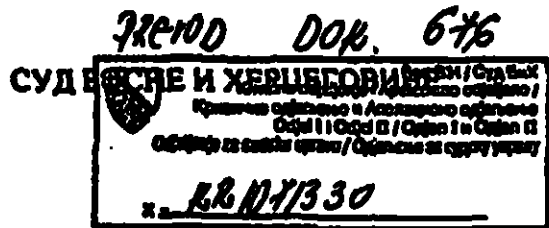


SUD BOSNE I HERCEGOVINE



No: X-KR-07/330  
Sarajevo, 16 April 2008

The Court of Bosnia and Herzegovina, Section I for War Crimes, Judge Šaban Maksumić as the Presiding Judge and Judges Pietro Spera and Marie Tuma as the Panel members, with the participation of Legal Advisor Lejla Konjić as a minutes taker, in the criminal case of the accused Zdravko Mihaljević charged with the criminal offence of Crimes against Humanity in violation of Article 172 (1), h), as read with sub-paragraphs a), e), f), i) and k) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), deciding upon the Indictment No: KT-RZ-44/07 filed by the Prosecutor's Office of Bosnia and Herzegovina on 1 February 2007, following an oral and public main trial in the presence of the accused Zdravko Mihaljević, his Defence Counsel, lawyer Dušan Tomić and the Prosecutor of the Prosecutor's Office of BiH, Slavica Terzić, rendered and publicly pronounced on 16 April 2008 the:

VERDICT

WHEREBY THE ACCUSED:

- ZDRAVKO MIHALJEVIĆ a.k.a. "Pijuk", son of Mate and mother Kata, maiden name Tuka, born on 27 June 1964 in Sarajevo, Personal ID No: 2706964172002, residing at 17 Čizma, Kiseljak Municipality, a caterer, literate, completed secondary school, married, father of three children - two underage and one child of age, indigent, served his military term in 1983 in Šabac, registered in military records in Kiseljak, Croatian by ethnicity, citizen of BiH and the Republic of Croatia,

Pursuant to Article 284 (c) of the Criminal Procedure Code of Bosnia and Herzegovina is

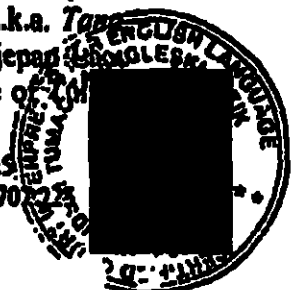
ACQUITTED

Of the following charges:

From April 1993 through the end of June 1993, as part of a widespread and systematic attack of the army and military police of the Croat Defence Council (HVO), directed against the Bosniak civilian population in the territory of Kiseljak Municipality, aware of such an attack, as a member of the II HVO Battalion, *Ban Josip Jelačić* Brigade from Kiseljak, in the capacity of the Commander of Special Purpose Unit (PPN) *Maturice*, he carried out, participated and aided and abetted the persecution of the Bosniak civilian population on national, ethnic, cultural and religious grounds including killings, enforced disappearance of persons, deprivation of liberty contrary to fundamental rules of international law, torture and other inhumane acts, insofar as:

On 12 June 1993, following an artillery attack by HVO units on the place of Tulice, Kiseljak Municipality, he participated in an infantry attack and the destruction of the place of Tulice and together with Vlatko Trogrlić a.k.a. *Žuna* and Anto Cvijanović a.k.a. *Tapa* led the members of the PPN *Maturice* and other HVO members, including Stjepan *Štoper* a.k.a. *Pepa*, Tibor Prajo, Ljubo Medić, Nikica Medić and after taking the place of

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they captured the entire Bosniak population of Tulice and rounded them up in front of the house of Mujo Bajraktarević; then, in front of the captured population, the suspect deprived Salko Bajraktarević of his life by firing from an automatic rifle at point-blank range, and ordered the Bosniak population to separate men from women and that a group of over 30 men set off towards the local graveyard in Tulica, and while armed, he escorted them along with several other soldiers including Tibor Prajo; when they reached the local graveyard he ordered the captured persons to stop and line up and after that he took prisoners out of line and, together with two more members of the PPN "Maturice", deprived them of their lives in a brutal manner by firing from an automatic rifle at point-blank range, thus depriving the following seven prisoners of their lives: Aziz Huseinović, Zijad Huseinović, Refik Huseinović, Mufid Tulić, Kasim Huseinović, Safet Katkić and Ahmed Bajraktarević, whilst other members of his unit and the HVO members looted the village, as part of the same attack, and killed Sifa Tulić and Safija Tulić, whose body was then set on fire, whereas Fatima Bajraktarević has been unaccounted for since after the attack; he then ordered the survivors from the group to go back towards the house of Mujo Bajraktarević, where he ordered them to enter a "TAM" vehicle which transported them towards Kiseljak, whilst he and soldiers, the Šimić brothers, escorted them in a "Golf" vehicle; on the way to Kiseljak he ordered Ibrahim Jahić to get off the vehicle, and the Šimić brothers to take Ibrahim Jahić back to the place of Tulica as of when Ibrahim Jahić has been unaccounted for, while other prisoners were taken to the barracks in Kiseljak and detained under inhumane conditions; the guards in the barracks and other HVO members took them to forced labour on a daily basis until they were exchanged, whilst some were also subjected to torture; the bodies of the killed Salko Bajraktarević, Aziz Huseinović, Zijad Huseinović, Refik Huseinović, Mufid Tulić, Kasim Huseinović, Safet Katkić, Ahmed Bajraktarević, Sifa Tulić and Safija Tulić were exhumed in February 1998 from the local graveyard in Tulice, while the mortal remains of Ibrahim Jahić and Fatima Bajraktarević have not been found hitherto;

