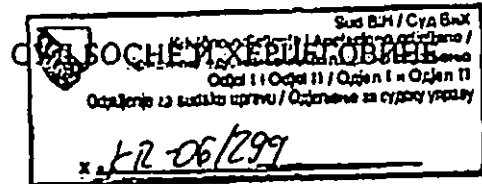


SUD BOSNE I HERCEGOVINE



Number: X-KR-06/299
Sarajevo, 30 April 2008

PREVOD 275

IN THE NAME OF BOSNIA AND HERZEGOVINA

Court of Bosnia and Herzegovina, War Crimes Section, in the Panel composed of Judge Minka Kreho as the President of the Panel and Judges Tore Lindseth and Roland Dekkers as the Panel members, with the participation of the legal advisor Amela Skrobo as the record-keeper, in the criminal case against the Accused Zijad Kurtović for the criminal offense of War Crimes against Civilians under Article 173(1)(c), (e) and (f), the criminal offense of War Crimes against Prisoners of War under Article 175(1)(a) and (b) and the criminal offense of Violating the Laws and Practices of Warfare under Article 179(1) and (2)(d) of the Criminal Code of Bosnia and Herzegovina, deciding upon the Indictment of the Prosecutor's Office of BiH number KT-RZ:115/06, dated 10 May 2007, which was confirmed on 16 May 2007 and amended on 24 April 2008, following the main trial wherein the public was excluded from a part of the trial and which was attended by the Accused and his defense counsel, Attorney Fahrija Karkin, and the Prosecutor of the Prosecutor's Office of BiH Vesna Tančica, rendered and on 30 April 2008, in the presence of the parties and the defense counsel, publicly announced the following

VERDICT

The Accused

Zijad Kurtović, aka Zijo, son of Bajro and mother Saja, née Hodžić, born on 30 January 1967 in Donja Drežnica, personal identification number 3001967150018, with residence at 75 Donja Drežnica, Mostar Municipality, Bosniak, literate, completed the Secondary Traffic Technical School/driver of motor vehicles, unemployed, married, citizen of Bosnia and Herzegovina, served the army in 1986/87 in Postojna, Slovenia, registered in the Mostar military records, poor financial standing, convicted by the Verdict of the Municipal Court in Mostar in the case Km-3/84 of 18 January 1985 for the criminal offense referred to in Article 148(1) of the CC SR BiH whereby the educational measure of committal to a Juvenile Correction Facility was imposed on him; by the Verdict of the Municipal Court in Stolac in the case K-44/85 of 24 September 1985 for the criminal offense referred to in Article 153(1) and sentenced to a one-year imprisonment; by the Verdict of the Basic Court in Mostar in the case number K-400/89 of 28 September 1990 for the criminal offense referred to in Article 42(1) of the CC SR BiH and sentenced to a six-month imprisonment; these sentences were deleted by the Decision of the Police Station Mostar number 03-11/1-4-13/96 on 3 April 1996,

IS GUILTY

Of the following:

In the second half of 1993, during the armed conflict between the Croat Defense Council (the HVO) and the Army of the Republic of Bosnia and Herzegovina, in the place Donja Drežnica, Mostar Municipality, in the Roman Catholic Church of All Saints, as a member of the Army of the Republic of Bosnia and Herzegovina, more specifically, the unit for

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physical security of the command of the Independent Battalion *Drežnica* of the 4th Corps of the Army of RBiH, he acted contrary to Article 3(1)(a) and (c) of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 and Article 3(1)(a) and (c) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and, during the armed conflict between the HVO and the Army of RBiH, violated the laws and customs of war acting contrary to Article 22 and Article 56 of the Regulations Respecting the Laws and Customs of War on Land, which are a constituent part of the Convention Respecting the Laws and Customs of War on Land of 18 October 1907, intentionally damaging the Roman Catholic Church of All Saints, in the way that:

1. On an unknown date in late September or early October 1993, during the first night of detention, in the place Donja Drežnica, Mostar Municipality, after twenty detained Croats, civilians Miroslav Soko, Marinko Drežnjak, Marinko Ljoljo, Mirko Zelenika, Vili Kuraja, Zvonimir Kukić, Vlado Ćurić and Anto Rozić and prisoners of war – HVO members Mate Rozić, Matija Jakšić, Nedeljko Krešo, Marko Rozić, Vinko Soldo, Anton Grgić, Witness A, Witness B, Branko Jurić, Kamilo Dumančić, Ivan Pavlović and Ivan Kostić, were transferred from the Parish Office and detained in the Roman Catholic Church of All Saints, he ordered them to sit in pews two by two, and then he put on a clerical dress – a monastic habit and, holding a cross upside down in his hand, ordered them all to raise their hands above their heads and bow their heads down towards the floor; they remained in this position for a rather long period of time and that terrified and hurt them; and then, after some time, he ordered them to put on orange roadman clothes and, upon his order, unknown members of the Army of the Republic of Bosnia and Herzegovina wrote numbers from 1 to 20 on the top back of each detainee, whereupon Zijad Kurtović called out by numbers the detained civilians and prisoners of war, including Witness B, Marinko Drežnjak and Miroslav Soko, took them out in front of the altar, questioned and punched them, and beat them with truncheons, iron pipes and wooden laths, calling them “Ustashas” and using other abusive language, while he hit the detainee Ivan Pavlović on his hand with a cross while he was sitting in a pew;

2. During October 1993, in the place Donja Drežnica, Mostar Municipality, in the Roman Catholic Church of All Saints, together with the members of the Army of RBiH known to him, on several occasions he beat the detained Croats, civilians and prisoners of war, including Miroslav Soko, Marinko Drežnjak, Marinko Ljoljo, Mirko Zelenika, Matija Jakšić, Ivan Pavlović, Witness A, Witness B, Branko Jurić, Kamilo Dumančić and Ivan Kostić, with truncheons, crosses, candlesticks and statues of saints over their heads and other parts of their bodies, rammed paintings of saints into their heads, made them eat leaves of the Bible and other religious books, ordered them to sing the songs whose content hurt their feelings concerning their ethnicity, and rammed the paintings depicting Jesus Christ’s Way of the Cross into their heads as they were singing, keeping them in constant fear;

3. During October 1993, in the place Donja Drežnica, Mostar Municipality, in the Roman Catholic Church of All Saints, he ordered members of the Drežnica Civilian Protection to take the detained Croat civilians and prisoners of war, including Miroslav Soko, Marinko Drežnjak, Marinko Ljoljo, Mirko Zelenika, Matija Jakšić, Ivan Pavlović, Witness A, Witness B, Branko Jurić and Kamilo Dumančić, on several occasions to the Vrđi front lines between the HVO and the

Army of RBiH, where they were forced to dig trenches, make dugouts, and carry ammunition, food, water and the dead, frequently exposed to crossfire from the positions of the Croat Defense Council and the Army of the Republic of Bosnia and Herzegovina and the shelling from the positions of the Croat Defense Council;

4. On an unknown date in October 1993, in the Roman Catholic Church of All Saints in Donja Drežnica, together with Hasan Delić, he beat the witness-detainee A with a truncheon over different parts of his body for several hours and stubbed out cigarettes on his neck and shoulders, and then, in such a condition, he forced him to have oral sex with the witness-detainee B, after which he stripped him naked and, together with Hasan Delić, continued beating him with a truncheon and stubbing out cigarettes over his body, as a result of which the detainee-witness A lost consciousness, while his body became completely black and blue as a consequence of heavy blows;

5. On an unknown date in October 1993, in the night hours, in the Roman Catholic Church of All Saints in Donja Drežnica, together with unknown members of the Army of the Republic of Bosnia and Herzegovina, he forced the detained Croats, civilians and prisoners of war, including Mirko Zelenika, Witness A, Witness B, Branko Jurić, Miroslav Soko, Ivan Kostić, Marinko Drežnjak, Ivan Pavlović, Marinko Ljojo and Kamilo Dumančić, to catch a live wire with their bare hands and then hold their hands and make a circuit in this way, whereupon, in order to improve electrical conductivity, he spilt water over the church floor, under the detainees' feet, as a result of which the detained Croats suffered intense physical pain;

6. On unknown dates in October 1993, during the night hours, in the place Donja Drežnica, Mostar Municipality, in the Roman Catholic Church of All Saints, together with the members of the Army of RBiH known to him, he ordered the detained Croats, civilians and prisoners of war, including Mirko Zelenika, Marinko Ljoljo, Marinko Drežnjak, Branko Jurić, Ivan Pavlović and Miroslav Soko, to play the harmonium, and then, since he did not like how they played, he pulled out a harmonium key and beat the detainees, civilians and prisoners of war, over their heads with the side of the key with a nail;

7. On an unknown date in October 1993, in the place Donja Drežnica, in the Roman Catholic Church of All Saints, after an unknown member of the Army of RBiH took a watch from the detainee Mirko Zelenika in his presence, he approached the detainee Mirko Zelenika, telling him: "*Seven, come here! Why didn't you say last night that you had a watch?*", and ordered him to turn towards the wall and raise his hands, and then hit him several times with a wooden leg in his lower back;

8. On an unknown date in late September or early October 1993, during the first night of detention, in the place Donja Drežnica, Mostar Municipality, in the Roman Catholic Church of All Saints, an unknown member of the Army of RBiH touched the detainee Mirko Zelenika with his hand and ordered him to stand up and walk towards the down part of the church, where he was awaited by Zijad Kurtović, who then held his left shoulder with his hand while the unknown member of the Army of RBiH was kicking him with a boot in his lower back, whereupon Zijad Kurtović punched the detainee Mirko Zelenika hard twice in his chin;

9. On an unknown date in early October 1993, in the Roman Catholic Church of All Saints in the place Donja Drežnica, he ordered the detainee Mirko Zelenika to lie down on the church floor and turn round, while he and three unknown members of the Army of RBiH were kicking him in his ribs when he would come close to them;

10. On an unknown date in October 1993, in the evening hours, in the Roman Catholic Church of All Saints in the place Donja Drežnica, after unknown members of the Army of RBiH beat the detainee Anto Rozić, he pulled out several of his teeth with his bare hands, which caused bleeding from the mouth and loss of consciousness of the detainee Anto Rozić;

11. During October 1993, together with the members of the Army of RBiH known to him, in the Roman Catholic Church of All Saints in Donja Drežnica, beating the detained Croats, civilians and prisoners of war, with paintings depicting Jesus Christ's Way of the Cross, paintings and statues of saints, he destroyed and broke them, destroyed the altar and sacristies, scribbled insulting words all over the church walls, drew testicles to saints on the paintings, destroyed the Bible and other holy books by making the detainees eat them, and destroyed the harmonium by beating the detainees with the keys, damaging the church interior in that way.

Therefore, violating the rules of international law during the armed conflict, he tortured the detainees – civilians and prisoners of war, inflicted great suffering on them and violated their bodily integrity, participated in the infliction of great suffering and violation of bodily integrity, treated them inhumanely and participated in inhumane treatment, applied measures of intimidation and terror, forced them to perform labor and violated the laws and customs of war during the armed conflict by deliberately damaging and participating in the deliberate damaging of the establishment designated for religious purposes,

Whereby:

Under Sections 1, 2, 3, 5, 6, 7, 8, 9 and 10 of the operative part, he committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c), (e) and (f) of the CC BiH,

Under Sections 1, 2, 3, 4, 5 and 6 of the operative part, he committed the criminal offense of War Crimes against Prisoners of War referred to in Article 175(1)(a) and (b) of the CC BiH,

Under Section 11 of the operative part, he committed the criminal offense of Violating the Laws and Practices of Warfare referred to in Article 179(1) and (2)(d) of the CC BiH, all in conjunction with Article 180(1), Article 29 and Article 53(1) of the Criminal Code of Bosnia and Herzegovina.

Therefore, pursuant to the mentioned legal provisions, in conjunction with Articles 39, 42 and 48 of the Criminal Code of Bosnia and Herzegovina, the Court

imposes on him a sentence of 10 (ten) years of imprisonment

for the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c), (e) and (f) of the CC BiH, committed in the manner as described under Sections 1, 2, 3, 5, 6, 7, 8, 9 and 10 of the operative part,

a sentence of 10 (ten) years of imprisonment

for the criminal offense of War Crimes against Prisoners of War referred to in Article 175(1)(a) and (b) of the CC BiH, committed in the manner as described under Sections 1, 2, 3, 4, 5 and 6 of the operative part, and

a sentence of 10 (ten) years of imprisonment

for the criminal offense of Violating the Laws and Practices of Warfare referred to in Article 179(1) and (2)(d) of the CC BiH, committed in the manner as described under Section 11 of the operative part,

and, based on the mentioned regulations and applying Article 53(2)(b) of the CC BiH, hereby

SENTENCES HIM

**TO A COMPOUND SENTENCE OF IMPRISONMENT FOR A TERM OF
11 (eleven) YEARS**

II

Pursuant to Article 188(1) of the CPC BiH, the Accused is obliged to reimburse the costs of the criminal proceedings.

III

Pursuant to Article 198(2) of the Criminal Procedure Code of Bosnia and Herzegovina, the injured parties are hereby referred to take civil action with their claims under property law.

Reasoning

1. Charges

The Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ: 115/06, dated 10 May 2007, charged Zijad Kurtović with committing three crimes against humanity and values protected by international law in concurrence in the manner described in 11 counts of the Indictment, namely the criminal offenses of War Crimes against Civilians referred to in Article 173(1)(c), (e) and (f), War Crimes against Prisoners of War referred to in Article 175(1)(a) and (b) and Violating the Laws and Practices of Warfare

referred to in Article 179(1) and (2)(d) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 180(1) and Articles 29 and 53 of the same Code.

The Indictment was confirmed on 16 May 2007 and on 28 May 2007 the Accused pleaded not guilty on all counts of the Indictment, whereupon the case file was forwarded to the trial panel, which opened the main trial on 27 August 2007.

The Prosecution announced that they would prove the allegations stated in the Indictment by the statements of former prisoners, while the Defense announced that they would challenge the participation of the Accused in the prohibited acts by the alibi for the Accused.

2. Presented Evidence

a) Prosecution evidence

The following witnesses for the prosecution were examined in the course of the main trial: Mirko Zelenika, Marinko Ljoljo, Kamilo Dumančić, Matija Jakšić, Branko Jurić, Ivan Kostić, Miroslav Soko, Marinko Drežnjak, Ivan Pavlović, Witness A, Witness B, Alija Bobić, Hasan Hakalović, Hamza Ajanović, Halil Čučurović, Safet Topić and Esad Šejtanić.

The following documentary evidence was presented: Peace Agreement; CD with accompanying documents; Statement of the president of the UN Security Council of 10 May 1993; Bulletin for soldiers about the situation at the HVO front lines of 1 September 1993; Copy of the ID card file of Zijad Kurtović; Order to attack by the Southeast Herzegovina Operations Zone HVO Second Brigade, dated 16 April 1993; Report for the Communications Centre of the Supreme Command Staff, dated 19 December 1993; Report from the sector Drežnica of the HVO, Posušje – the 5th Brigade *Posušje*, dated 31 August 1993; List of soldiers and civilians from the Drežnica parish who were detained in the Muslim camp in the museum *Jablanica*; Attachment number 13, dated 9 September 1993 – refers to crimes committed in Grabovica and Drežnica; Elements of the counterintelligence assessment in the territory in the area of responsibility of the Security and Information Service Centre Mostar, dated 14 April 1995; Official Note of the 6th Corps of the Army of BiH, dated 15 August 1993; Information on some elements of the political situation of the Ministry of Internal Affairs of BiH, dated 23 September 1993; Bulletin of the Security Administration of the Army of BiH Staff, dated 3 June 1993; Excerpt from the CIPS database for Zijad Kurtović; the Zijad Kurtović file - Cantonal Prosecutor's Office Mostar, dated 2 August 2004; Cover letter enclosed with the documents which the BiH Ministry of Defense delivered to the Prosecutor's Office of BiH, dated 25 December 2006; Certificate on salaries for Zijad Kurtović, dated 21 May 1996; Supplementary register file for Zijad Kurtović; Personal file of Zijad Kurtović; Decision of the Main Staff of the R BiH Armed Forces, dated 26 July 1995; Total overview of war units in each corps made by the Department for the organization of the armed forces, dated 15 March 1993; Order of the 4th Corps of the Army of BiH, dated 15 October 1994; Decision on commissions – promotions in the Army of R BiH of the BiH Presidency, dated 18 October 1994; Proposal of the Staff, dated 6 October 1994; VOB-8 form for Zijad Kurtović, dated 13 September 2006; Document of the BiH Ministry of Defense - authenticated file of Zijad Kurtović, dated 8 September 2006; Questionnaire concerning the collection of data on camps and other detention places; Provisional instructions for the work of the duty military police, dated 24 July 1993; Command and control in brigades and independent battalions over the military

