically harm her and that he only once pushed her slightly so that she would hurry. The witness described in detail in her evidence the very act of rape, which conforms to the description of facts in the Indictment, that is, all the circumstances related to the rape, from the use of force by the Accused to the penetration of the victims' body.

After that event the witness returned to Fatima's apartment, but did not tell anyone about the event, she only cried. She was afraid that if she specifically told anyone about what happened to her, Fatima Dervišević might throw her out of the apartment. Rape apparently at this time still carrying an undeserved stigma on the victim, Munira testified to her humiliation and she still feels a great shame. However, when she returned to the apartment there was also no real need to talk about it, because, as Munira explained, it was "known and sensed". Nothing more needed to be said.

The witness stated that she used to see the Accused after that event as he would come to Fatima's apartment, but he never mentioned it and they never again had an opportunity to be in the room alone. It is interesting to note that this particular crime of rape could have achieved another objective. Munira is a strong woman living and supporting herself independently. She was clearly seen at the time as a leader. Given that generally rape is a crime of power, the attack on Munira clearly establishes the Accused as the dominant figure in the building. Indeed he is the man in control. Other witnesses corroborate her story and emphasize her role as the protector although no one actually felt protected. Instead the women only felt fear.

Witness Almira Čelegija stated in her evidence that she remembered the Accused taking Munira Hodžić to her apartment one night so that she would give him her household appliances. This witness confirmed that on that occasion he was armed and in uniform and that Munira was pleading with him not to go with him, but to give him the apartment keys only. After he took Munira away, she was absent for about an hour. When she returned she was crying, screaming, was absent-minded and asking Fatima Dervišević to take care of her daughter in case something happened to her. Fatima Dervišević also confirmed all this in her evidence, adding that upon her return Munira said that they were finished and that there

³⁹ In fact the Panel is aware that both witnesses testified to seeking protection assistance from the Accused when paramilitaries entered the building looking for women. This behavior is not inconsistent with them being assaulted by the Accused but instead they were choosing to survive by seeking the Accused's protection assistance from the paramilitaries.

was no room for them any longer. Indeed her life as she knew it was over. As Munira said, this killed everything in her.

Witness Emira Smajkan also said in her evidence that Munira Hodžić asked her not to leave her alone if the Accused or someone else would come. She said that Munira's behavior changed when the Accused would come and that she was disturbed. Munira would change colors, talk fast and indicate she wanted Emira to stay. Witness Jasmina Fazlić also stated in her evidence that whenever Miodrag Nikačević was mentioned Munira would make a grimace "as if she wanted to say something but could not".

With respect to the exact date of the relevant event, the witness-victim said that she went to Fatima's apartment a couple of days following the start of the shelling of Foča and that the Accused took her away the first night upon her arrival to Fatima's apartment. Witness Fatima Dervišević stated that Munira Hodžić came to her place around 10 April 1992 and stayed for 5-10 days and that Nikačević came to take Munira one night while Munira was staying in her apartment. Witness Almira Čelegija also stated in her evidence that the Accused took Munira away in April, a couple of days after the start of the shelling, on 9 or 10 or 11 April 1992.

The Court did not determine the exact date of Munira Hodžić's rape, but exact dates do not have to be determined beyond reasonable doubt given the context of the widespread and systematic attack occurring at the time of the offense. The Court notes that there are certain discrepancies between Munira Hodžić's testimony and the respective testimonies of Almira Čelegija and Fatima Dervišević concerning the manner in which Munira was taken to her apartment by the Accused and the weapon the Accused had. Witnesses Fatima Dervišević and Almira Čelegija stated that the Accused took Munira Hodžić by her shoulders and out of Fatima Dervišević's apartment. However, witness Munira Hodžić stated that the Accused did not use force to make her move, but insisted verbally that she went with him and that the story he had told previously instilled fear in her. The Panel considers these inconsistencies to be minor and not discrediting her or the substance of her testimony that the Accused Miodrag Nikačević raped her.

The Panel is satisfied that witness Munira Hodžić had to go with him since, as she stated, he instilled in her enough fear so that she could not say no. The Panel reached this conclusion on the basis of the circumstances reigning at that moment and these circumstances undoubtedly lead to the conclusion that the Accused took advantage of the general events in Foča. It is not necessary to conclude if the Accused knew he was participating in a general plan to use rape as a weapon of war against the Muslim women of Foča. It is not relevant whether he used actual physical force or he accomplished this in another indirect way. Furthermore, it is not necessary for the Panel to determine if these crimes were part of a general plan against the women in Foča or isolated opportunistic rapes committed simply because the Accused knew there was no one to hold him accountable and they could be carried out with ease. At that time the Accused was the only Serb man at that entrance number. Moreover, he was constantly in camouflage uniform and armed. With respect to the weapon the Accused had, witness-victim Munira Hodžić stated that the Accused had a rifle, a pistol, and that she assumed he had a knife, as, according to her, everybody carried one. Witness Almira Čelegija stated that the Accused had a rifle, a knife and a hand grenade, but could not remember if he had a pistol. It follows from the aforesaid that the

Accused was armed at the relevant time. Furthermore, he gave the account of the events unfolding in Foča at the time to all the women that were at that entrance number at the time, including Fatima Dervišević, Munira Hodžić and Almira Čelegija, which instilled fear in all the women since they were alone and unprotected. Also, just before taking Munira away, the Accused told them that some minor girls had been raped. Given that Munira testified to the great fear she had for her daughter's safety, it is clear she would do anything to protect her. This in no way implies consent. Although the Accused did not use physical force, he did say several times that the witness had to go with him, not leaving her any choice. It is also important to note, as follows from witness Munira Hodžić's statement, that the Accused pushed her in the basement so that she should continue walking after she had again offered him the apartment keys. All this indicates that the witness did not have any choice at that moment either and that she was forced to continue walking toward her apartment together with the Accused. Nor did she have a choice when he forced her in the bathroom at her apartment so no-one would hear her cries.

The Panel is also aware, as stated earlier, that only the witness-victim testified about the act of rape, because she was alone with the Accused in the room at the time of the event the Accused is charged with. For this reason, the Panel reviewed particularly carefully the testimony of the Prosecution witness before accepting it as the basis for reaching the conclusion on guilt. In doing so, the Panel also took into account the ICTY jurisprudence pursuant to Article 96 of the Statute stipulating that no corroboration of the victim's testimony shall be required when a rape victim gives evidence.

With respect to the use of force, that is, direct assault on the limb of the victim during the act of rape, it is obvious from the victim's testimony that it indeed occurred. That is to say, the Accused grabbed the victim and undressed her forcefully while she was begging him to stop it. He penetrated her as he was cursing God. It is clearly visible from the victim's evidence that the assault was carried out with the use of force. The Accused took advantage of the violent environment. This act must be viewed in the context of the situation prevailing in the town of Foča at the time, the position of the Accused as a soldier and the position of the victim as a Muslim woman in that period. The Panel is convinced that the testimony of the witness-victim is truthful, because witness Munira Hodžić testified about having been raped by the Accused clearly, categorically and in detail. The Panel took into account the fact that the act of rape left her with grave consequences. Munira confirmed in her evidence that the Accused did not beat her while raping her and that she did not sustain any visible consequences on her body, which leads to the conclusion that she did not add anything in her testimony. Her statement is consistent with the statements of witnesses Almira Čelegija, Fatima Dervišević, Emira Smajkan and Jasmina Fazlić concerning the important facts that happened prior to the act of rape, as well as Munira Hodžić's behavior following the rape, that is, following her return from the apartment. Given all these factors, including close observation of the witness and the Accused while they each testified, the Panel finds Munira's testimony to be credible.