Consequently, as part of the widespread and systematic attack directed against the Bosniak civilian population, knowing of such an attack, he committed, participated and aided and abetted the persecution of Bosniak civilian population, on national, ethnic, cultural and religious grounds, including: killings, enforced disappearance of persons, deprivation of liberty contrary to the fundamental rules of international law, torture and other inhumane acts,

Whereby he committed the criminal offence of Persecution as a Crime against Humanity in violation of Article 172 (1), h) of the Criminal Code of Bosnia and Herzegovina, in conjunction with:

1. sub-paragraph a) deprivation another person of his life (murder),
2. sub-paragraph e) imprisonment in violation of fundamental rules of international law,
3. sub-paragraph f) torture,
4. sub-paragraph i) enforced disappearance of persons,
5. sub-paragraph k) other inhumane act of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health, referred to in the same Article.

Pursuant to Article 189 (1) of the Criminal Procedure Code of Bosnia and Herzegovina, the costs of the criminal proceedings referred to in Article 185 (2), a) through f) of this Code and the necessary expenditures and remuneration of the Defence Counsel shall be paid from the budget appropriations.

## II

Pursuant to Article 198 (3) of the Criminal Procedure Code of Bosnia and Herzegovina, the injured parties are hereby instructed to take a civil action under property law for all possible claims.

## Reasoning

### 1. Charges

The Indictment No: KT-RZ-44/07 filed by the Prosecutor's Office of Bosnia and Herzegovina, Special War Crimes Section, on 1 February 2008 charged Zdravko Mihaljević with the criminal offence of Crimes against Humanity in violation of Article 172, (1), sub-paragraph h), as read with sub-paragraphs a), e), f), i) and k) of the Criminal Code of Bosnia and Herzegovina.

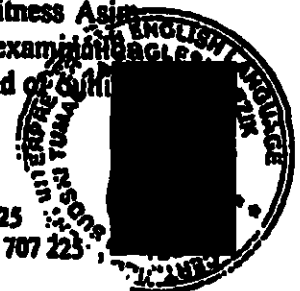
The Indictment was confirmed on 2 February 2007 and on 12 February 2007 the Accused pleaded not guilty to the offences he was charged with and the case file was forwarded to the Trial Panel to schedule the main trial.

### 3. Evidentiary procedure

a) During the evidentiary procedure, the Prosecution presented the following evidence:

The following witnesses were directly heard at the main trial: Elvir Huseinović, Avdija (Mebo) Bajraktarević, Hamdija Tulić, Zilha Huseinović, Džafer Huseinović, Bejda Delić, Senad Bajraktarević, Asim Hasić, Fedija Bajraktarević and witnesses who were granted certain protection measures and who testified under the pseudonyms: "A", "B" and "C". The Court also heard doctor Hamza Žujo at the main trial, as a forensic medicine expert.

The Court inspected the following documentary evidence filed by the Prosecution: Prosecution of BiH Record on examination of witness Elvir Huseinović No: KT-RZ 130/05 of 16 June 2006; Prosecution of BiH Record on examination of witness Zilha Huseinović No: KT-RZ 130/05 of 30 January 2007; Prosecution of BiH Record on examination of witness Džafer Huseinović No: KT-RZ 130/05 of 31 January 2007; Prosecution of BiH Record on examination of witness Bejda Delić No: KT-RZ 130/05 of 30 January 2007; Prosecution of BiH Record on examination of witness Senad Bajraktarević No: KT-RZ 130/05 of 31 January 2007; Prosecution of BiH Record on examination of witness Asim Hasić No: KT-RZ 130/05 of 31 January 2007; Prosecution of BiH Record on examination of witness Fedhija Bajraktarević No: KT-RZ 130/05 of 31 January 2007; Legend of