police, dated 3 December 1993; Order to attack, dated 11 September 1993; Official note, dated 16 May 1994; Official note, dated 14 April 1994 - Certified copy of the Daily Report of the Army of BiH – the 4th Corps, Military Police Battalion; Daily Report of the Army of BiH, dated 7 June 1993; Instructions on the application of the international law of war in international forces of the Army of the Republic of BiH from 1992 and the Order on the application of the international law of war from 1992; Extract from the criminal and operative records of the Police Administration Mostar for Zijad Kurtović, dated 8 November 2006; Occupancy list number 63, cadastral district Drežnica, and a copy of the cadastral plan; Land register extract for the Drežnica Church; Photographs of the church; CD with photographs of the church and facilities in Donja Drežnica; Color photographs printed from Exhibit 65; Document of the Mostar-Duvno and Trebinje-Mrkan Diocese, dated 19 April 2007; International Red Cross certificate for Marinko Drežnjak, dated 6 May 1994; Specialist's findings and opinion, dated 14 September 1994; Certificate for Matija Jakšić, dated 12 April 1994; Medical history for Matija Jakšić; Decision of the Cantonal Administration for Issues of Veterans and Disabled Persons, dated 8 February 2006; Certificate for Mirko Zelenika, dated 21 March 1994; Certificate regarding fitness for military service for Mirko Zelenika, dated 25 September 1993; Two general mobilization drafts for Mirko Zelenika, dated 25 June 1993 and 31 August 1993; 14 findings and opinions for Mirko Zelenika; 12 findings and opinions for Miroslav Soko; Psychological examination, dated 20 January 1998; Psychologist's findings for Miroslav Soko, dated 22 November 2005; Certificate for Miroslav Soko, dated 6 December 2004; Opinion of the board for Miroslav Soko, dated 16 January 2006; Decision on the status of a disabled veteran for Miroslav Soko, dated 29 December 1997, with the findings for Miroslav Soko, dated 3 December 1997; Certificate for Marinko Ljoljo, dated 21 March 1994; Specialist's findings and opinion for Marinko Ljoljo, dated 14 May 1994; Referral slip referring Marinko Ljoljo to hospital; Psychologist's findings for Marinko Ljoljo, dated 14 July 2005; Findings and opinion of the medical board for Marinko Ljoljo, dated 27 January 2006; Decision on recognizing the status of a disabled veteran for Marinko Ljoljo, dated 21 February 2006; International Committee of the Red Cross certificate for Anto Rozić, dated 21 April 1994; Decision for Anto Rozić, dated 19 May 2006; Decision for Anto Rozić, dated 4 December 1997; Certificate for Anto Rozić, dated 5 November 2004; 14 findings and opinions for Anto Rozić; Certificate for Ivan Pavlović; Letter dated 25 April 2007 – Report of the Clinical Hospital Mostar for Antun Grgić; Record of the Prosecutor's Office of BiH on the examination of the witness Mirko Zelenika, number KT-RZ-115/06, dated 22 August 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Mirko Zelenika, number KT-RZ-115/06, dated 3 July 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Marinko Ljoljo, number KT-RZ-115/06, dated 23 August 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Kamilo Dumančić, number KT-RZ-115/06, dated 4 July 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Matija Jakšić, number KT-RZ-115/06, dated 21 August 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Branko Jurić, number KT-RZ-115/06, dated 18 October 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Ivan Kostić, number KT-RZ-115/06, dated 23 August 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Miroslav Soko, number KT-RZ-115/06, dated 29 September 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Marinko Drežnjak, number KT-RZ-115/06, dated 3 July 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Ivan Pavlović, number KT-RZ-115/06, dated 16 November 2006; Record of Witness A; Record of Witness B; Record of the Prosecutor's Office of BiH on the examination of the witness Alija Bobić, number KT-RZ-115/06, d

21 November 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Hamza Ajanović, number KT-RZ-115/06, dated 13 November 2006; Report of the Army of BiH, dated 12 May 1994; Record of the Prosecutor's Office of BiH on the examination of the witness Hasan Hakalović, number KT-RZ-115/06, dated 13 November 2006; Record of the Prosecutor's Office of BiH on the examination of the witness Halil Čučurović, number KT-RZ-115/06, dated 29 March 2007; Record of the Prosecutor's Office of BiH on the examination of the witness Safet Topić, number KT-RZ-115/06, dated 29 March 2007; Record of the Prosecutor's Office of BiH on the examination of the witness Esad Šejtanić, number KT-RZ-115/06, dated 21 February 2007; List of prisoners in the collection centre Buturović Polje, dated 2 September 1993; List of prisoners of war in Buturović Polje, dated 14 September 1993; Certificate for Witness B, dated 21 March 1994; 13 findings and opinions from the Clinical Hospital Mostar for Witness B from 2003-2005.

b) Defense evidence

The following witnesses for the defense were examined in the course of the main trial: Zijat Mušić, Safet Bobić, Ahmed Kurtović, Hasan Delić, Ramiz Alić, Omer Pinjić, Enes Pendić, Rasim Žuškić, Senad Pezić, Meho Pendić, Ibrahim Kulak, Ibrahim Bašić, Sedin Mahmić and Ramiz Macić.

The following documentary evidence was presented:

Certificate of the Croatian Community of Herceg-Bosna HVO – Southeast Herzegovina operations zone – the 2nd Brigade – the 3rd Independent Company Drežnica, number 01-218/92, dated 22 December 1992; Handover of ammunition Croatian Community of Herceg-Bosna HVO – Southeast Herzegovina operations zone – the 2nd Brigade – the 3rd Independent Company Drežnica, dated 25 January 1993; Dispatch note of the 3rd Independent Company Drežnica, number 21/92, dated 9 November 1992; Issued goods – the 2nd Brigade – the 3rd Independent Company Drežnica, dated 27 January 1993; Call-up papers for Jasmin Alić to go to the battlefield – the 3rd Independent Company Drežnica, dated 30 July 1992; Call-up papers for Safet Bobić to go to the battlefield – the 3rd Independent Company Drežnica, number 01-49/92; Dispatch note, the 3rd Independent Company Drežnica, 15 November 1992; Joint call-up to go to the battlefield – the 3rd Independent Company Drežnica, dated 30 July 1992; Joint call-up to go to the battlefield – the 3rd Independent Company Drežnica, dated 30 July 1992; Roster of guards in the place Drežnica (taken from the bulletin board of the 3rd Independent Company Drežnica); Indictment of the Cantonal Prosecutor's Office Mostar, number Kt.53/2002, dated 25 June 2002; Submission (petition) to withdraw a warrant, filed by Attorney Nenad Gvozdić on 21 June 2005; Submission (request) to withdraw a warrant, filed by Attorney Nenad Gvozdić on 3 November 2006; Submission (letter) to withdraw a warrant, filed by Attorney Nenad Gvozdić on 22 June 2005; Consent of the Prosecutor's Office of HNK /Herzegovina-Neretva Canton/ to withdraw a warrant, number Kt.53/02, dated 23 November 2005; Letter of the Cantonal Prosecutor's Office Mostar, number Kt.53/02, dated 18 March 2008, sent to OKO /Criminal Defense Section/; Certificate of the takeover of documentation from OKO, dated 24 March 2008.

3. Procedural Decisions

a) Admission of Established Facts

On 5 September 2007, pursuant to Article 4 of the Law on the Transfer of Cases from the ICTY, in conjunction with Article 261(1) and Article 15 of the CPC BiH, the Prosecutor's Office filed a motion to accept as proven the fact that the armed conflict between the Croat Defense Council and the Army of the Republic of BiH existed during the period relevant to the Indictment against Zijad Kurtović. The Prosecution submits that this fact was established in the ICTY Judgments of both the Trial and Appeals Chambers in the case against Mladen Naletilić, aka Tuta, and Vinko Martinović, aka Štela, number IT-98-34, dated 31 March 2003 and 3 May 2006.

The Prosecution submits that the first instance judgment of 31 March 2003, which became final on 3 May 2006, in paragraph 179 established the existence of this conflict, exactly in the area of the Mostar Municipality, where Drcznica - the place where the relevant events occurred - is also located.

Paragraph 179 reads as follows: "*The Chamber is satisfied that an armed conflict existed during the time relevant to the Indictment, i.e. at least between 17 April 1993 and the end of February 1994.*"

The Prosecution proposed the admission of this fact for the purpose of the efficiency of the proceedings and judicial economy.

The Defense made a submission regarding the motion during the hearing held on 6 September 2007, when the defense counsel pointed out, just as he did at the status conference, that he would not challenge the events, but that he would challenge the facts by an alibi.

Responding to the motion, the defense counsel stated that he did not recognize the source of the proposed fact, but that he accepted as indisputable the fact that a conflict between the Army of R BiH and the HVO existed in the relevant area in September and October 1993.

Bearing in mind such state of affairs – agreement on the essential point, on the same day, 6 September 2007, the Court rendered a decision on the admission of the fact established in Paragraph 179 of the ICTY Judgment against Mladen Naletilić, aka Tuta, and Vinko Martinović, aka Štela, number IT-98-34, dated 31 March 2003, which became final on 3 May 2006.

When rendering this decision, the Court took as a starting point Article 4 of the Law on Transfer, which reads as follows: "*At the request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.*"

The Court considers that the formal requirement of Article 4, which requires that the parties be granted a hearing, has been met.

Article 4 gives the Court discretion to decide whether to accept the proposed facts. Neither the Law on Transfer nor the Criminal Procedure Code of Bosnia and Herzegovina establish criteria based on which the Court could exercise its discretion.

Article 4 of the Law on Transfer is drafted in terms similar to those of Rule 94(B) of the ICTY Rules of Procedure and Evidence.¹ Therefore, in relation to this provision, the ICTY jurisprudence may provide persuasive guidance in the interpretation and application of Article 4 of the Law on Transfer.

The Decision in the case *Prosecutor v. Momčilo Krajišnik* (*Krajišnik Decision*) gives the following criteria² for the acceptance of adjudicated facts:

- (i) it is *distinct, concrete and identifiable*;
- (ii) it is restricted to *factual findings* and does not include *legal characterizations*³;
- (iii) it was *contested* at trial and forms part of a judgment which has either *not been appealed* or has been *finally settled* on appeal; or
- (iv) it was *contested* at trial and now forms part of a judgment which is under appeal, but falls within issues which are *not in dispute* during the appeal;
- (v) it does *not attest to criminal responsibility* of the Accused;
- (vi) it is *not the subject of (reasonable) dispute* between the Parties in the present case⁴;
- (vii) it is *not based on plea agreements* in previous cases; and
- (viii) it does not impact on the *right of the Accused to a fair trial*⁵.

The Court would add the following criteria to the criteria established in the *Krajišnik Decision*: in order to be accepted as established, the fact must not be a conclusion, opinion or verbal testimony; it must contain essential findings of the ICTY which have not been significantly changed; and it must be established in the proceedings in which the accused had the same interest as the accused in this case and in which the accused was given the right to defense counsel as well as the right and opportunity to defend himself on his own against the charges brought against him. See, for example, *Popović* in the text above.

¹ Rule 94(B) reads as follows: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings." This principle is common in international criminal law. *Rules of Procedure and Evidence* of the Special Court for Sierra Leone, for example, contain almost identical provision as Rule 94(B).

² *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, *Decision on Prosecution motions for judicial notice of adjudicated facts and for admission of written statements of witnesses pursuant to Rule 92bis*, dated 28 February 2003. All ICTY Chambers have not formulated these criteria in the same manner. See, for example, *Prosecutor v. Popović et al*, Case No. IT-05-88-T, *Decision on Prosecution motion for judicial notice of adjudicated facts*, 26 September 2006, paragraphs 5-14 (*Popović Decision*).

³ It is not entirely clear what constitutes a legal characterization. In explaining its version of the same standard, the Chamber in *Popović* wrote only that it supported the suggestion of the Chamber in *Krajišnik* and that it has to be examined in each case individually. *Popović Decision*, *supra*, paragraph 10.

⁴ See the same *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, *Decision on the Prosecution's interlocutory appeal against the Trial Chamber's (10 April 2003) Decision on Prosecution motion for judicial notice of adjudicated facts* (28 October 2003) (*Milošević Decision*), Separate opinion of Judge Shahabuddeen.

⁵ See *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, *Decision on third and fourth Prosecution motions for judicial notice of adjudicated facts*, 24 March 2005. This test, *inter alia*, was applied in the *Ljubinac Decision*, *supra*, and *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, *Decision on judicial notice of adjudicated facts following the Motion submitted by counsel for the accused Hadžihasanović and Kubura on 20 January 2005*, 14 April 2005.

The Court also notes, as it was done by the International Criminal Tribunal for Rwanda in the *Karemera* case, that it would be improper to interpret criteria (v) mentioned above so broadly as to supersede the rule permitting adjudicated facts:

“The Appeals Chamber, however, has never gone so far as to suggest that judicial notice under Rule 94(B) cannot extend to facts that “go directly or indirectly” to the criminal responsibility of the Accused (or that “bear” or “touch” thereupon). With due respect to the Trial Chambers that have so concluded, the Appeals Chamber cannot agree with this proposition, as its logic, if consistently applied, would render Rule 94(B) a dead letter. The purpose of a criminal trial is to adjudicate the criminal responsibility of the Accused. Facts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial, and, as noted above, thus may neither be established by evidence nor through judicial notice.” (Citation omitted)⁶

Accordingly, the Chamber correctly concluded that facts which attest to the acts, conduct, or mental state of the Accused may not be accepted as established facts. However, facts which attest to the criminal responsibility of the Accused in other ways (for example, the existence of a widespread and systematic attack in a prosecution on charges of Crimes against Humanity) may be accepted as established facts.⁷

The Court agrees with this perception, adding only that the traditional rule against surplusage precludes interpreting Article 4 of the Law on Transfer as to render it a dead letter. Instead, the Courts are guided by this traditional rule to infer that the drafters of the Law on Transfer intended Article 4 to have meaning, and to the extent that the abovementioned interpretation of the fifth *Krajišnik* principle would render Article 4 meaningless, the Court is precluded from adopting it. Indeed, the rule against surplusage would have precluded the *Krajišnik* Chamber from including such a factor in their test in the first place, had they intended it to preclude the adjudication of any relevant fact at all.

In applying Article 4, the Court must also strike a balance between judicial economy and the Accused’s right to a fair trial and the presumption of innocence set out in Article 6 of the ECHR as well as the procedural safeguards referred to in Article 6 of the CPC BiH. For these reasons, the Court reiterates that the acceptance of established facts as ‘proven’ under the *Krajišnik* criteria does not relieve the Prosecutor of his burden of proof nor does it

⁶ *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73(C), *Decision on Prosecutor’s interlocutory appeal of Decision on judicial notice*, 16 June 2006, paragraph 48.

⁷ *Ibid*, paragraph 50, see *Papović* Decision, paragraphs 12-13, and especially footnote 45 (which states that a proposed fact dealing with the existence of a terror campaign against Bosnian Muslim refugees does not fit into the narrow exclusionary rule forbidding the acceptance of adjudicated facts dealing with the acts, conduct, or mental state of an Accused). See also *Prosecutor v. Golić*, Case No. IT-98-29-AR73.2, *Decision on interlocutory appeal concerning Rule 92bis (C)*, 7 June 2002, paragraphs 8-9 (concluding that it is permissible to accept as established facts relating to the acts and conduct of those whose superior was the Accused, even where the Prosecution proceeded in part on a theory of superior responsibility); *Prosecutor v. Dragoje Pounović*, Case No. X-KRŽ 05/16, *Appeals Judgment*, paragraph 5 (27 October 2006) (The existence of a widespread and systematic attack against non-Serb civilians in the said territory represents precisely such general fact which is clear, concrete and as such does not confirm the criminal liability of the Accused). But see *Prosecutor v. Željko Mejačić et al*, IT-02-65, *Decision on Prosecution Motion for judicial notice pursuant to Rule 94(B)*, 1 April 2004, when the Chamber refused to accept as established facts related to the existence of an armed conflict on the grounds that the facts were considered „too broad, tendentious and containing characterizations of facts”.

detract in any way from the presumption of innocence.⁸ The acceptance of a particular fact as proven only means that the Prosecutor has met his burden of persuasion as to that particular fact and he does not have to prove it further in his case in chief. The Accused maintains the right to challenge any of the accepted facts in defending himself from the charges against him,⁹ as with any other factual proposition offered to support the charges and on which the Prosecutor had presented evidence. If the Accused does challenge an established fact, the Prosecutor must then present additional evidence to rebut the challenge of the Defense. Likewise, established facts, if admitted, are considered in light of the totality of the circumstances and in light of all the evidence produced from all sources. They are no more dispositive than any other fact.¹⁰

Based on the foregoing, the practice of establishing facts does not violate Article 6 of the ECHR or Article 6 of the CPC BiH. In addition, the Court applies the rule from the ICTY *Krajišnik* case, which provides, *inter alia*, for disallowing a motion for the acceptance of adjudicated facts if allowing the motion 'would impact on the right of the Accused to a fair trial.' Furthermore, by offering the party opposing the motion, i.e. the Defense, to challenge the motion at the main trial and an opportunity to file a submission as a response, the Court took additional measures to ensure the fairness and integrity of the ongoing proceedings. Having provided the necessary procedural rights to the Defense, the Court may then decide to accept as proven those facts that are established by legally binding decisions in other ICTY proceedings pursuant to Article 4 of the Law on Transfer.

For all the foregoing reasons, the Court has decided to accept as proven the fact of the existence of an armed conflict between the Army of R BiH and the HVO, which has also been corroborated by other evidence presented in the course of the main trial, not only the testimonies of both the prosecution and defense witnesses, but also the documentation from the Archive of the Army of R BiH, which confirms the existence of this conflict through the then war reports.

b) Manner of the Examination of the Protected Witnesses

Deciding on the Prosecution motion contained in the Indictment to order protection measures for the two witness who were victims of sexual violence, during the status conference held on 29 June 2007 the Court asked for the clarification of this motion and the response of the defense counsel, and then, following the repeated clarifications and different motions regarding the manner of the witness examination, on 27 August 2007 rendered the

⁸ See, for example, *Salabaku v. France*, European Court of Human Rights (7 October 1988) (stating in the relevant part that shifting the burden of proof to the defendant under certain circumstances does not violate the presumption of innocence guaranteed by the European Convention when it is confined to 'reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence,' *id.* paragraph 28, and does not leave the Accused 'entirely without a means of defence' or interfere with the court's ability to freely evaluate the evidence offered by all parties to the litigation, *id.* paragraph 29).