When rendering the decision the Court also considered the forensic psychiatric report by Dr. Senadin Ljubović, expert witness in psychiatry. It should be noted here that the opinion of an expert in some field must not relate to the very testimony of an injured party, that is, a witness, which only the Court has the competence for evaluating, but must solely be related to the personality of the injured party. The Court took into account his analysis of the effect

of a forced sexual act committed against the victim by the Accused Miodrag Nikačević on her personality, sexuality and general life sexuality.

Finally, the Court determined that the expert witness provided an objective analysis of Munira Hodžić, stressing that the examination of the victim was marked by stormy and painful emotional reactions. The expert witness states that only the victim's outer shell is preserved, while the rest of her personality is destroyed. The expert witness also notes that, in addition to a series of psychological problems, the victim continually feels diverse physical difficulties. In the end of the analysis, the expert witness concludes that a ... and ... registered with the victim, and that the said psychopathology is manifested in numerous mental sufferings, such as repeated re-living of the traumatic events, loss of will and interests, concentration difficulties, numb emotional reactions, permanent feeling of bitterness and exasperation and the severely impaired ability to function. In the end, the expert witness notes that her sexuality has been completely destroyed following the rape and that she feels disgust and repulsiveness for it. During his oral presentation of his finding and opinion, the expert witness also said that change of personality was characteristic of rape victims.

The Court did not accept the argument of the Accused that he was not present in Foča in the relevant time, that is, in the building where he lived. The Accused stated that he went together with his wife outside Foča, to his mother-in-law's, and that he stayed there from 6 April 1992 to 25 April 1992, when he had to report to the station for the reasons indicated in the part of the Verdict explaining the Accused's knowledge of the attack. It is clear from the material evidence that the Accused was a participant of the war at the relevant time, and also the witnesses Fatima Dervišević, Almira Čelegija and Munira Hodžić stated in their respective testimonies that in the first days following the start of the armed conflict they used to see the Accused in the building and confirmed that he was armed and in uniform and that he would come to Fatima Dervišević's apartment. That is to say, the timeframe that the Accused indicated in his evidence is the timeframe in which the rape of the injured party Munira Hodžić happened, hence the aim behind his evidence was to provide an alibi which the Court did not accept for the reasons stated above. The Court did not accept the Defense argument analyzing the position of witness-victim Munira Hodžić that she was not credible because she enjoyed a privileged position as she had good relations with the Police Chief, so she used to leave and return to Foča without hindrance crossing the border at the time of the armed conflict. This privileged position, if true, did not prevent her from being raped.

During her testimony, witness Munira Hodžić also talked about everything that she experienced in the period before forever leaving Foča on 13 August 1992, including her departure from and return to Foča. The Court will not elaborate on that part in detail as it is not relevant for the offense that the Accused is charged with. However, it is important to examine a claim made by the Defense. Munira was originally driven from Foča to Montenegro by the Accused. Another neighbor made arrangements with him to take Munira and her daughter away. The Defense raised this issue to undermine her credibility. Why after all would any reasonable woman go anywhere with her rapist? To ask this question points to the ignorance of this crime. Rape is a crime of power and there is no one way a reasonable woman responds to an unreasonable crime. This was a time of war and chaos. Munira was fundamentally a survivor. As such, the Panel viewed this situation differently.⁴⁰

⁴⁰ See generally fn. 27 regarding the complicated responses to sexual violence.

It is also interesting to note that Munira carried a pistol on this trip and perhaps that gave her a false sense of control.⁴¹ The Panel believes that the issues of the trip, the car and the pistol are all part of the will to survive and no more meaning than that should be attached to these details. The Court believes that witness Munira Hodžić's contacts with the Police Chief and her departure from and return to Foča were attempts to find a way to survive and protect her daughter. They can in no way cast a doubt on the issue of rape by the Accused. It cannot be said that her pre-war acquaintanceship with the Police Chief Dragan Gagović, as well as her departure from and return to Foča, shows a privileged position at that time that protected her from rape or fear. In other words, it is obvious from the testimonies of both the Prosecution and the Defense witnesses that she was constantly being sought by different military formations and in danger. Paramilitary groups were searching for the blond boss. This could have been due to her status as a divorced independent working woman or due to her father's status in politics. Defense witness Jadran Đuderija said he remembered that Munira Hodžić was constantly scared during the time and when many other Muslim women and children were hiding in the apartment of the Accused those last days with the help of the Accused's mother in law.

Likewise, witness Emira Smajkan stated that she, too, left Foča for one period and went to Goražde and that she returned to Foča again. It follows from the aforesaid that it was undoubtedly very difficult to leave Foča in the relevant time, but that some other women, in addition to Munira, also managed to do it nevertheless. It is not disputed that Munira did leave Foča in early May and returned around 13 May. It is clear that upon her return things got much worse for her as the situation continued to deteriorate. She explained about the reason for her return -- the police chief told her it was safe and she had few options left. She had tried to get help in Montenegro to no avail. From there she went to Trebinje, but it was not safe for her and her daughter to remain in Trebinje any longer. Most likely she was not yet ready to leave everything behind and become a refugee. She returned from Trebinje to Foča. However, her position changed upon her return. She became a target and she knew she must finally leave. Munira, like the remaining women in Foča who had not fled or were imprisoned, left on the last convoy out of Foča on 13 August for Montenegro. The evening before the convoy left the women in Munira's apartment building were gathered in the Accused's apartment under the protection of his mother-in-law. This woman along with the assistance of the male members of the family did keep all the women and children safe this last night so they could make it to the bus convoy.

Two remaining issues of the Defense also need to be examined. During the time of the conflict, before leaving Foča on 13 August, Munira managed to hide her daughter with her friend, Dragica. Dragica kept her daughter safe and Munira expressed gratitude for this. However, Munira did not tell her friend about the rape. Munira only confided in one person. This is consistent with her feelings of humiliation and shame. What is difficult here is that Dragica clearly feels that because she as a good friend was not told about the rape, that somehow for her means the rape did not occur. The Panel rejects this analysis as having no basis other than a good friend's hurt about being excluded from her friend's pain. It is natural that Dragica, who gave such great assistance to Munira, would feel hurt, but it is clear she does not understand that at some point Munira stopped trusting. On this point Munira's testimony is quite clear. The last remaining issue is the length of time before Munira reported the rape. In Munira's words, she waited until she could deal with it when

⁴¹ Ibid.

she was retired and her daughter had finished school. The point of time when a woman chooses to report is irrelevant to the question of whether a crime was committed. It is also irrelevant to issue of Munira's credibility. This, as in all the evidence, has to be put in the context of the war and its aftermath in B-H.

Based on the foregoing, the Court concluded that the acts of the Accused contain all essential elements of the criminal offense of rape in the context of Crimes against Humanity. In other words, as indicated earlier, the Accused, within the widespread and systematic attack, of which the Accused had knowledge, took the victim to her apartment forcefully, whereupon he used force and assaulted her, and penetrated her, all of these acts happening in the context of the widespread and systematic attack against the non-Serb civilians.

