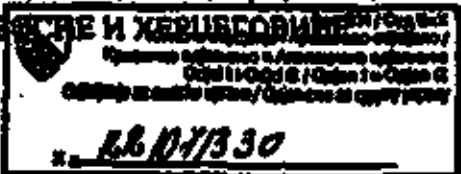


SUD BOSNE I HERCEGOVINE



320100 DOK. 676
СУД БОСНЕ И ХЕРЦЕГОВИНЕ



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

The Court of Bosnia and Herzegovina, Section I for War Crimes, Judge Šaban Mahumić as the Presiding Judge and Judges Pietro Spers and Mario 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 Tuma, 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 11 HVO Battalion, *San Josip Jelačić* Brigade from Kiseljak, in the capacity of the Commander of Special Purpose Unit (PPN) *Maurice*, 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. *Žuma* and Anto Cvijanović a.k.a. *Tape* led the members of the PPN *Maurice* and other HVO members, including Stjepan *Stjepan* a.k.a. *Pepo*, Tibor Prujo, Ljubo Medić, Nikica Medić and after taking the place of Tulice

Konjice Jelačić br. 88, 71 000 Sarajevo, Bosnia i Hercegovina, Tel: 033 707 100, Fax: 033 707 225
Кривични Јелачић бр. 88, 71 000 Сарајево, Босна и Херцеговина, Тел: 033 707 100, Факс: 033 707 225



they captured the entire Bosniak population of Tulica 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 Kiseļjak, whilst he and soldiers, the Šimić brothers, escorted them in a "Golf" vehicle; on the way to Kiseļjak 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 Kiseļjak 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 Tulica, 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 j) 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 Articles 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 Husainović, Avdija (Mebo) Bajraktarević, Hamdija Tulić, Zilka Husainović, Džafer Husainović, 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 Husainović No: KT-RZ 130/05 of 16 June 2006; Prosecution of BiH Record on examination of witness Zilka Husainović No: KT-RZ 130/05 of 30 January 2007; Prosecution of BiH Record on examination of witness Džafer Husainović 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 Fedija 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 Report 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 Selko Bajrektarević's dead body of 11 February 1998; Report on Identification of Zijad Husainović's dead body of 11 February 1998; Report on Identification of Refik Husainović'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 Husainović'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 Selko Bajrektarević; Death Certificate for Aziz Husainović; Death Certificate for Zijad Husainović; Death Certificate for Refik Husainović; Death Certificate for Mufid Tulić; Death Certificate for Kasim Husainović; 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 3rd 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: K2S-18/01 of 21 December 2001; Letter of the standard marking No: 003808/CIB/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 Husainović, Asim Hasić, Avdija (Hamid) Bajraktarević, Dragan Šimić, Mijo Šimić, Selver Bajraktarević, Anto Cvijanović, Tibor Prajo, Predrag Pravdić, Alija Bajraktarević, Halil Bešlić 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 Kraljevo PSS.

Expert witness, doctor Sead Latić, 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 analyzed 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 villages 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 Štako, 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 3rd 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 villages 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 Velić Velićević, 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 – *Isina* (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 P88 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 Avdija 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 Avdija 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 witnesses 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 Džafar 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 Saliko 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 *Matarice*.

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 – Tena. The Prosecution referred to the Order issued on 4 May 1993, which clearly shows that Zdravko Mihaljević was Commander of the 3rd group of *Matarice*. Some of the soldiers listed as members of the 3rd 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 cruelest members of *Matarica*. 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 Beravija had voluntarily transferred to the Army of BiH by stating that he was arrested and tortured in Siles, when he gave statements about Zdravko Mihaljević, among others.

The Defence further stated in the closing arguments that the attack on the village of Tutica 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 *Matarica*, 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 Tutica, except Tibor Prajo, while they mentioned almost all members of the 4th group of *Matarica*.

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 "lap voice" and so on.

According to the Defence, witness "A" stated that the individual who had committed the criminal offences had black fringes 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 to the general principles of law recognised by civilized 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 civilized 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 in any case milder than the capital punishment



was applicable at the time the criminal offence was perpetrated, whereby the principle of time constraints regarding applicability and the principle of applicability of a more lenient law are both satisfied.

Such a position taken by the Court complies with the positions taken in the Verdict rendered by Section I of the Appellate Division of the Court of BiH in the case of Abdulahim Maitouf, No: KPŽ 32/05 of 4 April 2006 and the Verdict in the case of Dragoja Pamović No: KPŽ 03/16 of 27 October 2006, which was confirmed by the Decision No: AP-172/06 rendered by the Constitutional Court of Bosnia and Herzegovina on 30 March 2007.

