X-KR/06/243

SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

prevod dok 318

No. X-KR-06/243
Sarajevo, 29 September 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA

Court of Bosnia and Herzegovina, in the Panel composed of Judge Mira Smajlović as the President of the Panel and Judges Elizabeth Fahey and Merja Halme-Korhonen as the Panel members, with the participation of the legal officer Lejla Haračić, in the criminal case against the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić, upon the Third Amended Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-154/06, dated 17 September 2008, under which the accused have been charged with the commission of the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Articles 29, 30 and 31 of the CC BiH, in conjunction with Article 180(2) of the CC BiH in relation to the accused Sreten Lazarević, following the public main trial, parts of which were closed for the public, in the presence of the accused Sreten Lazarević and his defense counsel, Attorney Radivoje Lazarević from Zvornik, the accused Dragan Stanojević and his defense counsel, Attorney Miloš Perić from Zvornik, the accused Mile Marković and his defense counsel, Attorney Nenad Rubež from Zvornik, the accused Slobodan Ostojić, and the Prosecutor of the Prosecutor's Office of BiH Jude Romano, substituting for Paul Flynn, on 26 September 2008 rendered and on 29 September 2008 publicly announced the following

VERDICT

The accused:

1. ***SRETEN LAZAREVIĆ**, son of Žarko and Savka, née Jokić, born on 31 March 1953 in the village of Ročević, Zvornik Municipality, where he resides, Serb, BiH citizen, qualified car-body mechanic by profession, married, father of two, currently free,*

2. ***DRAGAN STANOJEVIĆ**, aka Janjić, son of Drago and Ruda, née Jović, born on 13 March 1962 in the village of Ročević, Zvornik Municipality, residing in the village of Ročević – Kozluk, Serb, BiH citizen, married, father of three, currently free,*

3. ***MILE MARKOVIĆ**, aka Cigo, son of Teodor and Jovanka, née Ristić, born on 27 September 1952 in Donji Lokanj, Zvornik Municipality, residing in Zvornik at 83 Sime Perića Street, Serb, BiH citizen, waiter/cook by profession, widower, father of two, currently free,*

4. ***SLOBODAN OSTOJIĆ**, son of Dušan and Dragica, née Bogičević, born on 8 August 1966 in the village of Padline, Zvornik Municipality, residing in Padline bb /no number/, Zvornik Municipality, Serb, BiH citizen, married, father of two, surveyor by profession, currently free,*

Kraljice Jelene br. 88, 71 000 Sarajevo, Bosna i Hercegovina, Tel: 033 707 100, Faks: 033 707 225
Краљице Јелене бр. 88, 71 000 Сарајево, Босна и Херцеговина, Тел: 033 707 100, Факс: 033 707 225

[redacted]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

ARE GUILTY

Of the following:

During the state of war in BiH, contrary to the rules of international humanitarian law, namely the provision of Article 3 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, from May 1992 to March 1993, on the premises of the building of the Municipal Misdemeanor Court Zvornik and in the building of DP *Novi Izvor*, where civilians from the Zvornik Municipality area were imprisoned, as members of the reserve police forces of the Zvornik Public Security Station, they treated the prisoners inhumanely, inflicting on them immense suffering and violation of bodily integrity.

I SRETEN LAZAREVIĆ, as the deputy warden in the prison located in the building of the Misdemeanor Court and subsequently in the building of DP *Novi Izvor*, perpetrated, aided and abetted, and failed to prevent or punish the inhuman treatment of the unlawfully detained civilians, because:

1. **In mid-May 1992, in the building of the Misdemeanor Court, he aided and abetted an unidentified person in seriously beating the prisoner Ramis Smajlović in the way that he agreed that Ramis Smajlović be brought from the detention room to the room which he used as a guard, where the unidentified person, in the presence of the accused, seriously beat Ramis Smajlović with a police baton, which the accused did not prevent in any way whatsoever,**

2. **In June 1992 in the building of DP *Novi Izvor*, having asked the prisoners who of them was from Bratunac, he took the prisoner Sejfo Omerović out of the room in which they were imprisoned and handed him over to a group of unidentified persons, thus enabling them to seriously beat the prisoner in a nearby garage, after which they threw him into the trunk of the vehicle they had previously arrived by and drove off in an unknown direction; Omerović Sejfo has been unaccounted for ever since,**

3. **In July 1992 in the building of DP *Novi Izvor*, together with the guard Mile Marković, he beat up the prisoner Nurija Nuhanović, as a result of which Nurija Nuhanović lost consciousness,**

4. **In the summer of 1992 in the building of DP *Novi Izvor*, he was present when a group of guards, including Slobodan Ostojić, seriously beat up the prisoners Ramis Smajlović and Admir Hadžiavdić because of an alleged attempt of flight; he did not prevent it in any way whatsoever, but rather went along with such treatment,**

6. **Over the specified period, on several occasions he permitted unauthorized persons – groups of Serb soldiers called *Gogićevci* and others to enter prison premises by unlocking the doors for them or by allowing other guards to do that without being punished, thus enabling these persons to abuse the prisoners physically and**

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

mentally, as a result of which they suffered immense mental and physical suffering, so in that way:

a) On an undetermined day, *unidentified* soldiers physically abused the prisoners Fahrudin Memić, Edin Skurlić and Fadil Handžić and carved crosses on their foreheads,

b) On an undetermined day, unidentified soldiers abused the prisoners sexually by forcing them to put their sexual organs into one another's mouth, and thus, among other things, they forced the prisoner Ramis Smajlović to do that to another unidentified prisoner - a Romany by ethnicity,

II **DRAGAN STANOJEVIĆ**, as a guard in the prison located in the building of the Misdemeanor Court and subsequently in the building of DP *Novi izvor*, inhumanely treated the unlawfully detained civilians, because:

1. On several occasions he unlocked the prison premises and thus enabled groups of Serb soldiers to abuse prisoners in the way that he pointed at the prisoner Fahrudin Memić, saying he was a person who had wounded a Serb; in June 1992 in the building of DP *Novi izvor* in the same way he enabled a group of soldiers led by a certain Saša to beat the prisoner Fahrudin Memić, which they did by beating the injured party in various ways, including jumping all over his back, violating his bodily integrity,

III **MILE MARKOVIĆ**, as a guard in the prison located in the building of the Misdemeanor Court and subsequently in the building of DP *Novi izvor*, inhumanely treated the unlawfully detained civilians, because:

1. In July 1992 in the building of DP *Novi izvor*, together with the deputy warden Sreten Lazarević, he seriously beat up the prisoner Nurija Nuhanović, as a result of which Nurija Nuhanović lost consciousness,

IV **SLOBODAN OSTOJIĆ**, as a guard in the prison located in the building of the Misdemeanor Court and subsequently in the building of DP *Novi izvor*, inhumanely treated the unlawfully detained civilians, because:

2. In the summer of 1992 in the building of DP *Novi izvor*, together with a group of guards, in the presence of the deputy warden Sreten Lazarević, he seriously beat up Ramis Smajlović and Admir Hadžiavdić because of an alleged suspicion that they attempted to escape from the camp,

Therefore, during the war in Bosnia and Herzegovina and at the time of the armed conflict between the units of the Army of the Serb Republic of BiH and the Army of RBiH, in violation of the rules of international humanitarian law, they treated the prisoners inhumanely by abusing them mentally and physically, inflicting on them immense suffering and violation of bodily integrity,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Whereby they committed:

- **Sreten Lazarević, under Section I - 1, 2, 3, 4 and 6, the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Articles 29 and 31 of the Criminal Code of Bosnia and Herzegovina in conjunction with Article 180(2) of the Criminal Code of Bosnia and Herzegovina,**
- **Dragan Stanojević, under Section II - 1, the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Article 29 of the Criminal Code of Bosnia and Herzegovina,**
- **Mile Marković, under Section III - 1, the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Article 29 of the Criminal Code of Bosnia and Herzegovina,**
- **Slobodan Ostojić, under Section IV - 2, the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Article 29 of the Criminal Code of Bosnia and Herzegovina.**

Therefore, applying Articles 39, 42 and 48 of the CC BiH, the Court hereby

S E N T E N C E S the first accused, Sreten Lazarević, TO IMPRISONMENT FOR A TERM OF 10 (ten) YEARS

for the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Articles 29 and 31 and Article 180(2) of the CC BiH.

Applying Articles 39, 42, 48 and 50 of the CC BiH, the Court hereby

S E N T E N C E S the second accused, Dragan Stanojević, TO IMPRISONMENT FOR A TERM OF 7 (seven) YEARS

for the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Article 29 of the CC BiH.

Applying Articles 39, 42, 48 and 50 of the CC BiH, the Court hereby

S E N T E N C E S the third accused, Mile Marković, and the fourth accused, Slobodan Ostojić, TO IMPRISONMENT FOR A TERM OF 5 (five) YEARS EACH

for the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Article 29 of the CC BiH.

II

Pursuant to Article 284(1)(a) and (c) of the CPC BiH

THE ACCUSED ARE ACQUITTED OF THE FOLLOWING CHARGES

1. The accused Sreten Lazarević is acquitted of the charges that:

1.5. On an undetermined day, without any reason or cause, he slapped the prisoner Fahrudin Memić hard in the face,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH.

2. The accused Mile Marković is acquitted of the charges that:

3.2. In September 1992 in the building of DP *Novi izvor*, together with a person named Brane, he severely beat up the prisoner Idriz Ajanović, beating him all over his body and forcing him to hold his hands in front of his face in order to prevent the blood from splashing around,

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH in conjunction with Article 29 of the CC BiH.

3. The accused Slobodan Ostojić is acquitted of the charges that:

4.1. In July 1992 in the building of DP *Novi izvor*, together with the guard Mile Marković and the deputy warden Sreten Lazarević, he severely beat up the prisoners Nurija Nuhanović, Fethija Nuhanović, Mehmedalija Nuhanović and Ramo Ibrahimović, as a result of which Nurija Nuhanović lost consciousness and when he came around, he forced him to wipe the blood off the floor,

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH in conjunction with Article 29 of the CC BiH.

III

Pursuant to Article 283(1)(b)

THE FOLLOWING CHARGES ARE DISMISSED

In relation to:

1. the accused Sreten Lazarević

that:

On 19 May 1992, in the building of the Misdemeanor Court, he ordered the prisoners Ahmet Omerović, Mirsad Omerović and Midhat Omerović to surrender to him all their documents, money and other valuables, which they did and gave him the money in the total amount of DM 5000, for which he did not issue any receipt nor did he ever return their money, whereby he unlawfully and arbitrarily took their property as his own,

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(f) of the CC BiH,

and that:

Over the specified period, on several occasions he permitted unauthorized persons - groups of Serb soldiers called *Gogićevci* and others to enter prison premises by unlocking the doors,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

for them or by allowing other guards to do that without being punished, thus enabling these persons to torture and abuse the prisoners and inflict serious violations of bodily integrity upon them, so in that way:

c) unidentified soldiers forced the prisoners - brothers Mithad and Mirsad Omerović to fight each other as hard as they could, forcing their father, Ahmet Omerović, to watch that,

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH

2. the accused Dragan Stanojević
that:

On an undetermined day he severely beat up the prisoner Ejub Mustafić with a police baton, causing him to fall unconscious and, beaten up as he was, he threw him into the room among other prisoners with the words "here they come, your Green Berets", and due to those injuries Ejub Mustafić remained unconscious for two or three days,

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH,

and that:

In September 1992, he severely beat up the prisoner Murat Kuduzović, an old man at the age of 90, because the man had told him that he wanted to perform ablutions in order to carry out the ritual of Muslim prayer,

whereby he would have committed the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH.

Pursuant to Article 188(4) of the CPC BiH, the accused are relieved of the duty to reimburse the costs of the criminal proceedings.

Pursuant to Article 198(2) of the CPC BiH, the injured parties are instructed to take civil action to pursue their claims under property law.

Reasoning

1. Charges

The Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-154/06 of 28 September 2007, confirmed on 5 October 2007, charges the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić with committing the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) and (f), in conjunction with Articles 29, 30 and 31 of the Criminal Code of Bosnia and Herzegovina, and in relation to the accused Sreten Lazarević also in conjunction with Article 180(2) of the CC BiH, by the acts factually described in detail in the Indictment. At the hearing held

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

on 23 October 2007, the accused pleaded not guilty of the mentioned criminal offense before the preliminary hearing judge.

The main trial in this case commenced on 6 March 2008 and it ended by the presentation of the closing arguments of the Prosecution and the Defense on 23 September 2008.

Under the First Amended Indictment number KT-RZ-154/06 of 27 June 2008, the Prosecution specified the allegations stated in the Indictment with respect to the violation of Common Article 3 of the Geneva Conventions applicable to internal armed conflicts and Article 147 of the Fourth Geneva Convention of 12 August 1949, relating to the protection of civilian persons in time of international armed conflicts.

On 12 September 2008, the Prosecutor submitted to the Court the Second Amended Indictment, by which he withdrew the following charges: the violation of Article 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and then he dropped the charges against the accused Sreten Lazarević stated under Count I/2 and Count I/7c and the charges against the accused Dragan Stanojević stated under Counts II/2 and II/3 of the First Amended Indictment.

After the defense was granted additional time for the preparation of their defense, on 16 September 2008 the Prosecutor's Office sent a letter to the Court concerning the formal withdrawal of this Second Amended Indictment. After the defense stated its position, the Panel rendered the decision not to accept the mentioned withdrawal, because the Prosecutor can withdraw the Indictment until the commencement of the main trial, while during the main trial the Prosecutor can only drop the charges. The Trial Panel understood the Prosecutor's explanation regarding the withdrawal of the Indictment as the Prosecutor's intention to change the Indictment again, so he was granted additional time to draft it.

After that, on 17 September 2008 the Prosecution stated at the main trial that it maintained its position to drop the charges as previously stated in the Second Amended Indictment, but that it filed the Third Amended Indictment, charging the accused with the commission of the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Articles 29, 30 and 31 of the Criminal Code of Bosnia and Herzegovina, and in relation to the accused Sreten Lazarević also in conjunction with Article 180(2) of the CC BiH, and this Panel acted in accordance with this Third Amended Indictment when rendering the Verdict.

2. Evidence presented

a) Prosecution

The following witnesses were examined during the main trial: Nurija Nuhanović, Alija Buljubašić, Samir Pezerović, Admir Hadžiavdić, Ramis Smajlović, Fahrudin Memić, Fadil Smajlović, Ahmet Omerović, Mirsad Omerović, Witness A, Mustafa Halilović, Jusuf Omerović, and the expert witness Omer Čemalović. During the main trial, the Prosecution waived the examination of the proposed witness Ejub Mustafić.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

The following documentary evidence was presented: Medical finding of the Surgical Clinic Tuzla for Fahrudin Memić and the biochemical finding of the Institute for Medical Biochemistry Tuzla, dated 15 July 1992; Decision on the proclamation of the imminent threat of war, Official Gazette of the Republic of Bosnia and Herzegovina number 1/92, dated 9 April 1992; Order regarding the declaration of general public mobilization in the territory of the Republic of Bosnia and Herzegovina, Official Gazette of R BiH number 7/92 of 20 June 1992; Order issued by the commander of the brigade SV *Birać*, Major Svetozar Andrić, sent to the Zvornik Territorial Defense Staff, dated 28 May 1992; Letter from the Cantonal Prosecutor's Office of the Tuzla Canton number 12-1/01-1-207-4037/06, dated 7 June 2006, delivering records of members of the reserve police forces of the Zvornik Public Security Station during 1992; Excerpt from the page of the Red Cross Committee for the missing person Sejfo Omerović, dated 3 July 2006; Excerpt from the page of the Red Cross Committee for the missing person Murat Kuduzović, dated 3 July 2006; List of prisoners from the municipal prison Zvornik who went for an exchange on 1 January 1993; List of prisoners in the municipal prison Zvornik on 21 January 1993; List of prisoners in the municipal prison Zvornik on 2 February 1993; List of persons handed over to the collection centre Batković, made on 12 February 1993; Letter from the State Investigation and Protection Agency number 17-15/3-1-04-2-129/07, dated 16 April 2008, delivering the medical documentation for Nurija Nuhanović, namely: certified photocopy of the X-ray of both hips dated 17 May 2007, certified photocopy of the X-ray of L/S spine dated 17 May 2007, certified photocopy of the X-ray of L/S spine dated 3 April 2008 and the certified photocopy of the finding of the liver and pancreas dated 4 April 2008; Diary kept by the detainee Mustafa Halilović; Record of the examination of the witness Sredo Vuković, made in the Cantonal Prosecutor's Office of the Tuzla Canton, number KT 2273/05, dated 6 December 2005; Record of the examination of the witness Sredo Vuković, made in the Cantonal Prosecutor's Office of the Tuzla Canton, number KT 586/96, dated 13 February 2006; Prison Employees Payroll for August 1992; Excerpt from the brochure of the population of Bosnia and Herzegovina issued by the State Statistics Institute of the Republic of Croatia; Decision of the Ministry of National Defense Sarajevo sent to the Governments of AR /Autonomous Region/ and SAO /Serb Autonomous Region/ of the Serb Republic of Bosnia and Herzegovina, that is, to all Serb municipalities, No. 1/92, dated 16 April 1992; Order of the Crisis Staff of the Serb Municipality of Zvornik; Excerpt from *Srpski glas* dated 14 May 1992; Decision of the Crisis Staff proclaiming the state of war in the territory of the Serb Municipality of Zvornik, No. 01-2/92, dated 6 April 1992; Decision of the Crisis Staff to impose curfew in the territory of the Serb Municipality of Zvornik, dated 8 April 1992; Decision of the Crisis Staff to establish the Interim Government of the Serb Municipality of Zvornik, No. 01-1/92, dated 10 April 1992; Crisis Staff Order on general mobilization, No. 02-1/92, dated 8 April 1992; Decision of the Interim Government of the Serb Municipality of Zvornik to establish the Territorial Defense Command of the Serb Municipality of Zvornik, No. 01-023-44/92, dated 28 April 1992; Decision of the Interim Government of the Serb Municipality of Zvornik to appoint the Interim Management Board in the Primary School *Ivo Lola Ribar* Petkovci, No. 03-023-3/92, dated 5 May 1992; Order of the Ministry of the Interior Sarajevo, strictly confidential: 01-1/92, dated 15 May 1992; Request of the Interim Government of the Serb Municipality of Zvornik, with the invoice in the amount of 80,000 dinars attached; Information of the Interim Government of the Serb Municipality of Zvornik, dated 6 June 1992; Payroll of the Serb Municipality of Zvornik Territorial Defense for May; Payroll of the Serb Municipality of Zvornik Territorial Defense; Certificate of the Interim Government of the Serb Municipality of Zvornik, dated

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

10 June 1992, and Payroll for May of the Military Territorial Command of the Serb Municipality of Zvornik No. 1880/92, dated 28 June 2008; Payroll for May of the Serb Municipality of Zvornik Territorial Defense and the List of members of the Serb Municipality of Zvornik Territorial Defense No. 02-9-1/92, dated 15 May 1992; Payment of a salary to members of the *Beli orlovi* formation by the Municipality of Zvornik; Payment Order of the Interim Government of the Serb Municipality of Zvornik, dated 4 May 1992; Document of the Serb Municipality of Zvornik with a list of volunteers, persons from Loznica, signed by the Territorial Defense Staff Commander; Order of the Commander Dragan Petković on the transfer of soldiers from the Zvornik Brigade to the Birač Brigade, No. 701-2/92, dated 13 October 1992; Delivery of the Daily Operations Report by the commander Major General Savo Janković to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 20/27-101/1, dated 9 April 1992; Request for support-operation by the commander Major General Savo Janković to the 2nd Military District Command, Operations Centre, strictly confidential No. 11/43-477, dated 10 April 1992; Delivery of the *Daily Operations Report* by the Colonel Božo Milohanović to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 20/27-105/1, dated 13 April 1992; Delivery of the Daily Operations Report by the commander Major General Savo Janković to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 11/2-17, dated 18 April 1992; Video record *Death of Yugoslavia*, episode 4; Report of the Zvornik Municipality Police for 1992; Order of the commander Colonel Dragutin Ilić to rename Territorial Defense headquarters and units, dated 6 June 1992; Decision of the Drina Corps Command concerning further operations sent to the Command of the Bratunac Light Infantry Brigade, strictly confidential No. 2-126, dated 24 November 1992; Decision on further operations issued by the Drina Corps Command, strictly confidential No. 2-126, dated 24 November 1992, sent to the Bratunac Brigade Command; Decision on the proclamation of the imminent threat of war published in the Official Gazette of RBiH, No. 1/92, dated 9 April 1992; Excerpt from the daily newspaper *Oslobođenje* of 11 April 1992, article entitled "Oružane snage pod jedinstvenom komandom" /"Armed Forces under a Single Command"/, Decree Law on the Armed Forces of RBiH, published in the Official Gazette of RBiH, No. 4, dated 20 May 1992.

b) Defense

The following defense witnesses were examined: Vladimir Pisić, Nedo Lukić, Ismeta Ibrahimović, Asim Banjanović, Spomenka Stojkić, Ismet Rahmanović, Sredo Vuković, Nenad Jeremić, Sekula Ostojić, Vlado Delić, Ahmet Bošnjaković, Dragan Petrović, Draginja Aćimović, Dobrivoje Ristić, Sejfo Suljić, Mehmed Suljić, Asim Hodić, Nedo Vidović, Radivoje Ristanović, Radivoje Mičić, Adem Hamzić, Vehid Kadrić, Rajko Gligorević, Slavko Bogičević, Miloš Batić, Mehmed Redžić, Mirzet Hamzić, Džemail Isić, Dejan Bogdanović, medical expert witness Dr. Vidak Simić and the expert witness Mile Matijević, doctor of law, while the defense for the first accused waived the presentation of evidence through the examination of the witness Aleksandar Sekanić, the defense for the third accused waived the examination of the witness Fejza Bajrić, and the defense for the forth accused waived the examination of the witness Dimitrije Vidović.