⁹ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, *Decision on the Prosecution's interlocutory appeal against the Trial Chamber's* (10 April 2003) *Decision on Prosecution motion for judicial notice of adjudicated facts* (28 October 2003).

¹⁰ See the abovementioned note 6, paragraph 42: "...the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the Defense may then put the point into question by introducing reliable and credible evidence to the contrary. This approach is consistent with practice in national jurisdictions: whereas judicial notice of facts of common knowledge may be treated as conclusive, the final adjudication of facts in judicial proceedings is treated as conclusively binding only, at most, on the parties to those proceedings."

decision on the protection of these witnesses and the manner of their examination during the main trial.

The witnesses under the pseudonyms A and B, which were given to them under the mentioned decision, testified on 18 October 2007.

The public was excluded during their testimony, as it was established in the decision.

Pursuant to Article 235 of the CPC BiH, which stipulates that the Court may at any time, *ex officio* or on motion of the parties and the defense attorney, after hearing the parties to the proceedings and the defense attorney, exclude the public for the entire main trial or a part of it "if it is necessary to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness", where the protection of the personal and intimate life includes the protection of information from the intimate and personal life of the mentioned persons, and any public disclosure would seriously harm their interests, that is, the interests of the protection of their privacy, when rendering such a decision the Court was particularly mindful of the nature of the offense of which Witnesses A and B were victims and the traumas which they still feel. In such cases, despite the measure to protect their identities, a public testimony would pose a risk of disclosing their identities, and thus endangering their and their family's intimate and personal life.

The details of the mentioned decision, which also refer to the manner of ensuring the protection and its explanation, are given in a written copy of the decision, and therefore the Court will not explain it further here.

c) Prosecution motion to apply Article 273(2) of the CPC BiH

On 8 November 2007, during the main trial, the Prosecution submitted a motion to read the statement of the witness – injured party Anto Rozić at the main trial, given that the witness could not appear at the main trial due to his extremely difficult health condition.

The Prosecution further pointed out that the witness could not leave his house at all due to his 70% disability and inability to walk, which also excludes the possibility of a video link with the court in the witness's place of residence. Supporting their allegations also by the medical documentation obtained from the Konjic Municipality, the Prosecution proposed reading the statement of this witness given in the course of the investigation, namely the Record of the Examination of the Witness Anto Rozić, number KT-RZ-115/06, dated 18 October 2006.

The defense counsel objected to this motion, pointing out that he generally disagreed with witnesses not being examined before the trial panel, that he did not inspect the medical documentation which allegedly supported the allegations about the difficult health condition, but also that he opposed the expert evaluation of the health condition which would be carried out by the prosecution expert witness.

Prior to rendering the final decision on this motion, the Court asked for additional medical documentation and an expert evaluation of the health condition, which would also be presented orally at the main trial.

However, on 13 December 2007, during the main trial, the Prosecutor withdrew this witness, explaining his decision with the fact that he lost every contact with the witness.

Therefore, the Court no longer had reason to decide on the validity of the motion to apply Article 273(2) of the CPC BiH.

d) Refusal of the presentation of certain evidence

On 29 April 2008, stating his position regarding the specified Indictment, the defense counsel proposed the presentation of new evidence, namely two documentary pieces of evidence – a historical note and a record book (war diary) of the Assistant Commander for Security, as well as the summoning of the witness – expert Sefer Halilović, confrontation of Hasan Delić with Witnesses A and B, confrontation of the witness Mirko Zelenika and Sedin Mahmić, and the summoning of the witness Karačić – Hrnjez Mili.

The Prosecution opposed this motion completely, pointing out in the first place that the Indictment was specified more stylistically than substantively and that there were no changes of the state of facts which would require new evidence.

On the other hand, the Prosecution also noted the fact that the Defense had an opportunity to adduce the proposed evidence both during the presentation of their evidence and in additional evidence, and that such behavior obviously aims at delaying the proceedings.

Deciding on this motion, the Court primarily assessed the purpose and results of the amendment to the Indictment in terms of Article 275 of the CPC BiH, which stipulates the following: *"If the Prosecutor evaluates that the presented evidence indicates a change of the facts presented in the indictment, the Prosecutor may amend the indictment at the main trial. The main trial may be postponed in order to give adequate time for preparation of the defense. In this case, the indictment shall not be confirmed."*

Inspecting the Indictment filed on 10 and confirmed on 16 May 2007, the Court found that the state of facts presented in the confirmed Indictment did not differ from the state of facts presented in the specified Indictment. The specified Indictment, as the Prosecution also stated, contains mostly stylistic changes, while the other ones (such as specifying the names of some of the abusers) do not constitute essential elements of the factual description which require additional preparation of the Defense.

On the other hand, as the Prosecution correctly noted, the evidence proposed by the defense counsel could have been adduced – presented during the main trial, but the Defense, obviously, did not find them necessary for the defense of the Accused Zijad Kurtović.

This particularly refers to the motion to confront certain witnesses.

For all the foregoing reasons, applying Article 263(2) of the CPC BiH, which stipulates a possibility of disallowing a certain question or evidence, the Court refused the presentation of the proposed evidence as unnecessary.

4. Closing arguments

a) Prosecution

In her closing argument, the Prosecutor pointed out that she considered that, by the testimonies of the prosecution witnesses who were examined and the documentary evidence which was presented and tendered into the case file, the Prosecution proved beyond any

reasonable doubt that during the relevant period of time the Accused Zijad Kurtović acted contrary to the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the provisions of the Geneva Convention relative to the Protection of Prisoners of War of 12 August 1949 and the provisions of the Regulations Respecting the Laws and Customs of War on Land, which are a constituent part of the 4th Convention Respecting the Laws and Customs of War on Land of 18 October 1907. It is indisputable that the armed conflict between the HVO and the Army of RBiH existed at the time of the commission of the criminal offenses charged against the Accused in the Indictment, that the Accused was a member of the Army of RBiH and that he was the Commander of the Military Police attached to the Drežnica Battalion during the relevant period of time.

The witnesses agree that the person to whom they were handed over in late September or early October 1992 and who first took them to the Parish Office where they were beaten and interrogated and then to the church where they were detained, and later tortured them physically and mentally, humiliated them, and insulted their human dignity and their ethnic and religious affiliation, is exactly he – the Accused Zijad Kurtović. It is also indisputable that these witnesses were persons who, from the moment of falling under the power of the enemy until the final liberation and repatriation, enjoyed protection under the abovementioned Conventions.

The witness testimonies are not consistent regarding the date of detention, but they are consistent with respect to what they experienced in the church in Donja Drežnica. Based on their testimonies, it has been established with certainty that the Accused Zijad Kurtović, alone or together with Hasan Delić, Seno, Nono, Bimbo and other unknown members, beat them with statues of saints, rammed into their heads paintings of saints and paintings depicting Jesus Christ's Way of the Cross, made them eat leaves of the Bible and other religious books, beat them, made them play the harmonium and sing, stubbed out cigarettes on the neck and shoulders of Witness A, forced Witnesses A and B to have oral sex, forced them to catch a live wire with their bare hands, applied measures of intimidation and terror, and treated them inhumanely in other ways.

In her closing arguments, the Prosecutor also briefly referred to the defense evidence, although, as she pointed out in her closing arguments, with all due respect for the right to a defense, it does not deserve much attention.

The Prosecutor objected to the credibility of the testimonies of the defense witnesses who were examined, holding that they presented a number of untruths in their testimonies, so that the truth and the criminal liability of the Accused would not be established.

The Prosecutor also challenged the probative force of the defense documentary evidence, submitting that it proved what was already known to everyone and what was not the subject of this proceeding at all.

Finally, submitting that the Prosecutor's Office of BiH proved beyond any reasonable doubt that at the time of the armed conflict between the HVO and the Army of RBiH, in violation of the rules of international law, the Accused Zijad Kurtović committed the criminal offenses in the manner, at the time and at the place stated in the factual description of the operative part of the amended Indictment, the Prosecutor proposed that he be found guilty and sentenced to imprisonment which would at least to some extent give satisfaction to the detainees in the church of All Saints in Donja Drežnica, which would at least to some extent lessen the scars on their bodies and souls, and contribute to the reconciliation and coexistence in BiH, as well as that the trial panel, when meting out the punishment, takes as aggravating circumstances the prior convictions of the Accused, his capacity at the time of the commission of the criminal offenses and the unscrupulousness and monstrosity which he showed in the commission thereof.

The Prosecutor also proposed that the custody of the Accused Zijad Kurtović be ordered pursuant to Article 138(1), in conjunction with Article 132(1)(d) of the CPC BiH.

b) Defense

At the beginning of his closing argument, the defense counsel proposed that a verdict acquitting the Accused Zijad Kurtović of the charges be rendered, submitting that the Prosecution did not prove beyond any reasonable doubt that the Accused committed the acts charged against him in the Indictment, which he would try to prove in his closing argument. Referring first to the Prosecution allegations in the closing argument, the defense counsel challenged their truth and objectivity, submitting that the Prosecutor took the relevant event too personally and conveyed her emotions to the courtroom, which is certainly inadmissible. It is indisputable that the armed conflict between the HVO and the Army of the Republic of BiH existed and that the Accused was a member of the Army of RBiH; however, it is disputable whether the Military Police Platoon existed and whether the Accused was its commander. There is not a single written trace from which it could be indisputably concluded that a Military Police Platoon existed within the Drežnica Independent Battalion, let alone that its commander during the relevant period of time was exactly the Accused. The investigation failed to take the action which, in the opinion of the Defense, was necessary, namely the identification of the person against whom the proceedings are conducted, while the subsequent identification of the Accused by the witnesses in the courtroom may be characterized as self-evident identification, since it is logical that the person sitting next to his defense counsel is the person against whom the proceedings are conducted.

Analyzing the subjective prosecution evidence, the defense counsel pointed out that it is imprecise and inconsistent, internally contradictory and contradictory to other presented evidence. It is indisputable that the prosecution witnesses are personally interested in the outcome of the proceedings, in other words, that someone is punished for all the evil they suffered, but it cannot be established beyond any reasonable doubt from their testimonies that it was exactly the Accused who committed that. It is evident that the mentioned witnesses significantly changed their testimonies at the main trial in comparison with their statements given during the investigation, which cannot be justified by the passage of time and the fact that memories fade; the truth is one and unchangeable, while everything else is part of a construction which is subject to changes.

The defense counsel also objected to the Prosecution documentary evidence, finding it unreliable, given that it was compiled long after the events relevant to the Indictment, more precisely after 1996.

Contrary to the foregoing, the defense evidence, particularly the alibi, is sufficient to cast doubt on the prosecution evidence and lead to an unequivocal conclusion that the Accused did not have the status of the commander of the military police platoon during the relevant period of time and did not commit the acts charged against him in the Indictment, since he was at another place during the relevant period of time.

Such a conclusion can be drawn from the testimonies of all defense witnesses, which should be given credibility because they are consistent and unchangeable, while some of the witnesses even incriminate themselves in their testimonies.

The Defense also objects to the application of the CC BiH, submitting that the CC SFRY should be applied in the present case as the law which was applicable at the time of the commission of the criminal offense and as the law which is more lenient to the perpetrator.

The defense counsel finds irrelevant the prior convictions of his client, which by no means can be taken as an aggravating circumstance in the present case.

5. Applicable Law

As regards the applicable substantive law, the Defense objected to the application of the Criminal Code of BiH, pointing out that the Criminal Code of SFRY, which was applicable at the time of the events concerned, should be applied. According to the Defense, the application of any Law other than the CC of SFRY, which was applicable in the period relevant to this case, amounts to a violation of the principle of legality. The Defense referred to Article 7(1) of the ECHR and Article 15(1) of the International Covenant on Civil and Political Rights.

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

The principle of legality is also stipulated under Article 7(1) of the ECHR. The European Convention for the Protection of Human Rights supersedes all legislation of BiH pursuant to Article 2(2) of the BiH Constitution. Furthermore, this provision of the ECHR stipulates the general principle prohibiting a heavier penalty than the one that was stipulated at the time when the criminal offense was committed, but does not stipulate the application of the most lenient law.

Article 4a of the CC BiH stipulates that Articles 3 and 4 of the CC BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, "*was criminal according to the general principles of international law.*" Article 7(2) of the ECHR stipulates the same exemption, providing that 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 recognized by civilized nations*". (See also Article 15(1) and (2) of the International Covenant on Civil and Political Rights, which contains similar provisions. The State of Bosnia and Herzegovina, as a successor of Yugoslavia, ratified this Covenant.)

This provides the possibility to depart, under the described circumstances, from the principles laid down in Articles 3 and 4 of the CC BiH (and Article 7(1) of the ECHR) and from the application of the criminal code applicable at the time of the commission of the criminal offense and the application of a more lenient law in proceedings constituting criminal offenses under international law.

The Court points out that the crimes for which the Accused has been found guilty constitute crimes under international customary law and thus fall under "*general principles of international law*" stipulated under Article 4a of the Law on Amendments to the CC BiH and "*general principles of law recognized by civilized nations*" stipulated under Ar

7(2) of the ECHR, and thus the CC BiH can be applied in this case on the basis of these provisions.

Furthermore, the fact that the criminal acts listed in Article 173 of the CC BiH can also be found in the law which was in effect at the relevant time period – at the time of the perpetration of the offense, specifically under Article 142 of the CC SFRY, which also applies to the criminal acts listed in Article 175 of the CC BiH – or Article 144 of the CC SFRY and Article 179 of the CC BiH or Article 142(2), Article 148 and Article 151 of the CC SFRY, means that these criminal offenses were also punishable under the then applicable criminal code, which additionally supports the conclusion of the Court regarding the principle of legality.

The foregoing is in line with the position of the Appellate Division of Section I of the Court of BiH taken in its Verdict against Abduladhim Maktouf number KPŽ 32/05, dated 4 April 2006, and the Verdict against Dragoje Paunović number KPŽ 05/16, dated 27 October 2006. The Constitutional Court of Bosnia and Herzegovina deliberated on this issue in the A. Maktouf Appeal (AP 1785/06) and stated in its Decision dated 30 March 2007: "68. In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long term imprisonment, as often done by the International Criminal Tribunal for crimes committed in the territory of the former Yugoslavia (the cases of Krstić, Galić, etc.). At the same time, the concept of the CC SFRY was such that it did not stipulate either long term imprisonment or life sentence but death penalty for the gravest crimes and maximum 15 year imprisonment for less serious crimes. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law." "69. In this context, the Constitutional Court holds that it is not possible to simply 'eliminate' the sanction and apply other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."

In the opinion of the Panel, the principle of mandatory application of a more lenient law is ruled out in the trial of criminal offenses for which at the time of the commission it was absolutely predictable and commonly known that they were contrary to the general rules of international law. In the specific case, it is taken as established that the Accused had to know that in the state of war application of international rules has priority and that a violation of internationally protected values carries heavy consequences. If the provision of Articles 173 and 175 of the CC BiH is analyzed, it is obvious that it has been clearly stated that the body of this criminal offense includes, inter alia, elements of violation of international rules. This makes this group of offenses special, because it is not sufficient only to commit such criminal offenses through certain physical activity, but what is necessary is the awareness that the international rules are being violated by the commission and the assumption that the accused must know that the period of war or conflict or hostilities is especially sensitive and especially protected by the commonly accepted principles of international law and, as such, the offense gains an even greater significance and its commission carries even more serious consequences than an offense committed in another period.

Also, at the time when the criminal offenses were committed, Bosnia and Herzegovina, as a successor state of SFRY, was a signatory party to all relevant international conventions on human rights and international humanitarian and/or criminal law.¹¹

Also, customary status of criminal responsibility for Crimes against Humanity and War Crimes against Civilians and individual responsibility for war crimes committed in 1992 was recognized by the UN Secretary-General¹², the International Law Commission¹³, as well as jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)¹⁴. These institutions have established that criminal responsibility for Crimes against Humanity and War Crimes against Civilians constitutes a peremptory norm of international law or *jus cogens*.¹⁵ That is why it appears undisputable that Crimes against Humanity and War Crimes against Civilians constituted part of customary international law in 1992. This conclusion was confirmed by the Study on Customary International Humanitarian Law¹⁶ conducted by the International Committee of the Red Cross. According to that Study "serious violations of international humanitarian law constitute war crimes" (Rule 156), "individuals are criminally responsible for war crimes they commit" (Rule 151) and "States must investigate war crimes allegedly committed by their nationals or armed forces, or in their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects" (Rule 158).

According to the universal jurisdiction principle, customary international humanitarian law is obligatory for each state throughout the world, regardless of whether it has ratified the appropriate international legal instruments. Therefore, each state is bound to prosecute or extradite (*aut dedere aut judicare*) all persons suspected of having violated customary international humanitarian law.