6. Findings of the Court

a) General reflections upon the evaluation of evidence

The Court evaluated the evidence under this criminal proceedings in accordance with the applicable procedural law – the Criminal Procedure Code of Bosnia and Herzegovina by presuming the Accused's innocence prescribed by Article 3 of the CPC of BiH, which materializes the general principle of law that the burden of proof lies with the Prosecution, that has to prove the defendant's guilt beyond a reasonable doubt.

When evaluating the witness' testimonies witnesses, the Court paid particular attention to the conduct, bearing and character of the witnesses and evaluated also other evidence and circumstances surrounding this case. Also, the Court bore in mind that the credibility of witnesses depended on their knowledge of facts about which they testified, then on their personal integrity, accuracy and their obligation to tell the truth.

When authenticating the testimonies given by witnesses, the Court had no doubts that they spoke the truth, but the key issue here was whether certain witness testimonies were credible. To that end, the Court Panel took into account that they testified about the incident which had taken place long before their testifying and that, given the long temporal distance, there could be possible imprecision due to elusive human perception and recollection of traumatic events.

With regard to indirect evidence, the case law of this Court has established their admissibility. In addition, Article 15 of the CPC of BiH stipulates the right of the Court to free evaluation of evidence, so that the Court has to be convinced that the evidence was given voluntarily and that it is authentic and credible. Also, the probative value of indirect evidence given by a witness depends on the context and nature of the evidence, more precisely whether such evidence was supported by other pieces of evidence.

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

Indictment No: KT-RZ-44/07 was issued by the Prosecutor's Office of BiH on 1 February 2007 whereby the accused Zdravko Mihaljević was 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.

The Law provides that, in addition to the special elements associated with individual actions, the Prosecution also has to prove all general elements of the criminal offence of Crimes against Humanity to be able to define it as such, namely:

1. That there was a widespread or systematic attack directed against any civilian population,
2. That the accused was aware of such an attack,
3. That the actions carried out by the accused were taken within the scope of the attack and that he was aware of that.

It follows from one part of the Reasoning of the Verdict concerning the admission of the established facts in this case and also from the witness testimonies who confirmed that first there was an artillery attack which was followed by an infantry attack on the village of Tulica in Kiseljak Municipality on 12 June 1993. The Court indisputably concluded that at the time relevant for the Indictment, specifically in June 1993, there was a widespread and systematic attack in the area of Vitez, Busovača and Kiseljak Municipalities carried out by the Croatian Defence Council directed against Bosniak civilian population. The attack, viewed in the context of Crimes against Humanity under the international customary law, was not limited only to "an armed conflict".

As for other necessary elements of the criminal offence of Crimes against Humanity, having evaluated all presented evidence individually and their correlation, the Court found that it was beyond any reasonable doubt that the Accused was in the area of Kiseljak Municipality at the relevant period and that he was a member of the Croatian Defence Council. Nevertheless, although it follows from all the presented evidence that the Accused was aware of the widespread and systematic attack directed against Bosniak civilian population of Kiseljak Municipality and a broader area of Central Bosnia and that the actions described in the Indictment were taken within the widespread and systematic attack, the Prosecution failed to prove beyond reasonable doubt that those actions were taken by the accused Zdravko Mihaljević. A mere fact that the Accused was a member of the army that committed the crime and his presence in the broader area in which the crime took place, may not *a priori* be used as grounds for criminal responsibility of the accused Zdravko Mihaljević.

a. Responsibility of the accused Zdravko Mihaljević

It is therefore questionable whether the Accused, although a member of the Croatian Defence Council, participated in the infantry attack and the destruction of the place of Tulica at the time, place and manner as described in the Indictment, led the members of the PPN "Maturice" and other HVO members, took part in capturing the Bosniak population of the villages and depriving Salko Bajraktarević of his life together with Aziz Huseinović, Zijad Huseinović, Refik Huseinović, Mušić Tulić, Kasim Huseinović, Safet Katkić and Ahmed Bajraktarević. Then, on the way to Kiseljak, he ordered the Šimić brothers to take Ibrahim Jahić back to the village of Tulica, as of when Ibrahim Jahić has been unaccounted for. In so doing he committed the following offences: deprivation of other person's life (murder), unlawful deprivation of liberty in violation of fundamental principles of international law, torture, enforced disappearance and other inhumane acts of similar nature.



taken in order to cause great suffering and serious physical and mental injury or damage to health, as well as crimes against humanity.