The following documentary evidence was presented: Record of the examination of the witness Mustafa Halilović made at the Prosecutor's Office of BiH, No. KT-RZ-154/06, dated 24 May 2007; Certificate of the Ministry of the Interior, Public Security Center

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Zvornik – Police Station Zvornik, No. 13-01/1-142-16/96, dated 25 January 1996; Temporary weapon permit for the accused Sreten Lazarević; Report of the Ministry of the Interior Sarajevo on supervision and inspection of the situation at the Public Security Station Brčko, Public Security Station Zvornik and partially the situation at the Public Security Station Bijeljina, dated 17 June 1992; Excerpt from the newspaper "Crni petak" /"Black Friday"/; Information of the Ministry of the Interior – Crime Prevention Administration Pale pertaining to the activities of the Ministry of the Interior in the investigation of criminal operations of the paramilitary formation *Žute ose* /eng. yellow wasps/ in the territory of the Serb Municipality of Zvornik, No. 02-16/92, dated 4 August 1992; Information of the Ministry of the Interior - Security Services Centre Bijeljina pertaining to the security situation in the territory of the Serb Municipality of Zvornik, dated 20 July 1992; Daily events bulletin No. 78, dated 29 July 1992; Letter from the Ministry of the Interior Bijeljina – Public Security Station Zvornik sent to the Ministry of the Interior Pale, Security Services Centre Bijeljina and Sarajevo; Letter from the Ministry of the Interior - Crime Prevention Administration Pale sent to the police detachment, Public Security Station and the Public Security Station Bijeljina; Information of the Ministry of the Interior – National Security Service /SNB/ Sarajevo, dated 22 September 1992; Information of the Head of the RO SNB Birač sent to the Ministry of the Interior of the Serb Republic – SNB Vice Secretary, Security Services Centre Sarajevo - SNB Sector, No. 03/92, dated 5 September 1992; Excerpt from the book *Zvornik - od izbora do Dejtona* /eng. Zvornik – from the Elections to Dayton/, page 130; Analysis, Dr. Mile Matijević, dated 28 August 2008; Delivery of information from the record by the sector for records from the field of compulsory military service, signed by the Secretary of the Ministry Zdravko Skočibušić, sent to the Criminal Defense Section, confidential number 07-03-52-1/08, dated 20 August 2008; Delivery of documentation by the Federal Ministry of Veterans and Disabled Servicemen of the Homeland War, No. 07-03-52-2/08, dated 11 September 2008, pertaining to the recognition of participation in the BiH Army units for the persons in question; Certificate of the Ministry of the Interior, Public Security Center Bijeljina, Public Security Station Zvornik, No. 10-1-5/04-127-4118/08, dated 16 September 2008, certifying that Sreten Lazarević did not occupy management posts in the Public Security Station Zvornik; Motion to accept established facts (excerpt from the Judgment *Prosecutor v. Halilhasanović*) No. IT-01-47-T, dated 15 March 2006; Indictment of the Prosecutor's Office for War Crimes of the Republic of Serbia - Belgrade against Goran Savić and Saša Čilerdžić, KTRZ number 8/07, dated 13 March 2008, submitted to the District Court in Belgrade – War Crimes Chamber; Indictment of the Prosecutor's Office for War Crimes of the Republic of Serbia – Belgrade against Branko Grujić, Branko Popović, Duško Vučković, Dragan Slavković, Ivan Korać, Siniša Filipović and Dragutin Dragičević, KTRZ number 17/04, dated 12 August 2005, submitted to the District Court in Belgrade – War Crimes Chamber; Copy of the military ID booklet of the accused Dragan Stanojević, series AV, No. 173975; Copy of the ID card of the accused Dragan Stanojević and Findings, assessment and opinion of the First Instance Medical Board, Council 10 in Zvornik, No. 1740/08, dated 22 April 2008; Findings of the specialized doctor's office *Viva*, Zvornik, Kozluk bb, for Dragan Stanojević, dated 6 December 2000; Information from the Pension and Disability Insurance Fund of Republika Srpska, Branch Office Bijeljina, pertaining to the stage of the proceedings initiated at the request of Dragan Stanojević from Ročević, LBO: 8028923567, JMBG /personal identification number/: 1302962183944, dated 29 April 2008; Decision of the Alumina Plant *Birač* AD Zvornik to terminate employment contract number 04-230508/07, dated 23 May 2008; Evidence on professional qualifications

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

for the accused Dragan Stanojević; Certificate of the Basic Court in Zvornik No. 1530/96, dated 5 April 1996; Certificate of the Administrative Service of the Zvornik Municipality – local office Roćević pertaining to the common household and providing support to family members, No. 07-34/2008, dated 13 February 2008, and the Certificate of the Alumina Plant *Birač* AD Zvornik, No. 111, dated 14 February 2008; Operative part of the Verdict of the District Court in Belgrade – War Crimes Chamber, No. k.v. 5/2005, dated 12 June 2008, sent by fax; Certificate of the Ministry of the Interior of Republika Srpska – Public Security Center Bijeljina – Public Security Station Zvornik, No. 12-1/01-1-118/08, dated 5 March 2008; Record of the examination of Witness A, made by the State Investigation and Protection Agency, War Crimes Investigation Centre, No. 17-15/3-1-04-2-129/07, dated 18 May 2007; Findings and opinion of the certified court expert witness in medicine, Dr. Vidak Simić, dated 22 August 2008; Record of the examination of the witness Admir Hadžiavdić, made in the Canton Prosecutor's Office of the Tuzla Canton, No. Kt. 586/96, dated 24 January 2006; Record of the examination of the witness Ramiz Smajlović, made in the Cantonal Prosecutor's Office of the Tuzla Canton, No. Kt. 2273/05, dated 16 January 2006; Excerpt from the book *Zvornička sirat ćuprija*, pages 87, 88 and 92; Decision of the Director of the Zvornik Municipal Institute of Urbanism and Town Planning pertaining to the assignment to compulsory work service; Decision of the Assembly of the Serb Municipality of Zvornik pertaining to the establishment of a municipal prison in Zvornik, No. 01-023-220/92, dated 19 August 1992; Copy of the military ID booklet for Slobodan Ostojić, series BC, No. 153896; Church calendar for the leap year of 1992; Report on the health condition of the accused Slobodan Ostojić; Excerpt from the book of rules and the list of employees of municipal administrative bodies performing compulsory work on 26 December 1992, signed by the Secretary of the Assembly of the Serb Municipality of Zvornik, Mitar Vasić; Statement of the witness Mustafa Jahić given to the investigator in the law firm – lawyer Miodrag Stojanović on 9 July 2007.

3. Closing arguments

a) Prosecution

The Prosecutor submitted in his closing argument that he held that, during this criminal proceeding, the Prosecution presented to the Court sufficient evidence to render proper and legal decision, both with respect to the criminal offenses at issue and with respect to the criminal responsibility of the accused.

Through the testimonies of the examined witnesses and the presented documentary evidence, the Prosecution proved beyond any reasonable doubt the existence of the armed conflict, as the first and general element of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH. In addition, all the victims of this criminal offense are persons who were protected under international law, namely under Common Article 3 of the Geneva Conventions.

Letters from the Ministry of the Interior of Republika Srpska confirm that the accused were members of the reserve police forces in the Zvornik Public Security Station assigned to perform their duties in the buildings of the Misdemeanor Court or DP *Novi izvor* and that they were thereby obliged to adhere to the customs and rules of war and the Geneva Conventions. These letters confirm that all the accused were registered as reserve police

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

officers during 1992, and the prosecution witnesses also identified the accused as guards during the time period stated in the Indictment.

The examined prosecution witnesses specified the circumstances under which they were deprived of liberty and taken to the detention center in the buildings of the Misdemeanor Court and DP *Novi Izvor*, where they were tortured and treated inhumanely by the accused and other members of military formations, which resulted in damage to their health and reduction of their capabilities in life.

The Prosecutor urged the Court to discredit the finding of the medical expert witness Dr. Vidak Simić, who stated that all the injuries described by the witnesses constituted minor injuries and that the degree of pain did not exceed the limit of 5 (visual scale for pain from 1-10), arguing that it is not reliable, since the expert witness presented his finding having at his disposal very scarce medical documentation and reading the witness testimonies, without previously speaking directly to the witnesses and thus considering all the circumstances of the event.

The allegations from the defense that the accused did not receive any training to perform prison guard duties and that the beatings were justified and within permitted norms cannot be accepted for the reason that the presented evidence confirms that the accused Sreten Lazarević, as a pre-war police officer, received prior training and that the guard duty was not complex, and even without special training, the basic norms of propriety and humanity impose an obligation not to beat persons under one's control.

The Prosecutor also submitted that the mentioned criminal offenses constitute serious breaches of the Geneva Convention in the form of the crimes of torture and inhuman treatment of civilians as stipulated under Article 173(1)(c) of the CC BiH. Therefore, the Prosecutor sought to prove the criminal responsibility pursuant to Article 180(1) of the CC BiH for their direct participation in the above-mentioned acts or their omissions to act in order to prevent the mentioned crimes.[1] Moreover, the Prosecution contends that the accused Sreten Lazarević, as the deputy prison warden, is criminally responsible pursuant to Article 180(2) of the CC BiH for failure to prevent and/or punish the mentioned acts of the guards.

Finally, the Prosecution claimed that it was proven beyond any reasonable doubt that the accused committed each criminal offense charged against them in the amended Indictment.

b) Defense

In the response to the Prosecution's main arguments, the defense for the accused did not dispute the existence of the armed conflict between the Army of Bosnia and Herzegovina and the Army of the Serb Republic of Bosnia and Herzegovina during the period relevant to the Indictment and it also did not dispute that the accused were members of the reserve police force in the Public Security Station in Zvornik.

However, the defense denies that the accused directly perpetrated the mentioned criminal offenses, arguing that the evidence presented by the Prosecutor does not exclude the

[1] Prosecution's closing argument, pp. 1 and 40. See also, Third Amended Indictment, p. 4

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

existence of doubt about the criminal responsibility of the accused. Therefore, the defense argued that the Prosecutor failed to prove the crimes as alleged in the Indictment. Furthermore, the defense for Sreten Lazarević denied that the accused held the position of the deputy prison warden and that his duties included the supervision of the guards at the Misdemeanor Court and DP *Novi izvor*. Accordingly, the defense for the accused Sreten Lazarević challenged the Prosecution's argument that the accused Sreten Lazarević is criminally responsible for the abuse of prisoners under the principle of command responsibility. Also, the defense holds that, when they were deprived of liberty, a large number of the injured parties were members of armed formations of the Territorial Defense and later of the Army of BiH, which is also corroborated by documentary evidence. Hence, at the time when the criminal offense was committed, these persons did not enjoy protection under the Geneva Convention, but they had the status of prisoners of war. The status of Fahrudin Memić, who allegedly used a fire weapon at the time of his arrest, is particularly disputable.

During the closing argument, the defense also raised significant legal issues pertaining to the retroactive application of the law and the jurisdiction of this Court to decide this matter. With respect to the application of the substantive law, the defense for the accused stated that the Court should apply the law which was in force at the time when the mentioned criminal offense was perpetrated, not the current Criminal Code of BiH, since the retroactive application of the provisions of the CC BiH violates the provisions of the European Convention on Human Rights. Furthermore, the defense argued that Article 2 of the ECHR as well as Article 4 of the CC BiH requires the application of a more lenient law in this matter. The Trial Panel will give its response to this argument later in the section entitled the *Application of the substantive law*.

One of the arguments which the defense pointed out during the proceedings, tendering many pieces of evidence to support it, is the presence of paramilitary formations in the area of Zvornik and their uncontrolled and violent behavior. The defense wanted to prove by this that the guards in the buildings of the Court and *Novi izvor* were completely powerless to oppose the unauthorized entry of these armed units into the prison and that they were not sufficiently trained to offer resistance to them.

In his closing argument, the defense counsel for the first accused Sreten Lazarević also pointed out the inconsistency in the testimony of Ahmet Omerović, who identified the accused as the person who took out the injured party Sejfo Omerović, although at the main trial he was not precise either with respect to the identification of the accused or the number of persons who took the injured party out. This witness also testified about Count I/2 of the First Amended Indictment, which the Prosecutor dropped later. Furthermore, with respect to the witness Nurija Nuhanović, who testified about the circumstances stated under Count I/3 of the Indictment, he pointed out that he is at odds with the accused and in his testimony he presented mere speculations on which the responsibility of this accused must not be based, particularly because he did not mention him in his prior statements given during the investigation. Moreover, the credibility of the witnesses Smajlović and Hadžiavdić, who testified about the circumstances stated under Count 1.4, was also challenged with the claim that, in the course of the proceedings so far, they gave a large number of testimonies which are inconsistent, while a particular discrepancy in relation to these witnesses occurred regarding the "alleged flight". In addition, the witness Ramis Smajlović falsely testified that

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

he was not a member of the army at the time of his arrest, although the defense tendered evidence indicating his participation in the Army of BiH units and an excerpt from a book in which it is explicitly stated that he was the president of the Crisis Staff from 1991. With respect to the existence of command responsibility of the accused Lazarević, the defense once more pointed to the inconsistency in the statements of all witnesses who base their conclusion about this fact on mere indirect information, while the defense tendered many pieces of evidence from which it is clearly evident that the accused had the status of an ordinary guard in the prison. The expert witness Matijević explained at the main trial which professional qualifications a person had to have in order to be appointed to a managerial post in the Public Security Station. Furthermore, the defense invoked the Criminal Code of SFRY which was applicable at the time of the commission of the criminal offense and which did not recognize the doctrine of command responsibility as stipulated under Article 180(2) of the CC BiH. The Prosecutor failed to prove also in this case the existence of elements of this type of the responsibility of the accused, and he relied on the testimonies of the witnesses that are uncertain. The expert witness Matijević explained that a reserve police officer could only have a role as an ordinary guard and, as such, he could not have authority to prevent or punish other guards for their behavior.

The accused Sreten Lazarević agreed with the arguments of his defense counsel and pointed out that he considered himself innocent.

The defense counsel for the accused Dragan Stanojević challenged first of all the jurisdiction of the Court of BiH, justifying that with the fact that a case of such complexity should be tried before entity courts. In addition, the jurisdiction of the Cantonal Court Tuzla was also disputable, since the offenses were committed in the area under the territorial jurisdiction of the District Court Bijeljina. Acting in such a way, namely processing the accused before the Court of BiH, Article 449(2) of the CPC BiH was violated, which also resulted in the violation of Article 6 of the ECHR, and produced repercussions both on the legal qualification of the offense and on the application of the substantive law. With respect to the charges brought against the accused under Count II/1 of the Indictment, the defense points out that the acts of the accused did not reach the level necessary for the satisfaction of one of the elements of the existence of the criminal offense of war crimes, that is, they did not amount to a violation of Article 3 of the Geneva Convention. Further, the beating of Fahrudin Memić by paramilitary members was corroborated by the testimonies of few witnesses. The injured party himself, as a member of the Army of BiH, possessed a weapon at the time of his arrest and wounded a soldier during the deprivation of liberty. During his testimony, this witness denied that he was an army member as well as the reasons why he possessed the weapon. He also stated that he was beaten up more than 40 times, although none of the examined witnesses confirmed that, and he tried to establish that he sustained injuries presenting the problematic medical documentation tendered as prosecution evidence at the main trial. Even if the documentation were accepted as credible, according to the expert's findings it does not indicate the existence of any serious injuries that could have been caused by the beatings. Furthermore, the defense points to the witness Mirsad Omerović, who was absent from the prison premises almost every day, so he is not competent to confirm the allegations of the injured party about the beatings that occurred almost every day because he did not have an opportunity to see them. In addition, the accused took people to perform labor every day, so he was absent from the prison most of the time, and therefore the question reasonably arises of how he could open the doors and

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

point to the injured party almost every day. Also, the testimony of the witness Halilović is considered to be completely unreliable, given that he was even subjected to an expert evaluation in order to establish his ability to appear at the hearing and give his testimony.

Some witnesses spoke about the accused's fair treatment of the prisoners who were taken to perform labor, which was confirmed by Nenad Jeremić, Dobrivoje Ristić and Draginja Aćimović, while some testified about situations when the accused prevented paramilitary members from maltreating the prisoners while performing labor, and a certain number of them testified exclusively about the character of the accused Dragan Stanojević. The defense for this accused points out that there was no planned and premeditated exposure of prisoners to sufferings, while the events alleged in the Indictment, even if they did occur, constitute separate incidents.

Corroborating his assertions by the findings of the medical expert witness Vidak Simić, the defense also holds that the elements of the criminal offense charged against the accused are not satisfied, given that the acts charged against the accused did not cause severe physical and mental pain and suffering. Also, the Prosecutor did not prove the existence of such circumstances on the part of this accused, based on which his responsibility as an inciter could be established, nor were the legal elements required for this type of responsibility satisfied.

The accused Dragan Stanojević agreed with the closing argument presented by his defense counsel.

The attorney Nenad Rubež, as the defense counsel for the accused Mile Marković, pointed out in his closing argument that during the proceedings the Prosecutor failed to prove beyond any reasonable doubt the criminal responsibility of the accused Mile Marković. To wit, only one piece of evidence was presented to the Court as proof of the perpetration of the criminal offense under Count III/1 and it was presented by the examination of the injured party Nurija Nuhanović. The testimony of this witness is contradictory, false and contrary to other presented evidence. First, the assertion of the injured party that the accused kicked him with his military boots is unfounded. The reason for this is that the relevant act occurred in July when, in the nature of things, people do not wear boots, except when working in the field, and the event took place inside the prison building. What is also disputable is the ability of the injured party to clearly see from the position in which he was, since he was facing the wall, and recognize persons who were in the room on that occasion, as well as the person who was beating him, since he had his back to them. Furthermore, the injured party failed to prove in any way that his health was impaired as a result of the injuries sustained, given that the medical documentation which he delivered was evaluated by Dr. Vidak Simić, who stated at the main trial that the established diagnosis by no means indicated the existence of the cause-and-effect relationship with the events from 1992. The witness Ismet Ibrahimović, who made it possible for the injured party to get a job in the Republic of Germany after the exchange, claims that he never told him that he was beaten in the building of *Novi Izvor* and that he never complained about health problems. Furthermore, the witness Mustafa Halilović, who did not go to perform labor and who stayed in the same room with Nurija Nuhanović, never noticed that he had been beaten and he added that he would surely know if the accused Marković beat anyone, since he knew him from before. Hence, it is unclear how the guards beat a fairly large number of people

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

without anyone from the room where all the prisoners stayed hearing about that, although everything took place on the same floor.

The witnesses Admir Hadžiavdić, Samir Pezerović, Spomenka Stojkić, Ahmet Bošnjaković, Dragan Petrović, Fadil Smajlović and Asim Banjanović testified about the accused's fair behavior towards all the prisoners, which is also contrary to the statement of the injured party. Also, a large number of the examined witnesses claim that during their stay in the prison they received medical aid, while Nuhanović categorically states that there was no medical aid. Hence, the defense holds that the participation of the accused in the mentioned event was not proved beyond reasonable doubt. It is particularly pointed out that the Prosecution did not also examine the other injured parties as witnesses, namely Fethija and Mehmedalija Nuhanović and Ramo Ibrahimović, who were allegedly beaten up together with Nurija Nuhanović.

Regarding the charges brought against the accused under Count III/2 of the Indictment, the defense points out that the Prosecution presented only one piece of evidence in this respect as well, namely by the examination of the injured party. The testimony of this witness is false and contrary to the other presented evidence. The witness Mustafa Halilović, who knew the accused Mile well from before, categorically states that he was imprisoned at the same time when the injured party was imprisoned, but he never saw or heard that the accused beat anyone, including Witness A. This is significant if we take into consideration that it was exactly the injured party who stated that Mustafa Halilović was present in the room when he was brought beaten and covered with blood. According to the injured party, Nuhanović was also present in the room, but this witness is also not aware that Witness A was beaten or that that was done by the accused Mile. The defense points out that the manner of the perpetration of this offense, too, is disputable, since it took place during the summer months, when military boots are not worn, so it is unclear how the injured party claimed that the accused kicked him with his boots. Allegedly on that occasion the accused mentioned the killing of his brother-in-law at Velja Glava, in which respect the defense presented evidence by the examination of the witness Rajko Gligorević, father of Mile's late wife. Furthermore, Witness A could not move at that time due to a femur fracture, which he himself confirmed, so it is not clear how he could stand while the accused and a Serb prisoner were beating him and how he was brought back to the room out of which he had been taken if he could not move. The defense also challenged the status of this person at the time of capture, claiming that he was a prisoner of war, and in this respect the statement of this witness given to SIPA on 18 May 2007 was tendered as evidence, and thereby the qualification as charged against the accused is not in accordance with the status which the injured party had at the time when the offense was allegedly committed.

The accused Mile Marković agreed with the arguments presented by his defense counsel, adding that, during their testimony, Witness A and Nuhanović expressed open hostility towards him, which he considered to be completely groundless.

In its closing argument, the defense for the accused Slobodan Ostojić pointed to the joint strategic theses of the defense in this case. First of all, the accused's acts do not satisfy the standard required by the qualification of torture referred to in Article 173(1)(c) of the CC BiH. In this respect, the defense pointed to the finding and opinion of the expert witness Vidak Simić, in which it is stated that none of the injured parties sustained serious physical

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

injuries and that their day-to-day activities were not reduced in any way whatsoever. Hence, if the Court accepts the finding and opinion of this expert witness, it is clear that none of the injured parties suffered such pain and suffering which could be characterized as torture. With regard to the charges brought against the accused under Count IV/1, the Prosecutor presented evidence by the examination of a single witness, who is not sure where the accused was and whom he beat. Regarding this circumstance, the defense presented the evidence which constitutes an alibi for the accused. As many as three witnesses – Bogičević, Ristanović and Mičić utterly convincingly and reasonably asserted that on 19 July 1992 the accused attended their celebration of the family patron-saint's day in the village of Jasenica. The witnesses Mirsad Omerović, Mustafa Halilović, Witness A and Ahmet Bošnjaković do not know that someone maltreated Nurija Nuhanović nor did they ever hear that the accused Slobodan beat anyone. With respect to Count IV/2 of the Indictment, on this occasion the defense pointed to omissions in the testimony of Ramis Smajlović and Admir Hadžiavdić, who gave a fairly large number of contradictory statements prior to testifying at the main trial. Moreover, the period stated in the Indictment is the summer of 1992, so the question arises whether the accused Ostojić performed the duty as a guard in the prison at that time. In that respect, the defense tendered evidence confirming that Slobodan Ostojić went to carry out compulsory work service in August, and although the documents about that fact are not dated, the witness Spomenka Stojkić utterly convincingly pointed out that the accused Slobodan stopped performing his duty as a guard in late July. It should be added in the end that the witnesses Nedo Pisić and Dragan Petrović confirmed that they were not aware that the mentioned beating took place and that Ramis Smajlović never spoke about that.

The allegations stated in the Indictment that the prisoners only allegedly attempted to flee are incorrect. They really did obtain an implement to achieve that goal, and at the same time they could have inflicted serious bodily injuries on the guards. Assessing this fact, the defense presented evidence by examining the expert witness Mile Matijević, who confirmed that such a conduct of the prisoners could constitute a form of resistance, where the use of physical force would be legal and lawful. In the end, the defense pointed out that many witnesses, such as Vehid Kadrić, testified about the character of the accused, who assisted in the return of Bosniaks to Zvornik and the implementation of property laws after the end of the conflict.

The accused Slobodan Ostojić agreed with the closing argument presented by his defense counsel.

Finally, the defense for all the accused moved the Panel to render a verdict completely acquitting the accused of the charges.

4. Procedural decisions of the Court

a) Decision on the protection of witnesses and exclusion of the public from a part of the trial

At the hearing held on 15 May 2008, the Prosecutor's Office put forward a motion to exclude the public during the taking of the personal details from the witness for whom the protective measures were sought pursuant to the Law on the Protection of Witnesses,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

namely that this witness gives his testimony under a pseudonym. The mentioned motion was supported by the fact that this witness himself sought the protective measure because of his fear for the safety of his parents, who still live in the territory of the municipality where the crimes that are the subject of the Indictment occurred.

The defense for the accused opposed the mentioned motion, given that the personal details of the witnesses are indicated in the Indictment, and the Prosecution did not specify the circumstances from which follows well-grounded and justified fear that the witness's parents are indeed under threat or vulnerable in any way whatsoever.

After the defense presented its position, the Panel rendered the decision to exclude the public from a part of the trial, so that the witness can present his position regarding the sought protective measures. On that occasion, the witness stated that he himself did not feel vulnerable and that there were no specific reasons from which it would be evident that any threats had been made to his parents. However, it is a subjective impression of the witness that the safety of his parents will be endangered if his testimony is made public under his full identity, given that the testimony concerns the area of the municipality in which his parents still live. Furthermore, the witness specified that they are old and ill people who may need medical aid at any moment, and it is possible that certain people, after learning that the witness has testified in this case, could deny aid to his parents, whereby the care of them would be put into question, which could ultimately have very negative consequences for their health condition. In addition to the foregoing, the witness also stated that, out of the prescribed measures, he only sought that his personal details be not published in the media and that the pseudonym be used instead of his name and surname when publishing parts of his testimony.

Having considered the defense proposal, pursuant to Article 12 of the Law on the Protection of Witnesses, the Panel rendered a decision that the witness would testify under the pseudonym A at the hearing open to the public. Furthermore, it was established that, during the examination of the witness, the parties and the defense counsel would address him using his pseudonym, as well as that parts of the witness testimony could be published in the media only under the pseudonym.

The Panel holds that such an action has not infringed the accused's right to a defense, given that the parties to the proceedings, the defense counsel and the Trial Panel know the identity of the witness and that his direct and cross-examination is ensured with no restriction whatsoever. Also, the Panel finds that it is justified in the present case to order this type of the protective measures, on which the witness insists, considering that Article 3 of the Law on the Protection of Witnesses prescribes that the witness who thinks that there are reasonable grounds to fear that the personal safety of his family would be jeopardized due to his participation in the proceedings shall also enjoy the protection.