It can be clearly concluded from the presented evidence that the Accused's intent was for sexual penetration to happen and that he wanted it to happen and was aware that it was happening without the consent of the injured party. The Accused perpetrated the offense concerned with direct intent to perpetrate an act of rape, wanting the prohibited consequence, and with awareness that the act was happening without the consent of the victim.

b. Count 1(b) – the rape of witness Almira Čelegija

Having reviewed all presented evidence, the Panel concludes that the Prosecutor proved beyond reasonable doubt that, as alleged in the Indictment, the Accused Miodrag Nikačević coerced Almira Čelegija to sexual intercourse, thereby perpetrating the crime of sexual violence and rape pursuant to Article 172(1)(g) of the CC B-H. The Panel concludes that the Accused had sexual intercourse with the victim, thereby penetrating her body with a sexual organ. The Panel further concludes that the Accused used threat of violence, psychological oppression, and a coercive environment to coerce the victim to sexual intercourse, and that the victim did not freely and voluntarily consent to sexual intercourse. The Panel finally concludes that the Accused intended to have sexual intercourse with the victim and that he had sexual intercourse with the victim in full knowledge that the victim did not freely and voluntarily consent.

In reaching these conclusions, the Panel relied on the credible testimony of the victim as corroborated by the testimonies of other witnesses. In particular, as the victim was the only witness to the rape itself, the Panel carefully analyzed the testimonies of other witnesses regarding the circumstances before and after the incident. The Panel concludes that the testimonies of witnesses Fatima Dervišević and Munira Hodžić credibly and consistently described the circumstances prior to the incident, the circumstances in which the Accused insisted that the victim come to his apartment rather than her mother, the serious behavioral changes the victim evidenced following her return and afterwards, and other circumstances following the incident. Notably, the Panel considered the testimony that the victim returned to the apartment tense and with her hair cut to be strongly corroborative of the victim's description of the rape and her credible response to the rape. The Panel also considered that the testimony of Dr. Senadin Ljubović corroborated the victim's testimony. The Panel

concludes that this corroborative evidence established that the victim's testimony was credible, and that the evidence proved the allegation beyond reasonable doubt.

Furthermore, in assessing whether the victim could freely and voluntarily consent to sexual intercourse, the Panel considered all circumstances, including the Accused's acts prior to the incident, his behavior during the incident itself, and the general context of events in Foča at the time. The Panel concludes that it was proven beyond reasonable doubt that the victim could not and did not freely and voluntarily consent to sexual intercourse. In particular, the Panel concludes that the Accused, through his actions, created an atmosphere of extreme violence, fear, and psychological oppression, and further that he took advantage of a violent and coercive environment to break the victim's will. The Panel further concludes that the Accused threatened to force the victim's younger brother watch the rape if the victim did not acquiesce. Accordingly, the Panel concludes that it was proven beyond reasonable doubt that the Accused coerced the victim to sexual intercourse and that the victim did not freely and voluntarily consent.

Finally, in determining the Accused's *mens rea*, the Panel relied primarily on the Accused's acts and behavior before and during the incident. In particular, the Panel considered that the Accused intentionally described to the victim the horrific rapes and violence occurring in Foča at the time, knowing that the victim would not consent to sexual intercourse, but using fear and psychological oppression to coerce the victim. The Panel further considered the Accused's threat against the victim's brother as clear evidence of the Accused's knowledge. Accordingly, the Panel concludes beyond reasonable doubt that the Accused intended to have sexual intercourse in the full knowledge that the victim did not freely and voluntarily consent.

Witness-injured party Almira Čelegija, was 20 years old at the beginning of the conflict. She stated in her evidence that at the beginning of the war she lived with her mother and one younger brother at the same house number as the Accused, when her father and her older brother were forced to leave Foča. They were of military age and had to leave as did most of the other Muslim men at the time. The brother that remained behind was only 12 years old. The witness stated that the Accused first came to their apartment wearing a uniform. Although, the Accused came to say he would try to protect them as much as possible, the witness, like other witnesses, found his manner intimidating. The Accused talked about some young girls who had been raped and some having been taken away. In telling these stories he commanded authority over them by instilling fear in them. She also stressed that the *Partizan* camp was located across their building and that the Accused threatened them that they could be taken there and that the military would search their apartment, as they were suspected of having weapons since her father was in the military.

Early on in the conflict men came looking for weapons and took Almira to a room in her apartment and raped her. Her mother and brother were in the apartment and could only bear silent witness. That was the first time she was raped. The second time it was the Accused himself that was the rapist. Almira stated that the Accused's wife was pregnant at the relevant time and that in the periods of strong attacks in Foča or when the Accused would go to participate in the mop-up operations in the villages, he took his wife to his mother-in-law's place in Velečevo. However, when the wife returned Almira was expected to cook and

clean for her. At the time of her attack by the Accused, Almira was young and vulnerable. She in many ways was the opposite of Munira.

The witness stated in her evidence that the Accused made her clean his apartment, wash uniforms and make coffee when there were soldiers there. She stressed that the Accused always asked her to help him in the apartment when his wife was absent. Her mother always asked to go instead of her, but the Accused insisted that Almira should go to his apartment. Her mother said it was as if Almira was a slave. On one occasion, in June, when the Accused's wife was not in the apartment, he called her to clean the apartment insisting that she should go, not her mother. He raped her on that occasion. The witness states that the sexual violence took place on 15 or 16 June 1992. Witness Fatima Dervišević corroborated that the Accused Nikačević took the injured party Almira to his empty apartment mid-June. Witness Munira Hodžić said that it was some time in the period from 1 to 10 July that she heard from Almira that the Accused had raped her, which supports the conclusion that she was raped before 1 July.

The Court did not determine the exact date of the rape of victim Almira, but, as stated earlier, the exact date of a rape does not have to be established beyond reasonable doubt, given the time context of the widespread and systematic attack within which the criminal offense that the Accused is charged with happened.

The Court did not believe the testimony of the Accused, who gave his alibi for that period, stating that his wife returned to the apartment on 28 April 1992 and that she did not leave the apartment until the delivery on 21 July 1992.

It is beyond doubt that the Accused's wife gave birth to a child on 21 July 1992, which is visible from the material documentation provided by the Defense, such as the child's birth certificate and the hospital certificate. However, the Court did not find the Accused's statement to be credible in the part stating that his wife did not leave the apartment until the delivery. This fact was not corroborated in any way, and the Court accepted the fact that his wife left and returned several times in the period of shooting and when the Accused was engaged in the mop-up operations and assigned to the front line. Witnesses Fatima Dervišević, Munira Hodžić and Almira Čelegija testified about that, stating that the Accused took his wife out of the apartment when he would go to the mop-up operations in the villages or when there would be shooting, and witnesses Almira and Fatima also testified that they washed uniforms and did the cooking when the Accused was alone.

When rendering the decision, the Panel, as indicated earlier, evaluated this witness' statement with particular care, since she was the only witness testifying about the very act of rape. The witness described in detail the manner, time and circumstances of the rape by the Accused. It is clear from her evidence that the Accused forced her to go to his apartment. The victims' mother, Fatima Dervišević, also confirmed it in her evidence, stating that on one occasion ahead of his wife's delivery the Accused requested from Almira to come to his apartment to clean it up. She added that she pleaded with the Accused that she should go instead of her daughter, but that he insisted that the daughter should go with him. She heard a vacuum-cleaner after her daughter left. The witness also stated that Almira returned tense and with her hair cut off. Almira did not explain anything on that occasion. However, there were other women who were in the apartment at that time and they all

noticed that Almira had cut off her hair. It is also clear from the evidence of the witness-victim that the Accused, taking advantage of the violent environment, his power and his threat that he would bring the victim's brother so that the brother would be forced to undress her and watch, raped her in the manner described in the Indictment.