The Court indisputably concluded that the crimes contained in the indictment, charging the Accused with having participated in rounding up and subsequent killing of the mentioned Bosniak civilians, indeed happened. The Accused was charged as follows:

In the morning hours of 12 June 1993, an artillery attack was launched by HVO units on the place of Tulica while humanitarian aid was being distributed by *Mérahama*. The attack was conducted simultaneously from two directions – Oštrik and Rakovica, where the Serbian forces were deployed and from Ban Brdo and Čubren, where the Croatian Defense Council forces were deployed. The Court concluded that these facts followed from the testimonies of witnesses given at the main trial, who were in the village of Tulica the relevant day and who provided a clear and detailed account of how the artillery attack on the village started. They also testified that the attack lasted for four hours and that the HVO forces raided the village after that. Witness Džafer Husainović stated that he was outside the house when the attack started and when the shelling from the mentioned locations began, he hid at his aunt's house where he stayed until the shelling stopped. Then, on his way home, he met another cousin who was in flight and who told him that the village was invaded by Chetniks and HVO, that he escaped in the direction of Lepenica and on the way there, he encountered some soldiers in uniforms. The witness then described how he was arrested by the HVO soldiers. The testimony of this witness was entirely consistent as to the day and time, duration of the shelling and complied with the testimonies given by witnesses Avdija Bajraktarević, Hamdija Tulić, Zilka Husainović, Asim Hasić, Fedhija Bajraktarević, witnesses "A", "B" and "C" about the conclusive fact that the attack indeed happened in the morning hours of 12 June 1993. Not a single witness who was in the village that day raised any doubts as to the conclusion of the Court, since all the witnesses who testified about this event gave a more or less accurate account of the shelling, its start, intensity and duration and they were in agreement that the forces with HVO insignia entered the village immediately after it stopped.

After that, all inhabitants of the village of Tulica who were there at that time, were systematically captured and brought in front of the house of Ahmed Bajraktarević, where was a small village shop. Then a soldier arrived with a hood over his head, who separated men from women and children and told them to say good-bye to their loved ones.

The accused Zdravko Mihaljević is charged in the indictment with depriving Saliko Bajraktarević of his life by firing from an automatic rifle at point-blank range in front of the house of Mujo Bajraktarević and in front of the captured population. Witnesses for the Prosecution: Elvir Husainović, Avdija Bajraktarević, Senad Bajraktarević, Fedhija Bajraktarević, witnesses "A" and "C" testified about that and these individuals were direct witnesses of the execution. The Court found that the discrepancies in their testimonies concerning the number of bullets fired from the automatic rifle at Saliko Bajraktarević were minor and they did not question the testimonies in that respect, given the they were uniform in describing the arrival of Saliko Bajraktarević at the plateau in front of the shop, his short conversation with the disguised person, the warning given by the disguised soldier to Saliko to be silent and his shooting at him.

The Court did not give credence to testimonies given by the Defence witnesses Alija Bajraktarević and Halil Bešlić about this incident, since their testimonies were inconsistent both mutually and in relation to the other presented evidence. The Court did not find the testimony of witness Alija Bajraktarević convincing also about another fact. He mentioned to have recognized Serb soldiers in the village that day, however, that was not supported by any other heard witness and none of the other witness mentioned that there were any Serb soldiers in the village that day. This witness also only assumed that one of the four soldiers killed Salko Bajraktarević and said that he was afraid to watch that.

Witness Halil Bešlić testified that a soldier first wounded Salko in his legs and that a soldier in a camouflage uniform with no hood on his head killed him after that, which contravenes the testimonies of all other direct witnesses, who testified that he was not wounded.

All the heard witnesses were consistent in their testimonies that having separated around 30 men from the women, the soldier in a camouflage uniform with a stocking over his head took them together with several other HVO soldiers towards the local graveyard, where the selection was carried out and the following men executed: Aziz Husainović, Zijad Husainović, Kasim Husainović, Refik Husainović, Mušić Tečić, Ahmed Bajraktarević and Safet Kadrić.

All witnesses who were present at the site: Elvir Husainović, Avdija Bajraktarević, Senad Bajraktarević, witness "A", Asim Haslić, Halil Bešlić, witness "C" and witness "B", who watched the act of execution from a nearby grove, were completely consistent when they testified about that conclusive fact. The Court admitted the testimonies of these witnesses about the incident, given that they either directly participated in it or were direct witnesses present on the spot.

The witnesses were consistent when they testified about the incident involving Halil Bešlić. He had to step out of line near the local graveyard, he then talked to a soldier with a stocking over his head, who requested Halil to name the persons who possessed weapons and every time a name was called, that person had to step out of line and was executed. In addition to other witnesses, this was confirmed also by Halil Bešlić and left no doubt for the Court as to the sequence of those events.