of houses destroyed in the village of Tulica; Prosecution of BiH Record No: KT-RZ-130/05 of 26 January 2007; Prosecution of BiH Record No: KT-RZ-130/05 of 29 January 2007; Decision of the Court of BiH on the takeover of the criminal case No: X-KRN/05/68 of 5 October 2005; Ministry of Defence of BiH - Zdravko Mihaljević Personal File No: 504/64; Register File for Conscript Zdravko Mihaljević No: 1048050464; Order of the HVO Brigade *Ban Josip Jelačić* Kiseljak Conf. No: 02-1207-1/93, Criminal Record for Zdravko Mihaljević No: 02/6-3-04-2-5734/06 of 30 August 2006; Decision on Exhumation No: Kri: 148/96 issued by the Cantonal Court in Sarajevo on 17 October 1997; Decision on Exhumation No: Kri: 148/96 issued by the Cantonal Court in Sarajevo on 26 January 1998; Record on examination of expert witnesses dr. Ilija Dobrača and dr. Hamza Žujo No: Kri: 148/96 of 23 February 1998; MUP Sarajevo - Sketch of the site, exhumation, autopsy and identification, No: 359/98; Report on Search and Forensic Examination No: 359/98 of 8 February 1998; Cantonal Court in Sarajevo - Crime Scene Investigation Report No: Kri-148/96 of 9 February 1998; Report on Identification of Salko Bajrektarević's dead body of 11 February 1998; Report on Identification of Zijad Huseinović's dead body of 11 February 1998; Report on Identification of Refik Huseinović's dead body of 11 February 1998; Report on Identification of Mufid Tulić's dead body of 11 February 1998; Report on Identification of Kasim Huseinović's dead body of 11 February 1998; Report on Identification of Safet Katkić's dead body of 11 February 1998; Report on Identification of Ahmed Bajrektarević's dead body of 11 February 1998; Report on Identification of Sifa Tulić's dead body of 11 February 1998; Report on Identification of Safija Tulić's dead body of 11 February 1998; Death Certificate for Salko Bajrektarević; Death Certificate for Aziz Huseinović; Death Certificate for Zijad Huseinović; Death Certificate for Refik Huseinović; Death Certificate for Mufid Tulić; Death Certificate for Kasim Huseinović; Death Certificate for Safet Katkić; Death Certificate for Ahmed Bajrektarević; Death Certificate for Ibrahim Jahić; Death Certificate for Fatima Bajrektarević; Death Certificate for Sifa Tulić; Death Certificate for Safija Tulić; Operations Report of the Kiseljak Military Police Municipal Staff of 12 June 1993; Operations Report of the Kiseljak Military Police Municipal Staff of 13 June 1993; Report for 12/13 June 1993 of the Command of the 3<sup>rd</sup> Company of the Military Police Kiseljak No. 02-4/3-07/3-104/93 of 14 June 1993; Decision of the Presidency of the Republic of Bosnia and Herzegovina to declare the state of war ("Official Gazette of the RBiH", No: 7/92); Consolidated version of the Decision on establishment of the Croatian Community of Herzeg-Bosnia ("Official Gazette of the Croatian Community of Herzeg-Bosnia", No: 1/92); Constitution of the Federation of Bosnia and Herzegovina - the so-called Washington Agreement ("Official Gazette of the FBiH", No: 1/94); Decision of the Presidency of the Republic of Bosnia and Herzegovina to terminate the state of war ("Official Gazette of R BiH", No: 50/95).

The Court admitted as additional evidence: Judgment No: K.4/01-RZ rendered on 23 May 2002 by Cantonal Court in Travnik in the case of Tibor Prajo; Judgment No: K2-382/02 rendered on 27 November 2002 by the FBiH Supreme Court in the case of Tibor Prajo; Record on examination of protected witness "103" before the FBiH Supreme Court in the case No: KZS-18/01 of 21 December 2001; Letter of the standard marking No: 003808/GB/MAL/RR46a of the ICTY for Zdravko Mihaljević dated 15 February 2000; Order of the Operations Group 2 of the Central Bosnia Operative Zone of 27 May 1993; List of members of the Intervention Unit *BAN JOSIP JELAČIĆ* Kiseljak of 4 May 1993; AID Photo documentation of the village of Tulica dated 7 May 1998; Escort Sheet issued

by the Busovača HVO Military Police (ICTY Document No: Y0029604); Report No: KRI 2/98 of the Travnik Higher Court (ICTY Document No: 04632734):

b) The Defence adduced the following evidence at the main trial:

The following witnesses were directly heard: Elvir Huseinović, Asim Hasić, Avdija (Hamid) Bajraktarević, Dragan Šimić, Mijo Šimić, Selver Bajraktarević, Anto Cvijanović, Tibor Prajo, Predrag Pravdić, Alija Bajraktarević, Halil Bešić and witnesses who were granted protection measures so that they testified under the pseudonyms: "A", "C" and "D". Pursuant to Article 276 of the Criminal Procedure Code of BiH, witness "B" testified as additional witness and the accused Zdravko Mihaljević personally testified.