The Court believed this witness-victim, because she clearly and precisely described the act of sexual violence by the Accused. In favor of it is also the fact that she was a young girl at the relevant time and that the Accused had noticed her even before the war complimenting her on her looks. The witness stated that while raping her, the Accused told her he liked her hair. Immediately after the rape, the Accused told her to get up and finish cleaning the apartment. He left and Almira went into the child's room, took a pair of scissors she found there and cut off her hair. This is an act entirely consistent with a woman who had just been raped. Almira explained she cut her hair after the rape in order to punish herself and become unattractive, as she stated in her evidence. It should be noted that the victim got pregnant after this rape. She stated in her evidence that, after the first rape, she had her menstruation in May, but that she did not have menstruation in July following the rape by Nikačević. The circumstances surrounding her pregnancy and abortion were fully confirmed by witness Munira Hodžić, who was the only one who knew what had happened to her and who helped her undergo a curettage in a private hospital in Novi Pazar. However, none of the events surrounding the abortion have any relevance to the crime itself.⁴²

When evaluating the testimony of the witness-victim the Court took into account the finding and opinion of expert witness, Dr. Senadin Ljubović, whose finding the Court considered to be an objective one, given the fact that he was an expert witness with a long-standing practice and that he was an expert witness who had been the first one to conduct expert analysis of rape victims, some 1,000 of them.

In his report, the expert witness offered his conclusion and opinion on the effect of the rape, that is, sexual assault against the victim Almira Čelegija by the Accused. The expert witness stated in his report that what the victim was most affected by was the fact that she was being blackmailed that the Accused would bring her younger brother to watch the Accused having sex with her. He also stated that, although she was not raped by the Accused only, this rape was especially traumatic, because the Accused was her next-door neighbor, threats were made on her brother and she had the additional trauma of pregnancy and subsequent abortion. The expert witness concluded that there was no doubt that a pronounced psychopathology was manifested with the victim and that the rapes she was subjected to had caused the most severe stress and significant harm. The psychological consequences are manifested as numb emotional reactions. Her general ability to function has been severely impaired so that she just manages to perform the basic living functions. Her sexuality has been drastically damaged and she regards sexual intercourse as an agonizing duty and inner coercion and she often feels disgust during sexual intercourse. She often feels remorse after such behavior on her part. The expert witness also stressed that although the victim was married for seven years, she could not conceive, but that the reason was of psychological, not biological, nature.

⁴² Defense seems to imply that she is not credible as the circumstances around the abortion are not entirely clear. Given the trauma, humiliation and stigma around the issue of abortion these inconsistencies and confusion were not serious considerations for the Panel.

Also, the expert witness for the Defense, neuropsychiatrist Danilo Mihajlović, whom the Defense hired to give his opinion in relation to Dr. Senadin Ljubović's forensic psychiatric reports about both victims, stressed at the main trial that it was the attending physician who could give the most relevant finding about a victim.

The Court fully believed both witnesses-victims. The fact that both witnesses testified in the courtroom directly before the Trial Panel and in the presence of the Defense Counsel for the Accused should be particularly taken into account. Certain inconsistencies in the witnesses' respective statements are a result of the circumstances in which the statements were being taken or, generally speaking, are conditioned by the usual psychological factors connected to perception and reminiscing, especially given the character of the criminal acts that the Accused is charged with (forcing another to sexual intercourse, that is, rape).

It can be clearly concluded from the adduced evidence that sexual penetration was indeed the Accused's intent and that he wanted it to happen and was aware that it was happening without the consent of the injured parties as victims.

The Panel notes that, when rendering a decision whether to believe the witnesses-victims, it also took into account the general events in Foča at the time.

It is a commonly known fact that the situation in Foča at the relevant time was chaotic. That is to say, when the testimonies of these witnesses, as well as of the other witnesses who testified in the case, are placed in the time and the place of the events, it can be concluded that the witnesses' perception of what was happening to other people was reduced as they all focused on their own survival, saving their bare lives and the lives of their closest family members, hence many dates or events have been either forgotten or mistaken for another.

The Panel concludes that the statements of the witnesses-victims and the other Prosecution witnesses were completely mutually equivalent and consistent with respect to their fundamental and important elements and that few different interpretations of certain facts do not challenge the authenticity and credibility of the statements, given the fact that deviations are normal in the witnesses' psychological processes and that they do not relate to a single key fact.

Also, when rendering the decision, the Court took into account the arguments and the evidence by the Defense for the Accused which focused on challenging the credibility of both witnesses – victims during the evidentiary procedure.

The Defense primarily stressed during the main trial and in its closing argument the fact that both witnesses–victims reported the rapes after an extremely long period of time to the *Women Victims of War* non-governmental organization and that their motive was of financial nature. There was no credible evidence submitted on this point. The Defense also stressed the fact that the witnesses did not talk about it at the time it allegedly happened to them.

The arguments of the Defense are unfounded. That is to say, the Court stresses the fact that a large number of women who are rape victims decide to remain silent for their whole lives, not just a certain period in life. One should primarily take into account the environment and

the mentality in the area from which the witnesses come. At the time the rapes of the victims were committed in Foča, all Bosniak women feared for their lives. The majority of them were detained either in camps or their apartments, the latter being the case here. This was also confirmed beyond doubt by the facts established by the ICTY and accepted by this Panel.⁴³ The Prosecution witnesses stated that they were prohibited from moving around, communicating with one another and even watching through the window. In that situation, in everyday fear for their own and the lives of their closest of kin, unprotected, these women kept quiet and did not talk about the rape. Witness Munira Hodžić stated that they did not even talk about it among themselves, but that it was known and sensed. They also feared reaction of the community, their families, husbands, relatives and friends. The witness-victim Munira Hodžić said that she did not say anything about the rape to Fatima believing that Fatima would throw her out of her apartment. She also did not even mention it to her friend Dragica Milutinović, at whose place she would hide her daughter. It is obvious from the testimony of witness Munira Hodžić why she did not initially tell anyone about the rape, the reason being the fear for her own daughter.

There is also perhaps another reason. It can be argued that the Accused's mother-in-law rendered all the women in this apartment building great assistance. Perhaps out of respect for her they kept quiet. However, it is clear that keeping silent was no longer an option for either woman as the damage caused by the sexual violence would not heal. Fatima said years later her daughter could not sleep, she was nervous and finally seeking relief she contacted the women's organization. Victims of sexual violence often feel guilty for what happened to them. This follows from the testimony of witness Almira Čelegija, who cut her hair after the rape in order to punish herself and to make herself as unattractive as possible.⁴⁴ Both witnesses did not tell anyone about it even after the end of the war, which the Defense considers the reason to doubt the credibility of the witnesses' statements. Again the Panel finds this position to have no substance.

However, it is obvious from the adduced evidence that both witnesses suffered a psychological torture and that both avoided talking about it for a long time after the war, as they feared the reactions of their environment. The witness-victim Munira Hodžić stated that the reason why she did not report the rape was the fact that she was employed and that her daughter was in school. These are common responses to being raped.

Witness Almira Čelegija stated that she could no longer bear the psychological pressure and that, after having been granted support by her mother and Munira, she told her story to the organization after which she felt relief.