Expert witness, forensic pathologist Hamza Žujo, who together with doctor Ilija Dobrića, also a forensic pathologist and expert witness, examined the bodies in the village of Tulice in February 1998 confirmed at the main trial that the victims suffered a violent death. That followed from the Record No: Kri-148/96 of 8 February 1998 and of 9 February 1998 and the Record on identification of every individual person. It arises from the mentioned Expert evaluation report that all the stated individuals suffered a violent death, with the exception of Salko Bajraktarević, who did not have any skeletal injuries and the expert witnesses could not establish the direct cause of death, however, he did not rule out the possibility of violent death. It also follows from the Expert evaluation report that the bodies of Sifa and Safija Tulić were examined together with other bodies the same day in Tulice and that these two persons suffered a violent death, while the body of Safija Tulić was also burned. The Court admitted the Expert evaluation report in its entirety, since it was unbiased and prepared in accordance with professional standards, particularly having in mind that it was prepared by experts with years long experience in forensic pathology expert evaluation.

Further developments that are outlined in the account of facts of the indictment were indisputably proven – that the men who were taken away in a line and survived, were returned to the village of Tulica, where they were loaded onto a TAM make truck and that Ibrahim Jahić was taken off the truck in the place called Lepenica and taken in the unknown direction, which was confirmed by the witnesses who testified at the main trial and who eye-witnessed the incident. In addition, it follows from the testimonies given by the earlier mentioned witnesses that the other men were taken to the barracks in Kiseljak and, having spent different periods of time there, they were exchanged.

The indictment mentioned a person who disappeared without a trace after the attack on Tulica and she was referred to as Fatima Bajraktarević. However, not a single piece of evidence was presented at the main trial to support these allegations of the indictment.

The testimonies of all heard witnesses raised suspicion that the witnesses actually recognized the person who participated in the capturing and subsequent killing of their relatives and neighbours the relevant day. Majority of the Prosecution witnesses, who confirmed to have seen the main executor, agreed in their testimonies that there was one HVO soldier in the village that day who had a dark balacava over his head and face, with openings for eyes and mouth and they claimed that he executed Selko Bajraktarević near the local graveyard and other victims afterwards in the manner already described.

The executor was so described by the witnesses for the Prosecution: Elvir Husainović, Avdija Bajraktarević, Alija Bajraktarević, Senad Bajraktarević, witnesses "A", "B" and "C", but also witnesses for the Defence: Selver Bajraktarević and Halil Bešlić, who were consistent that there was a soldier in the village with a stocking/balacava on his head. On the other hand, witnesses Zilka Husainović, Asim Hasić, Fedija Bajraktarević testified that there were at least three soldiers in the village that day with disguise over their heads.

It follows from the presented evidence that only witness "C", out of all heard witnesses, had known the accused Zdravko Mihaljević from before by his nickname Pijuk and he confirmed at the main trial that it was the person sitting in the courtroom. He stated that he used to see him in Kiseljak in the same group with Tibor Prajo, Peo and Firgo and that he used to see him very often while he himself was engaged in the regional police. Witness "C" testified at the main trial that he always maintained that the person with a disguise on his head was Pijuk, but that he grew suspicion as to his identity and that he was not 100% sure about his identity due to the disguise over his head, but that he recognized the Accused by his voice. This witness stated that the person with a stocking on his head wore military trousers on the relevant day and a camouflage sleeveless assault jacket and following the executions, the mentioned soldier stayed in the village and did not accompany them towards Lepenica and Kiseljak. However, the witness stated that he did not see his face in the course of relevant incidents because he had a disguise over his head at all times. This witness expressly stated that he was beaten up in the barracks in Kiseljak, but that it was not done by Pijuk, but by another soldier who had a plaster over his eye.

Having evaluated the testimonies given by this witness as both Prosecution and Defence witness, together with his testimony as protected witness "103" given in the case of Tibor Prajo before the Supreme Court of the Federation of BiH, the Panel could not conclude