The Panel made such a decision because the witness had clearly explained the reasons for which he sought the protective measures and because he has a strong subjective conviction that the safety of his parents will be jeopardized, in the manner he described, if the content of his testimony is published under his full identity, and also taking into account the fact that it is necessary to enable the witness to freely testify at the main trial. The Panel also holds that it was justified to exclude the public from the part of the trial when the personal details of the witness were taken, which, in addition to the foregoing, is also justified by the fact that Article 235 of the CPC BiH stipulates that the public can be excluded from the entire or a part of the main trial if that is required for the purpose of the protection of personal and intimate life of the witness.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

b) Decision on the proposal to tender into evidence the statements given by the accused to the Prosecutor's Office in their capacity as suspects

On 2 July 2008, the Prosecutor's Office filed with the Court a trial motion to admit the earlier records of the questioning of the accused. The Prosecutor proposed that the statements of the accused Sreten Lazarević and Mile Marković given during the investigation in their capacity as suspects be read as evidence at the main trial. In the reasoning of the mentioned motion, the Prosecutor pointed out Articles 77, 78 and 79 of the CPC BiH, which stipulate procedural prerequisites for the questioning of the suspect during the investigation. The Prosecutor's Office finds the grounds for such a motion in the jurisprudence of the European Court of Human Rights and in Article 273 of the CPC BiH, which stipulates the exceptions from the presentation of evidence at the main trial and allows the admission of statements given during the investigation. Given that the Court establishes its decision on the lawfully obtained evidence, the Prosecutor pointed out that the statements were taken from the suspects in full compliance with the applicable provisions of the CPC, and that, as such, they are appropriate to be tendered into the evidentiary material.
In response to the mentioned motion, the defense for the accused opposed the tendering of the records of the questioning of the suspects into the evidentiary material. First of all, the defense held that an exception from the imminent presentation of evidence at the main trial, as stipulated under Article 273 of the CPC BiH, exclusively refers to the situations when the person whose statement is to be read is dead, affected by mental illness, cannot be found or his/her presence in the Court is impossible or very difficult, which is not the case here. The basic argument of the defense as to why the presentation of this evidence is inadmissible is the fact that the Law on Amendments to the Criminal Procedure Code of BiH, published in the Official Gazette No. 15/08 of 21 July 2008, entered into force on 29 July 2008. Namely, the defense points out that the provisions of the new, amended CPC BiH are to be applied to the accused in this case, in which case it is evident that during the investigation the statements were not taken in full compliance with amended Article 78 of the CPC BiH, which is more favorable to the accused, so it is unacceptable to admit such statements into the evidentiary material.

On 20 August 2008, the Panel rendered and publicly announced the decision that the evidence would not be presented at the main trial by reading the statements given by the accused during the investigation, namely that the following records would not be read out: Record of the questioning of the suspect Sreten Lazarević, made in the Cantonal Prosecutor's Office Tuzla, number Kt:586/96, dated 3 May 2006, Record of the questioning of the suspect Sreten Lazarević, made in the Prosecutor's Office of BiH, number: KT-RZ-154/06, dated 15 November 2006, Record of the questioning of the suspect Mile Marković, made in the Cantonal Prosecutor's Office Tuzla, number Kt:586/96, dated 5 May 2006, Record of the questioning of the suspect Mile Marković, made in the Cantonal Prosecutor's Office Tuzla, number Kt:586/96, dated 18 May 2006, and Record of the questioning of the suspect Mile Marković, made in the Prosecutor's Office of BiH, number: KT-RZ-154/06, dated 16 November 2006.

The Panel found the reasoning for such a decision in Article 125 of the Law on Amendments to the CPC BiH. This Article explicitly stipulates that in cases where the

indictment has been confirmed, the proceedings will be continued pursuant to the provisions of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, Nos. 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07 and 15/08) until the Law on Amendments to the CPC BiH comes into force, except if the provisions of the new law are more favorable to the suspect, or the accused.

Bearing in mind the foregoing, the Court concluded that in the present case it is not in accordance with the Law to admit the statements given by the suspects during the investigation. To wit, it is a fact that the statements were taken from the suspects in accordance with the then applicable statutory regulations; however, aforementioned Article 125 of the Law on Amendments explicitly stipulates that the provisions of the new Law will be applied whenever it is established that they are more favorable to the accused. In the present case, the Panel concluded that by reading the statements given during the investigation and by tendering them into the evidentiary material of the Prosecutor's Office, the accused would be brought into a less favorable position, given that during the examination they were not instructed that they could state their position regarding the offense charged against them and present all the facts and evidence in their favor, and that, if they did so in the presence of their defense counsel, such a statement would be admissible at the main trial, and it would be possible to read and use it at the main trial without their consent.

Giving the suspect all the prescribed instructions regarding his rights is of an essential importance for a lawful drafting of a record of the examination of the suspect during the investigation. If the present position of the accused in this case is viewed from this aspect, it is obvious that the mentioned amended provision of Article 78(2)(c) is more favorable to them, and it is evident that the suspects were not instructed pursuant to the provisions of the more favorable Law, because of which the Panel found that the admission of the Records of the questioning of the suspects into the evidentiary material is unacceptable. The last paragraph of Article 78 also stipulates that a decision of the Court may not be based on the statement of the suspect which was not made in accordance with this article, and for these reasons the Court refused the Prosecutor's motion to tender the records made during the investigation into the evidentiary material.

e) Decision regarding the admission of facts adjudicated in the proceedings before the ICTY

On 26 February 2008 and 29 May 2008, the Prosecutor's Office of BiH submitted motions to accept the established facts pertaining to the character of the armed conflict during the time period indicated in the Indictment on the basis of Article 4 of the Law on Transfer of Cases. The first motion contained 12 facts in total, which were taken from the trial judgments rendered by the ICTY in the cases *Prosecutor v. Tadić* (Case No. IT-94-1-T dated 7 May 1997) and *Prosecutor v. Mucić* (Case No. IT-96-21 dated 16 November 1998) as well as the appeal judgment in the case of *Prosecutor v. Tadić* (Case No. IT-94-1-A dated 15 July 1999). The Court held a hearing on this motion on 12 May 2008, allowing the parties to present their arguments pertaining to the Prosecutor's first motion. On 20 May 2008, the Court informed the parties that it considered accepting, *ex officio*, as proven 7 facts establishing the character of the armed conflict during the period indicated in the Indictment and allowed the parties to present their arguments in writing. Subsequently, the Prosecutor's Office filed a second motion seeking to clarify and admit facts concerning the role and position of the Serb reserve police forces of which the accused were members. The

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

second motion contained 5 facts in total, which were taken from the trial judgment in the case of *Prosecutor v. Krajišnik* (Case No. IT-00-39-T dated 27 September 2006).

After careful consideration of the arguments and upon a thorough review of the applicable legal regulations pertaining to the admission of adjudicated facts, the Court refused both motions of the Prosecutor's Office and withdrew its *ex officio* proposal.

After that, on 18 August 2008, the Prosecutor's Office of BiH submitted a third motion to accept the established facts and, after hearing the parties to the proceedings, the Panel rendered a decision accepting some facts established in the ICTY proceedings, namely in the cases *Prosecutor v. Duško Tadić*, No. IT-94-1, *Prosecutor v. Naser Orić*, No. IT-03-68, and *Prosecutor v. Mucić et al. (Čelebići)*, No. IT-96-21.

The Panel accepted the following facts proposed by the Prosecutor:

(1) *"having regard to the nature and scope of the conflict in the Republic of Bosnia and Herzegovina and the parties involved in that conflict, and irrespective of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces,... at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina ..."*
(*Tadić* Trial Judgment, paragraph 568)

(2) *"...the ongoing conflicts before, during and after the time of the attack on Kozarac on 24 May 1992 were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the Government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, elements of the VJ operating from time to time in the territory of BiH, and various paramilitary groups, all of which had occupied or were proceeding to occupy a significant portion of the territory of that State."*
(*Tadić* Trial Judgment, paragraph 566)

(3) *"during the period relevant to the indictment,*[2] *an armed conflict existed on the territory of BiH"*
(*Orić* Trial Judgment, paragraph 759)

(4) *"...furthermore, the alleged wanton destruction of Bosnian Serb property took place in the context of combat activity in eastern BiH. It follows that the alleged offences with which the accused is charged were committed during an armed conflict"*
(*Orić* Trial Judgment, paragraph 760)

(5) *"there was an "armed conflict" in Bosnia and Herzegovina in the period relevant*[3] *to the indictment (...)"*
(*Čelebići* Trial Judgment, paragraph 192)

(6) *"An armed conflict (...) existed in Bosnia and Herzegovina at the date of its recognition as an independent state on 6 April 1992"*
(*Čelebići* Trial Judgment, paragraph 214)

---

[2] The mentioned armed conflict covers the period from April 1992 to early 1995
[3] The mentioned armed conflict covers the period from April 1992 to December 1992

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

(7) *"The armed conflict (...) occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year."*
(*Čelebići* Trial Judgment, paragraph 234)

(8) *"The armed conflict in Bosnia and Herzegovina was the most protracted of all the conflicts which took place during the dissolution of the SFRY. It was characterized by a massive displacement of population as well as the practice of "ethnic cleansing"..."*
(*Čelebići* Trial Judgment, paragraph 107)

Article 4 of the Law on Transfer of Cases as well as Rule 94(B) of the Rules of Procedure and Evidence stipulate that at the request of a party or *proprio motu*, the court, after hearing the parties, may decide to accept as proven those facts that are established by legally binding judgments 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 Trial Panel met the formal requirements set forth in Article 4, which requires that the parties be given an opportunity to present their arguments.

In addition, when rendering its decision, being mindful of the developed jurisprudence of the ICTY and the Court of BiH pertaining to established facts, the Trial Panel took into consideration the following criteria: 1) the fact must be distinct, concrete and identifiable; 2) it must be restricted to factual findings and should not include legal characterizations; 3) it must have some relevance to an issue in the current proceedings; 4) it must not be subject to pending appeal or review; 5) it must not attest to criminal responsibility of the accused; 6) it must not be a subject of reasonable dispute between the parties in the present case; and 7) it must not be based on plea agreements in previous cases.

All of the facts the Trial Panel accepted as proven met these criteria. This court's discretionary right to take judicial notice of established facts is exercised on the basis of a careful consideration of the accused's right to a fair and expeditious trial in accordance with the principles of a fair trial enshrined in Article 6(1) of the European Convention on Human Rights and Article 6(2) and Article 13 of CPC BiH. As to the facts proposed by the Prosecutor's Office but not accepted, the Trial Panel concluded that these facts did not satisfy the foregoing criteria and therefore could not be accepted as such in this particular case.

Finally, the acceptance of facts proposed by the Prosecutor as "proven", under the criteria the Panel has outlined, did not relieve the Prosecutor of his burden of proof nor did it detract from the presumption of innocence under Article 3 of the CPC BiH. The acceptance "as proven" of facts established in the final judgments of the ICTY does not mean that the Prosecutor has met the burden of production of evidence on that particular fact and that he did not have to prove it further in his case in chief. The admission of each fact did not affect in any way the right of the accused to challenge any of the accepted facts in their defense, nor did it preclude the Prosecutor from presenting additional evidence in order to rebut the defense challenge. The admission of facts only additionally corroborated the Court's conclusion that an armed conflict was ongoing in the BiH territory at the time relevant to this Indictment.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

d) Decision to refuse the motion filed by the defense counsel for the second accused Dragan Stanojević to present evidence by the examination of the witnesses Senija Taletović and Hazima Sejdini from Zvornik

At the main trial hearing held on 20 August 2008, the Trial Panel rendered a decision to refuse the presentation of evidence by the examination of the witnesses Senija Taletović and Hazima Sejdini. On 19 August 2008, the defense counsel for the second accused, attorney Miloš Perić, delivered to the Court his submission, proposing that these two witnesses be examined with regard to the behavior of the second accused Dragan Stanojević toward a fairly large group of Bosniak women and children during the period from April to August 1992, with respect to the assistance to survive and their personal safety. Having considered the mentioned motion, with the attached statement of Senija Taletović given to the attorney Miloš Perić on 19 August 2008, the Panel found that the presentation of this evidence was unnecessary and irrelevant.
To wit, Article 263(2) stipulates that the Court has the right to reject the presentation of evidence if it assesses that the circumstances that a party tries to prove are irrelevant to the case or that the offered evidence is unnecessary. In the present case, the Panel considers the offered evidence unnecessary and irrelevant to the proceedings; in addition, the proposed witnesses would testify about the character of the accused Dragan Stanojević, about which the defense for the accused has already examined the witnesses Draginja Aćimović, Dobrivoje Ristić, Nedo Vidović and Adem Hamzić, and therefore the Panel concluded that a sufficient number of witnesses were examined with regard to the mentioned circumstance. According to the defense, the proposed witnesses would also testify about facts relating to the personality of the accused and his characteristics, which is only indirectly related to the factual description of the Indictment, because of which it was justified to conclude that their examination in the proceedings would not suggest new circumstances or contribute to the clarification of issues.

e) Decision to change the sequence of the presentation of evidence at the main trial

On 19 May 2008, at the main trial hearing, the documentary evidence of the Prosecution was presented in the manner as listed in the Indictment. However, the tendering of certain documentary evidence was postponed because at the time certain documents were not certified by the International Criminal Tribunal for the former Yugoslavia, and for the reason of judicial economy, the proceedings were continued, and the tendering of the mentioned certified evidence in the court file was postponed to a subsequent phase of the trial. At the same hearing, the Prosecutor announced a certain number of new pieces of evidence he intended to present to the Court, which were not proposed in the Indictment, about which the defense was informed in time and did not object to it.
After the formal completion of the evidentiary proceedings of the Prosecution on 28 May 2008, the reservation on tendering the evidence which lacked certification was maintained, and upon the order of the President of the Panel, the presentation of the defense evidence started in order to avoid postponing the main trial hearing until the certified documentation from the ICTY was obtained. No objection to this was raised by the defense on 19 May or 28 May.

On 20 August 2008, after the defense had exhausted almost the whole list of evidence it intended to present by hearing the witnesses, it submitted a request to the President of the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Panel to change the sequence of the presentation of evidence and to finally complete the presentation of all the documentary evidence of the Prosecution, given that that was in the interest of the accused. After the tendering of the remaining Prosecution evidence, which initially lacked certification, the Panel decided to change the sequence of the presentation of evidence at the main trial.

The Panel finds the reason for such an action in the fact that already on 19 May 2008 the Prosecutor announced that, in addition to tendering the evidence which was to be certified by the Tribunal, he would present a certain number of new pieces of evidence, which were delivered to the defense in time and which primarily referred to the proving of the existence of an armed conflict during the period covered by the indictment. Given that the defense announced the presentation of evidence by the examination of an expert witness exactly with regard to the existence of the armed conflict during the relevant period and with regard to the command organization of the police and the army and their relationship during the same period, acting pursuant to Article 261(2) of the CPC BiH, the Panel decided that it was in the interest of justice to present first the new evidence proposed by the Prosecution, so that the expert witness for the defense, when presenting his finding and opinion, could take into consideration all the documentation at the disposal of the Prosecution relating to the existence of the armed conflict. The defense agreed with this action, which proved to be purposeful, and on 20 August 2008 the mentioned new documentary evidence of the Prosecution was presented. The defense was also granted additional time to inform the expert witness about the mentioned documentation in order to have his finding and opinion as complete as possible, so his examination was postponed to 1 September 2008, which the defense proposed as an appropriate date.
Holding that such an action is entirely in the interest of justice and that the decision was made exclusively in the interest of the accused, the Panel concluded that the change of the sequence of the presentation of evidence at the main trial was entirely justified in the present case.

f) Decision to refuse to admit into evidence the material documentation which was proposed as evidentiary material of the accused *Dragan Stanojević*

At the main trial held on 26 August 2008, during the presentation of the defense evidence, the attorney Miloš Perić proposed the tendering of material documentation relating to the proceedings conducted against the mentioned accused before the Cantonal Court Tuzla and documents relating to the investigation conducted by the Prosecutor's Office of BiH. After the Panel considered the relevance of the mentioned documentation, at the hearing held on 27 August 2008, acting pursuant to Article 263(2), the President of the Panel announced that the admission of the mentioned documentation into evidence was rejected, namely: Information from the Prosecutor's Office of BiH number KT-RZ-119/06, dated 10 April 2006, Objection concerning territorial jurisdiction lodged with the Cantonal Court Tuzla by the attorney Miloš Perić, dated 1 June 2006, Decision of the Cantonal Court Tuzla number 003-0-KPS-06-00020, dated 2 June 2006, Decision of the Cantonal Court Tuzla number 003-0-KV-06-000151, dated 15 June 2006, Decision of the Cantonal Court Tuzla number 0003-0-KPS-06-00021, dated 19 June 2006, Decision of the Cantonal Court Tuzla 0003-0-KV-06-000166, dated 5 July 2006, Decision of the Court of BiH number X-KRN-06/243, 18 August 2006, two summonses from the Prosecutor's Office of BiH addressed to the attorney Miloš Perić, as the defense counsel for Dragan Stanojević, number KT-RZ 154/06,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

dated 11 November 2007 and 26 March 2007, and Record of the questioning of the suspect Dragan Stanojević number KT-RZ 154/06, dated 13 April 2007. The foregoing documentation was assessed as irrelevant to the proceedings and for that reason it was not admitted into the evidentiary material.

g) Decision to accept that the statement of Mustafa Jahić be read out

During the presentation of evidence by the defense for the fourth accused Slobodan Ostojić, the attorney Miodrag Stojanović proposed that the statement of Mustafa Jahić, which this witness gave to the investigator of this law firm Dejan Bogdanović on 9 July 2007, be read out as evidence at the main trial.
The fact that this witness, according to a certain number of the prosecution witnesses, has died was given as a reason for the mentioned proposal, and therefore the defense held that the requirement referred to in Article 273(2) of the CPC BiH, which stipulates exceptions from the imminent presentation of evidence at the main trial, was met. The Prosecution in principle opposed the defense proposal, invoking the formality of criminal proceedings and claiming that, according to the CPC provisions, the Prosecutor's Office is the only body authorized to collect statements and examine persons as witnesses during the investigative phase.
In this respect, the defense also proposed the examination of the investigator Dejan Bogdanović with regard to the taking of the statement from Mustafa Jahić and committed itself to deliver to the Court a proof of death of the mentioned person, which it would try to obtain from Austria, given that Mustafa Jahić acquired the citizenship of Austria and renounced the BiH citizenship before his death, so that his death is not registered in the official records of our country.

After the parties agreed at the hearing held on 4 September 2008 that the death of the mentioned person had been confirmed by a fairly large number of the Prosecution witnesses and after they agreed that the mentioned fact is indisputable, the Panel decided to accept that the statement of this witness be read out at the main trial as a piece of evidence for the fourth accused. In addition to the foregoing, the Panel also examined the attorney Dejan Bogdanović, who took the statement in his capacity as an investigator in the law firm of the attorney Miodrag Stojanović, with regard to the circumstances under which the statement was taken from this person.

The Panel also considered the Prosecutor's objection and it holds that such a collection of statements by the defense is in accordance with the Law. Attorneys have the right and they are obliged to collect facts and evidence in favor of their clients during the proceedings, including the investigative phase, as long as actions are taken in accordance with Article 10 of the CPC BiH and if the manner of the collection of evidence does not obstruct the conduct of the official investigation by the Prosecutor's Office. It is necessary to view the mentioned situation also through the mandatory application of the principle referred to in Article 14 of the CPC BiH, which guarantees equality of arms; this principle would be violated if the defense would be prohibited from taking actions aimed at the preparation of a high-quality defense already during the investigative phase. In this particular case, the statement was given by the person voluntarily, without coercion, and without making any suggestions as to the answers, which makes it suitable for consideration, while the Court

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

will make the final evaluation of its relevance and probative force when presenting the evaluation of all the evidence presented at the main trial.

b) Decision to refuse the motion filed by the Prosecutor's Office to present evidence in rebuttal by the examination of the witness Samir Pezerović

In rebuttal, the Prosecutor proposed the presentation of evidence by the examination of the witness Samir Pezerović with regard to the recognition of years of service in the Army of BiH, given that the defense, amongst its evidence, presented the document of the Federal Ministry of Veterans and Disabled Servicemen of the Homeland War, number 07-03-52-2/08, dated 11 September 2008, pertaining to the recognition of participation in the BiH Army units for the persons in question, including this witness. Having considered the mentioned motion, the Panel decided to refuse it as irrelevant, given that a fairly large number of witnesses explained the manner in which participation in the units of the Army of BiH was recognized to persons. In addition to the foregoing, the document of the Federal Ministry is an official and formally and legally authentic document of a competent state body, whose authenticity was not challenged in any way, so the Panel will evaluate its probative value together with the rest of the evidence presented at the main trial.

5. Application of the substantive law of Bosnia and Herzegovina

During the presentation of the closing argument, the defense also raised an objection concerning the application of the principle referred to in Article 3(2) of the CC BiH, which states 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 offence by law or international law, and for which a punishment has not been prescribed by law. Furthermore, Article 4(1) 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 not been amended after the perpetration of the criminal offense. In such cases, the law that is more lenient to the perpetrator shall be applied. Finally, the principle of legality is also defined under Article 7(1) of the ECHR, which supersedes all relevant legislation of BiH pursuant to Article 2(2) of the BiH Constitution.

The mentioned criminal offenses were committed in 1992, at the time when the Criminal Code of SFRY (hereinafter: the CC SFRY) was in effect. The CC SFRY did not stipulate the criminal offense of War Crimes against Civilians as a separate criminal offense. The new CC BiH, however, defines this offense as a separate criminal offense under Article 173 of the CC BiH. However, the Trial Panel finds that this criminal offense was stipulated under the then CC SFRY within individual criminal offenses under Article 142 as well as under international criminal law.

Article 4a of the CC BiH, which is in accordance with Article 7(2) of the ECHR,[4] states that Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to

[4] Article 7(2) of the ECHR states that this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was commited, was criminal according the general principles of law recognized by civilized nations.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the general principles of international law. This Article provides the possibility to depart from the principles laid down in Articles 3 and 4 of the CC BiH and to depart from the application of a more lenient law as stipulated under Article 4(2) of the CC BiH in proceedings constituting criminal offenses under international law. The current proceedings against the accused fall under the scope of Article 4a, because the crimes committed by the accused constitute flagrant violations of international law.

The case law of the European Court of Human Rights stresses the application of Article 7(2) instead of the application of Article 7(1) of the ECHR in several cases[5] where the subject of dispute was exactly the retroactive application of the domestic criminal law. In the case *Kolk v. Estonia*, the European Court stated that "the interpretation and application of domestic laws fall under the jurisdiction of the domestic courts..."[6] This also applies in cases when the domestic law invokes a rule of general international law or an international agreement.

Finally, this issue was considered by the Constitutional Court of BiH in the appeal by A. Maktouf.[7] The Constitutional Court stated that *"In practice, in the legislation of any country of the former Yugoslavia there was no possibility for imposing the sentence to life imprisonment or long term imprisonment, which the International Criminal Tribunal for Crimes Committed in the Territory of the Former Yugoslavia did often (cases Krstić, Galić, etc.). At the same time, the concept of the CC SFRY was such that it did not prescribe long term imprisonment or life imprisonment, but it prescribed the death penalty for the most severe criminal offenses and for less severe offenses a maximum sentence of up to 15 years imprisonment. Hence, it is clear that one sanction cannot be separated from the overall goal which was intended to be achieved by the penal policy at the time of applicability of that law".*[8] *"With regard to that, the Constitutional Court holds that it is not possible to simply "remove" one sanction and apply other, more lenient sanctions and thereby practically leave the most severe criminal offenses inadequately punished."*[9]

Analyzing the applicable provisions of the Criminal Code of BiH, the European Convention on Human Rights and recent decisions of the BiH Constitutional Court, the Trial Panel holds that the application of the CC BiH is justified in this case, which is in accordance with norms that establish standards for the respect of human rights.

6. Findings of the Court

6. a) Evaluation of evidence

After the Court conscientiously and substantively evaluated every piece of evidence individually and in relation to the other evidence presented at the main trial, and having previously analyzed the allegations from the Prosecution and the Defense, the Court established the state of facts as stated in the operative part for the following reasons.

---

[5] Decision of the ECHR in the case *Naletilić v. Croatia*, 51891/99

[6] *Kolk v. Estonia* No. 23052/04 citing *Papon v. France* No. 54210/00, ECHR 2001-XII and *Touvier v. France*, No. 29420/95, Decision of the Commission dated 13 January 1997

[7] Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP-1785/06, dated 30 March 2007

[8] Id. paragraph 68

[9] Id. paragraph 69

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Article 3(1) of the CPC BiH provides that the accused shall be considered innocent of a crime until proven guilty.[10] The Prosecutor therefore bears the burden of establishing the guilt of the accused, and, in accordance with Article 3(2) of the CPC BiH, the Prosecution must do so beyond a reasonable doubt.[11]

The fact that the defense did not challenge certain factual allegations contained in the Indictment does not mean that the Court has accepted these facts as proven. The burden of proof remains with the Prosecutor for each charge throughout the trial. Accordingly, in determining whether the Prosecutor proved the case beyond any reasonable doubt, the Trial Panel has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the one accepted by the Panel when ruling that the elements of the criminal offense charged against the accused were satisfied as well as every form of responsibility of which they have been found guilty. Any ambiguity or doubt has been resolved in favor of the accused in accordance with the principle *in dubio pro reo*.[12]

Pursuant to Article 15 of the CPC BiH, the Trial Panel has the right to freely evaluate the evidence.[13] Accordingly, the Trial Panel has carefully considered the charges against the accused, including all the evidence which was tendered. When evaluating the evidence presented during the main trial, the Trial Panel paid due attention, among other things, to the individual circumstances of the witnesses, including their possible participation in the events and the risk of self-incrimination, and their relationship with the accused. The Trial Panel has also considered the internal consistency of each witness' testimony during the direct or cross-examination and compared it to the statements they gave during the investigation.