Defense witness Dr. Danilo Mihajlović also said that many women never report rape and that some are helped by friends to overcome the difficulties. It is also obvious with both witnesses that they reported the rapes after they had felt some kind of security and support. That is why their reporting of the rapes 15 years later can in no way challenge the credibility of their testimonies.

⁴³ Established Facts F8, F9, and F10.

⁴⁴ The Panel recognizes that there is a common misunderstanding about sexual violence that shows even victims hold the same misconceptions as this crime has little to do with a woman's physical appearance.

In order to prove that the testimony of witness Almira Čelegija was not credible the Defense presented a certificate on the victim's bad behavior in the school and the Court considers this exhibit to be irrelevant for this case. This fact concerns the period before the wartime events and has no connection to the case at hand. The Court emphasizes that in cases of sexual violence the previous sex life of an injured party is not relevant and cannot be taken into account, hence it is logical that the injured party's pre-war behavior in school is also irrelevant.

The Defense also pointed at the inconsistencies in the witnesses' respective testimonies regarding the identity of the doctor who performed the abortion surgery on victim Almira. The Court also observed certain discrepancies in this respect, but the issue was clarified in the course of the evidentiary procedure. The victim Almira Čelegija's abortion is not an issue relevant for the description of facts in the Indictment, but it is relevant for the issue of credibility of these witnesses. That is to say, it is clear from the testimony of the witness-victim Munira Hodžić that there was a confusion regarding the doctor's last name during her evidence.

Although witness Munira Hodžić gave the name of Dr. Zatrić as the doctor who did the abortion in her evidence at the main trial, she also clearly stated that the abortion was performed by a doctor who opened a practice in Sarajevo after the war. After she testified for the second time, the witness clearly stated that she first met Dr. Zatrić following the recommendation of a family from Novi Pazar. After that, Dr. Zatrić recommended his colleague Dr. Aščerić to her. The witness also stated that she mentioned Dr. Zatrić's name to Almira, not Aščerić's, as Zatrić's was the only name she remembered. Witness Almira Čelegija also confirmed this in her evidence, stating that Munira told her they were going to Dr. Zatrić's and she no longer inquired because her only goal was to have the abortion. She also stated that she did not see the doctor's face because he wore a mask. Dr. Aščerić confirmed all this in his evidence and confirmed that he had a private practice in Novi Pazar where women from Eastern Bosnia were examined and where abortions were performed, but he could not remember Almira Čelegija's abortion, as he did not possess valid documentation given that much of his documentation was stolen or destroyed. Some documentation was also handed over to international organizations for use. After the war he opened a private practice in Sarajevo. The fact that it was a case of mistake concerning the last name made by witness Munira Hodžić at the main trial is also clear from these witnesses' reaction after the first testimony, when they went to Dr. Aščerić's practice in Sarajevo and requested the medical documentation about the abortion from him after witness Munira had remembered his last name.

Based on the foregoing, the Court determined beyond doubt that the Accused Miodrag Nikačević committed the criminal acts referred to in Count 1(a) and 1(b) of the Indictment.

c. Count 2: Imprisonment of Rasim Klapuh

Count 2 of the Indictment charges the Accused with the criminal offense of imprisonment in violation of fundamental rules of international law, referred to in Article 172(1)(e) of the CC B-H. The Court concludes that the Accused is criminally liable as an aider and abettor to the commission of this criminal offense.

The Court considers that this charge has been proven on the basis of the evidence given by witnesses Ešrefa Divijan, Šefik Divijan, Fikreta Maslo, Defense witnesses Momir Čančar, Ljuban Vuković, Zdravko Matović, and partially of the Accused himself. The Accused testified as a witness on the circumstances of this charge.

It is indisputable that on 2 August 1992, the Accused, as the leader of a patrol group, together with Momir Čančar and Miroslav Pjano, received a task to apprehend Rasim Klapuh for interrogation. The reason for the apprehension was the existence of a suspicion that the said individual participated in laying ambushes in which a certain number of people got killed. Witness Momir Čančar confirmed all this in his evidence. It is also beyond doubt that the Accused received a verbal order for apprehension from the then Police Chief Dragan Gagović. Defense witness Zdravko Matović, who was a duty officer in the Police Station that day, confirmed this in his evidence.

Although there are certain inconsistencies in the respective testimonies of both the Prosecution and the Defense witnesses and the Accused himself regarding the events at the meadow where the victim was found and in his house, and the number of the policemen who were on patrol, the very act of arresting the victim Rasim Klapuh is not disputable, given the fact that the Accused described clearly and categorically in his evidence all the circumstances of that occasion, and all that was confirmed by Prosecution witnesses Šefik Divijan, Ešrefa Divijan, Fikreta Maslo, as well as witness Momir Čančar. What is disputable in the whole case is the lawfulness of the initial arrest and the lawfulness of the handing over of victim Rasim Klapuh to the military police in Velečevo.

During the evidentiary procedure the Court determined that the original, that is, the initial arrest of Rasim Klapuh was not unfounded and, therefore, established the state of the facts to be different from the one in the Indictment and modified the description of the facts in the Indictment in that respect. That is to say, the Accused received a verbal order from his superior, the Police Chief Dragan Gagović. It follows from the material evidence of the Defense (O2), *Instruction on the Rules of Conduct and Mutual Relations of the Employees of the Ministry of the Internal Affairs*, of September 1991, that an order may be given in writing, verbally or via radio. It was also concluded beyond doubt that the order had been preceded by an operations plan to arrest certain persons, including the victim Rasim Klapuh, and that the plan was made because it was suspected that the victim had participated in setting ambushes. While the victim Rasim Klapuh was being arrested he was cautioned of the reasons of the arrest and that he would be taken for interrogation. It follows from the statements of witnesses Šefik Divijan and Momir Čančar that Rasim Klapuh was aware of the reasons for arrest at the meadow. Witness Fikreta Maslo said in her evidence that the Accused said when arresting Rasim Klapuh that he would be taken for interrogation.

It was also determined beyond doubt that, following the arrest of Rasim Klapuh, the Accused, together with the other policemen from the group, took Rasim Klapuh to the gate in Velečevo where the Command of the Army of Republika Srpska and the Military Police were located and handed him over there, wherefrom he was taken and detained in the Foča Penal and Correctional Institution (Foča KPD). After this, the injured party was taken on an unidentified day by unidentified persons, taken out of the Foča KPD and killed at an unknown locality. The act of handing over Rasim Klapuh and his taking toward the Foča

KPD was confirmed by the Accused and the Defense witnesses Momir Čančar and Ljuban Vuković.

With respect to the victim's death, this consequence ensues beyond doubt from the material evidence of the Prosecution which indicates the cause of Rasim Klapuh's death, which was a violent one, and the fact that the victim's body was found in a mass grave and identified.

The Panel concludes that by handing over the victim Rasim Klapuh to the military police in Velečevo, knowing that the victim would be unlawfully imprisoned by the military police at the Foča KPD, the Accused aided and abetted that unlawful imprisonment.

Having examined the totality of the circumstances, the Panel concludes that the evidence established that there was clearly a pattern of indiscriminate arrests and imprisonment of non-Serb civilian men in Foča at that time.⁴⁵ Non-Serb civilian men were systematically arrested and imprisoned at the Foča KPD, either on spurious grounds or on no grounds at all. The sole consistent characteristic of those men indiscriminately arrested and imprisoned at the Foča KPD was that they were all non-Serb civilian men. Once arbitrarily deprived of their liberty at the Foča KPD, the illegally imprisoned non-Serb civilian men were further denied all procedural rights and safeguards demanded under international law. In particular, those non-Serb civilian men imprisoned at the Foča KPD were not informed of the individualized, legitimate reasons for their detention, were not informed of any charges against them, and were not allowed to challenge the justification for their detention before a competent judicial authority. Moreover, while some non-Serb civilians were released from the Foča KPD, large numbers continued to be imprisoned without charge or judicial review.