Principles of international law recognized in the UN General Assembly Resolution 95 (I) (1946) as well as by the International Law Commission (1950) refer to "the Nurnberg Charter and the Judgment of the Tribunal", hence to war crimes in general. "Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal", which were adopted by the International Law Commission in 1950 and submitted to the General Assembly, prescribe in Principle I that "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment". Principle II also prescribes: "The fact that internal law does not impose a

¹¹ This particularly includes: *The Convention on Genocide (1948); The Geneva Conventions (1949) and their additional Protocols (1977); The Convention on Slavery amended in 1956; The Convention on Racial Discrimination (1966); The International Covenant on Civil and Political Rights (1966); The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); The Convention on Apartheid (1973); The Convention on the Elimination of All Forms of Discrimination against Women (1979); The UN Convention against Torture (1984).*

¹² Report of the UN Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 of 3 May 1993, sections 34-35 and 47-48

¹³ International Law Commission, *Commentary to the Draft Code of Crimes against the Peace and Security of Mankind (1996)*

¹⁴ ICTY, Appeals Chamber, *Tadić case, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 151; ICTY, Trial Chamber, Judgment in the Tadić case, dated 7 May 1997, paragraphs 618-623*

¹⁵ International Law Commission, *Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 26*

¹⁶ Jean-Marie Henchaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 2005, pages 568 et seq.

penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law”.

Therefore, the criminal offenses of War Crimes against Civilians and War Crimes against Prisoners of War should in any case be placed under “general principles of international law” referred to in Article 3 and Article 4(a) of the CC BiH. That is why, regardless of whether viewed from the aspect of customary international law, international treaty law or “the principles of international law”, it is indisputable that Crimes against Humanity and War Crimes against Civilians constituted criminal offenses at the critical time; in other words, the principle of legality was complied with in the sense of both *nullum crimen sine lege* and *nulla poena sine lege*.

Therefore, the criminal offenses of War Crimes against Civilians and War Crimes against Prisoners of War and the criminal offense of Violating the Laws and Practices of Warfare constituted criminal offenses also in the relevant period of time.

6. Findings of the Court

a) General considerations regarding the evaluation of evidence

The Court has assessed the evidence in this case in accordance with the applicable procedural code, that is, the Criminal Procedure Code of Bosnia and Herzegovina. The Court has applied to the Accused the presumption of innocence referred to in Article 3 of the CPC BiH, which embodies a basic principle of law, so that the Prosecution bears the onus of proving the guilt of the Accused, which has to be proven beyond reasonable doubt.

When evaluating the evidence of the witnesses that testified before the Court, the Court has considered their demeanor, conduct and character as much as this was possible. With regard to all the witnesses, the Court has also considered the probability, consistency and other evidence, as well as the circumstances of the case. Furthermore, throughout the proceedings the Court has been conscious of the fact that the credibility of witnesses depends upon their knowledge of the facts they gave evidence about, their integrity, honesty and the fact that they pledged to speak the truth in terms of the oath they took.

It is insufficient that the evidence given by a witness has been given honestly. The true issue in relation to identification evidence is not whether it has been given honestly, but also whether it is reliable. The Trial Panel has been conscious, throughout the proceedings, that evidence about facts that occurred sometimes (many) years prior to giving evidence involves inherent uncertainties due to vagaries of human perception and recollection of traumatic events.

As regards hearsay evidence, the Court underlines that it is well settled in the practice and jurisprudence of the Court that hearsay evidence is admissible. Furthermore, pursuant to Article 15 of the CPC BiH, the Court is free in its evaluation of evidence. The approach taken by the Court has been that it ought to be satisfied that such evidence is reliable in the sense of being voluntary, truthful and trustworthy. Furthermore, the probative value of a hearsay statement will depend upon the context and character of the evidence in question and/or if the evidence has been corroborated by other pieces of evidence.

The Court considered circumstantial evidence as being such evidence of circumstances surrounding an event or offense from which a fact at issue may be reasonably inferred. The individual items of such evidence may by themselves be insufficient to establish a fact, but, taken together, their collective and cumulative effect may be revealing and sometimes decisive.

In the present case, the documentary evidence has not been voluminous. Already in the course of adducing the evidence at the hearing held on 10 January 2008, the Defense pointed out that they would not object to adducing any prosecution documentary evidence, while they would present their final assessment of the evidentiary proceedings in the closing argument. However, at the hearing held on 24 April 2008, the Defense challenged the authenticity of certain evidence and particularly pointed out that certain documents were not drafted by authorized persons.

In order to assess the authenticity of documents, the Court considered them in light of evidence such as other documentary evidence and witnesses' testimonies. In addition, even when the Court was satisfied with the authenticity of a particular document, it did not automatically accept the statements contained therein to be accurate portrayal of the facts. The Court indeed evaluated these statements in light of the entire evidence before it.

Also, Article 15 of the CPC BiH established the principle of free evaluation of evidence, which gives the Court the right to evaluate the existence or non-existence of facts freely; that is, when assessing whether a certain fact exists or not, the Court is not bound by or limited to special formal evidentiary rules. The weight of evidence is not determined in advance, either in terms of quality or quantity. In terms of the free evaluation of evidence, the Court is obliged to conscientiously assess every piece of evidence individually and in relation with the rest of evidence and, based on such assessment, draw a conclusion whether a particular fact is proven. The evaluation of evidence includes its logical and psychological evaluation. The free evaluation of evidence is limited by the principle of legality of evidence.

Article 10 of the CPC BiH defines the concept of unlawful evidence, stipulating that information obtained or presented in an unlawful manner is considered as legally invalid evidence. Evidence obtained through a violation of fundamental human rights and freedoms or through an essential violation of the procedural law is defined as unlawfully obtained evidence, which, together with evidence obtained in an unlawful manner, constitutes legally invalid evidence, on which a court decision may not be based.

The issue of unlawfulness of evidence may be classified in three basic categories:

1. evidence obtained through violations of certain fundamental rights and freedoms,
2. evidence for which the law explicitly stipulates that may not be used when rendering a court decision in criminal proceedings,
3. evidence which would not be obtained by the prosecution authorities without information from unlawful evidence (so-called fruits of a poisonous tree)

Article 274(2) of the CPC BiH speaks about the authenticity of particular pieces of evidence, which have to be the original writing, document, record, recording, photograph or similar counterpart. The CPC BiH defines the term "original" under Article 20(p), stating that it refers to writing, recording or similar counterpart intended to have the same effect by a person writing, recording or issuing it. This subparagraph defines the term "original" s

to include photographs, and/or negatives or any copy therefrom. Article 20(r) of the CPC BiH defines the term "duplicate" for the purpose of criminal proceedings, stating that, by using scientific advancements, certain procedures (copying, enlarging, minimizing, re-recording, reproduction) are used to make duplicates from the original and matrix. Various technical recordings, if they were obtained under the conditions and in the manner stipulated by the CPC BiH, may be used as evidence in criminal proceedings. However, a verdict may not be based only on recordings as the sole evidence, because that challenges Article 6(2) (the presumption of innocence) and Article 8 of the ECHR (the right to respect for private and family life) – see *Schenk v. Switzerland*, Judgment of 12 July 1998, Series A, number 140. Furthermore, Article 20(s) of the CPC BiH defines the term "telecommunication address", which, according to this code and for the purposes of criminal proceedings, means any telephone number, either landline or cellular, or e-mail or internet address. What is important for the term "telecommunication address", as specified under subparagraph (s), is that a certain address is held or used by a person.

The issue whether documents whose content is important for the evidentiary procedure are originals or photocopies is often problematic. Although, in principle, there is a position that it is necessary to submit original documents to the court, this position in itself does not exclude the possibility of using a copy of a document as lawful evidence. The Supreme Court of the Republic of Croatia, in its Decision number I Kž-645/01, says the following:

"The accused are right when they say that all documents which have probative value should be submitted in original, which in the present case was not done with the record of the questioning of the suspect NŠ, dated 8 May 1999 (sheet 72-74 of the case file), nor did the first instance court, despite its efforts, succeed in obtaining the original during the proceedings. However, contrary to the arguments stated in the appeal, it cannot be accepted that this is unlawful evidence in terms of Article 9(2) of the CPC only because of this formal omission, given that the accused Š does not challenge the authenticity of that record, and that it was not obtained by breaching the defense rights guaranteed by the Constitution, the law or international law, while, also during the main trial when he presented his defense, the Accused himself stated he maintained that defense, which was then read out and for which he said that what was read out was exactly what he had stated to the law enforcement authorities. In addition, given that the accused Š completely denies the commission of the offense, it is inadmissible that the contested judgment be based on that evidence, and therefore, even if it would be accepted that this is evidence referred to in Article 9(2) of the CPC, the ground for appeal for the unlawful violation referred to in Article 367(2) of the CPC would not be satisfied."

The European Court of Human Rights (hereinafter: the ECtHR) established a general rule according to which national courts deal with the evaluation of evidence. As for decisions of the European Court of Human Rights (hereinafter: the ECtHR), a general rule was established according to which national courts deal with the evaluation of evidence. Since there is no explicit provision about this in the Convention, the ECtHR did not go to the extent of setting the rules about evidence and firmly maintained its position that its task is not to judge whether evidence was properly accepted at the trial, which is in principle an issue regulated in accordance with the national law, but to establish whether the court proceedings were fair as a whole. When considering whether a trial was fair or not, the Court examines the manner in which evidence was obtained and, if it was obtained in violation of any right of the Convention, the nature of that violation. Weight is given to the

issue whether a verdict of guilty was based exclusively or mostly on contested evidence and whether the defense rights were sufficiently respected. The principle according to which the rules about evidence are an issue regulated by the national law was established in the *Schenk v. Switzerland* case and confirmed by that court on numerous occasions thereafter. The ECtHR took the following position:

Although Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. Hence, the Court cannot, in principle or generally, exclude a possibility that unlawfully obtained evidence of this type may be accepted.

In the *Khan v. the United Kingdom* case, the ECtHR took the position that the use of evidence obtained in violation of the rights set forth in the Convention does not necessarily conflict with the right to a fair trial. It was not suggested in this case that the right to a fair trial necessarily implies the exclusion of evidence obtained in violation of Article 8, but that the verdict of guilty based solely on evidence obtained through unlawful acts of the criminal prosecution authorities conflicts with legal provisions and is not in accordance with Article 6. Dismissing the appeal filed by the appellant, the Court noted that he had ample opportunity to challenge the authenticity of that recording and that it is at the discretion of national courts to exclude evidence if they think that its admission would render a trial unfair.

As for the case law of the International Criminal Tribunal for the former Yugoslavia, a position is taken that the Rules do not contain a single rule pertaining to the exclusion of unlawfully obtained evidence and that, as it was confirmed in the *Kordić* case, "even if the illegality was established [...] [w]e have come to the conclusion that [...] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings." Such a position was also accepted in the decision of the Trial Chamber in the *Brdanin* case, dated 3 October 2003.

Hence, when evaluating the evidence, the Court struck a balance between the fundamental rights of the Accused and the essential interests of the criminal prosecution of a person accused of grave violations of international humanitarian law.

b) General characteristics of the criminal offense of War Crimes against Civilians

Pursuant to the Indictment of the Prosecutor's Office, the Accused, *inter alia*, has been charged with the commission of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c), (e) and (f), which reads:

"Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

- c) killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;*

e) *coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution, application of measures of intimidation and terror, taking of hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial, forcible service in the armed forces of enemy's army or in its intelligence service or administration;*

f) *forced labor, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic money or the unlawful issuance of money,*

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment."

The general elements of the criminal offense of Crimes against Civilians, which need to be proven by the Prosecution, follow from the legal definition thereof:

- i. The act of the perpetrator must be committed in violation of the rules of international law;
- ii. The violation must take place in time of war, armed conflict or occupation;
- iii. The act of the perpetrator must be related to war, armed conflict or occupation;
- iv. The perpetrator must order or perpetrate the act.

i. **The act of the perpetrator must be committed in violation of international law**

The Indictment charges the Accused Zijad Kurtović with Crimes against Civilians in violation of Article 173 of the CC BiH, namely, that in the relevant period he acted contrary to Article 3(1)(a) and (c) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War from 1949 (hereinafter: the Geneva Convention).

Article 3(1)(a) and (c) of the Geneva Convention reads:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts, among others, are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- c) *outrages upon personal dignity, in particular, humiliating and degrading treatment;"*

Article 2(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) provides:

"Rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law;"

Common Article 3 of the Geneva Convention from 1949 is generally considered a provision of customary law and it is binding on all parties to a conflict, either internal or international, and therefore this provision was in effect at the time and in the place of the incidents charged against the Accused.

When interpreting this provision, it is clear that it is not necessary that the perpetrator be aware of or intends to violate international norms, but rather it is sufficient that the commission itself is contrary to the rules of international law.

In order to establish a violation of the rules of international law, it is necessary to establish against whom the commission was directed, that is, whether the act was directed against the special category of population protected by Article 3(1) of the Geneva Convention.

According to the definition of the term protected categories contained in Article 3(1) of the Geneva Convention, civilians are persons not taking part in hostilities, including members of armed forces who have laid down their arms and/or those placed hors de combat.¹⁷

Moreover, Protocol I Additional to the Geneva Conventions defines civilians in the negative by stating that civilians are "those persons who are not members of the armed forces".¹⁸

Article 43(1) of Protocol I prescribes that:¹⁹

"the armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".

Thus, apart from members of the armed forces, every person present in a territory is a civilian.²⁰ Article 50 of Protocol I further considers that the civilian population is made up of all persons who are civilians and that the presence within that civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. The Article also states that in case of doubt, a person should be considered to be a civilian.

Therefore, considering the definition of the term "civilian", explicitly stating that civilians are all persons who are not taking part in hostilities and who are not members of the armed

¹⁷ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, paragraph 544.

¹⁸ J. Pictet et al, Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, p. 610.

¹⁹ Besides pointing to Article 43 of Additional Protocol I, Article 50 ("Definitions of civilians and civilian population") of the same protocol also makes explicit reference to Article 4(A) of the Third Geneva Convention concerning those included in the definition of armed forces. The Commentary to Article 50 of Additional Protocol I, however, suggests that Article 43 of Additional Protocol I contains a new definition that includes the provisions of Article 4(A) of the Third Geneva Convention; see *supra* note 4, p. 611.

²⁰ See *supra* note 4, p. 611.

forces, it is clear that all the persons injured by unlawful conduct of the Accused described in Sections 1, 2, 3, 5, 6, 7, 8, 9 and 10 of the operative part were civilians. Therefore, the option of participation in a combat is ruled out. None of these persons had weapons. They were not in a position to fight, while the act the Accused is charged with was directed against civilians of an ethnicity different from the ethnicity of the military force that controlled the territory where the civilians lived. This category of civilians is especially protected by international law. Injuries to life and bodily integrity inflicted upon this category are especially forbidden. Therefore, it is obvious that the criminal acts referred to in the Indictment, which, as it will be explained in the text below, the Accused committed, were contrary to the rules of international law, namely Article 3(1)(a) and (c) of the Geneva Convention.

ii. The violation must take place in time of war, armed conflict or occupation

Article 173 of the CC BiH provides that the criminal offense has to be in connection with violations of the rules of international law during, *inter alia*, an armed conflict. Since the Panel has found that the actions of the Accused satisfy the elements of a violation of the rules of international law, to wit, Article 3(1)(a) and (c) of the Geneva Convention, which provides that the Article is applicable to an armed conflict not of an international character, in that regard the Panel notes that many courts have concluded that this Article applies not only to internal conflicts, but to conflicts of an international character as well²¹. However, the Court did not deal with establishing the character of the armed conflict which has been found in this case to have taken place in BiH at the time relevant to the Indictment, because Article 173 of the CC BiH does not require that the character of the armed conflict, internal or international, be determined.

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. In terms of Common Article 3, the nature of this conflict is irrelevant. Namely, it is irrelevant whether a serious violation occurred in the context of international or internal armed conflict, if the following conditions are met: the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim, and the violation of the rule must entail the individual criminal responsibility of the person breaching the rule.

In addition to the agreement of the parties regarding the fact about the existence of the armed conflict, it is also important to point out that it follows from the documentary evidence presented by the Prosecution that the armed conflict between the HVO and the Army of RBiH existed during the relevant period, while the conflict inevitably took place in the territory of Drežnica – Mostar as well.

²¹ *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Judgment, 20 February 2001, paragraphs 140-152, especially paragraph 147. See also *Prosecutor v. Hadžihasanović et al*, Case No. IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, paragraph 13.

It is also important to note that in the proceedings conducted before the ICTY, several defenses (unsuccessfully) denied the existence of armed conflict in relation to a particular crime charged against the defendant, claiming that the crime was outside of an armed conflict (cases of *Kunarac*, *Blaškić*, *Tadić* ...). However, "[i]t is not necessary to prove that the conflict took place on every meter of the territory generally covered by a conflict". Crimes must be linked to an armed conflict by its nature or its consequences in order to be treated as war crimes. However, in order to be treated as a war crime, an individual offense does not have to coincide temporally or territorially with an effective conflict, and it may be committed outside of direct combat (*Vasiljević* and *Rutaganda* cases). The crime itself is not necessarily of a "military" nature, and it does not necessarily have to be a part of a policy or officially encouraged practice, plan and similar.

It is considered that an armed conflict exists "wherever there is a resort to armed force between States or protracted armed violence between authorities and organized armed groups, or between such groups within a State."

There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. To wit, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.

What ultimately distinguishes a war crime from a purely domestic offense is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Court's finding on that point is unimpeachable.