There were times when the oral testimony of witnesses differed from the statement they gave during the investigation. The Trial Panel notes that sixteen years have passed since the events alleged in the Indictment and, in all likelihood, the passage of time has affected the accuracy and reliability of the memories of witnesses. The Trial Panel has also recognized that, due to the nature of criminal proceedings, a witness may be asked different questions at trial than he was asked in prior interviews and/or that he may remember additional details when specifically asked about them at trial. Nevertheless, these matters called for careful scrutiny when determining the weight to be given to any such evidence.

It is indisputable that a large number of witnesses who appeared before the Trial Panel were victims of events that occurred in the Misdemeanor Court and DP *Novi Izvor*. Their testimonies were based on terrible incidents they had seen and experienced themselves. The

---

[10] Article 3(1) of the CPC BiH states that "a person shall be considered innocent of a crime until guilt has been established by a final verdict". This provision is in accordance with all major human rights instruments. See, European Convention on Human Rights, Article 6(2); International Covenant on Civil and Political Rights, Article 14(2)

[11] Article 3(2) of the CPC BiH states that "a doubt with respect to the existence of facts composing characteristics of a criminal offense or on which depends an application of certain provisions of criminal legislation shall be decided by the Court with a verdict and in a manner that is the most favorable for the accused".

[12] Article 3(2) of the CPC BiH

[13] Article 15 of the CPC BiH states that "...the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules".

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Trial Panel also recognizes that recollection and articulation of such traumatic events may invoke strong emotional reactions and may impair the ability of such witnesses to express themselves clearly and present a full account of their experiences in a judicial context, particularly because a certain number of the witnesses, after this prison, were transferred to the Batkovići camp, where they were maltreated again.

Consideration of the *oral* testimony before the Panel, certain inconsistencies and inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, are a relevant factor in judging weight and they do not necessarily discredit the entire witness' testimony. If a witness recounted in detail the essence of the events at issue, the peripheral deviations did not necessarily call into question the veracity of such evidence.

During the presentation of the Prosecution evidence, a large number of witnesses were examined who, in their testimony at the main trial, insignificantly departed from their prior statements given to the investigative bodies. This was the case with the witnesses Mirsad Omerović, Fadil Smajlović, Fahrudin Memić and Alija Buljubašić. The Court accepted as truthful the testimony of these witnesses.

Furthermore, the witnesses who in their testimony at the main trial made certain deviations from the statements they gave during the investigative phase were also examined during the proceedings. This was the case with the testimony of Ramis Smajlović and Admir Hadžiavdić. Thus the defense challenged the credibility of these witnesses, claiming that they gave a fairly large number of statements during the investigative phase, which in no respect correspond to their testimony at the main trial. The witness Ramis Smajlović, in his statement number Kt. 2273/05, dated 16 January 2006, did not mention the accused as persons who beat him on the relevant day. When explaining this deviation in the statements, the witness stated that he maintained his statement given at the main trial and that, at the time of the questioning, he could not clearly remember all the participants in the relevant event. Also, in his statement number Kt. 586/96, dated 24 January 2006, the witness Admir Hadžiavdić stated that he did bring a fork spanner to the room in which the prisoners stayed from the parking lot in front of the prison building, intending to use it to run away, which he denied in all subsequent statements. However, during the cross-examination, the witness confirmed those allegations, adding that at that time all unlawfully detained civilians thought about running away, although they were aware how abstract that idea was. This witness also made certain deviations with respect to the guards who performed the beating, but, like the witness Smajlović, after giving his statement during the investigation, he gave it more thought trying to remember as many details about the event as possible, and maintained his allegations made at the main trial. When assessing the testimonies of these witnesses, the Panel took into account all the discrepancies and objections raised by the defense for the accused. Even after a rather detailed cross-examination by the defense teams of all accused, and after the questions asked by the Panel members, the witnesses remained consistent in their averments. The Panel finds that the testimonies of the witnesses given at the main trial are consistent in crucial elements, both with respect to the persons who participated in the commission of the offense and with respect to other circumstances, so that it accepted the testimonies as truthful and gave them credence. The defense pointed out that the participation of the accused Sreten Lazarević and Slobodan Ostojić is disputable; however, when deciding about the criminal responsibility of the accused, the Panel did not

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

base its conclusion on the testimonies of only these two witnesses, but it also assessed the testimonies of the witnesses who stayed in the room with the injured parties on the relevant day. Since their testimonies given at the main trial are consistent and correspond to the statements of the rest of the witnesses who testified about the circumstances under Counts I/4 and IV/1, the Panel assessed them as relevant when deciding about the criminal responsibility of the accused Sreten Lazarević and Slobodan Ostojić.

The situation is similar also with respect to the witness Nurija Nuhanović, who, in his statement given in the Cantonal Prosecutor's Office Tuzla on 24 May 2007, did not incriminate Sreten Lazarević as the person who beat him on the relevant day. However, this witness explained during his further testimony that it was only then that he became aware of the identity of the accused persons, and he could not remember all the details relating to the event he was questioned about. This witness also claimed that no one asked him about that circumstance then, while he clearly identified the accused Sreten Lazarević in the courtroom during the main trial, claiming that he was in the room during the critical event and that he beat him. Just like during the investigation, the witness claimed that at that time he had to stand facing the wall, however, he could clearly see that the accused Mile Marković was standing on his right side, while Sreten Lazarević was standing on his left side. The manner in which the beating of this witness was carried out is not inconsistent with the allegations made during the investigation, so the Panel gave credibility to this witness with respect to the charges brought against the accused under Counts I/3 and III/1 of the Indictment. However, during the investigation, this witness did not mention the participation of the accused Slobodan Ostojić, whom he also mentioned in his testimony at the main trial, but still remained uncertain as to his active participation in the beating of one of the injured parties, so the Court could not base the responsibility of the accused Slobodan Ostojić on the assumptions of this witness.

The witness Jusuf Omerović also made some minor deviations from the statements given during the investigation, in which he could not precisely remember the names of all the guards in the Misdemeanor Court and *Novi Izvor*. However, during the main trial this witness clearly described the guard Veliki Dragan, who worked in *Glinica* before the conflict and whom he equates with the accused Dragan Stanojević, whom he identified in the courtroom. He clearly remembers the accused Sreten Lazarević as the person whom he found in the Court the first day when he arrived there and he also identified him in the courtroom, while he knew the accused Mile Marković from before. This witness explained at the main trial that he learned the names of all the guards during his stay in the prisons. As for the fourth accused, he can state that during the relevant time this man was blond, thin, and he was a kind of a clerk in the prison, but he is not sure whether his name was Slobodan. Hence, this witness clearly and precisely pointed to the accused as the guards in the buildings of the Misdemeanor Court and DP *Novi Izvor*, so that there is no doubt about his ability to identify the guards during their participation in the commission of particular criminal offenses of which they have been found guilty.

With respect to determining the existence of the command responsibility of the accused Sreten Lazarević, in addition to the testimonies of the witnesses who were examined, the Panel also relied on the statements given by the defense witness Sredo Vuković during the investigation. At the main trial, this witness denied his previous assertions, and categorically claimed that he had never appointed Sreten Lazarević as his deputy. However, in his prior

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

statements given in the Prosecutor's Office he explicitly explained his position as de facto prison warden, while he considered the accused Sreten Lazarević as his deputy. In the statements dated 6 December 2005 and 13 February 2006, he stated that he had chosen Sreten as his deputy because he was the oldest among the guards and somehow seemed to be a person of confidence. Even at the main trial, where the witness denied that he held the position of the prison warden, he still said that at some point he might have authorized Sreten to coordinate the work in the prison in his absence, but he still categorically stated that there is not a single written document about that. The Panel compared the statements given during the investigation with his testimony at the main trial, and it found that they are consistent to a large extent, with only one discrepancy pertaining to the status of the accused Lazarević, so it holds that it is an attempt to avoid incriminating the accused under command responsibility. Also, this witness did not even attempt to explain why he departed at the main trial from his statement given during the investigation. However, the Panel did not base its conclusion about that only on the testimony of this witness, but it linked it with the testimonies of all the witnesses who were examined, which is reasoned in the part of the Verdict establishing the command responsibility of the accused Sreten Lazarević.
In that respect, the Court has also admitted the indirect evidence, hence, evidence which does not follow from the testimony based on the witness's own knowledge. In evaluating the probative value of this evidence, the Court has carefully considered indicia of its reliability and, for this purpose, has evaluated whether it was corroborated by other testimonies or documentary evidence, and based on that it drew the only reasonable conclusion.

In the course of the oral testimony of some of the witnesses, it became apparent that their statements were materially different on certain points from the testimony of other witnesses. To wit, during the proceedings the defense examined several witnesses for the defense who testified that there was enough food on the prison premises, that the conditions were relatively good and that no one was beaten.

Also, a large number of the defense witnesses pointed to the fair behavior of the guards towards the prisoners and to their positive characteristics. The Trial Panel did evaluate these testimonies as relevant, but it drew a conclusion that the status of the prisoners in the prison was obviously not equal. It was indisputably established during the proceedings that there was a certain number of persons who enjoyed a certain "privileged status". These persons received medical aid, could contact their family members, receive parcels and go to perform work, escorted by the guards. Thus, the third accused Mile forwarded a parcel to the witness Alija Buljubašić which his wife had sent to him, while Witness A claims that the prisoner Mustafa Jahić also often received some parcels. However, the witness Halilović states that the same guards would sometimes threaten people who brought parcels to the prisoners, as it happened to a certain Nada, who tried on a couple of occasions to forward cigarettes to the prisoners, but she was warned by the guards not to do that again.

While almost all defense witnesses point to the satisfactory conditions of their stay in the buildings of the Misdemeanor Court and DP *Novi izvor*, the witness Nurija Nuhanović points out that the amount of food was very minimal, while on a couple of occasions they delivered spoiled food, so the witness lost 28 kilograms while he was imprisoned. They slept on a parquet floor, noting that those who went to perform labor could bring blankets and mats. As far as he knows, they did not receive medical aid, and they had an opportunity

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

to see the Red Cross vehicles passing by on the road, however, they never came to the premises of *Novi Izvor*. The size of the room on the upper floor where the prisoners stayed was approximately the size of two offices, while the hygiene was on the lowest level, and he personally did not have a bath for seven months, because the bathroom located next to the room was lacking the basic sanitary facilities.

The Panel has considered all the testimonies and, evaluating contradictions that occurred, it has concluded that the prison in the Misdemeanor Court and the building of *Novi Izvor* did not have satisfactory capacities to accommodate the large number of persons who were there.

If all the presented facts are viewed in their entirety, one can get an impression of generally inhumane conditions that prevailed there. In addition to inadequate hygienic conditions, the prisoners were often abused and maltreated by members of paramilitary formations, whose entry into the prison was not prevented in any way. The administration of medical aid to the prisoners was limited, which the defense explained with the lack of medical supplies in Zvornik at that time. The shortage of water in the prison was also explained by bad infrastructure in Zvornik.

As already stated, the witnesses pointed out that the amount of food was insufficient, and they pointed to the fact that many of them lost a lot of weight, while according to Witness A, one person even died due to insufficient food intake. The defense challenged this fact as well, claiming that the prisoners received the same amount of food as the army and the police of RS, which is incorrect, given that all the witnesses confirmed that they received meals twice a day, while the defense witness Vlado Delić explicitly stated that the army and the police had three meals a day. It is also a fact that usually the same quantity of food arrived and no account was taken of whether it was proportionate to the actual needs of the actual numbers of the prisoners.

The Trial Panel notes that in the present case, the documentary evidence has been voluminous and is of particular importance. In the course of the trial, several documents were tendered into evidence, which were contested by the defense. The Trial Panel has examined each and every document challenged by the defense with a view to deciding on its reliability and probative value.

The defense submitted that some of the documents are unreliable and that they have no probative force. In particular, the defense contested the admissibility of medical records for Fahrudin Memić tendered by the Prosecutor, which do not bear the date or the name of the medical doctor, claiming that those papers are devoid of an element required for establishing their authenticity. However, the fact that a document is unsigned or undated does not necessarily render that document non-authentic.[14] The Trial Panel considers that such documents do not *a priori* lose credibility. In order to assess the authenticity and relevance of documents, the Trial Panel considered them in light of other documentary evidence and testimonies. In addition, even in cases when the authenticity of a document is

[14] *Prosecutor v. Radislav Ljubinac*, Case No. X-KR-05/154, Verdict dated 8 March 2007, upheld by the Appellate Panel of the Court of BiH, Second Instance Verdict dated 4 October 2007. See also *Prosecutor v. Gojko Janković*, Case No. X-KR-05/161, Verdict dated 16 February 2007, upheld by the Appellate Panel of the Court of BiH, Second Instance Verdict dated 23 October 2007.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

not disputable, the Panel is not obliged to accept the facts contained therein as proven. Also the defense expert witness Vidak Simić, in his finding and opinion, mentions the injuries in the form of bruises on the body and cuts on the forehead, which the injured party sustained as a consequence of the commission of the criminal offenses charged against the accused Stanojević. This expert witness also interpreted the medical documentation which was delivered by the injured party and contested by the defense, and it is evident that the injuries stated therein largely correspond to the injuries which the injured party described and claimed he had sustained during his stay in the prison. It is exclusively the Court that decides what the consequence of the foregoing is with respect to the charges brought against the accused, and that decision will be reasoned in the part of the Verdict establishing the criminal responsibility of the accused Stanojević.

What was also disputable is the medical documentation of the injured party Nurija Nuhanović, establishing degenerative changes on the spine of the injured party, which, according to the defense expert witness, cannot be linked with the events from 1992. However, in the present case, the Panel heard the injured party at the main trial and evaluated the consequences of the commission of the criminal offense in relation to the period immediately after the relevant event. Based on the testimony of the injured party, the Panel concluded that on the relevant day he lost consciousness as a result of the beating, and bleeding occurred in certain areas of the body as a result of the beating he suffered, which was taken into consideration when establishing the responsibility of the accused under Counts I/3 and III/1 of the Indictment.

With regard to this circumstance, the defense presented evidence by examining the expert witness – specialist in forensic medicine Vidak Simić, who presented his finding and opinion at the main trial based on the delivered medical documentation and the statements of the injured parties, and explained it orally at the main trial on 26 August 2008. Based on this expert evaluation, the defense claimed that the acts of the accused do not satisfy the elements of the criminal offense of torture referred to in Article 173(1)(c) of the CC BiH, given that, according to the expert witness, none of the injured parties suffered severe mental or physical pain or suffering. The expert witness noted in his finding that, during their detention, the prisoners sustained injuries which, according to the forensic medicine rules, can be qualified as minor bodily injuries and they caused a lesser degree of pain according to the Visual analog scale for pain, which is a common parameter in the court practice, where the intensity of pain is measured on a scale from 1 to 10. With respect to all injured parties, it was established that the reduction of day-to-day activities did not occur as a result of the sustained injuries and that the beating did not leave any trace in the form of impaired physical appearance of the injured parties. However, this expert witness also confirmed that the injuries inflicted on many of them reached the threshold of pain 5 at the moments immediately after they were injured, while the prisoner – Witness A, due to the injury he sustained earlier, namely the femur fracture, suffered pain reaching the threshold 8-9 of the mentioned scale, and this condition got worse during his stay in rooms with inadequate conditions and without adequate medical aid. However, the Panel, while assessing the gravity of the criminal actions the accused have been found guilty of, besides the Finding and Opinion by the expert witness, which it accepted as such, also took into account all the circumstances of the event, including the manner of perpetration, the frequency of beatings, the inhumane conditions in which the detainees were held, without adequate tending to their injuries, and the constant fear and traumatic situations they suffered on a daily basis, expecting new abuse. In the present case, the Panel has found that

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the acts of the accused satisfy the elements of the criminal offense of inhuman treatment referred to in Article 173(1)(c) of the CC BiH, rather than torture referred to in subparagraph c) of the same article, as stated in the Indictment.

During the proceedings, the defense also presented evidence by the examination of the expert witness Mile Mątijević, doctor of law, with regard to the organization and role of the RS Ministry of the Interior during 1992, its relationship with the RS Army, and rights and obligations of guards. During the oral presentation of his finding and opinion at the main trial held on 4 September 2008, this expert witness pointed out that in 1992 the Zvornik Public Security Station had three organizational units, while the structure of employees was reinforced by engaging members of the reserve forces. Formally and legally, the position of reserve police officers was the same as the position of regular police officers. The expert witness also pointed to the problematic security situation during 1992, caused by the presence of a large number of paramilitary formations in the area of Zvornik. By this expert evaluation, the defense tried to prove that the guards in the buildings of the Misdemeanor Court and DP *Novi izvor* were members of the reserve police forces and that they did not have an adequate degree of training to oppose and/or prevent unauthorized entry of the paramilitary into the prisons and maltreatment of the prisoners. This expert witness was also supposed to confirm that the accused Sreten Lazarević was not superior to the other guards, because he did not have appropriate education, and that there is not a single piece of documentary evidence which would corroborate these assertions. The Panel has evaluated the finding and opinion of this expert witness and it finds that it portrays, to a large extent, the objective situation in the structures of the RS Ministry of the Interior at the time relevant to the Indictment, as well as the general security situation at the time of the commission of the criminal offenses of which the accused have been found guilty. However, exactly this witness claims that the accused, as reserve police officers and guards, were aware of their obligations, which primarily included providing security for the prisoners, prevention of flight, and the prevention of rebellion and incidents. Hence, the accused knew that they were obliged to prevent the entry of paramilitary formations which abused the prisoners. Exactly this expert witness stated at the main trial that he considered it logical and justified that the guards, in case of incidents, ask for assistance from the duty officers in the Zvornik Public Security Station, which was located next to the prison. He specifically said: *"a guard could ask the commander or the chief for assistance if an attack was expected or if someone threatened him"*, and, according to him, the Public Security Station had between 20 and 30 police members at that time. Hence, the defense expert witness also does not exclude the possibility of offering resistance to unauthorized entry of paramilitary formations by the guards, which will be explained in more detail in the next part of the Verdict.

In conclusion, the Trial Panel invokes Article 6(3) of the CPC BiH[15] and Article 6 of the European Convention on Human Rights[16], which stipulate that no accused person is bound

[15] Article 6(3) of the CPC BiH states that "the accused shall not be bound to present his defense or to answer questions posed to him".

[16] Although it is not specifically stated under Article 6 of the European Convention on Human Rights, the European Court of Human Rights considers that the right to remain silent and the right not to incriminate oneself are generally recognized international standards which are the core of the principle of a fair trial under Article 6(1) of the Convention. These rights are closely related to the principle established under Article 6(2) that everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law. See *Saunders v. the United Kingdom* (Application 19187/91), Judgment dated 17 December 1996 (1997); R. v. *Director of Serious Fraud Office, ex parte Smith*, 3 WLR 66 (1992).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

to testify against himself. In the present case, each of the accused exercised his right to remain silent and no detrimental conclusions were drawn from the fact that they did not testify.

b) General elements of the criminal offense of War Crimes against Civilians referred to in Article 173 of the CC BiH

The Indictment charges the accused with the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the Criminal Code of BiH, part of which reads as follows:

1. 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....

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

The accused are charged with individual criminal responsibility under Article 180(1) of the CC BiH in conjunction with Articles 29, 30 and 31. In addition, the accused Sreten Lazarević is charged with criminal responsibility under Article 180(2). Before it determines the individual responsibility of the accused and superior responsibility for the mentioned criminal offenses, the Trial Panel will first establish the existence of the general elements required for the existence of the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) of the CC BiH.

Hence, in order to prove the charges of War Crimes against Civilians, the Prosecutor is obliged to first establish the *chapeau*, or general, elements of such a criminal offense, namely:

1) The violation must constitute an infringement of a rule of international humanitarian law (added as an element to Article 173 of the CC BiH);
2) The violation must take place during an armed conflict, whether internal or international;
3) The crime must be committed against persons taking no active part in the hostilities (an element added to Common Article 3 of the Geneva Convention);
4) There must be a nexus between the acts of the accused and the armed conflict.

- <u>Violation of international humanitarian law</u>

The charge of inhuman treatment as a violation of the laws and customs of war in the present case is based on Article 173 of the CC BiH in conjunction with 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

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

international customary law,[17] and that all the acts enumerated in the Convention constitute serious violations of international humanitarian law.[18] As such, they entail individual criminal responsibility.[19] Accordingly, the Trial Panel concludes that the commission of the mentioned criminal acts constitutes violations of international law, whereby a general requirement referred to in Article 173 of the CC BiH has been satisfied.

- Existence of an armed conflict

Article 173 of the CC BiH stipulates that the criminal offense must be linked to a violation of rules of international law in time of armed conflict. Given that the Panel has established that the acts of the accused satisfy the elements of violating the rules of international law, namely Article 3 of the Geneva Convention, in that respect the Panel notes that many courts have concluded that this article is applicable not only to internal conflicts but also to conflicts of an international character.[20]

However, the Court has not dealt with the establishment of the character of the armed conflict, for which in the present case it has been established that it took place in BiH at the time relevant to the Indictment, since Article 173 of the CC BiH does not require that the character of the armed conflict be established.

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 of the Geneva Conventions, the nature of this armed 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 responsibility of the person breaching the rule.

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

---

[17] *Tadić* Jurisdiction Decision, paragraph 89; *Čelebići* Appeal Judgment, paragraph 143.

[18] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment dated 3 March 2000 (*Blaškić* Trial Judgment), paragraph 176.

[19] *Čelebići* Appeal Judgment, paragraphs 153-174, in particular paragraph 167. The Trial Panel notes that the provisions of the Criminal Code of SFRY, which were adopted by Bosnia and Herzegovina in April 1992 (Criminal Code of SFRY, 1990 ed., Article 142-143), established the jurisdiction of the Bosnian courts over war crimes committed at the time of war, armed conflicts or occupation, drawing no distinction between internal and international armed conflicts. Thus, the accused in the present case can be held criminally responsible under the national law for the crimes alleged in the Indictment.

[20] *Prosecutor v. Delalić et al*, case number IT-96-21-A, Judgment dated 20 February 2001, paragraphs 140-152, in particular paragraph 147. See also *Prosecutor v. Halilhasanović et al*, IT-01-47-AR 72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paragraph 13.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

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.

What ultimately distinguishes a war crime from a purely domestic offence 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 perpetrators acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that the acts were closely related to the armed conflict.

The Trial Panel has heard extensive witness testimonies and inspected the presented material documentation, such as the Decision of the Presidency of the Republic of Bosnia and Herzegovina (R BiH) declaring the imminent threat of war, dated 9 April 1992, and the Decision declaring the state of war, dated 20 June 1992, the Order declaring general public mobilization in the territory of the Republic of Bosnia and Herzegovina, Official Gazette of R BiH, number 7/92, dated 20 June 1992, as well as the documents, reports and witness statements.

Based on the evidence presented, the Panel concludes that at least from April 1992 to March 1993, there was an armed conflict between the forces of the Army of Bosnia and Herzegovina and the Army of RS in the area of the Municipality of Zvornik. In early April 1992, the Bosnian Serbs started erecting road barricades around Zvornik, effectively isolating it, and there were rumors among the Muslim population that an attack on Zvornik was being prepared. In early April of that year, as the general political and security situation worsened, the BiH Presidency declared a "state of imminent war danger". These facts were established through the testimonies of Ahmet Omerović, Ramis Smajlović, Samir Pezerović, Nurija Nuhanović, Admir Hadžiavdić, protected witness A, the defense witnesses Nedo Lukić, Spomenka Stojkić, Sredo Vuković, Vlado Delić, Ismet Ibrahimović, Asim Banjanović, the established facts number 1-8, as well as abundant documentary evidence tendered by the Prosecutor.