The Panel further concludes that it was proven beyond reasonable doubt that Rasim Klapuh was illegally imprisoned at the Foča KPD by the military police, that is, that he was imprisoned arbitrarily without legal basis. In particular, the Panel concludes that the military police intended to imprison and continue depriving Rasim Klapuh of his liberty *whether or not* there were legitimate grounds on which to justify that deprivation of liberty. That is, the Panel concludes that the possibly legitimate grounds for which Rasim Klapuh could have been detained were factually and legally irrelevant, as they were not the grounds upon which Rasim Klapuh was in fact detained by the military police. Rather, the Panel concludes that the military police intended to deprive Rasim Klapuh of his liberty on the basis of his ethnicity, that is, because he was a non-Serb male, and that they did in fact imprison him on that basis.

The totality of the circumstances compels this conclusion. As noted, the evidence clearly establishes a pattern of indiscriminate arrests and imprisonment of non-Serb civilian men in Foča at that time. The Panel considers it absurd to consider that so many non-Serb civilian men, numbering in the hundreds, were arbitrarily imprisoned, but that Rasim Klapuh, who was also a non-Serb civilian, was an exception and was imprisoned in fact on legitimate grounds. It is more realistic and logical to consider that Rasim Klapuh was imprisoned solely on the basis of his ethnicity, notwithstanding any legitimate grounds that may possibly have existed to justify that detention.

Similarly, the Panel considers the violations of procedural guarantees provided for under international law and the absence of procedural safeguards as convincing circumstantial

⁴⁵ Established Facts F7, F13, F39, and F40, and testimony of Omer Bavčić.

evidence that the deprivation of liberty was in fact on an arbitrary basis.⁴⁶ These violations of the procedural rights guaranteed under international law were gross – all rights were denied – and extensive – all imprisoned non-Serb civilian men were similarly denied their procedural rights. More specifically, the absence of any judicial process at the Foča KPD demonstrates that there was no concern to establish whether non-Serb civilian men were imprisoned on legitimate grounds and to release those civilian men who did not pose a specific risk to legitimate security interests. The failure to provide judicial process is particularly important to establishing whether the deprivation of liberty was in fact on legitimate grounds, as an initial deprivation of liberty on legitimate grounds may become illegal if those legitimate grounds cease to apply.⁴⁷ Procedural safeguards and judicial review would thus demonstrate that the deprivation of liberty was intended to be legally justified and was in fact legally justified, as it would evidence a concern to only deprive those persons of liberty who posed an individualized and specific risk to legitimate security interests. Conversely, the absence of procedural safeguards and judicial review here provides strong evidence that Rasim Klapuh was not in fact deprived of his liberty on a legal basis, but was imprisoned solely on the basis of his ethnicity.

In addition, the Panel concludes that the Accused knew that Rasim Klapuh would be deprived of his liberty by the military police arbitrarily and solely on the basis of his ethnicity. As an active member of the police, the Accused was aware of the events in the Foča KPD at the relevant time. It also follows clearly from the evidence given by Defense witness Omer Bavčić, whom the Accused was helping while the witness was detained there, that the Accused was aware of the events in the Foča KPD and the conditions therein, and that Rasim Klapuh would not be taken before the competent judicial bodies or tried in accordance with the law, and that the military police intended to imprison Rasim Klapuh solely on the basis of his ethnicity without regard to whether he in fact posed a specific security risk.

That the Accused was subsequently ordered by a police commander to hand Rasim Klapuh over to the military police, in contravention of the initial order to take him to the Police Station in Foča, does not relieve the Accused of criminal responsibility. In particular, as the

⁴⁶ The Panel considers that there are strong arguments to conclude that imprisonment as a crime against humanity may be established solely on the basis of gross or extensive violations, in either the initial deprivation of liberty or the maintenance of that deprivation of liberty, of the procedural guarantees provided for under international law. Simply stated, deprivation of liberty on legal grounds may still constitute the crime of imprisonment if the manner of imprisonment grossly violates a procedural right under international law or involves extensive violations of such rights. While not all violations of these procedural rights will rise to the level of the criminal offense of imprisonment, a case-by-case analysis of the facts, particularly in the context of the circumstances as a whole, may reveal that a violation of those procedural rights was so gross or violations were so extensive as to rise to the level of criminal behavior, regardless of whether legal grounds existed justifying imprisonment. The Panel need not resolve this issue here, as the Panel is satisfied that the evidence establishes that the deprivation of liberty was not justified by legitimate grounds, as established, in part, by evidence that there were gross and extensive violations of procedural rights under international law. The Panel only notes this alternative ground for concluding that the crime of imprisonment was committed. See *Krnjelac* Trial Judgment, para. 115, fn. 347 ("The Trial Chamber notes that arbitrariness of imprisonment pursuant to Article 5(e) may further result from an otherwise justified deprivation of physical liberty if the deprivation is being administered under serious disregard of fundamental procedural rights of the person deprived of his or her liberty as provided for under international law."); Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Working Group on Arbitrary Detention, E/CN.4/1998/44, 19 December 1997, Annex I, para. 8.

⁴⁷ *Krnjelac* Trial Judgment, para. 114.

Accused knew that Rasim Klapuh would be deprived of liberty by the military police arbitrarily and solely on the basis of his ethnicity, the Accused was aware that the order to hand the victim over to the military police was unlawful. Defense witness Zdravko Matović confirmed in his evidence that the initial order to take the victim to the police station was altered indicating that he should be taken to the military police in Velečevo instead.

The Accused is charged with committing the said offense as an accessory. Pursuant to Article 31 of the CC B-H, the following, in particular, shall be considered as helping in the perpetration of a criminal offense: giving advice or instructions as to how to perpetrate a criminal offense, supplying the perpetrator with tools for perpetrating the criminal offense, removing obstacles to the perpetration of criminal offense, and promising, prior to the perpetration of the criminal offense, to conceal the existence of the criminal offense, to hide the perpetrator, the tools used for perpetrating the criminal offense, traces of the criminal offense, or goods acquired by perpetration of the criminal offense.

Also, the essential findings in the ICTY jurisprudence say that aiding and abetting means rendering a substantial contribution to the commission of a crime.⁴⁸ Furthermore, the act (*actus reus*) of aiding and abetting requires practical assistance, encouragement or moral support. Thus, it was established in the *Furundžija* case that the *actus reus* of aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.⁴⁹ The act of aiding and abetting does not have to be the cause of the act of the principal perpetrator, but must substantially contribute to the perpetration of the crime by the principal perpetrator.

As it ensues from the Indictment, and as the Court concluded beyond doubt, the Accused aided by handing over the victim Rasim Klapuh to the military police, which constitutes a substantial contribution to the perpetration of the criminal offense of imprisonment. The Panel also concludes that the Accused knew that his act of handing Rasim Klapuh over to the military police assisted in the perpetration of the crime.

The Accused further knew that the military police intended to arbitrarily deprive Rasim Klapuh of his liberty. At a minimum, it is clear from his involvement with Omer Bavčić that the Accused was aware of the arbitrary arrests without further judicial hearings and procedural protections. Accordingly, the Accused knowingly assisted the military police in perpetrating the crime of imprisonment against Rasim Klapuh.