In determining whether or not the act in question is sufficiently related to the armed conflict, the Court took into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victims are non-combatants; the fact that the victims are members of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

It is indisputable that the laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to two types of acts. The laws of war do not necessarily displace the laws regulating

peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.

iii. The act of the perpetrator must be related to war, armed conflict or occupation

The third requirement is to allow for the distinction that not all crimes committed in times of armed conflict can be automatically labeled as war crimes. International jurisprudence has firmly established that for an act to be labeled a war crime there has to be a sufficient nexus to the armed conflict; that is, the acts of the Accused have to be "closely related to the armed conflict".²²

This close connection does not necessarily mean there has to be actual fighting occurring in the territory where the acts are being committed. The ICTY Appeals Chamber in *Tadić* held that: "international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there, and continues to apply until a general conclusion of peace is reached or, in the case of internal armed conflicts, a peaceful settlement is achieved".²³

Furthermore, "[t]he armed conflict need not actually have been causal to the perpetration of the crime. But the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".²⁴

To establish whether acts were indeed 'closely related to the armed conflict', the Appeals Chamber in *Kunarac* listed indicators such as: "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties".²⁵

Taking into account the presented evidence, the Court finds that the acts of the Accused were sufficiently related to the armed conflict. The Court takes particular notice of the position of the Accused in the military structure – that is, his being a member of the unit for the physical security of the command, his daily presence at the place where the crimes were committed, as well as the length of time over which the prisoners in the Church of *All Saints* in Drežnica were treated in a prohibited manner. Moreover, given his work and duties, there can be no doubt whatsoever about the awareness of the Accused of the armed conflict and the fact that he was very much a part of it.

²² See, *inter alia*, *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, paragraph 55; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002, paragraph 24; *Tadić* Jurisdiction Decision, paragraph 70.

²³ *Tadić* Jurisdiction Decision, paragraph 70.

²⁴ *Prosecutor v. Kunarac et al*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, paragraph 58.

²⁵ *Ibid.*, paragraph 59.

iv. The perpetrator must order or perpetrate the act

It indisputably follows from the testimonies of the prosecution witnesses, the direct victims of the prohibited conduct of the Accused, that the Accused committed the acts which constitute elements of the criminal offense of War Crimes against Civilians and which were aimed at severe deprivation of fundamental rights, such as the right to freedom and security, which is contrary to international law and which, under the above-quoted provision of Article 3(1) of the Fourth Geneva Convention, is impermissible against unarmed persons or those who are not part of an armed force, whereby he violated the rules of international law beyond doubt. The acts were committed during the armed conflict of which the Accused was aware and in which he undoubtedly took part.

The explanation for such a conclusion of the Court is given in the text below.

c) General characteristics of the criminal offense of War Crimes against Prisoners of War

The Indictment alleges that the Accused, violating the rules of international law, tortured the prisoners, inflicted great suffering on them and violated their bodily integrity, and participated in these violations, inhumanely treated and participated in inhumane treatment, applied measures of intimidation and terror and participated in their application, and forced them to labor, whereby he violated Article 3(1)(a) and (c) of the Geneva Convention relative to the Treatment of Prisoners of War.

Article 175(a) and (b) of the CC BiH and Common Article 3 of the Geneva Conventions

The charges against the Accused were brought pursuant to Article 175(a) and (b) of the CC BiH and Article 3 common to the Geneva Conventions of 12 August 1949 (hereinafter: Common Article 3). In the relevant parts, Article 175, item (a) stipulates the following: "Whoever, in violation of the rules of international law, orders or perpetrates in regard to prisoners of war any of the following acts: (a) depriving other persons of their life (murders), intentional infliction of severe physical or mental pain or suffering upon persons (tortures), inhuman treatment..." and/or item (b) causing of great suffering or serious injury to bodily integrity or health", shall be punished by imprisonment for a term not less than ten years or long-term imprisonment".

Common Article 3 of the Geneva Conventions, in the relevant parts, reads as follows: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts, among others, are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture..."

Two preliminary requirements must be met for the existence of the criminal offense referred to in Article 175(a) and (b) of the CC BiH and Common Article 3 of the Geneva Conventions. First, an armed conflict, either international or internal, must exist at the time relevant to the Indictment. Moreover, two additional requirements must be met for a criminal offense to be processed under Common Article 3 of the Geneva Conventions and Article 175(a) and (b) of the CC BiH. Article 175 of the CC BiH confers jurisdiction on the Court under the condition that the infringement constitutes a violation of the rules of international law, while Common Article 3 of the Geneva Conventions stipulates that a victim is a person taking no active part in the hostilities at the time of the commission of the criminal offense.

General requirements

According to the foregoing, the law does not apply unless the alleged offenses were committed in the context of an armed conflict and with a sufficient nexus between the alleged offense and the armed conflict.

1. The Court reasoned the existence of the armed conflict under general characteristics of War Crimes against Civilians in Section 6 b) ii. of the Reasoning.

2. The nexus between the Accused and the armed conflict is also explained in the reasoning for the criminal offense of War Crimes against Civilians, more specifically, under Section 6 b) iii. of the Reasoning, while the conclusion of the Court about the specific acts of the Accused will be presented in the text below.

3. Additional requirements under Article 175(a) and (b) of the CC BiH and Common Article 3 of the Geneva Conventions

i. Violation of international law under Article 175(a) and (b) of the CC BiH

The charge of inhuman treatment and infliction of great suffering or serious injury to bodily integrity of the prisoners and other acts brought against the Accused, such as violations of the laws and customs of war, in the present case is based on Common Article 3 of the Geneva Conventions, which sets forth a minimum core of mandatory rules and reflects the fundamental humanitarian principles upon which the Geneva Conventions are based in their entirety. It is also widely accepted that Common Article 3 is a part of international customary law,⁴² and that inhuman treatment constitutes a serious violation of international humanitarian law, which, of course, entails individual criminal responsibility.⁴⁴ Accordingly, the Trial Panel concludes that the mentioned crimes constitute a violation of international law and fall under the prohibited acts referred to in Article 175(a) and (b) of the CC BiH.

⁴² *Tadić* Jurisdiction Decision, para. 89; *Celebići* Appeal Judgment, para. 143.

⁴⁴ *Celebići* Appeal Judgment, paras. 153-174, in particular para. 167. The Trial Panels notes that the provisions of the Criminal Code of the SFRY, which was adopted by Bosnia and Herzegovina in April 1992 (Criminal Code of SFRY, 1990 ed., Art. 142-143), established the jurisdiction of the BiH courts over war crimes committed at the time of war, armed conflict or occupation, drawing no distinction between internal and international armed conflicts. Thus, the Accused in the present case can be held individually criminally responsible under the national law for the crimes alleged in the Indictment.

ii. Persons taking no active part in hostilities under Common Article 3 of the Geneva Conventions.

Finally, Common Article 3 of the Geneva Conventions requires that the Prosecution prove that a victim was a person taking no active part in the hostilities at the time of the commission of the criminal offense.⁴⁵

This Trial Panel finds that it is the specific situation of the victims at the moment of the commission of the crime that must be taken into account in determining his protection under Common Article 3. The Trial Panel considers that relevant factors in this respect include the activity, whether or not the victim was carrying weapons, and the type of clothing the victim wore at the time of the commission.⁴⁶ Accordingly, whether a person did or did not enjoy protection of Common Article 3 has to be determined on a case-by-case basis.

The Trial Panel also notes that Common Article 3 of the Geneva Conventions has a broad humanitarian purpose. Because of the Article's wide-ranging application during hostilities, the group of protected individuals within the terms of Common Article 3 includes detained persons who, prior to detention, were members of the armed forces or were engaged in armed hostilities.⁴⁷

As early as the 1863 Lieber Code there have been provisions ensuring the treatment of Prisoners of War ("POW"). Article 56 of the Code proscribed that *"a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment...or any other barbarity"*.

Article 5 of the 1929 Geneva Convention on Prisoners of War determined that *"no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted or exposed to unpleasantness or disadvantages of any kind whatsoever"*.

Most of the observations made in the Geneva Conventions ("GC") follow from the very foundations of the Conventions. They proclaim the principle of respect for the human person and the inviolable character of the basic rights of individual men and women.

According to the Commentary to the fourth Convention *"the principle of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers: it includes, in particular, the right to physical, moral and intellectual integrity -- an essential attribute of the human person"*.

As a consequence, the Conventions focus mainly on the importance of humane treatment, thus making everything that falls outside of that treatment 'inhuman'.

Inhuman treatment is considered a grave breach under all of the four Geneva Conventions. For instance, Article 13 of the third GC determines that prisoners of war must at all times be humanely treated and that they must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Violation of this provision

⁴⁵ *Celebitchi Appeal Judgment*, para. 420

⁴⁶ *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment dated 5 December 2003 (*Galic Judgment*), para. 50

⁴⁷ *Prosecutor v. Mladen Naletilic, aka "Tuta", and Vinko Martinovic, aka "Stela"*, Case No. IT-98-34, Judgment dated 31 March 2003 (*Naletilic and Martinovic Judgment*), para. 229. See also *Blaskic Judgment*, para. 177, citing *Tadic Judgment*, para. 615

is considered a grave breach under Article 130 of the same convention. This implies treatment not being humane. It is not limited solely to attacks on physical integrity or health; the aim of the Convention is certainly to grant prisoners of war in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals.

Further provisions in the Geneva Conventions include Article 17 GC III: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind". Article 32 GC IV states: "The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering...of protected persons in their hands. This prohibition applies not only to...torture...but also to any other measures of brutality whether applied by civilian or military agents".

Due to the emphasis on what constitutes humane treatment it becomes difficult to assess the actual physical treatment that would lead to a qualification of inhumane treatment. The word 'treatment' itself is indicated to be understood in its most general sense as applying to all aspects of man's life. For instance, the mention of physical or mental injury in the commentary to Article 147 GC IV would suggest at least some kind of injury that could be medically established. The commentary to Article 27 GC IV gives as examples "*acts of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values, including exposing people to public curiosity*".

Further indication as to what is indicated as inhumane treatment is found in the commentary to Article 13 GC III which states that the concept would imply in the first place the absence of any corporal punishment, but it would also include the positive obligation to stand up for the prisoner and to protect him and give him assistance to defend and guard him from injury or danger. This positive obligation on the Detaining Power again follows from the obligation to treat prisoners humanely.

The European Convention on Human Rights also refers to the prohibition of torturing prisoners.

Article 3 of the European Convention on Human Rights ("ECHR") states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. In the landmark case of *Ireland v. U.K.* the Court established that for ill-treatment to fall under the scope of this Article "*it must attain a minimum level of severity. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*".

The Court has further held treatment to be "*'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering*".

Consistent jurisprudence of the Court also stresses that "*the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment*".

For instance, in the mentioned case of *Ireland v. U.K.*, quoted above, the applicants were suspected members of the IRA and had been detained in specialized interrogation centres where they were submitted to specially designed interrogation techniques. These techniques involved, amongst others, standing against a wall in 'stress-positions', subjection to noise and deprivation of sleep and food.

The Court found that the treatment fell within the category of inhuman treatment under Article 3 since: "*The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation*".

For one of the applicants it was also found that his allegations of having been beaten were grounded based on medical reports that showed bruising and contusions on his body that had not been there prior to his stay at the interrogation centre. The Court held that such assaults had been severe enough as to constitute inhuman treatment.

In another case the Court also used the results of medical examinations to establish whether a certain treatment rose to the threshold of inhuman treatment. In *Tomasi v. France* the Court found it "*sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman*".

However, in another case the Court held that any recourse to physical force (thus even in absence of sufficient injuries) could lead to a violation of Article 3: "*The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention*".

The UN Human Rights Committee also dealt with the protection of prisoners, so that Article 7 of the International Covenant on Civil and Political Rights determines that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'.

Article 10(1) adds to this that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The terms inhuman and/or cruel treatment include all forms of imposition of severe suffering that are unable to be qualified as torture for a lack of one of the essential elements of torture.

In the one instance the Human Rights Committee ("the Committee") found inhuman treatment where a prisoner was forced under threat of punishment to stand blindfolded for 35 hours or to sit motionless on a mattress for several days.

The committee also found solitary confinement for one year without any correspondence to constitute inhuman treatment.

Inhuman treatment was also found in the case of *Massiotti v. Uruguay* where the prisoner was locked in a 4m by 5m cell with 34 other prisoners and where the water would rise up to 10cm during the rain season. Prisoners were kept indoors under artificial light all day.

In another case where the applicant had been subjected to ill-treatment during imprisonment such as truncheon blows to the knees, threats with knives, a thumb stuck in his eye and kicks while lying on the ground, the Committee found that "*the applicant's right to*

treated with humanity and with respect for the inherent dignity of the human person” had been violated. Finally, in a different case against Jamaica the Committee held: *“In the Committee’s opinion, the fact that Mr. Bailey was beaten repeatedly with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to head and hands, amounts to cruel and inhuman treatment within the meaning of article 7 of the Covenant”*.

In its jurisprudence, the ICTY has also reached a number of conclusions with respect to the inhuman treatment of prisoners of war

One definition of inhuman treatment in ICTY jurisprudence was determined by the Trial Chamber in *Čelebići* when it held: *“inhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture”*.

The Appeals Chamber in *Kordić and Čerkez* added: *“inhuman treatment under Article 2 of the Statute is an intentional act or omission committed against a protected person, causing serious mental harm, physical suffering, injury or constitutes a serious attack on human dignity.”*

Specific examples from ICTY jurisprudence include several findings from the abovementioned *Čelebići* case. In one instance the Trial Chamber held that *“the act of hitting an individual, who is so seriously injured that he is unable to stand, necessarily entails, at a minimum, a serious affront to human dignity. Accordingly, on the basis of the foregoing facts the physical mistreatment constitutes the offence of inhuman treatment”*. In the same case the Chamber found a crime of inhuman treatment because *“the accused intentionally caused serious physical and mental suffering by using an electric shock device on prisoners, causing pain, burns, convulsions, twitching and scaring, frightening victims and reducing them to begging for mercy”*.

Regarding the determination on whether or not a particular act would qualify under the abovementioned definition, the Trial Chamber in *Krnjelac* stated: *“the assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious”*.

When discussing the related definition of ‘serious bodily or mental harm’ the Chamber in *Krstić* held that: *“serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”*.

The International Law Commission stated the following in its discussion on inhuman treatment: *“The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. It should be noted that the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to*

those listed in the preceding subparagraphs. Secondly, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity”.

The Elements of Crimes of the ICC determine for inhumane acts as a Crime against Humanity that it involves that “the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health”. The added requirement is that “such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute”, with ‘character’ referring to the nature and the gravity of the act.

The Geneva Conventions contain a number of provisions that would allow for arguments that certain arguably “minor” acts (such as unpleasant treatment or exposure to public curiosity) are not considered humane treatment and therefore constitute inhuman treatment. However, the Court believes an approach more in line with the jurisprudence of the European Court of Human Rights and the Human Rights Committee and the International Criminal Tribunal for the former Yugoslavia would be more appropriate. The focus on actual ‘serious mental or physical suffering’ would also allow for the act to be considered in line of accompanying offences of the same gravity (be it Crimes against Humanity or War Crimes). This would maintain the status of Crimes against Humanity and War Crimes as particularly reprehensible crimes while not necessarily taking anything away from the conduct advocated in the Geneva Conventions since all levels of seriousness will be determined on a case by case basis and relative to each specific victim.

When determining the status of the victims in the present case, the Trial Panel points to its conclusion that the armed conflict between the HVO and the Army of RBiH was ongoing during the relevant period, and HVO members were captured in some combat operations during that conflict. Therefore, the Trial Panel concludes that 12, out of 20 prisoners in total in the church of All Saints in Drežnica, were prisoners of war and had the status of protected persons at the time of the commission of the mentioned crimes.

The relevant acts of the Accused will be reasoned in Section 6.c of the Reasoning.

d) General characteristics of the criminal offense of Violating the Laws and Practices of Warfare referred to in Article 179(1) and (2)(d) of the CC BiH

The general characteristics of this criminal offense stipulated under Article 179 of the CC BiH, which reads:

(1) Whoever in time of war or armed conflict orders the violation of laws and practices of warfare, or whoever violates them,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

(2) Violations of laws and practices of warfare referred to in paragraph 1 of this Article shall include:

a) Use of poison gases or other lethal substances or agents with the aim to cause unnecessary suffering;

b) Ruthless demolition of cities, settlements or villages or devastation or ravaging justified by military needs;

- c) *Attack or bombarding by any means of undefended cities, villages, residences or buildings;*
- d) *Confiscation, destruction or deliberate damaging of establishments devoted to religious, charitable or educational purposes, science and art; historical monuments and scientific and artistic work;*
- e) *Plundering and looting of public and private property.*

follow from the prohibition of unlimited right to adopt means of inflicting damage on the enemy, which was imposed already in 1907 under Article 22 of the Regulations Respecting the Laws and Customs of War on Land, which are a constituent part of the Convention Respecting the Laws and Customs of War on Land, signed on 18 October 1907.

In Section II of the Regulations, which is entitled *Hostilities*, Chapter I - *Means of injuring the enemy, sieges, and bombardments*, the mentioned Article 22 stipulates: "*The right of belligerents to adopt means of injuring the enemy is not unlimited.*"

However, the Court also has to point out the provision of Article 27 of the Regulations: "*In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.*"

In the present case, the state of siege can be taken into consideration – in other words, that the Army of R BiH controlled the area of Drežnica, where the Roman Catholic Church of All Saints was located.

Limitations in the choice of means of warfare were established already under the St. Petersburg Declaration of 1868, which stipulates that the only justified objective of combat in a war is to weaken the military power of the enemy.

This criminal offense, too, can be committed only in time of war or armed conflict; in that regard, the Court, explaining the general characteristics of the criminal offenses under Articles 173 and 175 of the CC BiH, has already established that the armed conflict between the HVO and the Army of R BiH was ongoing during the relevant period of time.