beyond reasonable doubt that witness "C" was positive about the identity of Zdravko Mihaljević-Pijuk as the person with a hood over his head who committed the offences he was charged with. The truth is that the witness stated in his testimony before the FBiH Supreme Court in 2001 that he immediately recognised Zdravko Mihaljević a.k.a. Pijuk by his figure and voice and provided a detailed account of the sequence of events the relevant day in Tulica. On the other hand, in his testimony before the FBiH Supreme Court, witness "C" could not identify the person with certainty, he referred to him as Mihejlović and he did not explain how he recognised him by his voice and figure. When testifying before this Court, witness "C" was always highly suspicious about Pijuk as a possible perpetrator of the relevant offences, he insisted that it was the individual that he suspected was Pijuk, but he specifically claimed that he never saw that person after Tulica, either in Lepenica or in the barracks in Kiseľjak. This averment directly contravenes testimony given by witness "A", who stated to have seen Pijuk in Lepenica, when this witness was in the truck together with witness "C" and others and that the mentioned soldier took his disguise off his head. It is even more in contravention with the testimony of witness Avdija Bajraktarević, who stated to have seen Pijuk in the barracks in Kiseľjak as well, when he allegedly took off his disguise and beat witness "C". When he testified at the main trial that after the exchange he had talked to some of his neighbours about the perpetrator, he said that he always expressed his suspicion that it was Pijuk.

When describing Pijuk, witness "A" stated to have seen him for the first time in Brnjaci in 1990 or 1991 and that someone told him that it was Zdravko Mihaljević Pijuk, so that he knew him from before by sight. When he described his snake tattoo, that he allegedly saw on the day of execution on Pijuk's arm, the witness stated that the snake was wrapped around a sword on the left Pijuk's upper arm and that he thought that he had seen the snake tattoo also two to three months prior to the relevant events. According to witness "A", Pijuk had black trousers and the top part of fatigues. The Court, however, could not give credence to the testimony of this witness, particularly to his knowing Pijuk from before, since it was in contravention of all other presented evidence. Witness "A" stated that upon the arrival of the truck in Lepenica, Pijuk, who escorted the truck, took his disguise off his head in front of the *Fortuna* café, that he clearly recognised him then and that he could also be recognised by all other captives who were in the truck. These averments made by witness "A" completely contravene not only the testimony given by witness "C", who stated that the person with a disguise over his face stayed in the village of Tulica and did not follow them to Lepenica, but also all other witnesses who were in the truck. None of those witnesses even mentioned that either Pijuk or anyone else took off their disguise in Lepenica. In addition, witness "A" testified that witness "C" told him already when they were taken out for execution near the local graveyard that it was Pijuk, but that was in contravention of testimony of witness "C", who did not remember this detail at all. Also, when testifying for the second time as Defence witness, witness "A" maintained that the main sign of identification of the perpetrator was the snake tattoo wrapped around the sword that covered the main portion of his left upper arm and shoulder. However, doctor Sead Labević, a plastic and reconstruction surgeon and expert witness, examined the Accused and presented his findings at the main trial. He found that there was no tattoo on that part of the Accused's arm and that there could never be any tattoo there. The Court found that the expert evaluation report was credible in its entirety, it was prepared in accordance with appropriate professional standards and it was particularly relevant because it was prepared by a specialist in plastic and reconstructive surgery who had been removing patients'



he mentioned in his testimony. The expert witness stated that, in addition to a cross, the Accused also had tattooed name "Katica" and "JNA" on the left lower inner arm and two more small tattoos filled by blue ink of 3,5/1 cm and 3,1/1 cm respectively. Having directly examined the middle and lower third of the front part of the left lower arm of the Accused, the expert witness stated at the main trial that there were no pictures underneath the two blue ink tattoos, but some numbers. The expert witness was specific that the cross tattoo was the most dominant one, visible and noticeable even from a greater distance, in proportion to the size of the courtroom, it could be seen from a distance of up to 10 meters. The mentioned information provided by the expert witness also suggests that the witnesses who during the relevant incident were near the person with a hood over his head, would certainly see the tattooed cross on that person's lower outer arm.

Witness Avdija Bajraktarević also testified about Pijuk as the perpetrator of the relevant criminal offences. He stated that the Accused had a cap on his head all the time, that he was naked from the waist up, but that he did not see the moment when he took off his cap. According to this witness, only time when he saw his face was in the barracks in Kiseljak, when the Accused allegedly beat witness "C" and when the witness "C" told him that it was Pijuk. Witness Avdija Bajraktarević described the tattoos, a snake on his left arm and a cross on his right arm and he was the only person who mentioned the cross as the most distinctive mark that he noticed on the person who had a hood over his head at the relevant time. Also, none of the other witnesses mentioned that Pijuk proceeded further from Lepenica, which was another inconsistency in the testimony of Avdija Bajraktarević. Witness Avdija Bajraktarević testified about the decisive facts contained in the Indictment, but he did not provide a detailed account of circumstances under which the incident happened, so that his testimony sounded like a repetition of certain circumstances surrounding the decisive facts, the witness was not specific about the conclusive facts, therefore the Court ruled that his testimony was unreliable and inadmissible. The Court was also mindful of the fact that the testimony of this witness about other important facts and circumstances was supported neither by testimonies of other witnesses nor by material evidence. The Panel could not give credence to the testimony of this witness also on the ground of its inconsistency with other presented evidence. The witness testified that Pijuk had black trousers and that he was naked from the waist up, that he saw his face in the barracks in Kiseljak when he started beating witness "C" and recognising Pijuk in the courtroom was not found convincing by the Court, since the witness "C", when testifying both as the Prosecution and Defence witness, expressly stated that Zdravko Mihaljević Pijuk never beat him, thus not in the barracks in Kiseljak, but that he was beaten by another person with a plaster over his eye. Witness "C" stated that the perpetrator of the relevant offences wore a military camouflage uniform at the relevant time.