Various paramilitary units also played an important role in the armed conflict in the Zvornik municipality, as well as in the entire Bosnia and Herzegovina. The Trial Panel has been given enough information about these groups, based on which a conclusion has been drawn that their presence was evident in and around Zvornik. Among the most notorious units in the Zvornik municipality were members of the *Gogić* unit from Loznica, the *Šešelj* people from Niš, and members of *Žute ose*. These units were mainly "composed of criminals, persons without character and morals, people who had no positive characteristics", as they were described by the defense witnesses Nedo Lukić, Sredo Vuković and Vlado Delić. The Panel will explain the participation of members of paramilitary formations in the arrest and abuse of the prisoners on the premises of the Misdemeanor Court and the building of *Novi izvor* in the part of the Verdict dealing with the criminal responsibility of the accused.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Hence, it was indisputably established during the proceedings that the internal armed conflict existed in the area of the Zvornik Municipality, but also in the wider area, whereby another general element of the existence of the criminal offense at issue is satisfied.

- Persons taking no active part in hostilities under Common Article 3 of the Geneva Convention

Common Article 3 of the Geneva Conventions requires the Prosecution to prove that a victim of the committed crimes was a person taking no active part in the hostilities at the time when the crime was committed.[21]

The specific situation of the victims at the moment when the crime was committed must be taken into account in determining their protection under Common Article 3 of the Geneva Conventions. Accordingly, it is necessary to establish in each particular case whether a person against whom the offense was directed enjoyed protection under this Article. Because of the Article's wide-ranging application during hostilities, the group of protected individuals within the terms of Common Article 3 includes, among others, all of those individuals who, at the time, took no active part in hostilities and who found themselves engulfed in the violence of war.[22]

During the trial, based on the testimonies of the examined witnesses, the Trial Panel has indisputably established that all the persons who were deprived of liberty and imprisoned on the premises of the Misdemeanor Court and the building of DP *Novi Izvor*, at the moment of their arrest and imprisonment, enjoyed protection in accordance with Common Article 3 of the Conventions. The reason for this is that these persons were arrested while they were performing their daily work, or while they were in flight together with other inhabitants. None of the arrested persons was uniformed or armed, or in any way actively participated in the hostilities between the parties to the conflict.

During the proceedings, the defense challenged the status of civilians, stating that some of the injured parties were members of the Army of BiH at the time of unlawful detention. In order to corroborate the foregoing, within its evidence, the defense presented the document of the Federal Ministry of Veterans and Disabled Servicemen of the Defense War of Liberation, number 07-03-52-2/08, dated 11 September 2008, delivering the documentation pertaining to the recognition of participation in the BiH Army units for Ramis Smajlović, Fahrudin Memić, Alija Buljubašić, Fadil Smajlović and Samir Pezerović. The participation was recognized to the mentioned persons mainly from 8 April 1992, which is taken as the beginning of armed conflicts in the territory of Bosnia and Herzegovina. The defense witness Džemail Isić explained in his testimony the method of calculating the individual's participation in the units of the Army of BiH. This witness claimed that the Muslim population was not militarily engaged during the relevant period. There was a kind of a civilian sector of the territorial defense, which functioned at the level of village guards. Those people did not have heavy weapons; they possessed hunting rifles or made improvised devices to protect themselves from potential danger. This witness also

---

[21] *Čelebići* Appeal Judgment, paragraph 420

[22] *Prosecutor v. Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Štela"*, Case No. IT-98-34-T, Judgment dated 31 March 2003 (*Naletilić and Martinović* Trial Judgment), paragraph 229. See also *Blaškić* Judgment, paragraph 177, citing *Tadić* Judgment, paragraph 615

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

confirmed that there was a Crisis Staff in the local community Glumine, whose president was Ramis Smajlović from 1991 until the end of May 1992; however, his activity mainly included coordination and establishment of positive relations with the Serb neighbors. In relation to the foregoing, this witness further explained the status of Ramis Smajlović, which the defense challenged during the proceedings, claiming that he also knows that Smajlović joined the units of the Army of BiH when he went to Tuzla after the exchange; however, the years of military service were retroactively applied to all persons.

Concerning these assertions, the Court also accepted the defense motion to admit into evidence the facts from the ICTY Judgment Prosecutor v. Hadžihasanović and Kubura and from the Judgment Prosecutor v. Kordić and Čerkez, from which it indisputably follows that the armed forces of the Army of BiH were established on 23 June 1992 by the Decision of the Presidency of RBiH, and after that date the Territorial Defense of RBiH which existed until that time was renamed the Army of BiH.

During the proceedings, the status of the witness Fahrudin Memić at the moment of deprivation of liberty was particularly disputable, since he was the only person who used a weapon on that occasion, in the way that he fired a bullet at random at the moment when two armed and uniformed persons came in front of his house.

The Panel considered these allegations from the defense when determining the status of the persons who were detained and kept in the building of the Misdemeanor Court and DP *Novi izvor*, and it finds that they enjoyed protection in accordance with Article 3 of the Geneva Conventions. Here one should bear in mind that a person's formal belonging to a certain armed formation does not exclude his/her right to protection at the time when that person does not actually take active part in the hostilities. At the moment of their arrest, none of the detained persons was uniformed, armed or was in the area of combat activities, save for the isolated case of Fahrudin Memić, who possessed a pistol and a permit for it. To wit, on the relevant day, wearing civilian clothes, he came home, intending to take food for his family and inhabitants with whom he stayed in a forest, where they fled due to a general worsening of the security situation. When armed and uniformed members of the paramilitary unit *Bijeli orlovi* came in front of his house, the witness Memić did fire a bullet at random in the direction of the entrance door. However, if one bears in mind the character of members of paramilitary formations and their notorious reputation, then it is justified to conclude that such behavior of the witness was more of an act of self-defense, than the participation in the armed conflict against the Serb forces.

The relevant facts which indisputably indicate that these persons were civilians are that, at the moment of their capture, these persons were not in the area of combat activities, and they were not uniformed or armed, therefore "it also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."[23] Hence, it is indisputable that all the persons who were deprived of liberty and detained on the premises of the Misdemeanor Court and the building of DP *Novi izvor* enjoyed protection pursuant to Common Article 3 of the Geneva Convention.

[23] ICTY, Blaskic case, Trial Chamber Judgment dated 3 March 2000, Para 214.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

- Nexus between the accused and the armed conflict

In addition to the existence of an armed conflict, the Prosecution must establish a sufficient link between the alleged acts of the accused and the armed conflict.[24] The armed conflict need not have been causal to the commission of the crime charged against them, but it must have played a substantial part in the perpetrator's ability to commit that crime.[25] It is also not required that the actual armed hostilities were taking place in the Zvornik municipality during the time period when the acts alleged in the Indictment occurred for the norms of international humanitarian law to apply. It is sufficient that the alleged crimes were closely related to the hostilities occurring in Zvornik or in other parts of the territories controlled by the parties to the conflict.[26]

After the armed takeover of Zvornik and the surrounding villages by the Serb forces, there were mass arrests of men fit for military service, who were initially detained at the *Ekonomija* Farming Cooperative and later in the buildings of the Misdemeanor Court and DP *Novi Izvor*, located next to tha Public Security Station (SJB) Zvornik. The assigned guards at those facilities were the accused Sreten Lazarević, Dragan Stanojević, Slobodan Ostojić, as well as a certain Milan Mitrović, Sveto Bajić, Dragan Stjepanović, Srećo Ikonić, Dragan Petrović, and Jovo (last name unknown). The witness Sredo Vuković confirmed that the accused Mile Marković came to the position of a guard only after the prisoners were transferred from *Ekonomija* to the Misdemeanor Court building.

It is indisputable that during the relevant period, the accused were members of the reserve police forces attached to the Public Security Station Zvornik, and in that capacity they were engaged as guards in the Misdemeanor Court building and later in the building of DP *Novi Izvor*, which, even before the Decision on the prison establishment was issued, were the main detention facilities for non-Serb civilians from the Zvornik Municipality. The identification of the accused is not disputable. There were three guards in the prison with the same first name of Dragan (Dragan Stanojević, Dragan Petrović and Dragan Stjepanović). The detainees referred to and addressed two of them by the nicknames of *Big Dragan* and *Little Dragan*. Based on the statements by witnesses-injured parties, corroborated by the statements by witness Sredo Vuković, the Court established that Dragan Stanojević, son of Drago, was referred to as *Big Dragan*, while Dragan Stjepanović, son of Vojo, was referred to as *Little Dragan*, both of them being from Ročevići. Each of the accused was involved in the operation of the detention facility, and it has been established that the accused Sreten Lazarević acted as *de facto* deputy prison warden, while the offenses charged against the accused were committed during the performance of their official duties as guards in the prison.

The averments stated by the defense for the accused Slobodan Ostojić that the accused was engaged in compulsory work service are untenable and were not corroborated by the evidence presented. It is not possible to establish the exact date when the accused Ostojić was assigned to compulsory work service based on the Decision on the assignment of the accused to compulsory work service in the municipal institute of urbanism and town planning in Zvornik. Also, the Panel did not accept the statement by the defense witness

[24] *Čelebići* Trial Judgment, paragraph 193
[25] *Kunarac* Appeal Judgment, paragraph 58
[26] *Tadić* Jurisdiction Decision, paragraph 70

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Spomenka Stojkić that the accused Slobodan Ostojić left the prison 10-20 days before her (the witness got out of the prison on 31 August 1992) and took up his compulsory work obligation, since the witness obviously had a privileged position in the prison and wanted to help all the accused. The witness said "they were all great to me and I take this opportunity to thank them before this Court." Also, this witness said she was sure that no third persons, except for Major Marko Pavlović, ever visited the prison, and that the prisoners were not mistreated by anyone, although the Panel has drawn a completely different conclusion based on the presented evidence. It is equally illogical that the witness, after the lapse of 16 years, should be able to remember the period when Slobodan Ostojić left to take up his compulsory work service, given that it was a rather minor event from the witness' perspective. Supporting this averment is the fact that it is visible from the list of salary payment for August 1992, issued by the Serb Municipality of Zvornik, that Slobodan Ostojić, listed under No. 9, was paid his salary for the month of August 1992.

Therefore, based on the abovementioned findings, the Trial Panel concludes that the general *(chapeau)* elements of War Crimes against Civilians pursuant to Article 173 of the CC BiH were proven beyond a reasonable doubt.

Under all counts of the Indictment, the accused have been charged with participating in the intentional infliction of severe physical or mental pain or suffering (torture) upon the unlawfully detained civilians at the time of armed conflict, in violation of the rules of international law. However, the Panel has found that the acts of the accused may be qualified as inhuman treatment under Article 173(1)(c) of the CC BiH, but before explaining the nature of the criminal acts, the Court will briefly refer to unlawful detention of civilians in the premises of the Misdemeanor Court and DP *Novi Izvor*, where the criminal offenses at issue were committed.

e) Unlawful detention of civilians

All the evidence presented clearly indicates that the deprivation of liberty of civilians and bringing them to the premises of the Court and *Novi Izvor* was arbitrary and unlawful. Even the witness Sredo Vuković, who had the role as the warden in the prison, does not know who arrested people, how many of them were in the prison, who the people who were brought there were, or the reasons why they were arrested, but he assumes that they were kept there for the purpose of exchange. This witness claims that the establishment of the prison, arrests and the bringing of persons, as well as their questioning was coordinated by the management of the Zvornik Public Security Station. However, he also stated that not a single decision on the detention of any person was issued at that time, because, in his opinion, there was no need for that in war conditions. He personally never saw such a document, while persons who brought prisoners never handed over any accompanying documentation to the guards or said anything verbally. Hence, there were no written documents stating reasons for the deprivation of liberty of a person. Given that he is a professional police officer, he knows the procedure which must be followed in regular detention of persons, but he held that the same rules of procedure towards persons deprived of liberty do not apply in times of conflict.

The manner of bringing persons to the prison was also confirmed by the witness Dragan Petrović, who was one of the guards in the prisons in the Court and *Novi Izvor* and who

Downloaded from worldcourts.com. Use is subject to terms and conditions. See www.worldcourts.com/terms.htm

explicitly claimed that persons were brought to the prison from the police station, noting that persons who brought them never handed over to the guards written decisions justifying the detention of persons in the prison nor did they give any verbal explanations as to the reasons for the deprivation of liberty of those persons. He only assumes that they were questioned in the Zvornik Public Security Station and he does not know whether they were presented with any statements which they were supposed to sign. He also explained that taking persons out of the rooms or their transfer to another location could take place exclusively in accordance with the order issued by the Ministry of the Interior, and none of the guards was allowed to do so on his own initiative. Also, a decision to detain civilians or release them could be issued only by the management of the Ministry of the Interior.

However, the witness Vlado Delić, who was an inspector for property offenses in 1992 and whose office was located in the building of the Zvornik Public Security Station, stated that his job did not include visiting prisons or centers where Muslim civilians were detained. He is also not aware that an official prison organized by the Ministry of the Interior existed in Zvornik at that time. On one occasion he visited the prisoner Sejfo Čirak in the building of *Novi Izvor* and then he saw for the first time that people were detained in the building, which he found to be strange, since at that time no one arrested or detained people in Zvornik, and Sejfo explained that to him saying that actually paramilitary formations simply "picked him up" and brought him there.

Hence, the detained civilians were never informed about the reasons for their arrest or detention in the prison and they were never presented with any document on a legal basis for their deprivation of liberty. Thus the witnesses Nurija Nuhanović, Admir Hadžiavdić and Samir Pezerović claim that they were never told why they were detained, but they concluded that that happened "because they were Muslims". The other witnesses who were detained in the Court and *Novi Izvor* described that in a similar manner. These detainees were never allowed to receive visits from their relatives, while only those who were at the so called "mercy of the guards" received aid in the form of parcels and medicines which friends or family would possibly send, which was confirmed by a large number of the witnesses.

The non-Serb detainees in the Misdemeanor Court were locked in their rooms, while some were taken out to perform labor, which was allegedly on a voluntary basis, but all of them stated that they volunteered to go to perform labor knowing that in that way they would receive additional and much needed food, and sometimes also a mat and clothes, and that they would avoid daily maltreatment.

Many detainees were beaten and abused in other ways, so that at any time at least half of the detainees had visible traces of beatings. Hence, it is clear that an atmosphere of fear prevailed at the detention facilities, inspired by the constant maltreatment of the detainees. The former detainees who testified before the Trial Panel described in detail acts of physical violence and mental abuse which they suffered or witnessed in the prison during their detention. Many of them even today feel the physical and psychological traumas because of these experiences.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

d) Torture and Inhuman Treatment as a War Crime against Civilians

Furthermore, based on the evidence presented, the Court has concluded that the accused committed the criminal offense referred to in Article 173(1)(c) of the CC BiH by the criminal acts of which they have been found guilty, in the manner that their acts constitute inhuman treatment, and not torture, which is also stipulated under subparagraph (c) of the same Article, given that the acts committed by the accused during the relevant period do not reach the standard required for torture.

To wit, our legislator gives a brief definition of this concept under Article 172(e). However, the law on torture is well settled under the customary international law and has been defined by the jurisprudence of the ICTY and ICTR. For the crime of torture to be established as a war crime, the following elements must be satisfied:

i. There must be an act or omission inflicting severe pain or suffering, whether physical or mental;
ii. The act or omission must be intentional;
iii. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[27]

Article 173(1)(c) of the CC BiH requires that the pain or suffering be "severe", a standard which is very contextual. In particular, the definition of torture as causing "severe" pain or suffering must be contrasted with the lesser crimes of inhuman treatment, cruel treatment and other inhumane acts, which require "serious" pain or suffering. While the precise threshold between "serious" and "severe" pain is not defined, it is nonetheless clear that torture is reserved for a more limited, more atrocious set of conduct. For example, the European Court of Human Rights concluded that a variety of different forms of deliberate mistreatment rise to the level of torture, including: "Palestinian hanging", i.e. being strung up by arms;[28] application of "falaka" ("falanga") and fracture of the sternum,[29] beatings with rifles that result in brain damage and permanent loss of bodily functions.[30]

There can be no doubt that there is almost universal condemnation of acts of both torture and inhuman treatment. Article 173(1)(c) of the CC BiH, the Geneva Conventions and the United Nations instruments proscribe inhuman treatment.[31] However, none of the aforementioned instruments have attempted to fashion a definition of inhuman treatment. The Prosecutor takes the position that acts which violate the basic principle of humane treatment and particularly the respect for human dignity constitute inhuman treatment.[32] It

[27] *Kunarac*, Appeal Judgment, paragraph 142
[28] *Aksoy v. Turkey*, 23 E.H.R.R. 553 (1996)
[29] *Salman v. Turkey*, Judgment of 27 June 2000
[30] *Ilhan v. Turkey*, Jugment of 27 June 2000
[31] Article 5 of the Universal Declaration of Human Rights; Article 7 of ICCPR; Article 3 of the European Convention; Article 5 of the African Charter on Human and Peoples' Rights; Article 5(2) of the American Convention on Human Rights; Article 6 of the Inter-American Convention; Article 16 of the Torture Convention; and Article 3 of the Declaration on Torture.
[32] Prosecutor's Closing Argument, p. 18.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

falls to this Trial Panel to identify the essential meaning of the offence as applied to the factual findings.

Article 3 of the European Convention on Human Rights (ECHR) determines that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". In *Ireland v. United Kingdom*, it is stated 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".[33]

The European Court and the European Commission of Human Rights have both developed a substantial body of jurisprudence addressing the various forms of ill-treatment, such as torture, inhuman and degrading treatment, prohibited under Article 3 of the ECHR.[34] For example, in *Tomasi v. France*, the European Court made an explicit finding of inhuman treatment amounting to a violation of Article 3 when the applicant had been slapped, kicked, punched, given forearm blows, made to stand for long periods without support, had his hands handcuffed behind his back, been spat upon, made to stand naked in front of an open window, deprived of food and threatened with a firearm. The European Court held that the large number of blows inflicted on Mr. Tomasi and their intensity were two elements which are sufficiently serious to render such treatment inhuman and degrading.[35] The Court has further held treatment to be "inhuman" if it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering.[36]

In addition, the Human Rights Committee ("the Committee") found that being forced to stand blindfolded and bound for 35 hours, while listening to the cries of other detainees being tortured, being threatened with punishment, and being forced to sit blindfolded and motionless on a mattress for many days, constituted inhuman treatment.[37] Also, when a person is subjected to ill-treatment during imprisonment such as truncheon blows to the knees, threats with knives, kicks while lying on the ground, repeated beating with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to head and the body, amounts to cruel and inhuman treatment.[38]

It is clear that the various international adjudicative bodies that have considered the application of the offence of inhuman treatment have defined it in relative terms taking into account all the factual circumstances, 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. Accordingly, this Panel considers all the circumstances of the alleged situations, including the personal circumstances of the victim.

---

[33] *Ireland v. United Kingdom*, Judgment, Application No. 5310/71, 18 January 1978, paragraph 162
[34] *A v. United Kingdom*, Judgment 23 September 1998, ECtHR, paragraph 20 (citing: *Castello-Roberts v. United Kingdom*, Judgment of 25 March 1993, 247-C ECtHR (Ser. A) 1993).
[35] *Tomasi v. France*, 13 EHRR 1, 1993, paragraph 115
[36] *Lorse and Others v. The Netherlands*, Judgment, Application No. 52750/99, 4 May 2003, paragraph 60
[37] *Soriano de Bouton v. Uruguay*, No. 37/1978. Referenced in *supra* note 12, p. 163
[38] *Leslie v. Jamaica*, No. 564/1993, paragraph 9.2.; *Bailey v. Jamaica*, No. 759/1997, paragraph 9.3.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Having considered the meaning of inhuman treatment in the context of international practice, the Trial Panel finds that inhuman treatment is an intentional act or omission, that is, an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity or violation of bodily integrity.

7. Criminal responsibility of the accused

Before presenting the facts and circumstances based on which individual criminal responsibility of each of the accused was established, the Panel will present the reasons by which it was guided when establishing the existence of command responsibility of the accused Sreten Lazarević in the situations when he did not act as a co-perpetrator or aider and abettor.

a) General elements of command responsibility

In addition to being charged with individual criminal responsibility based on personal participation in criminal conduct, the Indictment charges Sreten Lazarević with criminal responsibility on the basis of his position as superior at the Misdemeanor Court and DP *Novi Izvor*.

The concept of command responsibility is explicitly recognized in Article 180(2) of the CC BiH, which states that "*the fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*". In addition, the idea that persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law.

Before turning to the substantive discussion of the applicable law under the doctrine of command responsibility, the Trial Panel first acknowledges that it accepts, in accordance with international law, that individuals in positions of authority, whether within civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.

Although Article 180(2) of the CC BiH does not provide any guidance as to what is required for a superior to be criminally responsible for the acts of his subordinates, the jurisprudence of this Court, adopting the international standards, sets the following criteria:

1. The existence of a superior-subordinate relationship between the commander or superior and the alleged principal offender;
2. The superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

3. The superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

1. Requirements of superior-subordinate relationship

The first condition is to establish the existence of a superior-subordinate relationship, whether direct or indirect, between the superior (the accused) and the subordinate who is alleged to have committed a crime at issue. It is well established that, under international law, a hierarchical relationship may exist by virtue of the accused's *de facto* authority over his subordinates as well as by virtue of his *de jure* position of superiority.[39] Such relationship need not be formalized prior to the commission of a crime[40] and a tacit or implicit understanding between a commander and his subordinates as to their positioning *vis-a-vis* one another is sufficient.[41]

The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.[42] Having control means having *effective* authority over subordinates.[43] In other words, to be held liable for crimes of subordinates, it must be shown that at the time the crimes were committed, the superior, whether *de jure* or *de facto*, had *effective control* over his subordinates who have committed the crimes.[44] Thus, even in cases where the commander had *de jure* authority, the Prosecutor still has to prove beyond a reasonable doubt that this superior exercised effective control over his subordinates.[45]

According to the jurisprudence of the international tribunals, "effective control" means the material ability to prevent offences or punish the principal offenders.[46] The *Blaškić* Appeal Chamber held that "the indicators of effective control are more a matter of evidence than of substantive law"[47] and must be determined on the basis of the evidence presented in each case. In this respect, factors indicating the accused's authority and his effective control may include the official position held by the accused, his capacity to issue orders, whether *de jure* or *de facto*, the procedure of appointment, the position of the accused within the

[39] *Čelebići* Trial Judgment, paragraph 370, confirmed on appeal; *Čelebići* Appeal Judgment, paragraphs 205-206. The Court held that formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander. See also *Kordić and Čerkez* Trial Judgment, paragraphs 405-406.

[40] *Čelebići* Appeal Judgment, paragraph 193; *Prosecutor* v. *Krnojelac*, Case No. IT-97-25-T, Judgment dated 15 March 2002 (*Krnojelac* Trial Judgment), paragraph 93; *Prosecutor* v. *Blaškić*, Case No. IT-95-14-T, Judgment dated 3 March 2000 (*Blaškić* Trial Judgment), paragraph 301; *Kordić and Čerkez* Trial Judgment, paragraph 424.

[41] *Prosecutor* v. *Kunarac* et al, Case No. IT-96-23-T&IT-96-23/1-T, Judgment dated 22 February 2001 (*Kunarac* Trial Judgment), paragraph 397.

[42] *Čelebići* Trial Judgment, paragraph 377, *Prosecutor* v. *Sefer Halilović*, Judgment, Case No. IT-01-48-T, dated 16 November 2005 (*Halilović* Trial Judgment), paragraph 57

[43] *Čelebići* Trial Judgment, paragraph 378, confirmed on appeal, *Čelebići* Appeal Judgment, paragraphs 256, 265-266.

[44] *Aleksovski* Appeal Judgment, paragraph 76; *Stakić* Trial Judgment, paragraph 459. It is this relationship of obedience and control (not influence) which justifies holding a superior liable for subordinate relationship.

[45] *Hadžihasanović* Appeal Judgment, paragraph 21, dated 22 April 2008.

[46] *Halilović* Trial Judgment, paragraph 58, citing *Čelebići* Appeal Judgment, paragraph 256.