The second essential element of this criminal offense is a violation of the laws and practices of warfare, which has already been established through a short overview of forerunners of the prohibition of unlimited choice of means of warfare, while the Court will present in Section 6.e of the Reasoning the conclusion that the Accused committed exactly this criminal offense by his acts described under Section 11 of the operative part.

e) Liability of the Accused under each Section

Before evaluating the evidence relating to each Section of the operative part, it is important to analyse the common elements of all three crimes and all Sections of the operative part. This is because the actions of the accused constitute elements of the three crimes, that is,

during the same period of time – late September and October 1993, at the same place – the Roman Catholic Church of All Saints in Drežnica, Mostar Municipality, behaving uniformly and using the same means – including the church inventory, with the same group of detainees – which indeed included both civilians and prisoners of war, the Accused was involved in the illicit treatment of the group of 20 detainees.

It is indisputable that the crimes described under Sections 1 through 11 of the operative part took place in the latter half of 1993 and *lasted* during late September and October. This stems from the testimonies of all prosecution witnesses but of some defence witnesses too, who were aware that the detainees were kept in the All Saints Church in Donja Drežnica. It is therefore indisputable that the detainees were put in the All Saints Church in Donja Drežnica.

It was determined beyond dispute that 12 civilians and 8 prisoners of war were held captive in the church: civilians Miroslav Soko, Marinko Drežnjak, Marinko Ljolja, Mirko Zelenika, Vili Kuraja, Zvonimir Kukić, Vlado Ćurić and Anto Rozić, and the prisoners of war, HVO members Mate Rozić, Matija Jakšić, Nedeljko Krešo, Marko Rozić, Vinko Soldo, Anton Grgić, witness A, witness B, Branko Jurić, Kamilo Dumančić, Ivan Pavlović, and Ivan Kostić.

This stems not only from the testimonies of Marinko Drežnjak, Miroslav Soko, Marinko Ljoljo, Mirko Zelenika, who were civilians at the relevant time, and of Matija Jakšić, Branko Jurić, Kamilo Dumančić, Ivan Pavlović and Ivan Kostić, who were prisoners of war at the time, but also from the documentary evidence, in particular from the ICRC certificates on the status of prisoners at the relevant time.

A conclusion about their stay in the church and the treatment the detainees who did not testify were subjected to as well ensues indisputably from the testimonies of the prisoners who remember well with whom they were captured prior to their arrival in the All Saints Church as well as in the church itself.

The inability to specify accurately the time period of detention is fully justified because, starting from the very trauma caused by capturing and then followed by the traumas they went through during the captivity, when the time was measured with the arrivals of the soldiers who came to ill-treat them, the detainees lost all connections with the external world and, with that, the possibility to remember the exact dates of the beginning and the end of their detention in the church. Although some of the prisoners indicated that the commencement date was 30 September and some others said it was 1 October 1993, the Court decided to accept the consistent statements of all detainees that the detention in the All Saints Church in Donja Drežnica lasted during late September and October 1993.

It is beyond dispute that the crimes took place during the conflict between the HVO and the Army of RBiH and as a result of this conflict. This also stems from the consistent statements of all witnesses, be it prosecution or defence ones, and of the Accused himself, and, as explained above, also from the facts established in the final ICTY Judgement in *Prosecutor v. Mladen Naletilić aka Tuta and Vinko Martinović aka Štela*, no. IT-98/34, 31 March 2003.

In Drežnica, the conflict between the HVO units and the Army of RBiH that had previously fought together against the Army of the Serb Republic of Bosnia and Herzegovina broke out on 9 May 1993, as may be concluded beyond doubt from the consistent statements of all defence witnesses.

The Court had no dilemma about the Accused being a member of the Army of RBiH, as may be concluded from the personal file of the Accused no. 492074502240, indicating that he served in the army between 15 April 1992 and 11 December 1996 and that he held the rank of lieutenant; from the testimonies of the defence witnesses who remember the Accused as their fellow soldier as early as in spring 1992, but also from the testimony of the Accused who confirmed this fact.

The Accused was a member of the Independent Drežnica Battalion of the IV Corps of the Army of RBiH.

However, the identification of the Accused Zijad Kurtović as the person who perpetrated and took part in the perpetration of the described crimes is disputable, as is the Prosecutor's allegation that the Accused was a commander of the military police platoon within the Independent Drežnica Battalion of the IV Corps of the Army of RBiH at the relevant time. Still the Prosecutor's Office does not charge the Accused with command responsibility.

It is therefore necessary to determine what the Accused's status in the Independent Drežnica Battalion actually was.

From the Accused's registration file and the recommendation for his promotion (HQ's recommendation of 6 October and the decision on promotion of 18 October 1994) it can be concluded that he performed military police-related tasks. However, none of these documents tell us anything about the material time of the indictment, i.e. between the end of September and late October 1993.

In the course of the main trial the BiH Prosecutor's Office did not offer any other evidence in support of its allegation that he held this position or that a standard military police unit existed.

On the other hand, during the evidentiary proceedings it was found beyond doubt that Zijad Kurtović was a member of a platoon that did not carry out standard tasks of military police, but rather provided physical security for the command. The purpose of this platoon can be inferred from a report of the Army of BiH of 12 May 1994 no. 01/P-S-191/94 and also from the testimonies of both defence and prosecution witnesses.

The section "Current Situation" of the this report says that *The Military Police platoon within the Drežnica Battalion was set up before, but it did not carry out traditional military police tasks nor was the platoon trained in the method and procedures of the military police service.*

It is indicated that the platoon had 29 soldiers, which is, the Court underlines, equivalent to around 20 soldiers mentioned by the defence witnesses.

The report goes on to list in the section *Measures taken – analysis* the measures to be taken, including: *ordering the setting up of a platoon-style military police platoon, provide accommodation of the military police; instruction for work of the military police including the rights, duties and authorities of the military police; set up the daily log book.*

The report says that in the course of the setting up of this unit it is necessary to provide white belts and uniforms to this platoon, if possible, and to transfer one tenth of the unit to Konjic for a 10-day training in military police tasks.

The Court did not accept the prosecutor's allegations that the standard military police unit existed within the Drežnica Battalion i.e. that the Accused was its commander, after the Court considered the following: report of 12 May 1994 and the testimonies of the prosecution witnesses Halil Čučurović and Hamza Ajanović who indeed spoke of a special-

purpose unit – the unit for physical security of the command (FOK); the testimony of the Accused who said that as early as in 1992 he became a member of that unit; on the other hand, the testimonies of the witnesses/former detainees who spoke about Zijad Kurtović as someone who was in charge and who ordered everything but still they cannot claim that he was a member of the military police, which, the Court notes, could have certainly been established after seeing the Accused at the detention place over almost 20 days.

The Court concludes that a 30-soldier or so strong unit existed within this battalion and that apart from its regular duties it also had army-and-police duties, as well as that the Accused was its member; however this unit was the Unit for Physical Security of the Command rather than a Military Police unit.

It is contentious however whether the Accused Zijad Kurtović was the person who perpetrated and was involved in the perpetration of deeds described under Sections 1 through 11 of the operative part.

When evaluating this circumstance the Court was aware that of all 11 detainees who testified during the main trial, only one of them had known the Accused prior to the criminal act. However, the consistent statements of other detainees who were seeing the very Accused Zijad Kurtović almost every day and who described him as a tall and corpulent, leave no room for doubt about the Accused's identity.

More specifically, the witness Marinko Drežnjak, who is of the same age as the Accused, had lived in Grabovica, the place that is 5 km away from Drežnica, until September 1993. He attended the primary school in Donja Drežnica and he remembers well the Accused Zijad Kurtović.

He remembers that Zijad Kurtović had been a trouble-maker even before the war.

The Accused Zijad Kurtović was one of the soldiers who received the witness and other detainees at the *Parish Office – the church in Donja Drežnica*.

The witness described him as a tall and brawny, with dark thick hair.

He remembers well that he said to other detainees that he knew him.

The witness Mirko Zelenika, who had lived in Jablanica prior to the conflict, remembers that right after the arrival in Donja Drežnica, the All Saints Church, he learned the name of one of the soldiers who received them there. This soldier, whom he particularly remembers by many things, was the Accused Zijad Kurtović, and he had learned his name from the detainee Marinko Drežnjak. During the captivity, the witness also found out the names of other soldiers who either stayed or came there quite often, so he remembers Alija Bobić and Ahmet Kurtović who would take the detainees to the front line. The witness remembers that Ahmet Kurtović was the Accused Zijad Kurtović's brother.

He described Zijad Kurtović as a tall man, strong athletic, dark-complexioned, with a round-shaped head and a regular-shaped nose.

The witnesses A and B remember well the soldier who was particularly brutal to them. They learned his name from Marinko Drežnjak, but they got to remember him after seeing him almost every day at the church where they were detained. It was the Accused Zijad Kurtović whom they remember as a man of *strong constitution*.

The witness Matija Jakšić emphasised *"People are remembered for good deeds, but for such evil they shall never be forgotten. There's no way I could be wrong on this one: I am 100 percent sure."*

The other witnesses-former inmates remember the Accused Zijad Kurtović well, as will be detailed below, and although the Accused used an alibi defence and denied that he ever stepped into the All Saints Church while the detainees were there, and even that a Zijad, but not Kurtović, went to the church, the Court found beyond any reasonable doubt that the Accused indeed was in the church and behaved as described under Sections I through II of the operative part.

Under Section I of the operative part, the Accused was found guilty of the following: after the transfer of the detainees from the Parish Office to the All Saints Church, he ordered them to sit in pews two by two, and then he put on a clerical dress – a monastic habit and, holding a cross in his hand, ordered them to bow their heads and hold their hands above their heads, making the detainees feel pain and fear. Furthermore, of ordering, after a while, the detainees to put on orange roadman clothes and, upon this order, unidentified soldiers wrote numbers from 1 to 20 on the back of each detainee.

In addition, the Accused Zijad Kurtović was found guilty of taking the detainees out in front of the altar, interrogating and punching them, beating them with iron and wooden bars, calling them "Ustashas" and using other abusive language; he hit the detainee Ivan Pavlović with the cross to his hand while he set in the pew. The witness B, Marinko Drežnjak, Miroslav Soko were among those who were taken out.

All witnesses-former detainees -- Miroslav Soko, Marinko Drežnjak, Marinko Ljolja, Mirko Zelenika, Matija Jakšić, witness A and witness B, Branko Jurić, Kamilo Dumančić, Ivan Pavlović and Ivan Kostić – testified about being taken to Donja Drežnica and detained in the All Saints Church and about the events under this Section of the Indictment. However, in the explanation for each particular Section, the Court shall elaborate only on the statements of some of the witnesses, bearing in mind the consistent statements of all victims about the treatment they received during the captivity in the All Saints Church in Donja Drežnica.

The witness Marinko Drežnjak remembers being arrested in September 1993 by the members of the Army of RBiH, and then being taken by them to Zuka's Base in Donja Jablanica, where he was first placed into a potato-cellar/dugout together with other Croat detainees, and later to a stable -- with cattle.

He remembers that Marinko Ljoljo, Miroslav Soko, Mirko Zelenika, Marko Zelenika, Antun Grgić and two men with the last name Grgić were together with him in the dugout, and that there were 22 of them in the stable later, all Croat detainees.

They remained at the Zuka's Base until the beginning of October 1993, when one evening Zuka's soldiers loaded them onto a truck and drove them to Donja Drežnica. According to the testimony of this witness, their getting off the truck was accompanied with curses and beating; after that they were lined up waiting for some other soldiers to take them over. The witness remembers well that among these new soldiers he also recognized the Accused Zijad Kurtović whom he knew before the war.

After they had been taken over by these new soldiers, who took them first to the Parish Office and then to the church, the detainees were again beaten and insulted. The witness remembers that they were kicked, beaten with truncheons – with whatever they laid their

hands on. The ill-treatment at the Parish Office took about two hours and then they were transferred to the church. The witness remembers well that the witnesses A and B, Mirko Zelenika, Marinko Ljoljo, Vili Kuraja, Kamilo Dumančić, Ivan Pavlović, Vlado Ćurić, Zvonko Kukić, two Rozićs and Ivan Kostić. He remembers in particular Kamilo Dumančić who, as a result of beating, lost consciousness and fell already when they were being transferred from the parish office to the church.

After being moved to the church, the witness remembers that Zijad Kurtović ordered the prisoners to sit in the pews with their heads bowed down and arms raised above. Despite being in this position, the witness shortly saw the Accused in the monastic habit with a cross in his hands, standing in front of the detainees.

The witness remembers that the Accused ordered the detainees to put on roadman clothes, after which they had numbers written on their backs. "*I was number 5,*" the witness remembers. Then commenced the ill-treatment and beating of all parts of the body, including the head.

The witness Ivan Pavlović, a prisoner of war captured on 16 September 1993 on the front line between Jablanica and Prozor, spent the first 15 days in the Museum building in Jablanica. Later on he and Kamilo Dumančić were transferred to Zuka's Base in Donja Jablanica and put in the stable belonging to the Rogić family. He remembers well that he found there Marinko Drežnjak, Matija Jakšić, Mirko Zelenika and Marinko Ljoljo. As the witness indicated, they were loaded onto a truck and taken to Donja Drežnica.

Getting off the truck, staying at the parish office and then arriving in the church, the witness Ivan Pavlović had been subjected to the same beating, cursing and other forms of ill-treatment the witness Drežnjak had been through.

The witness also remembers the Accused and the orders as to how to sit in the pews, including the monastic habit and cross used by the Accused to beat the detainees later on during that first night of detention.

He learned the name of the Accused from the witness Marinko Drežnjak, though, while in the church, he memorized with certainty both his name and face.

That same person, Zijad Kurtović, ordered the detainees to put on the roadman clothes, and after that they were marked with numbers. "*We became numbers,*" the witness emphasised.

The witness remembers in particular that the Accused took the detainees one by one in front of the altar, interrogated them, simply "*seeking excuses to beat and ill-treat us,*" and that it was the Accused Zijad Kurtović who hit him in the hand with the cross while he sat in the pew.

All witnesses are in agreement when it comes to the implements used to beat them and that different derogatory terms such as "Ustashas" were used to refer to the detainees: the church inventory was used, and the witness Ivan Pavlović explained that they beat them with *whatever they could lay their hands on.*

The witness Miroslav Soko, the prisoner of war captured on 6 September 1993 by Zuka's Unit, was first placed in Zuka's Base in Donja Jablanica, to be later transferred to Donja Drežnica together with other detainees, particularly remembers the first night of his detention in the All Saints Church.

He remembers well that he was transferred to Donja Drežnica together with Marinko Drežnjak, the three men from Jajce: Kamilo, Matija and Ivan, some men from Butrović

Polje: Marko and Ante Rozić, Mate Rozić, Ivica Kostić and Ivan Soldo. *There were 20 of us altogether*, the witness remembers.

He remembers the Accused Zijad Kurtović as well, whose name he, just like everybody else, first heard from the witness Marinko Drežnjak, and later from the members of the Army of RBiH who were visiting the church; he will certainly remember his image and actions forever. He said that the Accused was an athlete, big, of strong constitution.

He remembers well that he and other detainees sat in the pew in the described position to the point of exhaustion, and that he was then taken in front of the altar by the Accused himself, who wore the monastic habit, and that it was the Accused who beat him even with a metal bar.

The witness B, another prisoner of war, initially captured at Zuka's Base to be transferred to Donja Drežnica together with the other said detainees, also remembers the first night of detention in Donja Drežnica. He remembers the Accused Zijad Kurtović who abused him and, as the witness put it, "*kicked and punched him and beat him with whatever else.*"

The witness Mirko Zelenika, civilian at the time, was deprived of liberty on 8 September 1993, and taken from his father's apartment in Donja Jablanica to the Rogića houses in Donja Jablanica. He indicated that he and eight other detainees were put in a potato cellar where they could not stand up at all. He remembers that on or around 20 September 1993 they were moved to a stable, and then – he thinks it was the last day of September – they were moved to Donja Drežnica by truck.

This witness went through the same ordeal from the moment he got off the truck, to the parish office to the church finally. He emphasises that "*all items in the church were being broken over us until they were all gone.*" The Accused Zijad Kurtović stood out in this, and, as the witness said, he ordered them to put on the roadmen clothes as soon as they arrived in the church.

The witness Marinko Ljolja, whose detention commenced on 8 September 1993, also remembers the first night spent in the All Saints Church in Donja Drežnica.

Speaking of the arrival in the church, the witness said "*it was beautiful and I was thinking to myself thank God I finally came to the church ... but we did not know what was coming up next.*"

This witness, just like all other witnesses-former detainees, confirmed that everything found in the church was used to beat the detainees.

In particular, he remembers his *host*. He remembers well that it was the Accused Zijad Kurtović, who, even that first night of the captivity in the church, stood out in everything from the ordering to sit in the pews to wearing the monastic habit and carrying the cross to the taking of the people in front of the altar and ill-treating – beating them.

The witness underlined that the Accused and other soldiers "*beat those from the front lines most.*"

The witness Matija Jakšić also came along with other detainees to Donja Drežnica. He was captured on the front line on 28 July 1993.

He remembers the church being ready for the Mass, as well as the Accused Zijad Kurtović who beat him already the first night he came there. He remembers that the Accused put on the cowl and then the *show* started.

And the *show*, the witness Kamilo Dumančić remembers, would start with the calling out of the prisoners by their numbers, upon which they were taken to the altar or behind the altar, where, as the witness emphasised, they were *beaten with all sorts of things*.

Thus, having in mind the consistent statements of these witnesses, that is, all 11 witnesses – former detainees, that the church seemed to be ready for the Mass when the detainees arrived, that its inventory, including all sorts of bars and parts of furniture, was used to beat the detainees, the Court found beyond any reasonable doubt that the Accused was responsible for the described actions.