The Court adduced the following documentary evidence for the Defence: Statement given by witness Avdija Bajraktarević on 23 and 14 May 1996 (ICTY Document No: 00697666); Statement No: 329/96 given by witness "A" on 13 April 1996 to AID; Report drafted by AID: "Attack on the unprotected villages of Grahovci and Han Ploča (ICTY Document No: 03595993); Certificate of Non-Conviction No: 02/PK-1-1-04-81/2087 dated 20 February 2008 for Zdravko Mihaljević; Statement given by witness "B" on 9 February 1994 to the Kreševo PSS.

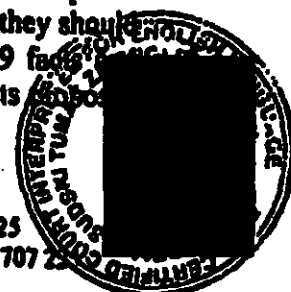
Expert witness, doctor Sead Lačević, a plastic and reconstructive surgeon, was proposed by the Prosecutor's Office of BiH and heard at the main trial and his Expert Evaluation Report dated 3 March 2008 was admitted into evidence – the Defence did not object to it.

### 3. Procedural decisions

a) Admitting as proved the facts established under the Judgments of the International Criminal Tribunal for the Former Yugoslavia.

Pursuant to Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH, the Prosecutor's Office of BiH filed as part of the Indictment their Motion to admit the established facts. Initially, the Motion filed by the Prosecution contained the facts of the first-instance Judgment No: IT-95-14/2-T rendered by the ICTY Trial Panel on 26 February 2001 in the case of Dario Kordić and Mario Čerkez. Those facts were contained in paragraph 520 and other paragraphs of the Judgment relevant to the widespread and systematic attack carried out in the Municipalities of Kiseljak, Busovača and Vitez, as well as in the second instance Judgment No: IT-95-14/2-a rendered in the same case by the Appellate Panel of the ICTY on 17 December 2004, specifically the facts under paragraphs 667, 668, 669, 670, 676 and other paragraphs of the Judgment which pertain to the widespread and systematic attack on the same Municipalities.

On 2 November 2007, the Defence responded to the Prosecutor's Office of BiH Motion to admit established facts and following a verbal instruction given by the Presiding Judge on 25 February 2008 during the main trial, the Prosecutor's Office of BiH filed their response to the Defence Motion by presenting specific facts for which they believed that they should be admitted, as established in this case. The mentioned response comprised 59 facts which could be considered as a consolidated Motion of the Prosecution and all the facts



by the Prosecution were taken from the ICTY Judgments rendered by Trial and Appellate Panels in cases No: IT-95-14/2 of 26 February 2001 and IT-95-14/2-a of 17 December 2004 - Prosecutor vs. Dario Kordić and Mario Čerkez.

In his Motion, the Prosecutor stated that in case that the proposed facts be admitted, it would contribute to a more efficient conduct of the criminal proceedings, thereby satisfying the right of the Accused to a trial without delay, as it is provided in Article 13 of the Criminal Procedure Code of BiH and in Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms.

The Defence responded to the Prosecution Motion ("Response") on 15 October 2007, reflected in general terms upon those facts and highlighted the case law and positions taken by the ICTY Trial Panels thereof. The Defence also addressed the criteria applied by the Court of BiH Trial Panel in the case of Miloš Stupar *et al.* when taking notice of the established facts. The Defence argued that taking notice of the facts which were not specifically outlined and listed, as the Prosecution presented them in their original Motion, would be unacceptable and impossible to admit.

Finally, having quoted and analysed every single proposed fact, the Defence moved the Court not to accept as established the facts contained in paragraph 520 of the ICTY Judgment No: IT-95-14/2 of 26 February 2001, same as facts 667, 668, 669 and 676 in the ICTY Judgment No: IT-95-14/2-a of 17 December 2004, while the Defence had no objections as to the admission of fact 670 taken from the same Judgment. Based on that, the Defence proposed that the Prosecution Motion concerning the disputed facts be dismissed as unfounded and not to be taken into consideration when rendering the verdict.

Having evaluated the arguments presented by the parties to the proceedings, primarily the general requirements for admitting these facts, the Court rendered the decision on 7 April 2008 in accordance with Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH to partially admit the Prosecution Motion and provided a detailed account of the decision to admit or not to admit certain facts as established.

The facts that the Court admitted as proven and established by the ICTY in essence related to the fact that the widespread and systematic attack was conducted in the relevant period by the HVO forces on the civilian Bosniak population in Central Bosnia Municipalities: Vitez, Busovača and Kiseljak, including the village of Tulica.