Based on the foregoing, the Court concluded beyond doubt that by his actions the Accused aided the unlawful imprisonment of victim Rasim Klapuh.

When evaluating the evidence, the Court also considered other pieces of evidence presented at the main trial. However, it did not find such evidence to be of particular importance and it did not find it necessary to analyze it in detail, since it did not considerably affect the final state of the facts and the conclusions that the Court made on the basis of the evidence evaluated in the Verdict. The Trial Panel is bound to review only those conclusions on facts that are of essential importance for establishing liability in relation to a particular Count of the Indictment.

⁴⁸ *Prosecutor v. Radislav Krstić*, IT-98-33, Judgment, 2 August 2001, para. 601.

⁴⁹ *Prosecutor v. Anto Furundžija*, IT-95-17/1, Judgment, 10 December 1998, paras. 235, 249.

The ICTY Appeals Chamber in the *Čelebići* case took the same position stating that "the Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial".⁵⁰

d. Conclusion

The Accused perpetrated the criminal offense referred to in Count 1(a) and 1(b) with direct intent, as it follows beyond doubt from the evidence presented in the proceedings that at the moment of the perpetration the Accused was aware of his act and that he committed the act by force and by threat of attack upon the victims' life and limb, that is, he was aware that the act was happening without the victim's consent and he manifestly wanted his actions to result in prohibited consequences. Accordingly, the Accused had the necessary *mens rea* and *actus reus* to establish liability as a direct perpetrator of the crime of sexual violence.

With respect to the offense in Count 2, the Accused substantially contributed to the commission of the crime of imprisonment knowing the intent of the military police to imprison Rasim Klapuh and knowing that his acts assisted the perpetration of the crime. Accordingly, the Accused had the necessary *mens rea* and *actus reus* to establish liability for aiding and abetting the commission of that crime, that is, accessory liability.

Therefore, the Accused committed several different acts that constitute several kinds of the criminal offense of Crimes against Humanity, in violation of Article 172, that is, sexual violence, referred to in Item (g), and aiding in unlawful imprisonment, referred to in Item (e).

III. SENTENCING

A. Necessary and Proportionate to the Gravity of the Crime

In regard to the criminal act itself, the crime of rape and imprisonment and by the commission of crimes against humanity as described in the Verdict, the Panel considered the punishment that was necessary and proportionate to the following statutory purposes, and the relevant statutory considerations.

(A) The sentence must be necessary and proportionate to the danger and threat to the protected persons and values (Art. 2 of the CC B-H). In connection with this, the Panel will also keep in mind the statutory consideration which specifically affects this purpose, that is, the suffering of the direct and indirect victims (Art. 48 of the CC B-H). The direct victims of this offense were the Muslim women who had been raped and their families as well as Rasim Klapuh and his surviving family. For the women and their families this led to their permanent removal from their homes in Foča. Munira lost her livelihood and her ability to trust. Almira feels permanently damaged. Rape is often a gender specific crime committed predominately, if not exclusively, against women in a time of war. Sexual violence as a tool

⁵⁰ *Čelebići* Appeal Judgment, para. 498.

of war causes mass terror, significant and long lasting emotional and often physical harm and forced relocation. This is what happened in Foča. At first glance the crime here appears to be an independent sexual assault committed by the accused on his own initiative. This is however a sexual assault committed during the time of armed conflict and, as such, must be analyzed with that perspective. One cannot separate the crime from the prevailing environment. To do so would marginalize and to a great extent minimize what took place. The Panel concludes and finds that the circumstances of these women's lives were horrific. Specifically as to the crimes testified to here, the Panel finds these two women were alone in a building with others controlled by one man, the Accused. As a member of the police he could come and go freely. The women were not able to do this. He delivered the news of the day, he instructed them on when they could leave or not leave their apartments, he granted protection from more malignant forces as needed, and he even participated in their eventual escape out of town. He controlled them and on two occasions he raped them. Specifically, he raped the most powerful woman there and also one of the most vulnerable women living in his apartment building. No more action on his part was needed to effectively be the dominant figure. Munira was a strong woman. At the time of the rape she was divorced. It is clear this is a status not exactly met with approval in the rural town of Foča. This fact was mentioned often in the trial and therefore one might actually assume it had relevance. In addition to her independent state she owned her own small business. Women turned to her and she to them and she was seen as a leader. Almira was a young girl, age 20 and vulnerable. The psychological harm inflicted on her has been life altering. Although she has gone on to a secure marriage, she is unable to have children and is unable to enjoy a fulfilling sexual relationship.

The suffering directly inflicted on these victims caused additional suffering to their families and their communities as well. The suffering continues today: both women testified to ongoing physical and psychological problems. Rasim lost his life and his family spent years not knowing of his fate. It is clear that today they still endure the suffering from his loss.

B) The sentence must be proportionate to this degree of suffering, and in addition, it must be sufficient to deter others from committing similar crimes in the future (Art. 6 and 39 of the CC B-H). When a community is invaded by hostile forces sexual assault is committed against female residents.⁵¹ These crimes inspired terror and force women to flee. The emotional devastation of rape is even more severe in a state of war when family, social, protective and legal structures have broken down.⁵² As for participating even in only a contributing role in the imprisonment of Rasim Klapuh, his contribution raises a serious issue for punishment and deterrence. A major reason for criminalizing activity associated with "camps" as crimes against humanity under international law, and prosecuting the participants who established and maintained camps in violation of customary international law, was to prevent others in future conflicts from repeating this form of systemic crime against vulnerable civilians.

C) In addition, this sentence must reflect community condemnation of the Accused's conduct (Art 39 of the CC B-H). The community in this case is the people of Bosnia and Herzegovina and the international community, who have, by domestic and international

⁵¹ See generally Askin, K., *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Kluwer Law International, 1997), Chapter VII, *Gender Specific War Crimes in the Yugoslav Conflict*.

⁵² Ibid.

law, made conduct of this nature a crime against humanity. These communities have made it clear that these crimes, regardless of the side which committed them or the place in which they were committed, are equally reprehensible and cannot be condoned with impunity.

D) The sentence must also be necessary and proportionate to the educational purpose set out in the statute, which is to educate to the danger of crime (Art. 39 of the CC B-H). Trial and sentencing for this activity must demonstrate not only that crimes perpetrated in time of war will not be tolerated, but that the criminal justice process is the appropriate way to recognize the crime and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the act can contribute to reconciliation by providing a legal, rather than violent, response and promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved.

All of these considerations relevant to the criminal acts committed by the Accused lead the Court to consider that a necessary and proportionate sentence reflecting the gravity of the crime itself should be at least the minimum sentence of 10 years.

B. Necessary and Proportionate to the Individual Offender

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

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

C. The Accused

1. The Degree of Liability

The Accused is directly responsible for the crimes he perpetrated. The rape crimes are his alone and were committed to achieve maximum control over his victims. The crime of

imprisonment is different. Here the Accused has been found guilty of being an accessory. He is not responsible for the systematic crimes which took place at the KPD after April of 1992. What he is responsible for is his complicity in bringing Rasim Klapuh to a place where he knew his fate would be poor.