The Court found credible the mentioned Expert evaluation report presented by dr. Sead Lašević, a qualified and skilled expert witness. It was found that there was a cross of 12x10x2,5 cm tattooed on the right lower outer arm of the Accused, but that there was no snake tattoo either on the left or the right arm of the Accused, not even any traces of a tattoo which could look like it. The expert witness was explicit in his assertion that there were no traces of any tattoo on the upper part of the body of the Accused and he supported that by stating that in case that a tattoo be possibly removed, the skin there always looks different from the intact skin and that was not found on the Accused. The expert witness also stated that the cross could be noticed by everyone should the arm have been exposed and that

witness Avdija Bajraktarević was the only one to state that the soldier who was there during the relevant incident had a cross tattooed on his arm.

It follows from the testimony given by witness "B", who managed to avoid the arrest and hid in a nearby grove, that he watched the execution of his neighbours near the local graveyard, from a distance of 100-150 meters (as the crow flies). He described the main executor as a soldier, completely dressed in a black long sleeved uniform, with a black vest over it and fingerless gloves on his hands. According to this witness, there were another two individuals in black uniforms who fired at those people and none of the soldiers in camouflage uniforms fired at the victims at the graveyard. He also stated that he had not known the accused Zdravko Mihaljević from before and that it was witness "C" who told him after the exchange in the village of Deovići, near Pazarčić, that Firga, Pijuk and Crnogorac had done it. In his testimony, witness "C" said that he did not remember telling witness "B" anything about that.

The Prosecution witness, Hamdija Tulić, who was not a direct participant in these events, named Pijuk as the perpetrator of the relevant offence and stated to have heard subsequently from his neighbours, inhabitants of Tulice, that the killings were committed by Firga, Žana and Pijuk.

Witness Senad Bajraktarević testified to have learned in Ključak that the person with a hood over his head was Pijuk, but it followed from his testimony that he could not precisely remember who among the then imprisoned neighbours and relatives told him about that nickname.

When describing the perpetrator of the mentioned criminal offences, witness Elvir Huseinović stated that he knew him as 'Glowe', that he had a stocking over his head, that he was of medium height, had a high pitched voice and wore a camouflage uniform. Witness Senad Bajraktarević stated that the person with a hood over his head had a characteristic lisp voice, a tattoo below his elbow and camouflage trousers, while witness Selver Bajraktarević, who did not directly see the execution near the local graveyard, stated that the soldier he saw in the village with a black hood over his head, was fairly short, stocky and wore uniform. Witness Alija Bajraktarević, who also witnessed the execution near the graveyard, described him at the main trial as a young, tall and strong soldier with a stocking over his head, with something on his arm, while witness Halil Bešlić, also present on the spot during the relevant incidents, described him as a soldier in a black long sleeved uniform, with a stocking over his head and accompanied by two soldiers in camouflage HVO uniforms.

As opposed to the testimonies of the mentioned witnesses, The Panel found that the witnesses for the Defence: Anto Cvijanović-Tana, Tibor Prajo, brothers Dragan and Mijo Šimčić, Predrag Pravdić a.k.a. Dragan and witness "D" gave an alibi to the Accused as to his presence in the village of Tulica on 12 June 1993, in absence of any other additional evidence. It followed from the testimony given by Ante Cvijanović a.k.a. Tana, mentioned in the Indictment as the person who together with Pijuk participated in the relevant incidents in Tulica and who had definitely known the Accused for years, that he was present in Tulica the relevant day since his unit was assigned to enter the village after the shelling.

¹ Translator's note: Person in charge

witness, however, categorically claimed that he neither saw Zdravko Mihaljević there at all, nor he saw the execution near the local graveyard and underlined that he had never been in the same unit with the Accused.