[47] *Blaškić* Appeal Judgment, paragraph 69.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

military structure and the actual tasks performed.[48] It is important to emphasize that the fact that the accused had ability to give orders might be evidence relevant to the determination as to whether there was a superior-subordinate relationship but is not in itself conclusive of whether that person exercised effective control over the perpetrator such that he may be held responsible for failing to prevent or punish crimes committed by the perpetrator.[49]

Since command responsibility is predicated on a superior's power to control acts of his subordinates, a degree of control that falls short of the threshold of effective control is insufficient to hold a superior criminally responsible. "Substantial influence" as a means of exercising command responsibility does not have the standing of a rule of customary international law to impose criminal liability.[50] Whether a superior has the necessary power or authority to be criminally responsible for not punishing or preventing his subordinates from acting may be assessed on a case-by-case basis, taking into account the cumulative effect of the accused's various functions.[51]

2. Requirements of knowledge of crime

The second requirement is the knowledge of the superior that his subordinate was about to commit or had committed a crime. Superior responsibility is not a form of strict liability.[52] It must be proved either 1) that the superior had actual knowledge that his subordinates were committing or about to commit crimes or 2) that he had in his possession information which would at least put him on notice of the risk of such offences.[53]

Actual knowledge has been defined as "the awareness that the relevant crimes were committed or were about to be committed".[54] Actual knowledge cannot be presumed but must be established by direct or circumstantial evidence.[55] Evidence such as written reports informing the commander of crimes or testimony of witnesses establishing that the accused knew of the crimes, can establish such knowledge. It is not important, however, how the superior acquired the information so long as it is sufficient to make him aware of the unlawful actions.[56] But in cases where the superior exercises more informal type of authority, the threshold required to prove knowledge is higher than for those operating within a highly disciplined and formalized chain of command with established reporting and monitoring systems.[57]

The imputed form of knowledge, i.e. "had reason to know" requires that the commander possessed some general information which put him on notice of the likelihood of unlawful

---

[48] *Kordić and Čerkez* Trial Judgment, paragraphs 418-424.
[49] *Kordić and Čerkez* Trial Judgment, paragraphs 416, 419-424; *Kunarac* Trial Judgment, paragraphs 396-397; *Čelebići* Appeal Judgment, paragraphs 193 and 197; *Blaškić* Appeal Judgment, paragraphs 68-69.
[50] *Čelebići* Appeal Judgment, paragraph 266.
[51] *Orić* Trial Judgment, paragraph 313; *Brdanin* Trial Judgment, paragraph 277.
[52] *Čelebići* Appeal Judgment, paragraph 239.
[53] *Čelebići* Appeal Judgment, paragraphs 223 and 241; *Krnojelac* Trial Judgment, paragraph 94.
[54] *Kordić and Čerkez* Trial Judgment, paragraph 427.
[55] *Čelebići* Appeal Judgment, paragraph 241, *Kordić* Trial Judgment, paragraph 427.
[56] *Blaškić* Trial Judgment, paragraph 308; *Aleksovski* Trial Judgment, paragraph 80; *Krnojelac* Trial Judgment, paragraph 94.
[57] *Kordić* Trial Judgment, paragraph 428, *Orić* Trial Judgment, paragraph 320.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

acts by his subordinates[58]. *Bagilishema* Appeal Chamber distinguished between the information which the accused may have had about the general situation in the relevant area (and which is not sufficient for him to be held responsible as a commander) and general information which put him on notice that his subordinates might commit crimes (which is sufficient for the commander to be found responsible for the acts of his subordinates, given that all other conditions are met).[59] Accordingly, the mental element for "had reason to know" is determined only by reference to the information in fact available to the superior.[60] It is sufficient for the information to be of a nature which, at least, put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were or were about to be committed.[61] Thus, the mere awareness of a commander of the risk of a crime being committed by his subordinates is not sufficient to trigger his legal responsibility. It must be shown that the commander was aware of the substantial likelihood that a crime would be committed as a result of his failure to act and that, aware of that fact, he failed to do anything about it.[62] In other words, the information in his possession must be sufficiently clear or alarming to indicate the likelihood of serious criminal offences having been or about to be committed and to trigger the commander's duty to investigate the matter further.[63]

It is also insufficient to show that the accused knew or had reason to know, in general terms, that crimes, regardless of their gravity and similarity to those being charged against him, were about to be committed or were committed by his subordinates. It must be established that the notice which the accused had received was notice of crimes of the same or similar nature with which he is now charged,[64] i.e. the accused must be shown to have had information in his possession which put him on notice that crimes of similar gravity and similar nature as those with which he is charged had been or were about to be committed and not just some general information that some of his subordinates might be involved in criminal activities without more details.[65] It is insufficient to show that the accused knew or had reason to know, in general terms, that crimes, regardless of their gravity and similarity to those being charged against him, were about to be committed or were committed by his subordinates. Nor can an accused be held responsible because he should have known of such crimes, i.e. for failing to seek and obtain information which would have put him on notice that crimes had been committed or were about to be committed.[66]

---

[58] *Kordić* Trial Judgment, paragraph 437. The commander does not need to actually possess information but that he was provided with it and that it was available to him.

[59] *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-1, Judgment dated 3 July 2002 (*Bagilishema* Appeal Judgment), paragraph 42.

[60] *Čelebići* Appeal Judgment, paragraphs 238-239.

[61] *Čelebići* Appeal Judgment, paragraph 223, citing *Čelebići* Trial Judgment, paragraphs 383 and 241.

[62] *Blaškić* Appeal Judgment, paragraphs 41-42; *Kordić and Čerkez* Trial Judgment, paragraph 437; *Čelebići* Appeal Judgment, paragraph 238.

[63] *Kordić and Čerkez* Trial Judgment, paragraph 437; *Čelebići* Appeal Judgment, paragraph 238.

[64] *Krnojelac* Appeal Judgment, paragraph 155. The Appeal Chamber pointed out that it was insufficient for the accused to have known that his subordinates had committed acts of beating to convict him of the crime of torture.

[65] *Krnojelac* Appeal Judgment, paragraphs 155, 178-179. The commander could not be said to have known or have had a reason to know that a given crime had been or was about to be committed because he may have known or have had reason to know that a less serious offence or one which does not contain all of the elements of the first one had been or was about to be committed.

[66] *Čelebići* Appeal Judgment, paragraphs 226-239, explicitly rejecting Prosecution's submissions to the contrary.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Knowledge, actual or circumstantial, may not be presumed from a commander's status alone.[67] In the absence of direct evidence of knowledge, a reasonable inference that the commander knew or had reason to know may be drawn from evidence available and it must be established beyond reasonable doubt.[68] It is not sufficient to simply demonstrate that the commander was aware that there was a risk that his subordinates could commit crimes because there is always a risk that such crimes could be committed.

3. Requirements of failure to prevent or punish

Thirdly, it must be established that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates.[69] Necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates.[70] Accordingly, what is necessary and reasonable depends primarily on the extent of the commander's actual proven ability to do anything about the crimes that form the basis of the charges.[71]

A commander has a duty to prevent his subordinates from committing the crimes when he knows or has a reason to know that they are about to commit them and also has a duty to punish the perpetrators of crimes when he knows or has reason to know that his subordinates have already committed them.

The duty to prevent rests on a superior at any stage before the commission of a crime by one of his subordinates if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect that such crime will be committed.[72] The duty to punish, however, arises only after the crime has been committed. Depending on the circumstances and commander's proven ability to do so, his "duty to punish" may entail investigating the alleged crimes to establish the facts or reporting crimes to the competent authorities or taking appropriate disciplinary measures against the perpetrators.[73] Hence, deciding upon what measures would be appropriate in a particular case is an evidentiary matter, not a matter of substantive law, and must be decided in light of all the circumstances of the case.[74]

The duty to prevent the commission of a crime arises when the commander knows or has reason to know that a crime is being or about to be committed, while the duty to punish arises when a crime has already been committed. Although the commander is required to take prompt and effective measures to punish or prevent serious offenses such as genocide, crimes against humanity, or war crimes, the measures required of the commander are limited to those which are feasible in all the circumstances which are within his power (the

---

[67] *Čelebići* Appeal Judgment, paragraph 226; *Kajelijeli* Trial Judgment, paragraph 776: While an individual's hierarchical position may be a significant *indicum* that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone.
[68] *Blaškić* Appeal Judgment, paragraph 41.
[69] *Čelebići* Appeal Judgment, paragraph 226; *Krnojelac* Trial Judgment, paragraph 95.
[70] *Blaškić* Appeal Judgment, paragraph 72; *Orić* Trial Judgment, paragraph 327.
[71] *Orić* Trial Judgment, paragraph 327.
[72] *Kordić and Čerkez* Trial Judgment, paragraph 445
[73] *Kordić and Čerkez* Trial Judgment, paragraph 446
[74] *Blaškic* Appeal Judgment, paragraph 72

Downloaded from worldcourts.com. Use is subject to terms and conditions. See www.worldcourts.com/terms.htm

kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior was expected to act).[75] In other words, a superior is not obligated to perform the impossible; his duty is to exercise the powers he has within the confines of those limitations."[76] That a commander failed to take particular steps after crimes have been committed by his subordinates (such as reporting the acts to his superior) is not *per se* conclusive of his failure to abide by his duties.[77] But a commander's failure to take any steps after learning a crime has been committed is certainly a factor that the Panel must consider and evaluate.

Accordingly, when determining whether a commander has adopted all necessary and reasonable measures, the Trial Panel must take into account all the circumstances that could have prevented the commander from doing more than he did (such as insufficient time to take particular measures or achieve a certain result or lack of resources to investigate, or obstructions from superior officers, insubordination of soldiers, etc.).

The law favors holding a commander responsible for the acts of his subordinates when the commander's failure to punish *contributes* to the criminal activity of those under his command. This is because his subordinates can interpret the omission as a sign that he condones, perhaps even encourages, the commission of war crimes.

b) Command responsibility of Sreten Lazarević

In addition to the allegations for being responsible for the direct participation in the inhuman treatment of the civilians, the Indictment charges Sreten Lazarević with the responsibility of the superior pursuant to Article 180 (2) of the BiH CC for the inhuman acts on Count I/6(a) and I/6(b).

Prior to establishing the factual findings regarding the underlying criminal offences the accused is charged with as being criminal responsible as the superior, it is necessary for the Panel to determine if the accused Sreten Lazarević, *inter alia*, held the position of the superior authority in the Misdemeanor Court and DP *Novi Izvor*. It is also necessary to find if the legal criteria for the existence of the criminal responsibility are satisfied pursuant to Article 180 (2) of the BiH CC.

The existence of such position cannot be established only by referring to the formal status that the person enjoyed. The decisive factor is the real possession of power or control over the actions of the inferior. Accordingly, the establishment of the superior responsibility of Sreten Lazarević depends on the factual finding of his authority in the Misdemeanor Court and DP *Novi Izvor*. Therefore, the Panel must establish if the evidence proves beyond reasonable doubt that the accused Lazarević held the position of the Deputy Warden and if the position provided him with the powers to prevent the commission of criminal offences or to punish the perpetrators.

---

[75] *Krnojelac* Trial Judgment, paragraph 95; *Čelebići* Appeal Judgment, paragraph 226; *Kordić and Čerkez* Trial Judgment, paragraphs 441 and 445
[76] *Krnojelac* Trial Judgment, paragraph 95; *Čelebići* Appeal Judgment, paragraph 226
[77] *Blaškić* Appeal Judgment, paragraphs 68, 69 and 72; *Kvočka* Trial Judgment, paragraph 316

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

To the extent to which there was a formal hierarchical structure at the Misdemeanor Court and DP *Novi Izvor*, the witness Sredo Vuković maintained that he was the Warden of both detention facilities during the Indictment period and that the accused Lazarević was his Deputy. In his first statement given on 6 December 2005, Sredo Vuković states that "*I was the commander of the prison and my deputy was Sreten Lazarević*". He stated at the main trial that there was not any change in the structure and hierarchy of the wardens when they moved to the premises of the Court and *Novi Izvor*, thus the Panel concludes that his statement that "*when I was absent, I used to give authorization to Sreten Lazarević to be in the lead of the prison*" applies also to DP *Novi Izvor* and Misdemeanor Court.

In his later statement given on 13 February 2006, the witness Sredo Vuković stated that in April or May 1992 he was appointed the Prison Commander at the first detention facility and he made Sreten his "*replacement*". He states that "*during my absence I was replaced by Sreten Lazarević, who was a reserve member. I chose Sreten as my replacement...*".

In this regard the Defense also presented the documentary evidence, through which it attempted to show that the status of the accused in the prison was equal to the position of other guards. In this regard the payroll of guards was filed indicating that the accused Lazarević received the same amount as others, and the confirmation of the SJB Zvornik /*Public Security Station in Zvornik*/ of 16 September 2008, which reads that the accused Sreten Lazarević never held a managerial posts in the SJB Zvornik. This Panel evaluated the mentioned documentary evidence, however it was indisputably established in the course of the proceedings that an official decision was never made appointing Vuković Sredo the prison warden and Lazarević Sreten his deputy. The mentioned documents were presented also to the Defense Expert Witness Mile Matijević, who averred that a person who did not meet all legal requirements pertaining to qualifications could never be appointed to a managerial post. However, the same expert witness in his introductory report noted that in 1992 a great deficit of staff occurred in this regard, and some unfit persons were appointed to managerial positions, which led to a poor personnel quality in all police structures. It is clear that the written evidence of appointment does not exist, but the evidence presented before this Panel leads to the undisputable conclusion that the accused in the material time *de facto* performed this office.

Numerous witnesses who were detained at the Misdemeanor Court and DP *Novi Izvor* also testified as to the role played there by Sreten Lazarević. Although the witnesses were not in a position to identify his rank precisely, they were unanimous in their conclusion that Sreten Lazarević was the Deputy Warden. The prosecution witnesses explained that the detainees were not officially told what the guards' positions actually were in the prison and that they learned this from the behavior of the guards during their imprisonment. The prisoners drew their conclusions on the basis of what they observed on a daily basis: the attitude of guards, the way the guards treated prisoners and each other. In general, the prisoners regarded Sreten Lazarević as the Deputy Warden, a senior guard who had authority and influence on them and other guards.

While this evidence is relevant to the Trial Panel's consideration in reaching a conclusion that Sreten was Deputy Warden of DP *Novi Izvor* and the Misdemeanor Court, it is not dispositive of the legal issue of whether he had command responsibility. The issue before the Trial Panel is whether the accused had effective control over his subordinates, i.e.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

whether he had the power to issue orders to subordinates and to prevent or punish their criminal acts.

In order to determine whether his acts at the detention facilities demonstrate the exercise of actual superior authority, the Trial Panel now turns to a consideration of the tasks that Sreten Lazarević performed in the prison. The defense witness Dragan Petrović testified that Sreten did the administrative work in running the prison and that the accused reacted to and found solutions to any problems at the prison. Furthermore, the accused spent considerable time in the guard's office where he would take care of the administrative work necessary for running a prison, including ordering food for the prisoners. At least one prisoner referred to that office as "Sreten's office." In addition, in the absence of Sredo Vuković, warden of the prison, Sreten would every morning check the status of the detainees to see if someone was ill. According to the testimony of Alija Buljubašić, this checking on the prisoners every morning was done by the person in charge of the prison, in regard of which he referred to Sreten, which was confirmed by witness Mustafa Halilović who testified that Sreten was the only guard who called for a doctor to examine a prisoner. This evidence indicates that Sreten Lazarević was tasked with assisting Sredo Vuković with overseeing and arranging the daily activities at the DP *Novi Izvor*.

With respect to the position of the warden Sreten Lazarević and his powers in prison, the witness Nurija Nuhanović stated that he knew that Sredo Vuković was the prison warden and that Sreten was his deputy. He found out about this through the conversations with other prisoners. Alija Buljubašić reached the same conclusion on the basis of Sreten's behavior toward other guards, because on one occasion while the transfer of prisoners to Batkovići was organized, the second accused Dragan came and informed the witness not to go anywhere, however after that Sreten arrived to tell the witness that the witness still should go for the exchange, and no comment followed, and based on that, he concluded that after all Sreten was the one issuing orders. The witness Ramis Smajlović draws this conclusion from the fact that Sreten was the only guard who never worked night shifts, while all other guards did, and the witness for the Defense Nenad Jeremić stated that he had never seen Sreten in the company of persons who were taken to the forced labor, which was also confirmed by the witness Mirsad Omerović, who went to work almost every day, and who averred that Sreten Lazarević never secured the prisoners or took them to the forced labor. More specifically, only few prisoners based the information about Sreten's position in prison on their personal impressions, while most of them based that knowledge on the information received from other prisoners, usually from those whom they found there after their arrival, which is the case with the witness Admir Hadžiavdić.

The witness for the Defense Asim Banjanović, referring to Sreten, used the term "*master of the room*". He got this impression because Sreten decided where he would be placed. Finally, this witness also attributes to Sreten the ability to protect the prisoners from beating; thus the Panel believes that this is another confirmation of Sreten's powers and authority to make decisions in *Novi Izvor* and Misdemeanor Court. Even the witness Mustafa Halilović in his diary which he kept while being in custody, on the page where he mentioned the names of all guards, next to the name Vuković Sredo indicated that he was the prison warden, while he mentioned the accused Sreten Lazarević as the deputy.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

The effective control of the accused Sreten Lazarević was also demonstrated when he ordered the guards – the accused to take actions in finding persons and items which were to serve for the alleged attempted escape by Admir Hadžiavdić. As the guards – the accused identified those persons, in the presence of the accused Lazarević they heavily beat the prisoners Smajlović Ramis and Admir Hadžiavdić. The following day, the accused Lazarević informed the warden Sredo Vuković about the events and the actions taken, and Ramis Smajlović also participated in one part of the conversation.

What the prisoners heard and concluded from their observations, that Sreten Lazarević was the Deputy Warden is yet another circumstance which the Panel considered in reaching this conclusion that Sreten was Deputy Warden of *Novi Izvor* and the Misdemeanor Court. Also, Sredo Vuković, by his own account, was often absent from the prison because he had to go to the frontline. The Panel holds that there had to be a person in charge of the organization and unhindered operation of the prison, particularly bearing in mind that the prison was located in two physically separate facilities, and that on certain occasions there were more than 100 detained persons in the prison. This assessment by the Panel is consistent with the activities of the accused Sreten Lazarević described in witness statements. All the aforementioned suggests that in Sredo's absence, Sreten was *de facto* in charge of the prison, and had authority over other guards.

c) Authority to Prevent Maltreatment of Prisoners

Having established the command responsibility on the part of the accused Sreten Lazarević, the Panel will briefly address one of the main arguments which the Defense presented in the main trial, which is directly connected to the criminal responsibility of the accused.

More specifically, during the proceedings the Defense pointed to the presence of the paramilitary formations in the area of Zvornik, and their illegal and aggressive behavior, which resulted in frequent raids into the Misdemeanor Court and the *Novi Izvor* building where they maltreated and beat the prisoners. The Defense represented the position that the accused, at the time, were not able to prevent the unauthorized entry of paramilitaries and the maltreatment of prisoners. The mentioned conclusion is primarily based on the fact that the guards were apparently recruited from the reserve police forces, and that they were not sufficiently trained to act in the critical situations, such as to resist the violent behavior of the soldiers.

This position was supported also by the witness for the Defense Sredo Vuković, who testified that the guards in the Misdemeanor Court and *Novi Izvor* did not have the suitable qualifications and abilities to resist the paramilitary unit members who visited the prison. According to him, those were the persons hired to work as guards in the beginning of the armed conflict and who had not undergone appropriate training to make them capable to oppose those persons. Witness Ramis Smajlović, too stated that he had known Sredo before the conflict, and he was a professional police officer, thus his conclusion was that he was the only one who was strong enough to oppose the paramilitaries. In this regard the witness avers that on one occasion Sredo Vuković made those soldiers go away threatening that he would use the weapons, being aware that his life too was in danger.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

However, the witness Vuković himself stated that on one occasion, when the persons in uniforms maltreated Fadil Handžić while he was working in the [illegible] he opposed them, and he immediately informed his superior thereof, who asked the witness to pass on the guards that no one should maltreat the prisoners, and that they should not let any uniformed and armed person in prison in the future. According to him, the guards were authorized to resist the soldiers and even ask for support, that is, additional staff in such situations.

These averments were confirmed also by the witness for the Defense Dragan Petrović, who was a guard in prison at the material time. He avers that the guards in prison did not undergo any training in the usage of any fire arms, physical force and how to tie the prisoners. At the time they did not have any rule-book to follow, according to the witness the acted "on their conscience". He was told as well as other prisoners that Sredo Vuković was the prison warden, and he assumed that he reported to the Chief or the commander of the police forces. This witness however firmly averred that the role of the guards and their duties had three aspects: the first was to secure the prison from the outside, which meant that they were obliged to prevent any unauthorized entry of the third persons on the prison premises, the second aspect was to provide the security of the prison inside by controlling the behavior of prisoners, and to maintain the order inside the prison and the third duty was to provide sufficient quantities of food and water. He further stated that the entry into the prisoner premises was possible only if one took the possession of the key which was kept in the drawer of the table in the guard's room, and he pointed out that no one else but the prison guards and warden had access to those keys. He explains that the keys of the premises in *Novi Izvor* and Misdemeanor Court were kept in the same drawer.

In addition, this witness confirmed that all guards in prison were aware that they could ask for support and additional staff from the Police Station in Zvornik. First of all, this station was in the vicinity of the *Novi Izvor* building. He found it almost impossible for the third persons to enter the prison willfully and maltreat the prisoners, exactly due to the vicinity of the station and the telephone line in the guard's room, which the guards might use in such situations to call for help or for additional staff. There was not need to do so in his shift, but he maintained that the guards had this possibility unless they themselves were not able to resist the attack of the third persons on the prison premises. At the time it happened that several persons in uniforms came to the prison building, who were armed and evidently intoxicated. Presumably, those were persons who had lost a family member or a friend in combat thus they came to the Court and *Novi Izvor* building to provoke and maltreat prisoners, but the witness maintained that the entry in these guarded buildings was not easy. The guards were obliged to prevent them from entering, which they regularly did, so that the entry was always denied to those persons whenever he was on the shift.

The witness Mirsad Omerović explicitly avers that nobody could enter the prisoner room, unless a person took the keys from the guards and entered the room. He never heard any arguments or noticed any resistance from the guards when the paramilitaries came into prison. He further explains that he never heard the guards arguing or quarreling based on which he could conclude that they attempted to prevent the entry of paramilitaries into the prison. Contrary to that, he states that the situation was totally different when Sredo was present in prison, because nobody could enter the prison, that is, at the time when paramilitaries came to the prisoners' room.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

In the course of the proceedings it was established that the guards knew what their duties were, that is, their obligations, as stated by the guard Dragan Petrović. They also had the knowledge that in the case of need, they could ask for the support. However, not only did the guards never attempt to prevent the entry of soldiers into the prison, but they, without putting up any resistance, unlocked the rooms where the prisoners were held. This was confirmed by the witness for the Defense Sejfo Suljić, who, while he was detained in the Court, noticed that armed and persons in uniforms never forcibly entered the prisoner rooms. He even stated that before their entry, the door was *„regularly unlocked"* so that they never had the need to forcibly enter and break in. These persons wearing uniforms most frequently came during the day, and rarely during the night hours. Upon their arrival the witness and others had to look down, while the persons would non-selectively hit the prisoners, most often with wooden batons similar to handles made of beech-wood, and police batons.

This was confirmed also by the witness Ahmet Omerović, who avers that it was the guards who allowed the paramilitaries to enter the prisoner rooms. These persons who came to maltreat the prisoners would normally come during the daylight and occasionally during the night, and were wearing military uniforms, cockades, carrying hand grenades, sabers and swords and introduced themselves as dukes. Furthermore, he describes that after the soldiers had come to the Misdemeanor Court, after a while the sound of unlocking the door could be heard, and the guard who opened the door would remain in the doorway, and the soldiers would pass by him into the room, and beat up and maltreat the persons they found there. As the previous witness, he avers that there was an order that after the door was open all prisoners had to bend their heads and look at the floor, thus sometimes it was difficult to notice who among the guards unlocked the door, but he was able to notice that the duty officers on that day always let the soldiers in, thus he was sure that while he was detained in the Court, all four accused were in the situation to open the door and let the soldiers enter.

One fact has to be added as an argument challenging the averment of the Defense, which is that a number of witnesses confirmed and described the situations when unarmed guards resisted members of the paramilitary formations, who would usually appear in the locations where the detainees were taken to the forced labor. The soldiers would usually appear with a clear intention to maltreat the prisoners, but in each of these situations it showed that if the guards successfully resisted, on those occasions a physical or verbal conflict never occurred. The witness for the Defense Jeremić Nenad described the situations in which the guards, mostly the accused Dragan Stanojević stood up against a number of uniformed and armed persons, who appeared with the clear intention to maltreat the persons taken to the forced labor, and in this regard he stated that the guards in such situations *"put their heads instead of theirs to protect them, and in those situations they were not armed."*

As it was stated in the introductory part of this Verdict, the duty of the guards to prevent the unauthorized entry into the prison was confirmed also by the expert witness for the Defense Mile Matijević who avers that even the reserve police officers in the position of the guards were surely aware that their duties in essence were to secure normal conditions to all persons who were in prison in any status or capacity. More specifically, it was necessary to secure the order in terms of safety of the prisoners, prevention of escape, preparation of mutiny and other incidents. He also believes that the advantage of the Court and *Novi Izvor*

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

building shows in the fact that it is only 290 meters away from the Public Security Station in Zvornik, so the guards could ask for assistance or support at any time.