2. Conduct and Personal Circumstances of the Accused

The conduct and personal circumstances of Nikačević prior to, during and after the commission of the offense present facts both in aggravation and mitigation, and are relevant to considerations of deterrence and rehabilitation.

a. Before the Offense

Nikačević prior to April 1992 appears to have had an ordinary career in the police service. He began work in the police system. At the time war broke out he was working at the police station in Foča. He was married and expecting his first child. He had no prior criminal record.

b. Circumstances Surrounding the Offense

Nikačević as a police officer had a position of trust in the community. That he abused this trust goes without saying. That he disguised his intentions by false offers of protection is particularly disturbing. This is a pattern of behavior that followed all three crimes. Even with Rasim's family, who begged him for help afterwards, he continued to cruelly deceive them rather than tell them the truth. The manner in which he committed these offenses is an aggravating factor.

c. Circumstances since that Time

After the war Nikačević continued to work at the police station in Foča. He remains married with two minor children to support. He has not committed any criminal offense that the Panel is aware of since the conclusion of the war. However, he is currently suspended from the police department. These circumstances are neither aggravating nor mitigating.

d. Conduct During the Case

Nikačević was very involved in the conduct of his defense and questioned many of the witnesses himself. He appeared to work well with his Counsel. His questioning of some of the Prosecution witnesses was forceful, but within appropriate bounds for cross examination. He was respectful to the Court and professional in his demeanor. His conduct during the case was appropriate and met the Panel's expectations, and is therefore neither an aggravating nor mitigating factor.

3. Motive

Motive in this case is not connected with intent. As reasoned above, the Accused possessed the necessary intent to commit the crimes described in the law and established in the reasoning of the Verdict. However, there is nothing in the evidence to support any assertion that Nikačević was motivated by personal hatred of any ethnic group nor that he had any particular vendettas or biases against individuals in the persecuted group that were underlying his conduct toward them. In fact, there is evidence to the contrary. This is a mitigating circumstance. While there appears no clear indication what motivated this Accused to perpetrate the offenses with which he is convicted, they do fit the picture of a controlling individual who is motivated and fueled by power. This is an aggravating factor.

4. Personality of the Accused

The Panel has no evidence regarding the personality of the Accused other than that revealed by his actions in committing the crime and that which could be observed from his behavior in the courtroom, both of which have been discussed above

5. Statutory Reduction of Punishment

Article 49 of the CC B-H provides with respect to reduction of punishment:

"The court may set the punishment below the limit prescribed by the law, or impose a milder type of punishment:

- a) When law provides the possibility of reducing the punishment; and
- b) When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment."

Of the exceptionally extenuating circumstances for the Accused, the Court also took into account his role in Foča during the war. During the widespread and systematic attack in Foča, many Muslim women were hidden on several occasions in the Accused's apartment by his mother-in-law, wife and brother-in-law with the Accused's knowledge and consent, these women thus having been saved from being taken away, raped or killed by members of the armed force or paramilitary groups of Republika Srpska.

Defense witness Hamdija Guhdija also testified that Nikačević saved him and his family while they were in Foča by bringing them food in their apartment a couple of times and asking a neighbor to lock up the building entrance so that nothing would happen to them. One night the Accused also hid the families of witness Hamdija Guhdija and Dr. Suljević at his mother-in-law's, where his pregnant wife was also staying, in order to save them from arrest or death. The witness also described the manner in which Nikačević took these two families out of Foča and to Podgorica at the time when it was impossible to cross the border; he avoided control at the roadblock, and on this occasion Nikačević was attacked.

Witness Jadran Đuderija also testified that the Accused Nikačević saved his, his sister's and mother's lives. The first time he saved them was after the Serb soldiers separated the witness and his sister from their mother and wanted to take them away, but the Accused saved them

and hid them in his apartment and afterward brought their mother, too. They spent 5-6 days there and his pregnant wife cooked for them. The Accused was also hiding them in his mother-in-law's house for one period, whereupon he helped them to flee to Čačak. The Accused did not ask for anything in return.

Witness Omer Bavčić, who was detained in the Foča KPD, stated in his evidence that he had known the Accused and that the Accused secured him a more favorable position in the Foča KPD compared with the other detainees'. On one occasion he was taken to be a human shield and he was the only one to stay alive. He stated that he would have definitely been dead if it had not been for the Accused Nikačević arranging protection for him.

Defense witness Smajo Hadžimusić stated in his evidence that he heard that the Accused had helped Muslims in Foča during the war.

The Court is aware that there were other witnesses the Defense could have called on this issue if permitted by the Trial Panel. The Trial Panel in the interest of efficiency decided it was not necessary to hear every witness of this nature or all members of a family that benefitted from his actions. What is necessary is the Panel recognizes that there were other witnesses that would have testified in a similar manner.

These stories are not insignificant. They are actions taken by the Accused that saved lives. While the Panel may believe that this is part of the observed behavior of the Accused and is just another aspect of his obsession with power and control, it also recognizes that these were good choices and need to be recognized as such by the Panel. All of these stories indicate significant extenuating circumstances that the Trial Panel must take into consideration in sentencing. In looking at the individual considerations as required by law, and reasoned above, it is clear that the extenuating factors outweigh the aggravating factors.

The Panel has responded to this in two significant ways. First, the Panel took this into consideration in deciding whether to impose long term imprisonment or an elevated sentence higher than the minimum of 10 years. This question was answered in favor of the Accused and the Panel decided on Ten Years. Next, the Panel looked at the extent of these mitigating circumstances and decided to again find in favor of the Accused and reduced the minimum sentence by another two years. The grateful words of the Defense witnesses were genuine and their perspective was valuable to the Panel's conclusion that highly extenuating circumstances exist that indicate that the purpose of punishment can be achieved with less than the 10 year minimum sentence set out in Article 172 (1) of the CC B-H.

6. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, to make amends for his criminal actions.

Considering the established state of the facts and the consequence as a result thereof, and the causal link between them, the Court pronounced the Accused guilty of the criminal offense of Crimes against Humanity in violation of Article 172(1)(e) and (g) of the CC B-H

and sentenced him for it to imprisonment for a term of 8 (eight) years, as it considered that this kind of sanction is proportionate to the gravity of the offense given the significant mitigating factors and the Accused's participation and role and that it will serve the general purpose of sanctions and the purpose of punishment pursuant to Article 49 of the CC B-H.

It was determined beyond doubt that the Accused committed the criminal acts he is charged with. However, when all the elements, the extenuating and the aggravating alike, are considered, it follows that the exceptionally extenuating elements exceed the other elements, hence the Panel rendered a decision to reduce the punishment to the Accused. Pursuant to Article 56(1) of the CC B-H, the time the Accused spent in custody from 14 February 2008 to 20 January 2009, pursuant to this Court's Decision, shall be credited toward the pronounced sentence.

Decision on the costs of criminal proceedings and claims under property law

Pursuant to Article 188(4) of the CPC B-H, the Accused shall be relieved of the costs of the criminal proceedings and the scheduled amount, which shall be borne by the budget of the Court.

Pursuant to Article 198(2) of the CPC B-H, the Court decided that the injured parties should pursue their claims under property law in a civil action, as establishing the facts on the amount of the claims would take a long time, which would mean an unjustified delay in the current proceedings.

RECORD-TAKER

Emira Hodžić

[signature affixed]

PRESIDING JUDGE OF THE PANEL

Judge Davorin Jukić

[signature affixed]

[seal of the Court of B-H affixed]

LEGAL REMEDY: This Verdict may be appealed with the Appellate Panel of the Court of B-H within 15 (fifteen) days of the day the written copy of the Verdict is received.