Similarly, witness Tibor Prajo, who participated in the operation in Tulica and was convicted for that by a final judgment, claimed to have been in the village throughout the operation, but he was explicit that he had not seen Zdravko Mihaljević there and that Zdravko Mihaljević had never been the commander of *Matorica*.

The testimonies given by these witnesses were corroborated by witness Dragan Šimić, who stated at the main trial that he had been present the relevant day at *San Ardo*, where they were deployed, while his brother, witness Mišo Šimić stated that he had been at Pijesevac on the relevant day, at the front line. Both witnesses were consistent that they were not in Tulica on 12 June 1993, while witness Dragan Šimić stated that he thought that they had said hello to Pijuk in Lepenica, whom both of them knew very well, that he wore jeans, sneakers and a T-shirt and that he was unarmed. Both witnesses also claimed that they had not taken away Ibrahim Jahić together with Pijuk, as it was alleged in the indictment.

The averments of witness Tibor Prajo about Zdravko Mihaljević's belonging to the PPN *Matorica* were confirmed by the testimony of witness "D", who had known the Accused very well even before the war started in 1992. He expressly stated that Zdravko Mihaljević had never been the Commander of the PPN *Matorica* and added that his unit was created in late April 1993, that its first commander was Mato Lučić and that the unit was named after him when he died - PPN *Matorica* and Marinko Bošnjak became its commander. The testimony of this witness was entirely consistent with testimonies of other Defence witnesses as to the averment that Zdravko Mihaljević was not in Tulica the relevant day, since his unit was deployed in the town of Kiseljak. He also stated that the older brother of Zdravko Mihaljević was much better known as Pijuk in Kiseljak, while Zdravko Mihaljević was known by his nicknames Mali Pijuk.

The testimonies of the mentioned Defence witnesses completely complied with the testimony given by the Accused, when he testified as witness at the main trial. He stated that he had never been a member of *Matorica*, but that he was a member of that special purpose unit when its commander was Mato Lučić until he got killed on 10 May 1993. According to the Accused, the mentioned unit "dissolved" and was not engaged all the time through June 1993, when he was assigned to the civilian police. The Accused stated that he had never seen the Order of 27 May 1993 on the establishment of *Matorica* platoon and assigning Zdravko Mihaljević as the leader of the third group and that he had never received the Decision on his appointment to that position and that he had never been the commander of that unit. He was suspicious about the listed members of the unit, since some of those men were colonels and generals and it did not make sense that he could command over so highly ranked officers. The truth is that the Accused stated that some of the listed individuals, like Sergej Seravija or Slavko Tuca, were under his command in 1992, but that Sergej Seravija was arrested by the Army of BiH in 1993, so that he could not have been assigned to *Matorica* later on, while Slavko Tuca left to Croatia in late 1992 and never returned, so that his belonging to *Matorica* was questionable.

Same as the witnesses for the Defence who knew the Accused, the Accused personally stated that he was not in Tutica the relevant day, that he was in Lepenica, where he visited Mr. Pravić in his red *Stazi* vehicle, in civilian clothes and he explained that he used to visit Mr. Pravić because of his dogs since was a hunter, but when he did not find him there, he immediately left Lepenica. The Accused also said that during his short visit to Lepenica, he saw Dragan Šimić in passing and that he just waved to him to say hello and witness Dragan Šimić confirmed that in his testimony.

The proceedings revealed that the imprisoned people were being taken for forcible labour by the guards and other HVO members until they were exchanged and that some of them were subjected to torture. These facts follow from the testimonies of heard witnesses, primarily from the testimonies given by Elvir Husainović, Senad Bajraktarević, Asim Hasić, Džafar Husainović, who were in unison that they were being taken for forcible labour during their imprisonment in the barracks in Kiseļjak to dig trenches for HVO, that some prisoners were tortured while they were imprisoned in the barrack. Nevertheless, the Court could not link those events with the Accused, since it was not proved under the proceedings that he participated in them, due to already mentioned reasons.