In the text below, the Panel will explain how the previously described circumstances were taken into consideration, while establishing the individual criminal responsibility of all the accused.

Count 1.1 Sreten Lazarević

The Court has found that the accused Sreten Lazarević is responsible for the commission of the offenses charged under Count 1.1. of the Indictment, for in mid May 1992 in the Misdemeanor Court building he aided an unidentified person to heavily beat the prisoner Ramis Smajlović, by allowing that Ramis Smajlović be brought from the prisoner room to the guard's room where an unidentified person in the presence of the accused heavily beat Ramis Smajlović with a police baton, which the accused did not prevent in any way. In other words, in the course of the proceedings it was established beyond reasonable doubt that the prisoner Ramis Smajlović was heavily beaten by an unidentified person in the presence of the accused Sreten Lazarević.

The witness Ramis Smajlović describes the mentioned event in detail, saying that after the arrest on 15 May 1992 he was brought in the Misdemeanor Court, and detained on one of the premises. On the same day, the accused Mile Marković picked him up and took him to another room, with the accused Sreten Lazarević already being there. The witness further states that he was ordered to line up facing the wall, after which he heard that a third person entered the room wearing a camouflage uniform who hit him with the baton several times on the shoulder, due to which his neck became heavily swollen, so that according to him *his neck almost disappeared between his shoulders and his head.* After that person finished the hitting, he was ordered to remain facing the wall, until the person who beat him left the room.

Witness Alija Buljubašic and Fadil Smajlović also testified regarding this event. These witnesses described how Ramis Smajlovic was taken out of their room; they also described and confirmed the extent of his neck and hand injuries upon his return. Their testimony is corroborated by the Defense witness Dragan Petrović, who was a guard at *Novi Izvor*. He stated that Ramis Smajlović told him that he had been seriously beaten on the day when he first arrived at the prison.

Based on the evidence presented, the Trial Panel concludes that the beatings that occurred did cause Ramis Smajlović serious physical pain, which was evident. Even the accused Mile Marković, who brought the accused into the room, later on brought a wet towel for him to ease the pains he suffered due to the injuries he had sustained.

Article 31 of the BiH CC stipulates that among other things the aiding in the commission of the criminal offence is the supplying of the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence. The act of helping for which this Panel finds the accused liable is that the accused contributed to the commission of the criminal offence committed by another by consenting that Ramis Smajlović be brought from one prison room to another and throughout the period he

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

observed Ramis Smajlović being beaten without preventing it in any way. He also supplied the perpetrator with the police baton by which the criminal offense was committed. It indisputably follows that the accused in the commission of the action acted with intent until the completion of the activity, because he was aware that the forbidden consequence might follow, that is, it could not remain unknown to him, but he consented to its occurrence. More specifically, by the said actions the accused aided the unidentified person to inhumanely treat the prisoner Ramis Smajlović causing severe physical pain and suffering, thus the Court finds him responsible for the commission of the criminal offence punishable under Article 173 (1) (c) as read with Article 31 of the BiH CPC.

The arguments of the defense for the accused, that witness Alija Buljubašić stated that on the critical occasion Ramiz Pavlović was taken out from the detainees room by Marko Pavlović, the then commander by the TO Headquarters, are untenable. It was established during the proceedings that witness Ramis Smajlović was repeatedly mistreated by unidentified persons and that he was taken out of the room by Major Pavlović, but this was a completely different event. The factual description of this count was slightly modified in accordance with the facts established at the main trial.

<u>Count 1.2. Sreten Lazarević</u>

The Court found that the accused Sreten Lazarević committed the offence charged with under Count 1.2. of the Indictment for in June 1992 in the DP *Novi Izvor* building, having asked the prisoners who among them was from Bratunac he took out the prisoner Sejfo Omerović from the room and handed him over to a group of unidentified persons, whereby he enabled this group to heavily beat the prisoner in the nearby garage, and subsequently threw him in the trunk of the vehicle by which they had arrived, and drove away into an unknown direction, and Sejfo Omerović has been unaccounted for ever since. It is visible from the Red Cross letter dated 3 July 2006 that the injured party Sejfo Omerović is registered as a missing person under No. ID BAS-001058-01.

The conclusion on the responsibility of the accused Sreten Lazarević for the mentioned event follows from the statements of the witnesses Ramis Smajlović, Alija Buljubašić, Jusuf Omerović, Fadil Smajlović, Ahmet Omerović and Mirsad Omerović, who testified about the severe beating of Sejfo Omerović. All of these witnesses stated that in June of 1992, when asked who among them was from Bratunac, Sejfo Omerović said that he was, after which he was taken out of the room in which he was held in the DP *Novi Izvor* and handed over to a group of unidentified men who then took him to the garage directly opposite the prison in the DP *Novi Izvor* building. The prisoners-witnesses, who observed the events from their prison windows, described that a group of unidentified men repeatedly kicked the victim in front of the garage before he was taken inside. The witnesses noticed that those men were dressed in black clothes and wore black caps on their heads. The witnesses claim that the beating of Sejfo Omerović continued inside the garage because they could hear the sounds of blows, as well as "*screaming, cries and moaning*" of the victim. Furthermore, the witnesses agree that after a certain period of time, the screaming stopped and Sejfo's lifeless body was thrown into the trunk of a Mercedes and driven away in an unknown direction. To date, Sejfo Omerović remains unaccounted for. That the accused Sreten Lazarević on the critical occasion roll-called and took out Sejfo Omerović from the detainees room the Panel established based on the statements by witness Ahmet Omerović who said that on the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

critical occasion the accused Sreten Lazarević came into the room and asked who among them was from Bratunac. Since Sejfo Omerović stepped up, Sreten told him that he was supposed to come down and give a statement. This was indirectly corroborated by the statement of witness Mirsad Omerović who said that on the critical day he was laboring at the *Ekonomija*, and that upon his return he learned that Sejfo Omerović had been tortured and killed in the garage across from the prison building. The witness further said that on that day when they were returning from labor the accused Sreten Lazarević was on guard's duty.

These witnesses' testimonies are consistent and credible and establish beyond a reasonable doubt that the accused Sreten Lazarević took the victim from his detention room and handed him over to the group of unidentified men, who seriously beat the victim. In addition, the accused Sreten, while this event was happening, was present in the *Novi Izvor* building, thus it could not have remained unknown to him that the victim was indeed subjected to maltreatment, given that the garage where this was happening was in the immediate vicinity of the prison building, and all witnesses confirmed that the screams and cries of the victims could be clearly heard while most of them observed this event from the window of the building.

The accused acted contrary to the duties he had as a guard also by failing to report the mentioned event to the prison commander (which is confirmed also by the witness for the Defense Sredo Vuković) although he knew that as the duty guard on the same day after the questioning he did not bring the victim back to the room from which he had taken him out.

Complicity, in terms of Article 29 of the BiH CC, was *inter alia* committed if several persons, by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence. The complicity, apart from the joint decision on the act, also requires the objective contribution to the commission of the offence, which assumes the taking of such action which has a decisive importance in the process of commission of the offence and without which the offence could not be committed. There is the intent and willingness on the part of the accused to commit the offence. Furthermore, the accused knew well that the paramilitary formations often visited the prison premises, which maltreated the prisoners. These allegations were confirmed by the injured witnesses who testified on frequent "raids" by various paramilitary units of the prison facilities and who constantly maltreated the prisoners. In other words, on the relevant occasion, when unidentified persons – paramilitary formations – came into the prison and demanded that one particular person from Bratunac be handed over to them, the accused was aware that that person would be exposed to maltreatment but in spite of that he showed the willingness to participate in that event. The objective contribution to the act of commission is that the accused, having called the person from Bratunac, brought him in and handed him over to the unidentified persons and thereby enabled them to maltreat him in the nearby garage. Had the accused not consented to hand over Sejfo Omerović to these unidentified persons, and had he prevented the maltreating of the victim in the course of the commission of the offence, which he was obliged to do, the offence would not have been committed as planned.

Based on the presented evidence, the Trial Panel concludes that the level of maltreatment Sejfo Omerović suffered was aimed to cause, and it did cause, severe physical and mental pain and suffering.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Notwithstanding that Sejfo Omerović was beaten until he was unconscious, this beating does not rise to the level of torture but certainly constitutes inhuman treatment. Accordingly, the Trial Panel finds the accused guilty of the crime of inhuman treatment pursuant to Article 173(1) (c) in conjunction with Article 29 CC BiH.

The Court, *however, did not find* that the offence was committed in the manner described in the factual description of the Indictment for, based on the presented evidence, it was not possible to establish beyond reasonable doubt that in the garage the victim was maltreated in the way that he was positioned to hang upside down, given that all witnesses are consistent in claiming that the interior of the garage was not visible from the window from which the prisoners observed the event, thus this part was omitted from the factual description of the Indictment.

<u>Count I.3 Sreten Lazarević and Count III.1 Mile Marković</u>

Based on the presented evidence, the Panel established beyond reasonable doubt that Nurija Nuhanović, together with his family members, Fethija Nuhanović, Mehmedalija Nuhanović and Ramo Ibrahimović, were brought to DP *Novi Izvor* on 19 July 1992. Where on the same day he was beaten up on one of the premises by the accused Sreten Lazarević and Mile Marković, and due to these punches he lost consciousness.

The only piece of evidence presented concerning this event is the testimony of Nurija Nuhanović. Accordingly, the Trial Panel concludes that his testimony is not sufficient to conclude that on the same day together with him Ramo Ibrahimović and Fethija and Mehmedalija Nuhanović were also beaten, that is, that the event happened in the manner described in the factual description of the Indictment.

The witness Nurija Nuhanović stated that after his arrest on 19 July 1992 at 11:00 hours, by unidentified armed persons dressed in uniforms, it was in the evening when he was brought on the premises of the *Novi Izvor* building. This witness stated that he recalled that on one occasion Sreten arrived with guards Mile, Slobodan and he thought it was another person there by the name of Dragan, and he was taken to the room usually used by guards, including Fethija Nuhanović, Mehmedalija Nuhanović and Ramo Ibrahimović, and ordered them to line up facing the wall and placing their hands against it. As his face was not pressed against the wall, he was able to see the person who kicked him on his right hip and around his waist. It was a person by the name of Mile who used to be a waiter before the conflict. He was able to notice that Sreten beat Mehmedalija by the baton until he knocked him down. He was able to see this, in spite of facing the wall, because it was happening on his left-hand side. After Mehmedalija had fallen down, Sreten turned toward the witness and started beating him, and shortly afterwards he lost his consciousness.

As for the recognition of the persons who were in the room at the time, the witness stated that he used to know Mile before as a waiter, while he learned of Sreten's name later on while in prison.. The witness stated that that he was sure about the guards' names who beat him up on the material day because he met those persons on a daily basis on the *Novi Izvor* building. In the course of the proceedings, the Defense pointed to the fact that this witness in the statement he gave to the Prosecutor's Office on 24 May 2007, did not mention Sreten

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

as a person who beat him. However, the witness Ramis Smajlović said in his statement that he recalled the events when the prisoner Nurija was taken out of the premises and beaten up. At that moment Nurija did not know the name of the guard who had done so, but the witness Smajlović told him to show him the person who had hit him, if he recognized him, which Nurija did, pointing with his eyes to Sreten while he was passing by in the hall.

The witness for the Defense Ismet Ibrahimović avers that Nurija Nuhanović never spoke about the event, although they met in the Republic of Germany after the exchange, and Nurija never complained to this witness about the pains he suffered as a result of the event. However, this witness stated that he was in the *Novi Izvor* building until 15 July 1992, more specifically, before the arrival of Nurija Nuhanović, Fethija and Mehmedalija on 19 July 1992 thus it is evident that this witness was not in the prison when these persons were beaten up, and the fact that the witness Nuhanović never spoke about it does not mean that the mentioned event never happened.

As for the level of beating Nurija Nuhanović suffered, not only was he covered in blood and unconscious, but he also sustained permanent injuries which, at least for a while, affected his labor performance. The Panel accepted the statement of this witness in the part in which he firmly avers that the accused Sreten Lazarević, having ordered him to face the wall placing his hands on it, was standing on his left hand side, while the [illegible] Marković was on his right, beating him. The Panel gave credence to Nurija's testimony in the part in which he stated that Sreten beat him up with the police baton unconscious. When he regained consciousness, he was still lying on the floor, covered in blood. Several days later, Sreten asked Nurija and others if they wanted to go out for labor, and he addressed the victim saying: "*What happened, happened*". Nurija did agree to go out for labor because all prisoners avoided staying on the premises which were on a daily basis raided by soldiers who maltreated prisoners, which does not mean that he did not suffer severe pains caused by the beating.

Based on the credible evidence presented, the Trial Panel concludes that the level of beating which Nuhanović Nurija sustained was intended to, and did, cause him serious physical and mental pain and suffering, which was evident from the physical injuries that he sustained that day, the only day he was beaten while at *Novi Izvor*. The Panel concludes that the level of beating he sustained did not satisfy the legal criteria for torture but does satisfy the legal criteria for inhuman treatment. The perpetrators of this serious beating were Sreten Lazarević and Marković Mile who acted with direct intent, because by their behavior, that is, by beating the person unconscious, they were fully aware that the forbidden consequence would follow, and yet they did want it to occur, thereby they committed a criminal offence of Inhuman Treatment contained in Article 173 (1) (c) as read with Article 29 of the BiH CC.

The Defense of this accused contested the averments of the victim, stating that the manner in which he averred the event happened was disputable, given that it happened during he summer, so it is unclear how could it happen that the accused Mile was wearing boots when he was kicking the victim. In the instant case this averment of the Defense is based on the assumptions that the accused at the time was not wearing boots on the closed premises. The expert witness for the Defense Mile Matijević did confirm that the guard was supposed to be wearing the same uniforms and the winter and summer uniforms differed whereby he

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

also confirmed that the boots are considered to be the field kit and that they were not worn on the closed premises. However, this witness explained that at the time they wore the available kit, not the one stipulated by the Law, because it was a time period in which the shortage of the skilled staff and equipment existed and in which even the law regulations did not cover all the aspects of the structure and functioning of the MoI and the military, thus the argument of the Defense cannot be accepted regarding the formal dress code of the guards in prison.

Counts I.4 Sreten Lazarević and IV.2 Slobodan Ostojić

The Prosecutor established beyond a reasonable doubt that both prisoners Ramis Smajlović and Admir Hadžiavdić were seriously beaten at *Novi Izvor* by prison guards, including Ostojic Slobodan, while Sreten Lazarević watched. Based upon the credible evidence, the Trial Panel concluded that the events as stated in the operative part of the Verdict did occur and constitute War Crimes against Civilians pursuant to Article 173(1)(c) in conjunction with Article 29 of the CC BiH.

Numerous witnesses, including Samir Pezerović, Ramis Smajlović, Admir Hadžiavdić, Mustafa Halilović, and protected witness A, testified about this event.

In this regard, the witness Nurija Nuhanović avers that on one occasion the guard Slobodan entered the room asking that a pry-bar or key be handed over, for he had allegedly seen one of the prisoners bringing it in. Then he clearly set an ultimatum saying that the mentioned items should be thrown out under the bars, and that it was not necessary for him to know who had taken them. At that moment the witness Nuhanović did not know if any prisoner truly had the requested items. The witnesses are consistent that after the deadline expired and after the search failed to produce the alleged item, Slobodan came in and removed Ramis Smajlović and Admir Hadžiavdić to another room. According to Admir Hadžiavdić after they had come to the other room, they were ordered to face the wall and in doing so he was able to notice that among other guards present were Sreten, Miloš, Mali (Little) and Veliki (Big) Dragan and Slobodan Ostojić. They beat them with police batons.

Admir was beaten by Dragan and Slobodan, whom the witness recognized in the courtroom, but he was unable to see who was beating Ramis, while Sreten was all the time present in the room but did not beat him. He was able to clearly see all guards, because he turned around several times, begging them to stop beating them, saying that nobody had intended to flee, and they responded to it by curses. The witness Ramis Smajlović describes the event in the same way, and he is sure that he was beaten by Mali Dragan and Slobodan, while Sreten was present all the time, but he did not react in any way to prevent or stop the beating. When he was beaten he only knew Sreten, while he found out the names of others later in the conversation with other prisoners. He was beaten on the back and below his knees. He never fell down. He did not hear the guards speaking except that seemingly at one point Dragan Veliki said that perhaps they were not guilty.

Admir Hadžiavdić further testified that the beating for him seemed to last forever, and each time when he fell he was told to get up, and every time he was not able to do so they would kick him. A couple of times he attempted to pretend that he fell unconscious, however they did not stop kicking him. He does not remember if they stopped themselves or they got tired

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

or someone ordered it. After they came back to the room he described that he and Ramis were "*black and blue from this beating*" and other prisoners helped them, helping them with taking the food and putting on poultices. He felt the consequences of this beating even for the following three days, since he was unable to go to the toilette on his own because he could not stand on his feet, thus he was carried there.

However, the witness A who was present in the same room testifies that it was the guard Slobodan who took Admir and Ramis out of the room, having set a prior ultimatum, and later on he returned and said: "*Ramis, Admir, you did not bring it, the time is up!*", and subsequently he took them to the room next door. It is this guard who after the beating brought Admir back to the prisoners' room, carrying him under his arm, because he was unable to walk due to the blows he had received. This witness also avers that the injuries on Ramis and Admir were rather visible, and while they were beaten up, he could hear the punches and cries from the room where they had been taken to, while Mustafa Halilović testifies that he could clearly hear Slobodan asking the victims if they had wanted to escape.

In his later testimony, asked by the Defense the witness Hadžiavdić confirmed that he did bring the key from the SUP parking place where he did some work, because at that moment it seemed to him that it was possible to escape from *Novi Izvor* building, but he figured out soon that such idea is entirely pointless. He testifies that the prisoners did think about it, but it was an idealistic aspiration, given that it was impossible to get out of the premises where they were held, and the free territory was as far as Tuzla. He recalls that, after his arrival, Slobodan said that the key should be thrown out under the metal door, but he does not remember that while doing so he said that he would not make any problems to a person who handed over the key voluntarily.

In other words, the Panel concludes that Ostojić Slobodan and other guards, in the presence of the Deputy Prison Warden Lazarević Sreten, heavily beat up the victims, so badly that neither of them could stand or walk for several days without somebody's assistance.
Since the detention of both Admir and Ramis was unlawful, they cannot be faulted for even thinking about escape. In order to justify such conduct on the part of the guards the Defense tendered into evidence an excerpt from the Rule Book on Performance of Public Security Duties – published in 1977, which, according to the expert witness Mile Matijević, was acted upon even in 1992. The Defense represented the case that these two victims were preparing to escape and obtained the instrument by which they could do it and inflict injuries on the guards.

The expert witness, explaining the mentioned event, referred to Article 43 of the Rule Book, which defines the situations when it is justified to use the force against prisoners, however, he too categorically stated that during the searches and finding the items which serve for the escape, the physical force should be used first and that a rubber baton should be used as the last resort. In addition, he firmly avers that it is justified to use the means of force only as long as the active or passive resistance lasts, and expressly states that a police officer must not use excessive force. In the case at hand the conduct of the guards toward the victims exceeded the beating permitted by law for those who violate the prison rules. In addition, the application of the Rule Book is questionable and the averment of the expert witness as to whether the demonstration of force is at all justified in the case concerned. One may ask the question here as to how it was possible that the described conduct of the guards is linked

[redacted]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

to the Rule Book, which justifies the use of the physical force in some situations, and upon which the guards allegedly acted, when one bears in mind that all persons in the Court and *Novi Izvor* building were unlawfully deprived of liberty and detained. More specifically, the legitimacy in acting is violated in the very beginning, and the Defense refers to it only when the rights of the accused are violated. If the guards acted pursuant to the law, how it was then possible that in a number of situations they neglected their basic duty, which the expert witness for the Defense pointed out several times in his testimony, relating to the safety of the detainees, that is, preventing the unauthorized personnel to enter the prison and maltreat the prisoners, which happened almost every day.

Based on the presented evidence, the Panel concluded that the beatings of Admir and Ramis were intentional and that they caused severe physical and mental pain and suffering. The severity of beatings and the inflicted injuries satisfy the legal criteria stipulated for inhuman treatment.
The accused Sreten Lazarević and Slobodan Ostojić in the commission of the offences acted as co-perpetrators. Slobodan Ostojić is a direct perpetrator of the offence, and Sreten Lazarević gave such contribution (ordered the search, bringing in of the victims, watching of the beatings, and requesting the confession) which is logically considered to be as significant as the commission of the criminal offence. Acting in the mentioned manner, the accused Lazarević Sreten and Ostojić Slobodan took intentional and conscious actions to commit the criminal offence which is their common offence. The contribution of each of them is significant and without it the offence could not have been committed in the planned manner.

In the commission of the offence they acted with direct intent, being aware of the irregularities of beatings and consequences of such conduct, and wanting such consequence, whereby these accused committed the criminal offence of Inhuman Treatment under Article 173(1)(c) as read with Article 29 of the BiH CC.

Count 1.6. a) and b) Sreten Lazarević

Based on his command responsibility the accused Sreten Lazarević is charged with failure to prevent or at least report the commission of the criminal offence by other guards who opened the prison door to paramilitaries allowing them to maltreat the prisoners. More specifically, on an undetermined day the guards allowed unauthorized persons to enter the prison and carve crosses on the foreheads of the prisoners Fahrudin Memić, Edin Skurlić and Fadil Hadžić. The Prosecutor also proved beyond reasonable doubt that the prisoner Ramis Smajlović was sexually abused, by forcing prisoners to put their sexual organs into one other's month, and thus, *inter alia*, they forced the prisoner Ramis Smajlović to do it to another unidentified prisoner - a Romany by nationality.

a) The witness Ramis Smajlović recalls that the event indicated in the Indictment happened on an undetermined day in the night hours. At the time the prisoners had already been asleep when paramilitaries entered the *Novi Izvor* premises, firstly removing Fahrudin Memić and Kasim Pedžić, whom they beat up, and subsequently a certain Saša arrived with his group, including a girl wearing a camouflage uniform. One of the persons from the group was carrying a specially designed knife with a very sharp point. He also explained that Saša was a notorious member of the paramilitary units, and he heard from other

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

prisoners that at the time when they were detained in the Misdemeanor Court and previously in the *Ekonomija* prison that person came and maltreated the prisoners. The witness for the Defense Vlado Delić explained that a person known to the prisoners as "Saša" was in fact a young man from Vojvodina, who was at the time a member of the paramilitary formations. This witness also had an opportunity to conduct a crime scene investigation in the case when 5 citizens were murdered, which, based on the information gathered in the field, was committed by Saša himself and a girl who was constantly with him, and who is known as Lelica.

The witness Alija Buljubašić recalls this event on the *Novi Izvor* premises, when on one occasion armed soldiers entered the premises where the prisoners were held, and carved crosses on the foreheads of Skurlić, Fazlić and Fahrudin Memić. Those men were then ordered to lick their blood off the floor. He then explained that Fahrudin Memić, while he was licking his blood off the floor, was forced to put his fingers on the floor and soldiers stamped on them. This witness eyewitnessed that they carved crosses on the foreheads and chests of the mentioned prisoners. He does not know how they entered the premises, given that the door was locked, and he assumes that the guards let them in. He further avers that the guards did not come in with the soldiers. They would probably stay in front of the door. He was not able to notice the details about it, because the prisoners were ordered to stand up when a soldier entered the room, with their hands behind their back and their heads bent, and when a third person entered the room they had to address him saying: "*Yes, mister Serb soldier*"

A victim of the mentioned event, the witness Fahrudin Memić, remembers that the persons who carved crosses on his forehead, stamped on his fingers, said they were coming from Radalje. Later on some prisoners told him that on that occasion they had taken his watch off his hand, which he did not feel at all. The witness Mirsad Omerović did not participate in the event, but he saw the scars on Skurlić and Fadil after he had come back from labor. He saw that they had deep injuries, and he thinks that Edin Skurlić still has the scar on his forehead, because as he heard they had carved the cross on his forehead by a bayonet, and he also heard that Saša had done it. This witness also avers that the soldiers could only enter if the guards who had the keys let them in. He also pointed out the difference between the situation when Sredo was in the prison, who never allowed anybody to enter the prisoner rooms, as opposed to the situation when other guards were on duty whom he never saw or heard objecting to the entry of the armed soldiers.

b) In regard to the sexual abuse of the prisoners, Fahrudin Memić testified that he was present in the room when Veliki Dragan opened the door, followed by Saša, escorted by two men and a girl. He ordered Ramis and a man of Romany nationality to take their trousers off and perform oral sex on each other, while the girl who accompanied them was watching the event smiling. He was able to clearly see that because those persons beat him up on that occasion.