#### **b) Admitting certain Prosecution evidence**

In the scope of presenting their documentary evidence, the Prosecution proposed at the main trial hearing of 1 October 2007 that the statements given by witness "C" before the ICTY in the case of Tihomir Blaškić on 8 May 1998 and in the case of Kordić, Čerkez on 6 March 2000, be admitted as Prosecution evidence. The Defence objected to that and the Court decided not to admit these statements as evidence given that they were proposed to be admitted during the presentation of Prosecution evidence, but they were not proposed as evidence in the Indictment. The Court leave the possibility of proposing and admitting the

evidence at the second stage of the proceedings, which was done on 25 February 2008, when the witness was re-examined and the statements admitted into evidence.

At the main trial hearing held on 2 October 2007, the Defence Counsel objected to admitting into evidence the following documents: D 11 – Decision on the takeover of the criminal case; D 12 – on the ground that the Defence had not seen up to that moment either the original or certified copy of that document; D 13 – they argued that those documents should not have been certified by the Ministry of Defence of BiH, but they should have been certified by municipal authorities and the same arguments were used for the Prosecution evidence D 14, D 15, and D 16; D 40 – because the Operations Report was signed by Vlado Šteko, who could be heard about that, D 41 because the Report was signed by Commander Miroslav Viletić, who could also be heard, D 42 because the Report was signed by the Commander of the 3<sup>rd</sup> Company Letić, who could also testify, according to the Defence.

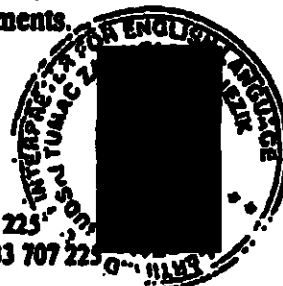
The Court decided that same day to admit this Prosecution evidence, since the Defence failed to sufficiently refute their authenticity and those were official documents, which form satisfied the relevant evidence-related criteria prescribed by the law. This also applied to the last three proposed evidence, so that the Court found that it was not necessary to hear the individuals who had signed them.

At the main trial hearing held on 3 December 2007, the Court decided to admit the two mentioned Judgments rendered in the case of Tibor Prajo, notwithstanding the objections raised by the Defence that it was a common fact, since these two Judgements established that Tibor Prajo directly participated in the relevant incidents in Tulica.

At the main trial hearing held on 31 January 2008, the Court admitted as evidence the Record on examination of witness "C", given as a protected witness before the Supreme Court of the Federation of BiH under the pseudonym "103", even though the Defence objected to it by stating that the Record was signed neither by the Presiding Judge of that Court, nor by the witness. They also stated that the witness was in no condition to testify, however they agreed with the Prosecutor that the witness could not possibly sign it on that occasion since he was a protected witness and since that piece of evidence was already used by the Defence when witness "C" was directly examined by the Defence as their witness.

The Prosecutor proposed at the main trial hearing held on 7 February 2008 that Haris Adrović be heard as an additional witness to testify about his arrest. The Court, however, admitted the objection of the Defence and did not allow testifying of this witness as irrelevant given that his testimony of 2001 concerned the town of Kiseljak and not a single reference was made in it to the village of Tulica.

At the main trial hearing held on 25 February 2008, the Defence also objected to admitting the ICTY Judgments into evidence, by arguing that they were not relevant to this case since the name of Zdravko Mihaljević a.k.a. Pijuk was not mentioned at all. It was decided that the mentioned Judgments would not be entirely admitted as evidence, but that they could be used when proposing the established facts to be admitted or in the closing arguments.



The Defence Counsel objected at the main trial hearing of 10 March 2008 to admitting the Prosecution documentary evidence: AID Photo documentation of the village of Tulica dated 7 May 1998 since the photographs were taken full five years after the incidents in question had taken place in the village of Tulice; Escort Sheet issued by the Busovača HVO Military Police (ICTY Document No: Y0029604) given that the document was neither stamped nor signed; Report No: KRI 2/98 of the Travnik Higher Court (ICTY Document No: 04632734) because this piece of evidence was associated with Tibor Prajo's case and it was not presented to Tibor Prajo when he testified in this case and because the identification had already been carried out in this case.

Despite the position of the Defence Counsel, the Court admitted the proposed evidence – photo documentation, on the ground that the photographs really show the village of Tulica and they are authentic; the Escort Sheet because the witness "C", when he testified before this Court, stated that he had known the Accused from before, while the Report of the Travnik Higher Court was admitted given that the Defence failed to challenge its authenticity and credibility.

#### **c) Admitting certain Defence evidence**

At the main trial hearing held on 9 November 2008, the Defence Counsel proposed to the Court to summon witness Mirsad Mujkić, a baker from Kiseljak, to testify about the personality of the accused Zdravko Mihaljević and his behaviour during the war.