Therefore, having evaluated all the witness' testimonies, both for the Prosecution and for the Defence, together with the documentary evidence admitted in the file during the main trial, the Court could not conclude beyond reasonable doubt and with certainty that it was the accused Zdravko Mihaljević who indeed perpetrated the relevant offences he was charged with in the indictment. It was obvious that not a single witness provided a complete account of the participation of the Accused in the incidents of 12 June 1993 in the village of Tutica and further on, the way they were described in the indictment. As it has been already mentioned in the Reasoning of the Verdict that there were no at least two consistent testimony of witnesses as to the movement of the person with a hood over his head during the relevant incidents, or as to the clothes he wore, his appearance or activities undertaken by him. To that end, witness "C" claimed that the mentioned person stayed in the village of Tutica after the execution and did not accompany them, while witness "A" stated that the person took off his hood in front of the café in Lepenica. Witness Avdija Bajraktarević testified to have seen Pijuk's face in the barracks in Kiseļjak, when he was beating witness "C". The testimonies given by these key Prosecution witnesses, who identified the individual with a hood - executor of Senko Bajraktarević and others near the local graveyard, as Pijuk, each of them in his own way, completely contravened each other about the conclusive facts. It clearly follows from everything presented up to now that the mentioned witnesses gave different and inconsistent information about the identity and movement of the Accused on the relevant day. In addition, their descriptions of clothes the executor wore did not correspond to a decisive degree to the descriptions given by the key Prosecution witnesses. Witness Avdija Bajraktarević explicitly stated that Pijuk had black trousers and that he was naked from the waist up, witness "A" that he had black trousers and a black vest and a short sleeved T-shirt, witness "C" that he wore military camouflage uniform. Also, the Prosecution witnesses who stated to had possible seen the Accused before, could not say specifically when, under which circumstances and did not present any fact about that. They merely stated that someone else told them that it was Pijuk or Zdravko Mihaljević called Pijuk, but that they did not communicate with him, or that they recalled only to have seen him some time prior to the war and the relevant incident.

Such an identification of the accused Zdravko Mihaljević was incoherent, so was their referring to the Accused only as to "Pijuk" or as to "a person with a mask-cap on his head", different descriptions of his clothes – some witnesses stated that he was completely dressed in a black uniform, whereas others said that he wore a military camouflage uniform and even that the perpetrator was Vlado Kapetanović, as was stated by the Prosecution witness Džafer Husainović, who testified not to have seen anyone with a camouflage hood over his head that day in Tulica. All that justified reasonable doubts as to the identity of the Accused charged in the indictment.

The Court found particularly relevant the testimonies given by the key Prosecution witness – witness "C", who was the only Prosecution witness who had indeed known the person by the nickname of Pijuk before the critical incidents. Having analysed the testimonies in detail, the Court concluded that there was a high degree of suspicion that the person who wore a hood over his head the relevant day and who indisputably killed Selko Bajraktarević and other victims near the local graveyard on 12 June 1993, actually was the accused Zdravko Mihaljević.

During the criminal proceedings, the Defence focused on the identity of the accused charged in the indictment, and serious doubts were raised as to the identity of the Accused due to the averments made by all the heard Defence witnesses about the perpetration of the relevant offences by Zdravko Mihaljević. All the mentioned witnesses who had known the Accused from before were consistent in their testimonies that he was never a commander of the FPN *Matorice* and that he was not in the village of Tulica the relevant day. The Court entirely admitted the statements given by these witnesses as credible, precisely on the ground of their consistency about the conclusive facts, both mutually and in correlation with the testimony of the Accused given as witness.

The absence of conclusive identification of the accused Zdravko Mihaljević as the perpetrator of the relevant criminal offence, which was coupled with the fact that the Prosecution witnesses had not known the Accused from before and in view of the alibi provided by the Defence witnesses that the Accused could not have been present at the relevant place on the relevant time, guided the Court to conclude that the Prosecution failed to prove beyond reasonable doubt that it was the accused Zdravko Mihaljević who perpetrated the offences in the village of Tulica the relevant day that he was charged with in the indictment. The evidence presented by the Prosecution did not prove beyond reasonable doubt even the presence of the Accused at the relevant place, or that he commanded or perpetrated the relevant offences.

Therefore, the conducted evidentiary procedure failed to prove that the accused Zdravko Mihaljević participated in the widespread and systematic attack directed against the Bosniak civilian population, in the deprivation of liberty contrary to fundamental rules of international law, torture, enforced disappearances and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health. The Court applied *in dubio pro reo* principle, and due to the lack of evidence acquitted the accused Zdravko Mihaljević of the charges pursuant to Article 284 (c) of the CPC of BiH.

7. Costs of the criminal proceedings and possible claims

Considering that the accused Zdravko Mihaljević was acquitted of charges, the Court ruled pursuant to Article 189 (1) of the Criminal Procedure Code of Bosnia and Herzegovina, that 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.

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.

Record taker
Legal Advisor

Lejla Koujić
(signature affixed)

PRESIDING JUDGE

Šaban Maktumlić
(signature affixed)

LEGAL REMEDY: An appeal may be filed to contest this Verdict with the Appellate Panel of the Court within 15 days from the date of the receipt thereof.

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

Certified Court Interpreter for the English Language