Under Section 2 of the operative part, the Accused was found guilty of beating, together with the members of the Army of RBiH known to him, on more than one occasion, the detainees, including but not limited to Miroslav Soko, Marinko Drežnjak, Marinko Ljoljo, Mirko Zelenika, Matija Jakšić, Ivan Pavlović, witness A, witness B, Branko Jurić, Kamilo Dumančić, Ivan Kostić, with truncheons, crosses, candlesticks, statues of saints over their heads and other parts of their bodies, rammed paintings of saints into their heads, made them eat leaves of the Bible and other religious books, ordered them to sing the songs which offended their religious feelings, ramming the paintings depicting the Christ's Stations of the Cross into their heads as they were singing, thus keeping them in constant fear.

Almost all prisoners were the victims and witnesses of such behaviour of the Accused. However, considering the specific nature of the place at hand, the time and the manner of perpetration, as well as the uniqueness of the protected edifice, the Court shall only deal with some of them with respect to each Section.

The witness Kamilo Dumančić was a prisoner of war at the relevant time. He was arrested on 16 September 1993 on the front line between Prozor and Jablanica. He is one of many prisoners who were originally detained in the Jablanica Museum, then via Zuka's base in Donja Jablanica ended up in the All Saints Church in Donja Drežnica.

He remembers well that in late September he and 19 other detainees were moved by truck from Zuka's Base to Donja Drežnica. As soon as he got off the truck he was beaten so much that he lost consciousness.

He said he woke up in the church, where, he remembers well, all prisoners were being ill-treated.

Various soldiers ill-treated and abused them in the church. He emphasised that the Accused Zijad Kurtović stood out in that. He remembers him well, describing him as a brawny man, 190 cm tall, called by the nickname Zijo by other soldiers; during his stay in the church he got to know his full name.

"They beat us with whatever they could find in the church, holy books were eaten, rosary beads were eaten ... paintings, crosses, truncheons, books behind the altar, anything found in the church!"

They rammed paintings onto their heads, beat them with the cross to heads, kicked and punched them, kicking particularly those who fell on the floor.

The witness emphasised that he believed that the Accused had been in prison before the war and that is why he knew the procedure for treating prisoners.

The witness Ivan Kostić was a prisoner of war, captured as early as in April 1993, and from that time onwards he was in many prison camps from Zuka's Base in Donja Jablanica to the All Saints Church in Donja Drežnica. He also remembers the ill-treatment he was subjected to in the church.

The witness was 19 at the time, and the traumas he had been through still have a huge impact on his life.

He remembers that the detainees in the church were variously abused and humiliated. He remembers, in particular, Zijo – resident of Drežnica whose name he heard from Marinko Drežnjak. The witness described Zijo as tall, dark-haired and athletic.

Zijo, among others, beat the detainees, also by breaking the paintings over their heads. He also remembers that the detainees were forced to eat leaves of the Bible and other holy books.

The witness Matija Jakšić also remembers the Accused Zijo Kurtović forcing the detainees to eat the rosary, leaves of the Bible and other religious books, and that this was *the same Zijo who put a pistol, rifle in his mouth.*

"They beat us up with the church inventory, with whatever, mostly kicked us but also punched us," the witness remembers, stressing that they had been ordered to sing but only those songs chosen by the abuser. *He particularly remembers a song that refers in its first part to a door, and then that the Serbs and Croats will be gone.*

Without any doubt that the Accused Zijad Kurtović was involved in everything, the witness Mirko Zelenika remembers that all detainees were opportunistically beaten with truncheons, wooden legs and anything that could be taken off the church wall, and that this was accompanied by barbaric howling, emphasizing that "all muck, cursing, singing, joy, was for them something like a village fiesta."

The witness emphasized that *"There were other forms of abuse, we were in trouble and that is when people pray to God, however we were forced to mock God and church and our Catholic religion."*

"As long as there were any items in the church they would be broken over us. It is astonishing how those people enjoyed it, how happy they were, making sport of us," the witness remembers.

The witness Branko Jurić, PoW since mid-1993 who was transferred from Zuka's Base in Donja Jablanica to the All Saints Church in Donja Drežnica, emphasised that the church inventory, in particular the paintings and statues, were broken over the detainees' bodies, and he remembers well that the detainees were forced to sing some "church" songs, at which the abusers laughed, and then beat them again with bars, crosses etc.

This witness remembers, in particular, being beaten by a tall, dark-haired and athletic soldier. He could not remember his name and other details.

The consistent statements of these witnesses leave no doubt about the involvement of the Accused in the criminal activities.

Under Section 3 of the operative part, the Accused was found guilty of ordering the members of the Civilian Protection to take the detainees, including Miroslav Soko, Marinko Drežnjak, Marinko Ljoljo, Mirko Zelenika, Matija Jakšić, Ivan Pavlović, Witness A, Witness B, Branko Jurić and Kamilo Dumančić, on several occasions to the Vrđi front lines between the HVO and the Army of RBiH, where they were forced to dig trenches, make dugouts, and carry ammunition, food, water and the dead, often exposed to crossfire from the positions of the Croat Defence Council and the Army of the Republic of Bosnia and Herzegovina and to the shelling from the positions of the Croat Defence Council.

The witness Marinko Drežnjak remembers that the Accused would be taking them to the front lines in early days of their captivity in the church, and later on the members of the

Civil Protection, including Zijad's brother Ahmet Kurtović and Alija Bobić did this. On Zijad's orders and instructions they would be taken in the morning. He remembers well that they would be taken towards Vrđi where they carried the bodies, made dug-outs, carried food and ammunition, and they always were in between the separation lines and exposed to fire.

The witness Ivan Pavlović remembers well that the Accused Zijad Kurtović himself told the two members of the Civil Protection where to take the detainees that particular day and what assignments to give them. They carried out these assignments, including the collection of dead bodies, mostly in between the separation lines while being exposed to crossfire.

The witness A also remembers the instances of being taken out of the church to the front line for compulsory work service.

He remembers that during the shelling the detainees were not allowed to take shelter in the dugouts together with the soldiers of the Army of RRiH(sic!) but instead they had to stay outside, exposed to shells and quite often to rifle fire. He remembers one occasion when at Vrđe he and another detainee had to carry two bodies of killed HVO soldiers who had been lying there in between the front lines for about 20 days. *"We carried them and we were starved, so we had to stop after every 50 meters."*

Remembering this event, the witness B emphasised that the bodies lied in a 300 meters fire-swept no man's land and that they were exposed to crossfire throughout.

The witness Mirko Zelenika remembers that, while in captivity in the All Saints Church, many prisoners were used as "logistics" to carry "all sorts of things" to Vrđi – a strategic elevation of tremendous importance for both parties to the conflict. The witness remembers well that they went to Vrđi on the orders of Zijad Kurtović, stressing that Alija Bobić and Ahmet Kurtović (Zijad's brother), members of the Civilian Protection, would escort them to Vrđi.

Marinko Ljoljo also remembers being taken to Vrđi by the Accused's brother specifically. He testified that he remembered well that Zijad Kurtović ordered that they be taken up there. At Vrđi the detainees performed all sorts of labour, including the carrying of the dead and wounded. This witness also underlined that they had always been exposed to crossfire.

Under Section 4 of the operative part, the Accused was found guilty of beating, together with Hasan Delić, the witness-detainee A with a truncheon over different parts of his body for several hours and putting out cigarettes on his neck and shoulders, and then, in such a condition, he forced him to have oral sex with the witness-detainee B, after which he stripped him naked and, together with Hasan Delić, kept on beating him with a truncheon and putting out cigarettes over his body, as a result of which the detainee-witness A lost consciousness, while his body became completely black and blue as a consequence of heavy blows.

Not all of the detainees testified about this event, but those who did had no dilemmas when giving evidence during the main trial.

"I remember every day spent in Donja Drežnica," the witness A said, emphasising that he was sure that the detainees were transferred from Zuka's Base in Donja Jablanica to the All Saints Church in Donja Drežnica on 1 October 1993. Recalling that the soldiers present there beat them with *anything they got hold of, and at the altar too,* the witness in particular

remembers the occasion when the Accused Zijad Kurtović and Hasan Delić – whose name he found out while staying in the church – *lashed out* on him.

"They made me strip off my clothes and they beat me until I turned black, and then they put out cigarettes on my shoulders and neck... they beat me into unconsciousness."

The witness barely uttered that sometime halfway through this abuse they ordered him to put the witness B's penis in his mouth. The act was brief but the consequences - the feeling of humiliation it left are for life.

The witness said that each time he sees the cross by the altar now he remembers the church in Drežnica and that one simply cannot get rid of this memory. He also said *"And do I feel hatred?! No. It is more anguish caused by the memory of it."*

The witness B unwillingly remembers this event, saying that they hesitantly talked about that even after it had happened, but it is simply difficult to forget.

He remembers well that on the relevant day Zijad Kurtović and Hasan Delić, whom he met while in captivity in the church, first beat and put out cigarettes on the witness A and then ordered the above-described act. The witness B had to take off his trousers and *underpants* and the witness A then was ordered to put the witness B's penis in his mouth.

It was brief, but *"I felt catastrophic... the greatest humiliation ever ... the fear was catastrophic..."* the witness B remembers.

During that, the witness pointed out that Zijad Kurtović and another two soldiers were laughing.

The witness Marinko Drežnjak saw this event as well, remembering that the Accused first ordered that they be *"pummelled"*, and then the witnesses were forced to have oral sex.

The witness Ivan Pavlović too saw this.

The witness Mirko Zelenika remembers the night when this event happened. He did not see the Accused and Hasan Delić beating the witness A but he heard cries and blows. He said he heard the following day from the witness A what had happened. He remembers that the witness A was disfigured and had traces of cigarette burns all over.

The witness Branko Jurić remembers that somebody ordered the witnesses A and B to have oral sex but he did not see who that was. The witness Matija Jakšić learned about this event directly from the witnesses A and B soon after it happened.

Under Section 5 of the operative part, the Accused was found guilty of the following: together with unidentified members of the Army of the Republic of Bosnia and Herzegovina, he forced the detained Croats, civilians and prisoners of war, including Mirko Zelenika, Witness A, Witness B, Branko Jurić, Miroslav Soko, Ivan Kostić, Marinko Drežnjak, Ivan Pavlović, Marinko Ljojo and Kamilo Dumančić, to hold a live wire with their bare hands and then hold each other's hands making a circuit, whereupon, in order to improve electrical conductivity, he poured water on the church floor, under the detainees' feet, as a result of which the detainees suffered intense physical pain.

The described actions were just one of the forms of abuse and humiliation of the detainees. Almost all detainees were the witnesses/victims of this abuse.

The witness Mirko Zelenika remembers that most of the sockets in the church were broken and the bare wires stuck out of the walls. It was these wires that were used for the abusive

purposes. He remembers that Zijad Kurtović and other soldiers forced the detainees to touch these wires and then hold each others' hands so that the electric shock could also affect the last one in the line/circuit.

The witness Marinko Ljoljo also testified about the broken and wrecked sockets and he remembers that the detainees were forced to form the electric circuit. During this instance of abuse, the floor was wet and the present soldiers were adding water.

The witness Ivan Pavlović also recalls that Zijad Kurtović ordered prisoners to grab the live wire and hold each other's hands forming a circle, which caused unbearable pain. The floor was wet and Zijad, the witness remembers well, poured water under the prisoners feet to improve conductivity.

The witness Kamilo Dumančić was also part of the electric circuit and he also indicated how terrible was the pain inflicted by that.

Marija Jakšić also testified, remembering well that Zijo entered the church and made the prisoners, one by one, grab the wire and hold each other so that the first and the last prisoner in the circuit suffer the electric shock.

Under Section 6 of the operative part, the Accused was found guilty of having ordered -- together with members of the Army of BiH known to him -- the detainees, including Mirko Zelenika, Marinko Ljoljo, Marinko Drežnjak, Branko Jurić, Ivan Pavlović and Miroslav Soko, to play the harmonium, and then, since he did not like how they played, he pulled out a harmonium key and hit the detainees in their heads with the side of the key with a nail.

So the witness Mirko Zelenika, saying he is not educated in music and he therefore does not know the name of the music instrument they were made to play, testified that they had to play that instrument -- it is not like a classic piano -- as long as any sound may be heard. The witness remembers that the keys were falling off because of such playing. He remembers well the nails on these keys and that the soldiers, including Zijad Kurtović, used these keys -- the side with the nail on -- to beat them in the head. *It took quite some time*, the witness remembers.

Marinko Ljoljo remembers the harmonium in the church that was also used as a torture instrument. He remembers the prisoners being called out and forced to sing church songs and that he recited instead of singing and, for that, he was punished with a harmonium key in his head. The witness remembers that he was hit with the harmonium key side with the nails.

The witness Miroslav Soko also remembers this form of torture. He said he had also been punished for not being able to sing, so after being hit with the key in his head -- of course with the side having a nail in -- he was forced to eat leaves of the books.

Marinko Drežnjak remembers that "the piano" was totally destroyed because they made them play it and sing as well, and when the soldiers, including the Accused, did not like how the detainees did it, they would start ripping off the keys and hitting the detainees with the key side with a nail on.

The witness Ivan Pavlović remembers Zijad forcing the detainees to gather around the harmonium to sing and play, and when they did not like the play, he would take the harmonium key and hit in the head the one who was playing at the moment while those who sung he would hit in their hands.

Under Section 7 of the operative part, the Accused was found guilty of having approached the detainee Mirko Zelenika, telling him: "*Number seven, come here! Why didn't you say last night that you had a watch?*", and ordered him to turn towards the wall and raise his hands, and then hit him several times with a wooden leg in his lower back. This happened after an unidentified member of the Army of RBiH, in the Accused's presence, took away Mirko Zelenika's watch.

The injured party Mirko Zelenika remembers that he hid his watch and the wedding ring in the linen of his jacket, but that he gave the watch to one of the soldiers who came to the church one night with a group of soldiers "Wolves of Igman" who inquired about him as a man from Jablanica who worked in the Municipal Administration. Holding a table leg in his arms, that soldier asked the witness where his money was. The witness then took out his watch and saying that he was giving away the watch to the soldier, he avoided further mistreatment.

However, the Accused Zijad Kurtović and a soldier standing next to him saw it, and the Accused approached the witness saying "*Number seven, come here! Why didn't you say last night that you had a watch?*" Then he took the same table leg, announcing "*The investigation will start now*", he ordered the witness to raise his arms and turn to the wall, after which he started beating him ferociously in the lower back.

The witness Marinko Drežnjak also remembers this event. He was also searched by these soldiers who came from elsewhere. He remembers that Mirko Zelenika surrendered his watch to one of those soldiers, but the Accused Zijad Kurtović saw it and then beat Mirko with the table leg.

The witness Marinko Ljoljo was also searched by these soldiers who arrived. Explaining how the detainees managed to hide small stuff like watches and wedding rings, he remembers that his watch and wedding ring had also been taken away, but Mirko Zelenika's watch was of a much higher quality. The witness remembers well that Mirko gave this watch to one of the soldiers, however the Accused Zijad Kurtović saw this surrender and he then "*reprimanded*" Mirko Zelenika for that.

This reprimand actually meant more torture and "*special treatment*" that Mirko usually received.

The witness Matija Jakšić also remembers this event and the special treatment the witness Mirko Zelenika received from the Accused Zijad Kurtović.

Under Section 8 of the operative part, the Accused was found guilty of the following: after an unidentified member of the Army of RBiH touched the detainee Mirko Zelenika and ordered him to stand up and walk down the church, where he was awaited by Zijad Kurtović, who then held the detainee's left shoulder with his hand while the unidentified member of the Army of RBiH was kicking him with a boot in his lower back, whereupon Zijad Kurtović punched twice the detainee Mirko Zelenika hard in his chin.

The injured party Mirko Zelenika remembers that this event took place shortly after he arrived in the church. *"I was touched on the top of my head and asked to come,"* the witness remembers. The witness remembers well that Zijad Kurtović stood in front of him and nodded his head at the soldier, giving him a sign to stand on the chair, and then the soldier kicked the witness with the tip of the boot each time Zijad gave him a sign to do so. After multiple blows were dealt this way, Zijad himself fiercely punched the witness twice in the face and, as a result, the witness fell down on the floor.

The witness Marinko Drežnjak also remembers the special treatment of the injured party Mirko Zelenika and the described scene when the unidentified soldier climbed the pew and hit the injured party.

The witnesses Marinko Ljoljo and Matija Jakšić remember that the injured Mirko Zelenika had a special treatment, i.e. that he was quite often the victim of various forms of torture, including the described one.

Under Section 9 of the operative part, the Accused was found guilty of ordering the detainee Mirko Zelenika to lie down on the church floor and turn around, while he and three unknown members of the Army of RBiH were kicking him in his ribs whenever he would come close to them.

This was one of the forms of special treatment the detainee Mirko Zelenika had.

The injured party Mirko Zelenika remembers well that the Accused Zijad Kurtović once ordered him to twist around on the floor while two soldiers stood on both sides and all of them would kick him in his ribs. He remembers that he forced him to crawl back to his pew, *while the Accused himself stood on top of him.*

The witness Marinko Ljoljo also remembers that the Accused ordered the witness Zelenika to crawl on the floor kicking him again and again.

The witness Matija Jakšić remembers well that Mirko Zelenika was forced to lie on the floor, lick the concrete floor, and that they beat him while he was in this position. The witness Marinko Drežnjak remembers this as well, emphasising that Mirko had to roll on the church floor.

Under Section 10 of the operative part, the Accused was found guilty of pulling out several teeth of Ante Rozić with his bare hands, after he was beaten up by unidentified members of the Army of RBiH, causing Rozić's bleeding from the mouth and loss of consciousness.

The injured party Ante Rozić did not testify about this because he was unable to respond to the Court's summons due to his serious illness, but the eyewitnesses Mirko Zelenika, Marinko Ljoljo, Miroslav Soko did, as well as Marinko Drežnjak and Ivan Pavlović who testified indirectly.

The witness Mirko Zelenika remembers the injured party Ante Rozić as being the oldest one among them, but in particular he remembers him by a scary scene when the injured party was trying to break loose from the Accused, after which the witness saw the Accused holding teeth in his hands and telling the injured party that he will have to pay because the

teeth are not pulled out for free. The witness is certain that the Accused "wiped off" the injured party's loose teeth.

The witness Marinko Ljoljo remembers that *"it occurred to somebody to pull out teeth without anaesthesia"* and that the Accused Zijad Kurtović pulled out Ante Rozić's teeth and asked him to pay for that service. *"I looked at Ante, he was miserable,"* the witness remembers.

The witness Miroslav Soko also remembers that the Accused Zijad Kurtović pulled out Ante Rozić's tooth, telling him after that that Ante owed him a favour because the tooth extraction is chargeable. After that, Ante fainted.

Witness Marinko Drežnjak did not see who pulled out the injured party's tooth, but he did see when the injured party lost his conscience because of that.

Ivan Pavlović did not see the critical event, but he did hear about it, among others also from the injured party himself.

In Section 11 of the operative part, the Accused was found guilty of destroying and breaking, together with the members of the ARBiH known to him, the Stations of the Cross paintings, and paintings and statues of saints, having used them to beat the prisoners, and of destroying the altar and sacristies, scribbling insulting words on the church walls, drawing testicles to saints on the paintings, destroying the Bible and other holy books by making the prisoners eat them, destroying the harmonium by beating the prisoners with its keys, thus damaging the interior of the church.

The activities described in this Section and their consequences are the result of the prohibited behaviour described under the remaining 10 Sections of the operative part, and all detainees testified about that.

Although the abuse of prisoners has been described above, the Court shall refer again to some of the testimonies.

The witness Matija Jakšić recalls that everything was in place in the church upon the arrival of the detainees, and that it was ready for a Mass. During the captivity, however, the church inventory was used to abuse prisoners. The Accused Zijad Kurtović and other soldiers rammed paintings onto the prisoners' heads, beat them with statues, drew testicles on the saints paintings. The witness recalls that by the time they left the church everything was destroyed inside.

This testimony has also been confirmed by the witness Ivan Kostić who remembers the harmonium that was destroyed by the time they left the church.

Marinko Drežnjak indicated that only the pews were left standing in the church – everything else was broken over the prisoners.

The holy books were gone too. Some were thrown away and some eaten by the prisoners because, if hungry, they were made eat the leaves of the books.

"Who would ever think of breaking the Stations of the Cross paintings on our heads" the witness Marinko Ljoljo still wonders, recalling that all fittings in the church were broken *"on our bodies, unfortunately."*

However, the items broken on the prisoners may not be viewed as usual instruments and implements used to inflict pain and abuse. These items were part of the church inventory but also the artefacts used in prayer by Catholics. In addition to the Golgotha of being detained in the religious shrine, this has left deep and lasting, if not indelible, traces on the prisoners who were all Catholics.

All witnesses agree that any new visit to church revives the memory of the Church of All Saints in Donja Drežnica – the church that, instead of being the place of prayer, was the place of suffering, of abuse and humiliation of its detainees, all of them Catholics.

In addition, as the witness A put it, each cross by the altar reminds him now of the sufferings in the church in Donja Drežnica, the sufferings that recur, that he cannot suppress.

The then guard Alija Bobić testified about the prisoners in the church.

He recalls that he had known some of the prisoners, including Vlado Ćurić and Mirko Zelenika. This witness was a member of the Civilian Protection and he was in charge of guarding the 20 prisoners.

"The people were nice and decent, they were warned that I would kill them if they attempted to escape," the witness recalls.

This witness does not remember anything unusual about the prisoners but he knew that they wore orange outfit worn by road repairmen. He did not see any injuries on them, and after the prisoners left the church, he did not notice that the church interior was ruined.

The witness knew the Accused but he did not see him near the church at the material time, although, as the witness pointed out, he allows that the Accused could have come to the church when other members of the Civilian Protection stood guard.

As announced at the beginning of the main trial, the defence challenged with an alibi the involvement of the Accused in the crimes.

Through the testimonies of Zijad Kurtović's fellow soldiers, the defence argued that at the material time – in late September and in October 1993 – the Accused was not in Donja Drežnica at all but that he was in the operations (Vrđi and Batačke Lazine) and later on in Blagaj and/or Mostar.

Such a defence emerges from the testimonies of all witnesses including Rasim Žuškić, Senad Pezić, Meho Pendić, Ramiz Macić; the witness Ibrahim Kulak even asserts that all charges against Zijad Kurtović are a result of the framing by Mili Karačić with whom the Accused had a conflict and who was openly saying that he would come up with "a scheme" to take revenge on the Accused.

None of these witnesses knew of the prisoners in the church but that some troops from Sarajevo were there instead, or that members of the Army of BiH were detained there occasionally.

All witnesses claim that their Drežnica Battalion had no prisoners.

They remember however that on the first day of the conflict with the HVO the church was hit with a shell and visibly and considerably damaged.

They however did not explain from whose positions the shell was fired.

On the other hand, the witness Hasan Delić, another fellow soldier of the Accused and of other witnesses mentioned above, recalls that at the material time the Church of All Saints indeed was the place for prisoners, both civilian and war, all of them Catholics.

So the witness remembers that he himself went to the church together with other soldiers nicknamed Đemo, Zike and Nečko, after an operation in which Zijad Kurtović was involved too.

He remembers well the night when he saw a relatively young man – the witness A – near the church door. He asked him where he was from and how he got captured, and when the witness A told him that, the witness ordered him to fetch the witness B and then he forced them to have oral sex. However, the witness suddenly abandoned his intention and he told them to get dressed and go back to their places. The witness indicated that he would be able to recognize those young men today and that he would like to apologize to them.

The witness remembers well that that same night two of his fellow soldiers ordered Mirko Zelenika to lie on the floor and twist like an animal while they beat him in this position.

The witness is explicit in saying that the Accused was not with them at the church that night but he remembers that he was involved in some operations taking place around that time.

The Accused himself remembers in particular two dates in the material time: 30 September when he went to a mock operation at Batačke Lazine and 8 October when he went to Blagaj.

He heard of disobedient soldiers of the Army of the Republic of BiH being detained in the church and he emphasises that the parish office adjacent to the church was totally destroyed by a shell and that the church was roofed.

He remembers that these two buildings served as the HVO command and depot before the conflict.

In his reply to the prosecutor's question why all prisoners who testified accuse only him for the abuse they suffered in the church, the Accused claims that before the war – in 1990 or 1991 – he fell out with Croats (Grabovica and Drežnice) when he set the Croat flag on fire which was used by the wedding procession and because he fell out with Mirko Zelenika over his daughter.

The Court finds the defence of the Accused irrelevant and obviously devised to avoid criminal liability after considering the consistent testimonies of 11 witnesses – former prisoners who said that it was the Accused Zijad Kurtović who participated and often ordered their torture while they were in captivity in the Church of All Saints in Donja Drežnica, and on the other hand, the alibi offered for certain dates during the material time, the contradicting testimonies of the defence witnesses about (non)existence of the “camp” in the church and about it being destroyed or not, and in particular after considering that none of the defence witnesses was a guard in the church who would in that case be able to confirm whether or not the Accused was seen at the church.

The Court notes that it is irrelevant whether the Accused took part in the operations at Vrđi or Batačke Lazine because he could reach the church and abuse the prisoners who indeed testified that they had been abused mostly during the night.

On the other hand, all witnesses including the Accused himself, spoke about the operations undertaken on particular days while the captivity in the church lasted quite some time and not only on 30 September, 4 October or between 6 and 8 October 1993, when the Accused was away for these operations or in Blagaj. The Accused first said that he went to Blagaj to look for his sister who escaped from Stolac from whom he had not heard for months, but

later during his testimony he said that he went to Blagaj to purchase flour and tobacco. That flour and tobacco were the main reason for going to Blagaj was confirmed by the witness Ibrahim Bašić who, when the prosecutor asked him, could not remember where he had been 10 days ago but still he claims with certainty that he was in Blagaj together with Zijad Kurtović on 8 October 1993.

He remembers this very important date by the soaring prices of flour and tobacco.

Even if the claims about the involvement in the operations and the trip to Blagaj are accepted, considering the testimonies of the witnesses/victims who explicitly described the Accused as the person who abused them during their captivity during the material time and that they heard his name from the witness who recognized him and who had known him before the war, the Court cannot eliminate the possibility that the Accused still managed to reach the church and abuse the prisoners. This transpires also from the testimony of the prosecution witness Alija Bobić who said that even though he had never seen the Accused near the church he may have come there during the night when the witness did not stand guard. The Court finds that the testimonies of the defence witnesses – who tried not only to offer the alibi for the Accused but also to eliminate any possibility of the existence of the camp in the church in Donja Drežnica – were given solely with the intention to relieve the Accused of his responsibility and, as such, the Court did not accept them after considering them in the context of all other evidence adduced during the main trial.

The Court evaluated the evidence individually and in the context of other evidence, having in mind all other pieces of evidence adduced during the main trial that it did not attach special importance to, nor did it find necessary to make a thorough analysis of those particular pieces of evidence, because they did not have a major impact on the state of facts that was ultimately determined and on the conclusion the Court reached in relying on the evidence whose probative value it provided in the Judgment.

Thus the Court concluded beyond any reasonable doubt that, in late September and during October 1993, the Accused Zijad Kurtović was regularly visiting the church of All Saints in Donja Drežnica where Croat prisoners, Catholics were held at the time. The Court also found beyond any reasonable doubt that the Accused was visiting the church with his fellow soldiers rather than alone. However, having considered the testimonies of both defence and prosecution witnesses that most of people in Drežnica have nicknames and that some nicknames were used to refer to the abusers, that is, none of the witnesses was able to confirm with certainty who is the person going by the nickname Bimo or Nono or others, the Court did not accept the allegations in the amended indictment that the Accused committed the actions described in particular counts of the indictment together with the specified fellow soldiers. The Court therefore found that in those actions the soldiers known to the perpetrator were involved, or in some Sections of the Judgment – unidentified soldiers not to prejudice any potential future proceedings against accomplices.

The Court is convinced that the Accused was aware of the prisoners' position, their vulnerability, but also the treatment that he was supposed to offer, just like any other soldier – participant in a conflict. This has been reasoned in detail in the general elements of the crimes of which he was found guilty.

However, the time and venue of the captivity and, again, the pattern of the Accused's treatment of the prisoners: he was visiting the church, he was not a guard there, led the Court to an unequivocal conclusion that the Accused had a direct intent, that is, he was aware of his actions and wanted them to happen.

Witnesses-former prisoners provided credible testimonies about being abused, tortured, humiliated and about the desecration of the religious shrine as well as lifelong traumas – because every time these people go to church for prayer they are reminded of the terror they have been through in such an edifice -- roadman's outfit and marking with numbers, beating, electric circuit formed of the prisoners, tooth extraction with bare hands, forcing the prisoners to sing church but also offending songs, forced labour and exposure to cross-fire; from this the Court concluded beyond any reasonable doubt that the Accused Zijad Kurtović breached the international law at the time of the armed conflict between the Army of BiH and the HVO, and tortured prisoners, caused sufferings and bodily and limb injuries, treated them inhumanely and intimidated and terrorized them, forced them to work and participated in such treatment of these persons by other soldiers, and that by using the church inventory in carrying out these actions together with other soldiers, he breached the law and customs of war. Having in mind different categories of prisoners and the means used in committing the described acts, he committed the criminal offenses of War Crime against Civilians, War Crime Against Prisoners of War and Violation of Law and Customs of War in concurrence, for which he was found guilty and lawfully punished, as will be explained below.

7. Sentencing

In deciding on the length of the compound 11-year prison sentence, or 10-year for each crime committed, the Court applied Article 53, in particular Paragraph (2)(b) CC BiH, reading as follows:

(1) If the perpetrator, by a single action or by several actions, has perpetrated several criminal offences, for which he is tried at the same time, the court shall first assess the punishment for each of the offences separately, and then proceed with imposing a compound punishment of imprisonment, long-term imprisonment or a compound fine for all the offences taken together.

(2) The court shall adhere to the following rules in imposing compound punishment:

- b) If the court has determined punishment of imprisonment for the concurrent criminal offences, the compound punishment must be higher than each of the individual punishments, but the compound punishment may not be as high as the sum of all incurred punishments, nor may it exceed a period of twenty years;*

The Court evaluated in particular the fact that the crimes of which the Accused was found guilty were committed with direct intent, or knowingly and voluntarily, ergo with the Accused's unequivocal knowledge of the character of his actions and the consequences thereof.

When deciding on the length of the sentence, the Court appreciated all circumstances affecting it, in particular the degree of responsibility, the motives behind it, the degree of undermining or injuring the protected value, as well as the circumstances under which the crime was committed. The Court also took into consideration the Accused's previous lifestyle, his personal situation and conduct during the trial, that is, the Court took into consideration both mitigating and aggravating circumstances.

Aggravating Circumstances

In case of the Accused Zijad Kurtović, the court first analysed the gravity of the crimes of which he was found guilty.

The gravity of the crimes with which defendants are charged has always been determined by their impact on the victim or the persons affected by the crime and the close family members. The gravity is measured *in personum* rather than in terms of universal consequences. The Court finds that although the guilt of the Accused may relate to particular and general harm done to the victim and its family, it would be by far too much if any mishap in a community were to be ascribed to the Accused who was found guilty.

Although the crimes against values protected by international law sometimes carry a long-term prison sentence, the Court did not opt for it in this case in view of the consequences.

In this case, the Court used the following elements which are normally considered when meting out the sentence:

The Court primarily considered how the decision may protect the society from defendants who are found guilty, which plays an important role in meting out the sentence. The protection policy depends on the nature of the crime and the conduct of the accused. The protection of the society often requires long prison sentences in order to protect the society from hostile, violent behaviour of the guilty defendants. This factor is important and relevant when the guilty accused is deemed to be socially harmful.

In this specific case the Court considered the role and contribution of the Accused to the commission of crimes, the fact that the Accused was not found guilty of committing one criminal action on a one-off basis, but of actions repeatedly happening over an extended period of time, where these actions were a result of an obvious intention to treat the prisoners – the protected value – in a forbidden fashion. However, considering that this conduct yielded three crimes, each carrying 10-year or long-term prison sentences, in deciding on the sentence the Court had to bear in mind that the three crimes were a result of the prohibited behaviour towards the same group of prisoners, which indeed included two categories: civilians and prisoners of war, and that the church was destroyed through the use of its fittings in abusing the prisoners.

The Court also had in mind the rehabilitation considerations and the reintegration of the guilty Accused into the society. This is usually the case when young or poorly educated members of the society are found guilty of crimes. It raises the need to reintegrate them into the society in order for them to become its useful members and to enable them to lead a normal and productive life after they are released from prison, which the Court did bear in mind here when it decided on the sentence.

Apart from the need to sufficiently deter the Accused from ever thinking about being involved in the same crimes again by imposing an appropriate sentence, the Court considered also the individuals who may find themselves in a similar situation in the future, who should also be deterred from getting involved in such crimes.

Although the consequences of these crimes are far-reaching and lasting, the Court notes that this punishment will add to the awareness-raising about the consequences of such crimes and their being punishable, or about the fairness of punishing the perpetrator.

Mitigating circumstances

In determining the appropriate sentence for this perpetrator, it is important to take into account personal considerations such as the age of the Accused and his conduct.

The Court also took into consideration that the Accused is a family man and that his conduct during the entire proceedings was fair.

Conclusion

Having considered all the foregoing aggravating and mitigating circumstances, the Court concluded that the imposed sentence is proportional to the gravity of the committed crimes, the degree of criminal liability of the defendant, the circumstances under which it was committed and the motives that led the Accused to commit the crimes, and that the compound sentence will achieve the purpose of punishment in terms of special and general prevention.

8. Decision on Costs of Proceedings and Claim under Property Law

When deciding on the costs of the criminal proceedings, apart from the verdict of conviction the court also evaluated the financial standing of the accused, and having reviewed the file, the Court established that the accused was represented by a hired attorney, pursuant to Article 188(1) CPC BiH, the Court decided that the Accused shall reimburse the costs of the criminal proceedings. The Court shall issue a separate decision to that effect.

Pursuant to Article 198 (2) CPC BiH, the Court decided to refer the injured parties to pursue their property claims through a civil action, because the sums were not specified in these proceedings. If they were to be determined in these proceedings it would have caused considerable difficulties and procrastination.

RECORD-KEEPER
LEGAL ADVISOR
AMELA SKROBO
(signature affixed)

PRESIDING JUDGE

MINKA KREHO
(signature and stamp affixed)

INSTRUCTION ON LEGAL REMEDY: An appeal is allowed against this Judgment. The appeal is to be filed with the Appellate Division of this court within 15 days after the day of the receipt of the written copy of this Judgment.

*We hereby confirm that this document is a true translation of the original written in
Bosnian/Serbian/Croatian.
Sarajevo, 19 August 2008*

Certified Interpreters for the English Language