The same proposal included summoning of witness Ivan Velimir Veličević, who was a Police Commander in Kiseljak when the relevant incidents in Tulica took place because Police patrols were sent to Lepenica when the incidents in Tulice happened. The Court dismissed this proposal as irrelevant and redundant, since the evidence had already been presented in relation to these events.

At the main trial hearing of 25 February 2008, during the presentation of documentary evidence for the Defence, the Court refused to admit as evidence the Document issued by SIS on 26 March 1997 – *Istina* (the Truth) since the Court could not attach any relevance of the mentioned document to this case.

The Court decided to admit as Defence evidence the AID Report (ICTY Document No: 03595993) due to its relevance to the criminal proceedings given that the document was a compilation of witness statements about the relevant incidents in the village of Tulica and as such, it was closely linked to this case.

On 11 March 2008, the Court admitted as additional evidence the statement given by witness "B" on 9 February 1994 at the PSS Kreševo, despite the objections made by the Prosecution that it was only an informative statement since this witness testified in the direct examination about the circumstances contained in the statement.

At the main trial hearing held on 10 April 2008, the Court dismissed the proposal made by the Defence on 9 April 2008 that three additional witnesses be heard since the Court found that there were no grounds or reasons to re-open the evidentiary procedure that was completed at the previous hearing. It was also found that the Defence Counsel never

approached the Court in written form regarding any denial of evidence or access to records to the Defence. The facts proposed by the Defence to be proved by the presentation of such evidence – if anyone was assigned certain vehicle during the relevant period – were completely different from the facts contained in the Indictment.

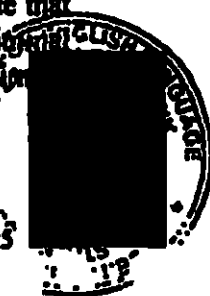
d) Since the parties agreed to it, some witnesses were granted certain protection measures and they testified at the main trial under the pseudonyms "A", "B", "C" and "D". The parties consented to a closed session when witnesses "C" and "D" testified, so that the trial was closed to public throughout their testimony pursuant to Article 235 of the Criminal Procedure Code of BiH. The Court found that to be the only appropriate measure to achieve their protection. Also, the audience was moved to another room while these witnesses testified, so that they could not see the witnesses, but they received audio transmission of their testimony. In accordance with Article 235 of the Criminal Procedure Code of BiH and with the consent of the parties, the public was also excluded from the main trial whenever the Court deemed that some parts of testimonies of these witnesses could reveal their identity.

e) The Accused refused to attend the main trial on the ground of hunger strike from 11 September 2007 through 15 October 2007. To that end, the Court rendered a decision on 11 September 2007 whereby it was ruled that should the Accused persist in his unfounded refusing to attend the scheduled hearings, to which he was duly summoned, those hearings would be conducted in his absence, however, he would be entitled to appear before the Court at any given moment. The Defence Counsel would be present at the hearings held in the absence of the Accused and the Court would promptly inform the Accused about the conduct of the proceedings by providing him with the audio/video record of the entire hearing the same day it was held. The hearings were held in the absence of the Accused on 11 September, 1 October and 9 October 2007. When rendering this decision, the Court was guided by the fact that such a behaviour of the Accused was obviously aimed at his wilful obstruction and procrastination of the criminal proceedings. The absence of the Accused from the scheduled hearing was his wilful decision not to appear before the Court. Since the Accused was in custody, the Court found that it would be inappropriate to order that he be brought in under such circumstances given that physical force was not seen to be a proper way of sending a message to the Accused that the trial would continue without his presence. Therefore, the Court found that instead of exerting force, it would be better in this specific case to duly inform the Accused that the trial would continue in his absence and to instruct him that he could appear before the Court at any given time. This approach was supported by international case law, for instance the Decision rendered by the International Criminal Tribunal for Rwanda in the case of Jean-Bosco Barayagwiza (case No: ICTR-97-19-T) and it was also in accordance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

#### **4. Closing Arguments**

##### **a) Prosecution**

In their Closing Arguments, the Prosecutor's Office of BiH primarily tackled the issue that emerged during the main trial – the identity of the perpetrators of the relevant criminal offence. To that end, the Prosecution argued that the identity of the Accused was confirmed



by witness Avdiija Bajraktarević in the first place, who recognised the Accused in the courtroom as Pijuk and who stated at the main trial that the Accused had a snake either drawn or tattooed on his arm.

According to the Prosecution, it was witness "A" who recognised the person with a hood over his head and who had heard a number of times the voice of the person with a stocking over his head the relevant day in Tulica. The Prosecution argued that witness "A" corroborated the important parts of the testimony given by witness Avdiija Bajraktarević. Despite the obvious attempt to influence this witness prior to his testimony, he nevertheless told the truth and recognised Zdravko Mihaljević Pijuk as the co-perpetrator. He allowed no doubts as to his identity. The Prosecution further submitted that in his earlier testimonies before the ICTY and Cantonal Court in Travnik in the case of the accused Tibor Prajo, witness "C" never had any doubts whatsoever about Pijuk's identity, nor did he have them when he testified in this case before the Prosecutor's Office of BiH. Although the witness knew the Accused very well from before, he nevertheless used the word "doubt" at the main trial at least 30 times. In their closing arguments, the Prosecution mentioned the tattoo to which some of the witnesses referred to as an identification mark of the perpetrator, giving an example of the testimony given by witness Džafer Huseinović. They also added that it was beyond any doubt that the Accused had several tattoos on his body and that he changed some of them, according to the testimony of expert witness-plastic surgeon. The Prosecution noted that Salko Huseinović, who had died in the meantime, stated earlier that one of the killers was Zdravko Mihaljević Pijuk, with a disguise over his face.

The Prosecution believed that it followed from the foregoing that Zdravko Mihaljević had perpetrated the offences he was charged with in the Indictment and proposed to the Court to pronounce the Accused guilty of the criminal offence of Crimes against Humanity in violation of Article 172 of the CC of BiH.

With regard to the body of the referenced criminal offence, which is reflected in the fact that there was a widespread and systematic attack of the HVO army and HVO military police in the relevant period that was directed against the Bosniak civilian population in the territory of Central Bosnia, including Kiseljak Municipality and that the Accused knew of such an attack and perpetrated the criminal offences described in the Indictment, the Prosecution believed that all these elements were proved at the main trial before this Court.

The Prosecution based their conclusion that the Accused was a member of the HVO on the Order of the Operations Group 2 of the Central Bosnia Operative Zone of 27 May 1993, Personal File for Officer Zdravko Mihaljević and the Register File for Conscript Zdravko Mihaljević, which show that Zdravko Mihaljević was a member both of the HVO and *Maturice*.

In the closing arguments, the Prosecution also reflected upon the averment of the Defence that the Accused was not in Tulica the relevant day and that that was confirmed by the Defence witnesses Tibor Prajo and Anto Cvijanović – Tana. The Prosecution referred to the Order issued on 4 May 1993, which clearly shows that Zdravko Mihaljević was Commander of the 3<sup>rd</sup> group of *Maturice*. Some of the soldiers listed as members of the 3<sup>rd</sup> group pointed out that Sergej Seravija voluntarily transferred to the Army of BiH in September 1993 and subsequently gave several statements mentioning Zdravko Mihaljević

as one of the cruellest members of *Maturica*. The Prosecution thereby concluded that all the charges of the indictment were entirely proved.

As for the application of substantive law, the Prosecution completely supported the to date practice of the Court of BiH to apply the Criminal Code of Bosnia and Herzegovina to this kind of criminal offences.

With regard to the aggravating circumstances, it was proposed to the Court to give particular weight to the age of victims and command position held by the Accused and noted that an appropriate sentence would serve as both special and general precaution.

At the end of their closing arguments, the Prosecution proposed that the Accused be ordered into custody on the grounds of Article 138 of the CPC of BiH and on the special grounds set forth in Article 132 (1), a) of the same Law.

#### b) Defence

In their closing arguments, the Defence submitted that on 3 August 2006 Zdravko Mihaljević was suspected of killing 127 civilians in the area of Kiseljak Municipality and that the Prosecution included only 7 out of 127 mentioned victims in their Indictment.

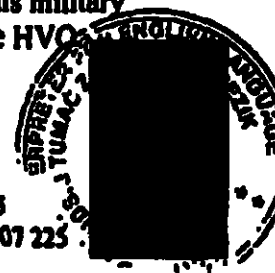
The Defence Counsel contested the averments made by the Prosecution that Sergej Seravija had voluntarily transferred to the Army of BiH by stating that he was arrested and tortured in *Silos*, when he gave statements about Zdravko Mihaljević, among others.

The Defence further stated in the closing arguments that the attack on the village of Tulica was led by Žuna, which was confirmed by all the witnesses, while witness "D", according to the Defence, confirmed that the Accused could not have been there at all.

The Defence argued that on 2 May 1993 Zdravko Mihaljević was only proposed to be appointed as one of the commanders of *Maturica*, but that that did not happen due to the killing of Mato Lučić on 10 May 1993. None of the witnesses confirmed to have seen any of the soldiers of his group (19 of them) in Tulica, except Tibor Prajo, while they mentioned almost all members of the 4<sup>th</sup> group of *Maturica*.

With regard to witness Avdija Bajraktarević and witness "A", the Defence argued that those were unreliable witnesses due to numerous inconsistencies in their testimonies as to the identification of Pijuk and the manner the killings were carried out, which was precisely why those witnesses had not testified before the ICTY. The Defence connected the testimonies of these two witnesses with the testimony of witness "C" and submitted that the three witnesses had given diametrically opposite descriptions of perpetrators of the relevant offences.

As for witness "C", they argued that his first encounter with Zdravko Mihaljević was in the courtroom and that the witness was highly doubtful about his identity. The Defence questioned the credibility of this witness since he dropped his rifle and took off his military shirt, but he was lucky enough to be arrested by an acquaintance who was with the HVO.



The Defence highlighted the inconsistent testimonies of witnesses during the main trial as to recognising the Accused by his voice, since one of them said that the tone of his voice was "medium", another one that it was "high pitched", while the third one said that he had a "lisp voice" and so on.

According to the Defence, witness "A" stated that the individual who had committed the criminal offences had black fatigues and a yellow T-shirt, witness "C" that he had a camouflage uniform, while witness "B" said that all three executioners had black uniforms. The Defence, therefore argued that there were not at least two consistent testimonies about this conclusive fact and witness "A" was the only one who had seen short gloves on the perpetrator's hands and the Defence noted that everyone knew who had worn such gloves in Kiseljak throughout the war.

With regard to taking away of Ibrahim Jukić, the Defence Counsel argued that the Prosecution should have heard the sons of the mentioned person during the proceedings, since they were also placed in the truck in Lepenica and knew who killed their father. The Defence also pointed to the failure of the Prosecution to hear all the individuals mentioned in the Indictment.

The Defence concluded their closing arguments by saying that they addressed only the account of facts contained in the Indictment, but not the substantive law and added that the Accused, just by arriving from Croatia, gave legality to the Court of BiH.

The Accused agreed to what his Defence Counsel said in his closing arguments.

### **5. Applicable law**

It is important to note why the provisions of the CC of the SFRY, which was in force at the time the relevant incidents took place, is not applied as the substantive law.

Article 3 of the CC of BiH prescribes principle of legality which foresees that criminal offences 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 offence by law or international law, and for which a punishment has not been prescribed by law. Article 4 of the CC of BiH provides that the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence. If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Principle of legality is foreseen also in Article 7 (1) of the European Convention, that has priority over all other law, as it is provided in Article 2 (2) of the Constitution of BiH. The mentioned provision of the European Convention prohibits that a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed, however no application of the most lenient law is prescribed.

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

when it was committed, was criminal *according to the general principles of international law...*, while Article 7 (2) of the European Convention foresees the same exception, provided that sub-paragraph 1 of the same Article ... *"shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognised by civilised nations"*. (see also Article 15 (1) and 2) of the International Covenant on Human and Political Rights that contains similar provisions. The state of Bosnia and Herzegovina, as one of the successors of the Yugoslavia, has ratified this Treaty).

Therefore, the requirements are defined that have to be satisfied to allow departure from the principles set forth in Article 3 and 4 of the CC of BiH (and Article 7 (1) of the European Convention), as well as derogation from the application of the criminal code that was in force at the time of perpetration and the application of a more lenient law in the criminal proceedings to prosecute the offences that are considered to be criminal offences also in international law.

Hence, at the relevant period covered by the Indictment, none of the criminal provisions of the CC of SFRY explicitly addressed the Crimes against Humanity, as are now foreseen in Article 172 of the CC of BiH.

The criminal offences the Accused is charged with constitute criminal offences also in international customary law, so that they are subsumed under "the general principles of international law", as foreseen in Article 4 a) of the Law on Amendments to the CC of BiH and under "*the general principles of law recognised by civilised nations*" set forth in Article 7 (2) of the European Convention. It follows from these provisions that the CC of BiH may be applied in this case.

The status of the Crimes against Humanity in the international customary law, as well as the concept of attributing individual criminal responsibility, in the period relevant to the Indictment, are incorporated, *inter alia*, in the Report of the United Nations Secretary General in accordance with the Resolution 808, paragraph 2 of the Security Council dated 3 May 1993, International Legal Committee, Commentary to the Draft Code of Crimes against Peace and Security of Mankind (1996) and the case law of the ICTY and ICTR. These institutions have established that the culpability for Crimes against Humanity or *ius cogens* represents the imperative norm of the international law (International Legal Committee, Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 26). Therefore, it seems indisputable that the Crimes against Humanity were incorporated in international customary law in 1992.

Moreover, the fact that the Crimes against Humanity, listed in Article 172 of the CC of BiH, were encompassed in the law that was in force in the relevant period – at the time of perpetration of the criminal offences, specifically in Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186 of the CC of SFRY, which means that the criminal offences were punishable by the then applicable criminal code, additionally contributed to the conclusion reached by the Court as to the principle of legality.

Eventually, the application of the CC of BiH is additionally justified by the fact that the punishment foreseen by the CC of BiH is any case milder than the capital punishment