The witness Ramis Smajlović confirmed that on one occasion the soldiers led by the previously named person Saša, came to the *Novi Izvor* premises, and forced the witness and others to perform oral sex to one another. The witness had to do that with a person of Romany nationality, while Fadil Handžić did the same with an elderly person. He recalls that a girl accompanied Saša, who was watching it all, but he does not remember who

[redacted]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

among the prisoners was present on that occasion. These allegations were confirmed by the witness Alimet Omerović, to whom Ramis spoke about the event, mentioning that his sons were forced to do the same, but they never said so, while the witness Mirsad Omerović also stated at the main trial that he and his brother were never sexually abused, but they knew what happened to Ramis Smajlović, because on the material day he did not go to the forced labor and he heard this story from other prisoners. Having in mind the circumstances surrounding the commission of the offence, the manner and consequences it caused, the Trial Panel infers that the maltreatment of prisoners by paramilitaries was an inhuman act.

Having established that the guards allowed the paramilitaries to enter the prisoner rooms and maltreat them, and that the accused Sreten Lazarević was part of the prison hierarchy and had effective control over the guards, the Trial Panel has to consider the evidence to establish if the accused knew that the criminal offences were about to be committed or that they were committed by his subordinates and whether he did not take any reasonable measures to prevent them, punish them or at least to report to the superiors their unauthorized behavior.

While establishing whether the accused knew or had reason to know about the maltreatment of the prisoners, the Trial Panel considered the following evidentiary factors: nature of the criminal offences, their frequency and duration, the distance of the accused from the location where the criminal offences were committed, visible material evidence that the criminal offences were committed, the scale of the criminal offences and commission of the criminal offences in the past period under the similar circumstances or in which the same persons took part.

The Trial Panel recalls their previous findings that the beatings of the prisoners by unauthorized persons were a common occurrence at the Misdemeanor Court and *Novi Izvor*. The Panel also recalls that the accused was present in prison when unauthorized persons maltreated prisoners, and that they heard the sounds of beating, they saw the material evidence of beating, heard cries and moans of victims. Although the Trial Panel accepts that the accused Lazarević perhaps did not know that the paramilitaries would carve crosses on the foreheads of those persons, it infers that the accused was directly informed about the beatings of the prisoners, because in most other cases he was either present or directly involved in the physical maltreatment of the prisoners.

Accordingly, the Panel finds that the accused did know of the physical and mental abuse of prisoners by unauthorized persons who were allowed to enter the prison by guards. Sreten's daily presence in prison and his direct participation in the maltreatment of prisoners as well as his knowledge of the physical state of the prisoners corroborates this conclusion. The witness for the Defense Mehmed Redžić stated that it was evident at any time at a minimum of half of the prisoners that they were beaten. Given that Sreten personally knew that he and other guards repeatedly allowed unauthorized persons to enter the prison and maltreat the prisoners, he had the necessary knowledge about the specific crimes which the Prosecution argues he failed to prevent.

Knowing that the guards subordinated to him allowed unauthorized persons to enter the prison and physically and mentally abuse the prisoners, the accused was obliged to prevent unlawful actions and punish guards for their wrongdoings. Not even a single piece of

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

evidence was tendered suggesting that the accused took any action to punish the guards who had allowed the unauthorized persons to enter the prison or to prevent repetition of these criminal offences. Even if he did not have the possibility to punish the guards for their acts, he was under the obligation to inform the Prison Warden who would then take actions in this regard.

However, there is ample evidence that the accused could have prevented causing physical and mental pain and suffering to which the prisoners were subjected. Firstly, the police station was only several meters away and duty police officers could be called by phone. Secondly, Sredo Vuković testified that he was expecting the guards to inform him that unauthorized persons had entered the prison to maltreat prisoners, but in the main trial he was persistent that he was never informed about it. When Sredo saw carved crosses he threatened that one or more guards who allowed the entry would be sent to the front line. After this, unauthorized persons were not allowed to come near the prison or prisoners anymore. More specifically, Sreten could have immediately reported the commission of the criminal offences and guards who allowed the entry, and the abuse would have stopped. Instead, the accused did nothing, thereby allowing the physical and mental abuse of the prisoners to continue. This was confirmed also by the witness Mustafa Halilović who stated the following in his testimony "*Sreten never attempted to stop the soldiers, but Sredo did. He even told the guards that they should not let anybody into the prison without permission.*"

The legal duty of those in positions of authority to take the measures required either to prevent the crime or to punish the perpetrator implies that, in certain circumstances, all that is required is to report the matter to the competent authorities. This is because international law also recognizes that a superior cannot be required to perform the impossible. For this reason, a superior may only be held criminally responsible for failing to take those measures that are within his powers. In this case, the Trial Panel faults Sreten Lazarević and holds him criminally responsible for failing to notify the police and/or Sredo that unauthorized persons were entering the prison and abusing prisoners.

Accordingly, based on the evidence presented, the Trial Panel concludes that the Accused is criminally responsible under the theory of superior responsibility for the inhuman treatment of Ramis Smajlović, Fahrudin Memić, Edin Skurlić and Fadil Hadžić as described in the operative part of the Verdict.

<u>Count 2.1, the Accused Dragan Stanojević</u>

The Prosecutor established beyond any reasonable doubt that the accused Dragan Stanojević on many occasions unlocked the prison premises and enabled Serb soldiers to abuse prisoner Fahrudin Memić by pointing him out and by telling the soldiers that he was a person who wounded a Serb.

The witness Alija Buljubašić recalls when on one occasion a soldier came into the room in *Novi Izvor* accompanied with the guard Dragan, and asked the witness if he knew Abdulah Buljubašić, and after he responded that he was his relative, he received a blow with a baton. The accused Dragan, who was still present, said that the witness should not be maltreated because he had been detained by mistake, and he pointed to *a guy from Sapna*, and on

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

whom he usually pointed to soldiers, stating that he had been in the BiH Army, and subsequently they would maltreat him. In his personal opinion Dragan had criteria for the selection of persons on whom he always pointed, probably to save other prisoners. On several occasions the witness brought this guy from Sapna a cube of sugar and some drops and medicines he had found in houses, for him to calm down. He did this every time when he was beaten up, which happened relatively often. The mentioned "*guy from Sapna*" is in fact Fahrudin Memić. The victim also confirmed at the main trial that the guard Dragan on several occasions opened the door to the soldiers, pointing to him and saying that he was a member of the BiH Army and that he had thrown a hand grenade and wounded a soldier, which is why they called him "bombaš"/*bomberl*. This guard always encouraged the soldiers to beat him up. He knows for sure that it was Veliki Dragan, as they called him, who opened the door and pointed to him, but he is not sure if he would stay in the room while they were beating him. This guard was well-built and had a tanned skin, and he recognized him in the courtroom as the second accused Dragan Stanojević. His general conclusion was that he was beaten up every time Dragan opened the door.

In addition to the day-to-day maltreatment of Fahrudin Memić, the witnesses also confirmed the event with which the Indictment charges Stanojević. More specifically, the event happened on the same day as the sexual abuse of the witness Ramis Smajlović. More specifically, the victim Fahrudin Memić avers that on the same day he saw the guard Dragan opening the door, and then Saša followed him accompanied by two men and a girl. Having maltreated Ramis, they ordered the victim to lie on the floor with his hands clenched into fists which he had to put under his belly, and at least one of them was jumping on his back, which caused his ear bleeding, probably due to the pressure. The girl who came with him addressed all the present in the room saying that she would be back tomorrow and repeat it all. The witness Ahmet Omerović confirmed this, which was in the room when a person wearing a uniform with a cockade on his hat jumped on Memić's back, while he was lying on the floor. In his testimony he confirmed that it was in fact the guard Dragan whom he recognized in the courtroom as the second accused, who nicknamed Fahrudin Memić "a bomber" and he always pointed him out to the soldiers, saying that he was the one who should be beaten up. Contrary to these testimonies of the guards, Memić was constantly saying to the prisoners that he had been brought to prison from the Vidak's farm, practically from the house, so that everybody was unclear as to why he got that nickname. Apart from him other prisoners got nicknames too, so Fetah was nicknamed "Dinamitaš"/*blasterl*, Mustafa Halilović was "Sašin otac"/*Saša's fatherl*. Other guards used those nicknames too later on, when pointing for the soldiers to the prisoners who should be maltreated.

The witness Fadil Smajlović confirmed that *a guy from Sapna* was almost always maltreated, sometimes he would see them throwing him in the room beaten up, and on several occasions he was present when the soldiers were beating him and then the guards were present in the room. However, the witness Mirsad Omerović avers that he was also present on a couple of occasions when the soldiers beat Fahrudin Memić, and he noticed that Dragan opened the door and after the soldier had entered he stayed there, he did not enter the room, he only watched it, without taking any action to prevent soldiers to maltreat this prisoner.

The Panel accepts that Fahrudin Memić was often beaten up during his detention and the injuries he sustained were clearly visible.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Rendering the decision that the accused Dragan Stanojević violated Article 173(1)(c) as read with Article 29 of the BiH CC, the Panel concluded that Fahrudin Memić was maltreated due to the actions taken by this accused, which actions significantly contributed to the commission of the criminal offence. The accused had the intent and willingness to commit the offence. The accused knew well that the paramilitary formations visited detention premises who maltreated the prisoners. On the relevant occasions when formations were coming to the prison, the accused was aware that the exclusive reason of their coming was to maltreat the prisoners but in spite of that he showed his willingness to participate in that event. The accused gave the objective contribution to the commission of the offence by opening the prison door voluntarily, providing the members of the paramilitary units an unhindered entry into the prisoner rooms. Had the accused on the given occasion denied entry to those persons or if in the course of its commission he prevented their maltreatment, the planned offence would not have happened. Also, it is important to state that all the witnesses were consistent in establishing that the maltreatments of the paramilitaries happened mostly when the accused Dragan Stanojević was on the shift.

The position of the Defense that the accused was forced to let the paramilitaries into the prisoner premises is unacceptable. It follows from the presented evidence that other guards had difficulties in communicating with the paramilitaries when they arrived, but it is evident that when Dragan Petrović was a guard, he never opened the door, and the persons were not maltreated. In support of this Court's conclusion is the fact that the accused Stanojević always took active part in it, by pointing to the prisoner Fahrudin Memić, and based on the statement of the witness Ahmet Omerović, in situations like this he was usually standing on the doorway "*smiling*".

The Panel established that regardless of the nature and frequency of these beatings to which the victim was subjected, the physical and mental pain he suffered did not rise to the level of torture, only to the level of inhuman treatment, in the way that he was subjected to the permanent maltreatment, beating with rifle butt and fists, and then ordered to lick his own blood, and was always left without any medical treatment. In spite of the serious injuries the Court found that the actions of the accused meet the requirements of the criminal offence of Inhuman Treatment punishable under Article 173(1)(c) of the BiH CC as read with Article 29 of the same Code.

II

8. Acquitting Part of the Verdict

Pursuant to Article 284(1)(a) the accused Sreten Lazarević was acquitted of charges that he had committed the criminal offences under Count 1.5. of the Third Amended Indictment.

As for the charges against the accused, the Panel concludes on the basis of the presented evidence that the mentioned event happened in the manner described in the factual part of the Indictment. Fahrudin Memić testified on the mentioned event, stating that on the 22 of

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

1992, he believes it was Friday, he was taken from the Misdemeanor Court to the guards' room where he found Sreten and a long-haired soldier. Upon his arrival, they asked him about his brother-in-law's brother whose name was Hasan, saying that they had information that he was involved in the weapon smuggling. On that occasion Sreten slapped him in the face "*with the back of his hand*". Later in his testimony he explained that apparently Sreten hit him with a clenched hand and it felt as if he received a stronger slap. This witness added that by that time he had already had visible injuries, because either his lip or ear were often split, and the event happened shortly after the carving of crosses, so that he had a cross carved on his forehead, but he believes it was not so visible.

However, the witness also stated that with regard to other injuries he sustained, this one was not so severe, but it was more humiliating, and that the slapping did not cause any bruising and swelling on his face. More specifically, the Panel believes that the acting of the accused did not cause serious physical or mental pain, or violate the bodily integrity of the accused, as a minimum requirement of one of the elements of the criminal offence under Article 173(1)(c) of the BiH CC. The fact that the treatment was only humiliating without meeting other requirements is not sufficient for the qualification of the criminal offence the accused is charged with in this Count of the Indictment.

Pursuant to Article 284(1)(c) the accused Mile Marković is acquitted of the charge that he had committed the criminal acts indicated under Count 3.2 of the Third Amended Indictment.

As for the charge on this Count of the Indictment, the Prosecution presented only one piece of evidence by hearing the victim, who stated that on one occasion Mali Dragan came for him in the room and took him downstairs to the guards' room. There was a table in the room, and he saw a certain Brane standing next to it, who he believes was a prisoner too, because he was wearing civilian clothes. Immediately after he arrived, he hit him in the belly and the witness fell down. Then Mile continued kicking him having the military boots on, and due to these kicks the witness still has a scar on his chin. According to the victim, he was ordered to keep his hands in front of his face to prevent the blood from splashing on the walls. At the time Brane was standing behind the table watching it. On that occasion Mile addressed the witness asking him who had killed his wife's brother at Velja Glava, to which the victim could not give the answer.

Mali Dragan brought him back to the room, where he found Nurija Nuhanović, Mustafa Halilović and a certain Hadžija from Kula. Mali Dragan took him to the bed and put him there, and he recalls that Mustafa Jahić wiped him with a wet towel. He did not find out the reasons of the beating but he assumes that it is because he was at the window once, talking to his under-aged neighbors who were brought to the Court, whom he asked about his family. In the aftermath he had an opportunity to see the guard Mile who cursed his mother saying: "*Haven't you died?*". The witness then asked him to kill him, to spare him from further suffering, to which he replied: "*Do you know that my bullet costs 5 marks, you have to suffer for it*".

However, during the trial no other witness confirmed the beating of the victim, although all of them were together on the first floor premises. The witness Mustafa Halilović does not recall the mentioned event, that is, he does not know that the victim was beaten up, and he

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

points out that he would have surely noticed if he had been beaten. The victim also averred that after the beating he was brought back to the room where the witness Nurija Nuhanović was, however this witness too did not know anything about the mentioned event. The witness Alija Buljubašić never heard the prisoners complaining about the conduct of the accused Mile Marković, which was confirmed also by the witness Samir Pezerović, while the witness Ramis Smajlović stated that the victim was in prison with him, but that he did not know if he had any problems and if someone beat him. At the main trial Ahmet Omerović stated that he knew the victim during their detention, but he did not remember that he was beaten up during his detention. Finally, the witnesses Jusuf Omerović, Fadil Smajlović, Mehmed Redžić, Asim Banjanović and Sejfo Suljić testified about the attitude of the accused toward the prisoners, and they did not know that the accused Marković at any time took the victim out and he never spoke about the beating.

In addition, the Defense for the accused, contesting the credibility of the victim's testimony, more specifically contesting the averments that Mile beat him saying: *"Who killed my brother-in-law at Velja Glava?"*, presented the evidence by hearing the witness Rajko Gligorević, who is the father of the late wife of the accused Mile Marković. In his testimony this witness firmly stated that he did not have a son, in other words, that the accused did not have a brother-in-law. He also confirmed that his three other daughters were married, but that their husbands did not get killed, only one of them died in 2007 in Dobanovac. Among the persons whom the accused may call a brother-in-law one may consider the husbands of Mile's two sisters, but to the witnesses' knowledge none of them was killed.

In the case at hand the Trial Panel could not establish beyond reasonable doubt that the incriminating event happened in the manner indicated in the Indictment, basing its belief exclusively on the statement of the victim, particularly if an entirely illogical averment of the accused is accepted about what the accused said during the beating, given that it is unquestionable that the accused does not have a single family member whom he could consider his *brother-in-law*, and nobody in his family was killed during the conflict. The fact is that other witnesses, who were present in the room with the victim, do not mention the event, which would certainly be remembered, if it happened at all. Following the above mentioned, the Trial Panel, having no evidence which would establish the criminal responsibility of the accused beyond any reasonable doubt, acquitted him of the charges of having committed the criminal offence punishable under Article 173(1)(c) of the BiH CC.

Pursuant to Article 284(1)(c), the accused Slobodan Ostojić was acquitted of charges that he had committed the criminal acts under Count 4.1. of the Third Amended Indictment.

The evidence presented at the main trial was not sufficient to prove the participation of this accused in beating up the prisoners Nurija Nuhanović, Fethija Nuhanović, Mehmedalija Nuhanović and Ramo Ibrahimović. Firstly, during the trial no substantive body of evidence was presented to indisputably confirm that the accused Ostojić was present in the *DP Novi Izvor* building on 19 July 1992, when the beating up of the victims took place.

The victim Nurija Nuhanović testified about this circumstance, who clearly described the participation of the accused Sreten Lazarević and Mile Marković in the mentioned event, but he was not clear regarding the participation of the accused Slobodan Ostojić in beating

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

up of other persons brought into the room with him. He only concludes in the sense of the substantial likelihood that the accused Ostojić beat Fethija Nuhanović and Ramo Ibrahimović because he "*was standing on the same side where they were*" and was able to clearly see that he "*approached*" other victims, but due to his position he was not able to clearly see if he was hitting them and whom among the victims he was beating. The participation of the accused Ostojić is disputable as well as his very presence in the room, if one takes into account the fact that during the cross-examination the injured party Nurija Nuhanović was not able to recognize the accused Ostojić in the courtroom, although he categorically stated that it was he whom he saw in the room where the beating happened.

The Defense of this accused offered the alibi by hearing the witness Radivoje Mičić and Radivoje Ristanović, who stated that on the material day, more precisely on 19 July 1992 the celebration of the *Molitva [the prayer]* took place in the village of Jasenica, in which the accused participated. In support of this averment the church calendar for that year was adduced as evidence into the court file which clearly indicates that *Petrovdan [the Saint Peter's Day]* in that year was on Sunday 12 July 1992, which according to the witnesses means that the *Molitva* of the Jasenica village took place on the following Sunday, that is, on 19 July 1992.

According to the witnesses heard, the accused Ostojić was in the village of Jasenica with his wife, visiting his relatives. The witness Radivoje Ristanović states that Slobodan was in his house until 19:00 hours, and then he left to another relative Radivoje Mičić, who also appeared to testify and confirmed that Slobodan was at his place until 22:00 hours, and that he subsequently drove him and his wife home.

However, the Trial Panel did not give credence to the testimonies of these witnesses primarily because the witness Radivoje Ristanović, during the examination was not sure on what day *Molitva* took place in Jasenica, if *Petrovdan* was on Sunday, in other words, he did not know if it was celebrated on that Sunday or on the following one, because it traditionally happens on the first Sunday after *Petrovdan*. The Panel finds it unusual for the person who clearly recalls traditional holidays, celebrates them and remembers the persons who participated in the celebrations. He also stated that prior to his testimony together with the accused he had a look at the calendar from 1992 in order to refresh his memory as to when *Petrovdan* and *Molitva* took place in the village. Also, the panel did not believe the testimony of Radivoje Mičić, who also confirmed that *Molitva* was on 19 July 1992, and that Slobodan visited his relatives in Jasenice every year on the *Molitva* Day. More specifically, this witness avers that the accused visited him every year and that he visited his village Padžine to celebrate the *Treće trojice*, however asked by the President of the Panel he stated that he did not know when Slobodan had got married and that he was not at his wedding party and that he did not visit him when his children were born, because he allegedly had other obligations. In conclusion, the testimonies of the witnesses are inconsistent with other indisputable facts, and above all, they are illogical. The witnesses in a well-argumented manner and categorically averred that it was exactly in 1992 when Slobodan was visiting them in the village, at the *Molitva*, as their friend, although they did not know any details about the status of Slobodan at the time and his engagement as a guard. The witness Mičić who pointed out the strong private ties with the accused, had poor knowledge about them, and evidently he did not participate in any significant event in the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

life of the accused, such as the wedding or the child birth. In conclusion, the Trial Panel did not give credence to these witnesses and it did not accept the alibi of the Accused.

However, in the course of the proceedings the evidence was not presented through the testimony of other persons, who were allegedly injured by the commission of the criminal offence with which the accused was charged on this Count of the Indictment, thus the Panel concluded that based on the testimony of one of the victims it was not possible to establish beyond reasonable doubt the involvement of the accused in the commission of the given criminal offence.

The Court, while evaluating the evidence, considered also other pieces of evidence presented at the main trial, however it did not analyze them in detail and it did not find it relevant to the rendering of the final decision about the criminal responsibility of the accused for the commission of the given criminal offence. The Court rendered this decision having in mind that this evidence eventually would not affect the final state of the facts established as well as the conclusions the Court drew based on the evidence whose evaluation it presented in the Verdict.

III

9. Dismissing part of the Verdict

Pursuant to Article 283(1)(b) the Panel reached the Verdict dismissing the charges, given that the Prosecutor by filing the Second Amended Indictment of 12 September 2008 abandoned the criminal prosecution for the criminal acts under Counts I/2 and I/7 c) of the First Amended Indictment, which relate to the accused Sreten Lazarević, and the charges under Counts II/2 and II/3 which relate to the accused Dragan Stanojević.

10. Meting out the Punishment

Deciding on the duration of the punishment for each of the accused, the Court particularly considered the fact that the criminal offences of which the accused were found guilty were committed with an intent, direct or potential, in other words, with the indisputable knowledge of the accused about the nature of the acts and their consequences.

The Court particularly considered the fact that all illegal acts were committed against members of other ethnicity in relation to the ethnicity of the accused. Members of that ethnicity, as it was established, were all the time under the authority of the accused, helpless, in other words, subjected to the autocracy of the accused.

With respect to the aggravating factors on the part of the accused, the Court had in mind that they committed the offences in the capacity of reserve police officers-guards in prison, being aware of their position and power over the prisoners whom they were obliged to protect, especially with regard to Sreten Lazarević, who acted as a superior to the guards, more precisely he had a higher level of responsibility. Also, the aggravating factors against the accused Sreten Lazarević and Dragan Stanojević, which the Court took into account, are the number of acts, and the persistence the accused demonstrated in committing the criminal offence.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

As for the mitigating factors, the Court had in mind the family situation of the accused, their proper behavior before the Court, and the fact that the paramilitary formations made the performance of the duties to the guards more difficult, and on the part of the accused Mile Marković and Slobodan Ostojić the lack of persistence and ruthlessness in the commission of the offence.

The Court believes that the sentence of ten years' imprisonment imposed on the accused Sreten Lazarević is proportionate to the gravity of the committed offence and the level of the criminal responsibility of the accused, and that the purpose of punishment will be achieved with the sentence.

The Court considered the established mitigating factors with regard to the other accused by their quality and quantity as particularly mitigating, and having in mind the current family situation and health condition of the accused, it decided to sentence the accused Dragan Stanojević to seven years of imprisonment and the accused Mile Marković and Slobodan Ostojić to five years of imprisonment each, believing that the imposed sentence will achieve the purpose of punishment.

11. Decision on Costs

As for the decision by which the accused are relieved of the duty to pay the costs of the criminal proceedings, the Court believes that the accused are of such financial standing that they are not able to bear the costs of the criminal proceedings and thus, pursuant to Article 188(4) of the BiH CPC, it relieved them of their payment.

12. Decision on the Property Claims

Acting pursuant to Article 198(2) of the BiH CPC, the Court advised the survivors and victims of the crime to pursue their potential property claims in the civil proceedings given that during the trial they were not able to state the amount of this claim, and the information gathered during the proceedings did not offer the Panel a reliable basis to finally or partially decide on any property claims.

Minutes Taker
Lejla Horozić

President of the Panel
Judge
Mira Smajlović

Legal remedy: An appeal from this Verdict may be filed with the Appellate Division of Section I of the Court of Bosnia and Herzegovina within 15 (fifteen days) of the day when a written copy of this verdict was sent.
The appeal shall be filed with this Court in the sufficient number of copies.

We hereby confirm that this document is a true translation of the original [redacted] Serbian/Croatian.
Sarajevo, 01.12.2008
[redacted]
Certified Court Interpreter for English
[redacted]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm