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**Case No.:** X-KRŽ-06/299

**Date:** Delivered on 25 March 2009

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**Before the Appellate Division Panel composed of:**

**Judge Dragomir Vukoje, Presiding Judge**  
**Judge Azra Miletić, Reporting Judge**  
**Judge Philip Weiner, Member**

**PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA**

**v.**

**ZIJAD KURTOVIĆ**

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**SECOND INSTANCE VERDICT**

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**Prosecutor for the Prosecutor's Office:**

**Ms. Vesna Budimir**

**Defense Counsel for the Accused, Attorney:**

**Mr. Fahrija Karkin**

## CONTENTS

<b>1. INTRODUCTION, OPERATIVE PART .....</b>	<b>3</b>
<b>2. REASONING.....</b>	<b>4</b>
<b>3. I APPEAL BY THE DEFENSE COUNSEL FOR THE ACCUSED .....</b>	<b>5</b>
4. I 1. Essential Violations of the Criminal Procedure Provisions.....	5
5. I 2. Erroneously and Incompletely Established Facts .....	11
6. I 2.1. Erroneously Established Facts .....	11
7. I 2.2. Incompletely Established Facts .....	18
8. I 3. Violation of Substantive Law .....	21
<b>9. II APPEAL BY PROSECUTOR OF THE PROSECUTOR'S OFFICE OF B-H.....</b>	<b>29</b>

**Number: X-KRŽ-06/299**  
**Sarajevo, 25 March 2009**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, Section for War Crimes, sitting on the Appellate Division Panel composed of Judge Dragomir Vukoje, as the Presiding Judge, and Judge Azra Miletić and Judge Phillip Weiner, as members of the Panel, and Legal Officer Sanida Vahida-Ramić, participating as the record-taker, in the criminal case against the Accused Zijad Kurtović, for the criminal offense of War Crimes against Civilians, in violation of Article 173(1) (c), (e) and (f), criminal offense of War Crimes against Prisoners of War, in violation of Article 175(1) (a) and (b), and the criminal offense of Violating the Laws and Practices of Warfare, in violation of Article 179(1) and (2) (d), in conjunction with Article 180(1) and Article 29 and 53(1) of the Criminal Code of Bosnia and Herzegovina (CC B-H), having decided upon the respective Appeals by the Prosecutor's Office of B-H and the Defense Counsel for the Accused, Attorney Fahrija Karkin, filed from the Verdict of the Court of Bosnia and Herzegovina, No. X-KR-06/299, dated 30 April 2008, following the session of the Panel attended by the Accused, his Defense Counsel and the Prosecutor of the Prosecutor's Office of B-H – Vesna Budimir, on 25 March 2009, pronounced the following:

**V E R D I C T**

**The Appeal lodged by the Prosecutor's Office of B-H shall be refused as unfounded and the Appeal lodged by the Defense Counsel for the Accused Zijad Kurtović shall be partially upheld in the way that legal evaluation and legal qualification of the offense in the Verdict of the Court of B-H, No. X-KR-06/299, dated 30 April 2008, shall be modified.** The acts described in Sections 1 through 10 of the operative part of the First Instance Verdict of which the Accused was found guilty, shall be legally qualified as the criminal offense of War Crimes against Civilians set forth under Article 142(1) of the Criminal Code of SFRY, adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY, and the sentence of imprisonment for the term of 9 (nine) years is hereby determined for that criminal offense. The acts under Section 11 of the operative part of the First Instance Verdict of which the Accused was found guilty, shall be qualified as the criminal offense of Destruction of Cultural and Historical Monuments, set forth under Article 151(1) of the same Code, for which the sentence of imprisonment for the term of 3 (three) years is determined. Therefore, in application of Article 48(1) and (2)3) of the same Code, the Accused is hereby sentenced to **a compound sentence of imprisonment for the term of 11 (eleven) years.**

In the remaining part, the First Instance Verdict shall remain unchanged.

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**\* This is a corrected version of the Second Instance Verdict as it includes the corrections made on 7 September 2009 (Decision on correction No. X-KRŽ-06/299 of 7 September 2009).**

## **R e a s o n i n g**

1. By the Verdict of the Court of B-H, No. X-KR-06/299, dated 30 April 2008, the Accused Zijad Kurtović was found guilty of the acts committed in the manner and at the time described in the operative part of the Verdict in Sections 1, 2, 3, 5, 6, 7, 8, 9 and 10, whereby he committed the criminal offense of War Crimes against Civilians, in violation of Article 173(1)(c), (e) and (f) of the CC B-H; in Sections 1, 2, 3, 4, 5 and 6, the criminal offense of War Crimes against Prisoners of War, in violation of Article 175(1) (a) and (b) of the CC B-H, and in Section 11, the criminal offense of Violating the Laws and Practices of Warfare, in violation of Article 179(1) and (2) (d) of the CC B-H, all in conjunction with Article 180(1) and Article 29 and 53(1) of the CC B-H. In application of Article 53(1), for each of the referenced crimes the Panel sentenced the Accused to 10 (ten) years of imprisonment respectively and in application of Article 53(1) of the CC B-H, the Panel sentenced him to a compound sentence of imprisonment for the term of 11 (eleven) years.
2. Pursuant to Article 188(1) of the CPC B-H, the Accused shall be bound to reimburse the costs of the criminal proceedings, and pursuant to Article 198(2) of the CPC B-H, the aggrieved parties are referred to pursue their property law claims by means of civil action.
3. The Prosecutor of the Prosecutor's Office of B-H (Prosecutor) and the Defense Counsel for the Accused, Attorney Fahrija Karkin (Defense Counsel), filed appeals from the Verdict in a timely manner.
4. The Prosecutor filed the Appeal pursuant to Article 296(1)(d) of the CPC B-H contesting the decision on the criminal sanction, and moved the Appellate Panel of the Court of B-H (Appellate Panel) to properly evaluate the aggravating and mitigating circumstances, uphold the Appeal and modify the contested Verdict by imposing a more severe prison sentence on the Accused than the one pronounced.
5. The Defense Counsel for the Accused also filed a timely Appeal, specifically alleging an essential violation of the criminal procedure provisions pursuant to Article 297(1)(d) and (k), violation of the Criminal Code pursuant to Article 298(1)(d), and erroneously and incompletely established facts pursuant to Article 299(1) and (2) of the CPC B-H, moving the Appellate Panel to uphold the Appeal, vacate the First Instance Verdict and order a re-trial.
6. The parties did not submit responses to each other's Appeals.
7. At the session of the Appellate Panel held on 25 March 2009 in terms of Article 304 of the CPC B-H, the Prosecutor and the Defense Counsel presented brief summaries of their Appeals and stated that they entirely maintained their arguments and motions offered in the appeals, and in their oral submissions in response to each

other's Appeal they respectively stated that they found the Appeal by the opposing party unfounded and moved the Court to refuse them as such.

8. The Accused agreed with the submissions of his Defense Counsel.
9. Having reviewed the First Instance Verdict (hereinafter: the Trial Verdict) within the appeal limits and pursuant to Article 308 of the CPC B-H, the Appellate Panel has issued its decision as quoted in the operative part for the reasons that follow:

## **I APPEAL BY THE DEFENSE COUNSEL FOR THE ACCUSED**

### **I 1. Essential violations of the Criminal Procedure Provisions**

10. Pursuant to Article 297 of the CPC B-H, a verdict may be contested due to the essential violations of the criminal procedure provisions, specifically listed in Paragraph 1 of this Article.
11. A substantial violation of the provisions of the criminal procedure has also occurred if the Court has not applied some provisions of this Code or has applied them erroneously during the main trial or in rendering the verdict, but only if this affected or could have affected the rendering of a lawful and proper verdict (Article 297(2) of the CPC B-H).
12. Specifically, the Defense Counsel challenges the Verdict on the grounds envisaged under Article 297(1) d) and (k) of the CPC B-H.

#### **(1) a) Article 297(1)d)**

13. *An essential violation of the criminal procedure provisions is established:*  
  
*... (d) if the right to defense was violated.*
14. The violation of the right to defense implies that the rules of procedure have not been applied or have been applied erroneously to the detriment of the Accused.
15. In the present case the Defense Counsel submits that the right to defense was violated due to the relatively short period of time the Defense had to prove its case bearing in mind the length of the entire proceedings against the Accused from the commencement of the investigation through the presentation of the closing arguments.
16. The Defense Counsel also submits that the right to defense was violated due to the Verdict being announced within a very short period of time (twenty minutes following the presentation of closing arguments).

17. Finally, the Defense Counsel claims that both these violations (referred to in paragraphs 14 and 15) resulted in the violation of the principle of equality of arms.
18. The Appellate Panel finds that these appeal objections raised by the Defense Counsel are unsubstantiated.
19. Specifically, the Appellate Panel notes that the burden of proof rests with the Prosecutor who must prove all of the elements of the crimes charged. The Accused bears no such burden and is clothed in the presumption of innocence. The Accused has the right to present a defense or may decide to remain silent as he has no duty to prove his innocence. Consequently, the Prosecutor has the duty to use all legal means available to prove his theory of the case, and it reasonably follows that the Prosecutor would require much more time to attain that goal than the Defense. "This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides."<sup>1</sup> An examination of the record indicates that the Accused had sufficient time to defend his case. The Appellate Panel further notes that at trial the Prosecution and the Accused introduced almost the same number of witnesses and took almost the same amount of time. Therefore, the Appellate Panel finds that the allegation that the Accused's right to defense was violated by having less time than the Prosecutor is unsubstantiated and is hereby dismissed.
20. With regard to the Defense Counsel's objection to a short period of time between the completion of the main trial and the hearing for the pronouncement of the Verdict, by which the Accused's right to defense was violated, the Appellate Panel notes that, contrary to the grievances of the appeal, the First Instance Panel was duly mindful of the deadlines for the pronouncement of the verdict as foreseen under Article 286(1) of the CPC B-H (*Time and Place of the Pronouncement of the Verdict*).
21. Article 286(1) of the CPC B-H reads:

*After the pronouncement of the verdict, the Court shall announce the verdict immediately. If the Court is unable to pronounce the verdict the same day the main trial was completed, it shall postpone the announcement of the verdict for a maximum of three (3) days and shall set the date and place when the verdict shall be announced.*
22. Therefore, the legislator set the criteria concerning the deadlines for pronouncement of a verdict according to which the Court *may* pronounce the verdict immediately after its passing or the Court may postpone the pronouncement of the verdict for a maximum of three (3) days if unable to hand it down immediately. Possibility of the Court to pronounce the verdict immediately after its passing is reflected in its actual ability to pronounce the verdict immediately upon its passing depending on the complexity and extensiveness of a specific case.

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<sup>1</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defense Case, 20 July 2005, para. 7.

23. Specifically, taking into account the ample evidence, the variety and number of the criminal actions and offenses charged against the Accused, including the extensiveness of the indictment (total of 11 Counts), the criminal case against Zijad Kurtović before this Court is, beyond any doubt, a complex and extensive case. However, it was no obstacle for the First Instance Panel to pronounce the Verdict immediately upon the completion of the main trial or, more precisely, 20 minutes thereafter.
24. The Appellate Panel notes that regardless of the level of complexity of this case, the First Instance Panel had been in a position to assess and evaluate the evidence throughout the evidentiary proceedings and prior to the closing arguments. Therefore, since the First Instance Panel acted in accordance with the statutory criteria and had sufficient time to analyze and evaluate the evidence, the allegation of error is without a legal or factual basis. Therefore, the Appellate Panel has dismissed it.

### **Violation of the Right to Defense and Equality of Arms**

25. The Defense Counsel argues that the First Instance Panel, when acting in the manner described above (paragraph 15), and with reference to the appeal objection under Article 297(1)d) (violation of the right to defense), also violated the principle of equality of arms.
26. Primarily, international standards prescribe the principle of equality of arms, specifically Article 14(1) and (3)(e) of the International Covenant on Civil and Political Rights (ICCPR), as well as Article 6(1) and (3)(d) of the European Convention on Human Rights (ECHR).
27. In its relevant part Article 14 of the ICCPR reads:

(Paragraph 1)

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a **fair** and public **hearing** by a competent, independent and impartial tribunal established by law. (...)*

(Paragraph 3(e))

*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

*(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

28. The relevant parts of Article 6(1) and (3)(d) of the ECHR read:

(Paragraph 1)

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a **fair** and public **hearing** within a reasonable time by an independent and impartial tribunal established by law. (...)*

(Paragraph 3(d))

*Everyone charged with a criminal offense has the following minimum rights.*

*(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

29. The cited standards do not refer only to equality of arms in the criminal proceedings and other proceedings, but also to the equality of all citizens before the court. Naturally, we shall focus on the aspect of equality of arms in the criminal proceedings.
30. Equality of arms in criminal proceedings is one of the elements of a wider concept of a fair trial and reflects one of the fundamental principles of the criminal procedure. As such, it has been prescribed under the CPC, however it is not specifically defined in the CPC; rather it pervades through the entire procedural law and arises through specific procedural actions undertaken by the parties (and defense counsel), or more precisely, it is reflected in the principle of equality of legal means in the criminal proceedings (the so-called equality of arms). The principle plays an important role in all stages of the criminal proceedings, especially during the main trial. For example, this principle is reflected in the following rights of parties (and defense counsel): to directly examine their witnesses (direct examination) and the witnesses of the adverse party (cross examination), to adduce evidence refuting (challenging) the arguments of the adverse party, to lodge appeals (except when this right was legally denied, that is, when appeal is inadmissible), and to oppose the argument of the adverse party.
31. When these requisites are considered in light of the specific grievances of the Appeal filed by the Defense Counsel, this Panel finds that, contrary to the appeal arguments, the First Instance Panel did not violate the principle of equality of arms in the criminal proceedings.
32. Actually, the fact that the Defense, unlike the Prosecution, used much less time in preparing their strategy, *per se*, cannot imply that the principle of equality of arms was violated. The case file indicates that the Defense utilized all procedural rights and same conditions as the Prosecution. For example, at the trial the Defense summoned their witnesses under equal terms as the Prosecution, used the opportunity to cross examine the witnesses, adduced documentary evidence refuting Prosecution arguments, filed (regular) legal remedies - appeals from the First Instance Panel's decisions, and made procedural objections as envisaged by the law. The fact that all these actions took them much less time than the Prosecution does not mean that the principle of equality of arms was violated, so the appeal arguments on this issue have been dismissed as ill-founded.

33. Furthermore, the Defense Counsel submits that the pronouncement of the verdict 20 minutes upon the conclusion of the main trial violated the equality of arms.
34. The Appellate Panel finds that the reasoning provided above (paragraphs 20-24) is relevant for this contention and it would be unnecessary to reiterate it, also because the Defense Counsel provided only arbitrary objections without any supporting basis while conceding that such acting by the First Instance Panel was not in contravention of the CPC.
35. Accordingly, the Defense Counsel's appeal arguments in that regard have been dismissed as ill-founded.
36. In paragraphs 92 and 93 of this Verdict, the Appellate Panel will consider the allegation concerning an essential violation of the criminal procedure provisions (violation of the right to defense) since it is being raised under the guise of incompletely established facts.

**(1b) Article 297(1) k)**

37. The following constitute an essential violation of the criminal procedure provisions:  
  
*...(k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts.*
38. The Appellate Panel notes that it shall examine any appeal filed for the essential violation of the criminal procedure provisions pursuant to Article 297(1) k) of the CPC B-H based on *prima facie* verdict analysis. The Appellate Panel shall examine if the wording of the verdict is incomprehensible, internally contradictory or contradictory to the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. During such examination the Appellate Panel shall not consider if the Trial Panel made an error of fact or substantive violation of the law, it shall rather only establish if the verdict formally contains all necessary elements of a well reasoned and comprehensible verdict.
39. Furthermore, the Appellate Panel notes that the appellant **must show** that the aforementioned formal error invalidates the verdict.
40. The Appellate Panel takes into account that Article 297(1) k) of the CPC B-H is not an adequate ground for the appeal in the case when the accuracy of the facts which the trial panel either found or failed to find is contested. Pursuant to Article 299(1) of the CPC B-H, an error in establishing a decisive fact (erroneously and incompletely established state of facts) constitutes an adequate ground for contesting the verdict when the accuracy of the fact which the trial panel found or failed to find is contested. Pursuant to Article 297(1) k), the appellants should limit their appeal arguments to the formal aspect of the verdict and in case of the alleged error in the state of facts they should invoke Article 299 of the CPC B-H.

41. Careful and comprehensive analysis of the contested verdict with respect to the question whether it contains flaws which may constitute an essential violation of the criminal procedure under Article 297(1)k) of the CPC B-H, reveals clearly that such flaws do not exist and therefore essential violations of the procedural provisions from Sub-paragraph (k), which was only arbitrarily mentioned in the Appeal, were not made.
42. This Panel determined that no faults could be found in the Verdict with respect to essential violation of the criminal procedure provisions or its comprehensibility and clarity, that is, with respect to any possible flaws which the legislator specified under Article 297(1)k), which would result in revoking of the First Instance Verdict.
43. The elaborative methods applied in the Verdict fully comply with the relevant provisions of the procedural code. In fact, the Verdict initially provides a list of the adduced evidence and their contents and then evaluates them for their authenticity. The contested Verdict provided reasons regarding the decisive facts relevant for the adjudication in this legal matter, including a detailed and comprehensive analysis of all the evidence, both individually and its correspondence with all the other evidence, which will be further elaborated on in the section examining whether the state of facts was correctly and completely established.
44. Utilizing this methodological and procedural approach, the Verdict contains evidence for all facts found to be reliably established regardless of the category of the fact (decisive facts, circumstantial facts, test facts). Not a single fact relevant for the verdict was neglected.
45. Additionally, the operative part of the Verdict included all relevant elements of the criminal offenses under Articles 173, 175 and 179 of the CC B-H, with precise description of underlying acts described in all Sections of the operative part.
46. The Appellate Panel thus concludes that since the Defense Counsel has failed to establish that the First Instance Verdict is deficient pursuant to Article 297(1)(k), the allegation must be dismissed as ill-founded.

#### **(1) c) Lawfulness of the identification of the Accused**

47. Identification of the Accused during the *investigation* and in the *courtroom* was carried out in a lawful manner, although the Defense claims to the contrary in the Appeal. Specifically, identification of the Accused (during both of the referenced stages) was not performed as one of the actions aiming at obtaining evidence (in terms of Article 85(3) of the CPC B-H), as the Defense Counsel alleges, but rather constitutes an integral part of a witness' testimony.
48. As it follows from their statements given during the *investigative stage* on the events referred to in the Indictment, the witnesses spoke clearly and unequivocally about the Accused as the person responsible for their hardship in the Church of All Saints in Drežnica, referring to his first and his last name or his nickname ("Zijo"), his

origin, stature, character and behavior. They usually described him as a tall, corpulent man of athletic build, with thick hair, somewhat older than his fellow soldiers and as a person of authority. The witnesses were consistent that they learned of his identity from Marinko Drežnjak, who was also held captive in the Church and who had known the Accused from before.

49. As for the identification of the Accused by the witnesses in the *courtroom*, the witnesses would at their own initiative spontaneously point to the Accused when describing the incident which was then stated for the record by the Presiding Judge. This clearly demonstrates that the identification procedure was not the one described under Article 85 of the CPC B-H.
50. On the other hand, the identity of the Accused throughout the proceedings did not appear to be questionable at any point and therefore, given the overall circumstances of the case, there was no need for undertaking a special procedure aiming at identification of the Accused.
51. For the above reasons, the Appellate Panel holds that this was not the identification procedure defined under Article 85 of the CPC B-H and that the way in which it was carried out was lawful, which is why the appeal objections raised on this ground are refused as unfounded.

## **I 2. Erroneously and incompletely established facts**

### **I 2.1 Erroneously established facts**

#### **2.1 a) Knowledge on the part of the Accused about the status of the captives**

52. The Defense Counsel notes that the Trial Verdict does not show how the First Instance Panel established the knowledge on the part of the Accused about the status of the captives, adding that it failed to establish whether he knew who was a civilian and who was a soldier.
53. In this regard in its relevant part, the Trial Verdict reads:

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

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

*A conclusion about their stay in the church and the treatment the detainees who did not testify were subjected to as well ensues indisputably from the testimonies of the prisoners who remember well with whom they were captured prior to their arrival in the All Saints Church as well as in the church itself.*<sup>2</sup>

54. Having analyzed this allegation by the Defense Counsel concerning the findings of the First Instance Panel regarding the knowledge of the Accused about the status of the captives, the Appellate Panel concludes that this objection is partially founded. The Trial Verdict indicates the names of the prisoners of war and civilian prisoners, but does not provide clear reasons for the finding that the Accused was fully aware of those circumstances. However, the Appellate Panel does not find this omission of the First Instance Panel to be of such quality to require fully upholding the Defense Counsel's grievances and revoking the Trial Verdict. Specifically, this omission did not prevent the Appellate Panel from reviewing the legality and validity of the Trial Verdict in that part. The operative part and the reasoning of the contested Verdict are consistent with respect to decisive facts on this matter, and it is evident what the decision is and how it was reached, while the First Instance Panel's omission to corroborate the conclusion about the Accused's knowledge about the status of the captives, in the opinion of this Panel, is not of such quality as to result in revoking the Verdict, but can be rectified by the allowed intervention of the Appellate Panel in favor of the Accused.
55. The knowledge of the Accused about the status of captives is a decisive fact, which needed to be proven in the circumstances of finding the Accused guilty of two criminal offenses: War Crimes against Civilians and War Crimes against Prisoners of War. Although at the beginning of their testimony, when speaking about the circumstances of being taken prisoners, the witnesses also testified about their status at the moment of their arrest, before they had the first contact with the Accused Zijad Kurtović, and although the Accused might have been aware of it, given his subsequent interrogation of the aggrieved parties, the Trial Verdict does not present a clear and valid conclusion on that fact. Nonetheless, their testimonies were all consistent that **during their first contact with the Accused**, upon getting off the TAM-truck just before they were "unloaded" in front of the Parish Office, they were in plain clothes, **unarmed and placed hors de combat**.
56. Considering this fact, during their first contact with the Accused, the witnesses-victims were already protected under Article 3 of the Geneva Convention on the Protection of Civilian Persons during the Time of War dated 12 August 1949<sup>3</sup>, which is a decisive fact the Accused was aware of and on which the Trial Verdict presented valid reasons.
57. Article 3 of the Convention provides a clear definition of the category of protected population. According to this Article, the following are protected: *Persons taking no active part in the hostilities, including members of armed forces who have laid down*

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<sup>2</sup> See p. 36 of the BCS version of the Trial Verdict.

<sup>3</sup> The Common Article 3 of the Geneva Conventions, the so-called Mini Convention, is common to all four Geneva Conventions from 1949.

*their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.* Accordingly, not only did this Article protect several categories of population, but it also provided equal status to them.<sup>4</sup>

58. Taking into account the testimonies of the witnesses-victims, it is evident that in this case we have the category of captives who were "deprived of liberty", which the Accused must have known, given all the circumstances, and he also must have been aware that those people enjoyed certain protection, as properly found by the Trial Verdict.<sup>5</sup>
59. However, numerous actions that the Accused undertook against the captives, which were established by the First Instance Panel, are of such nature that they constitute a violation of international law regardless of the category of population at issue and regardless of the awareness of the Accused of that particular circumstance. For example, Article 3 as the common Article to all Geneva Conventions is also provided for under the Geneva Convention Relative to the Protection of the Prisoners of War from 1949, and thus it is not necessary to elaborate further on the subjective element on the part of the Accused, regardless of the category of the captives.
60. This Article provides that this category of population shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
61. However, it follows from the congruent testimonies of the witnesses that they were, in fact, captured, tortured and humiliated because they were Croats of Roman Catholic faith and that during their captivity in the Church they were subjected to ethnic and religious slurs by the Accused and his fellow soldiers and were forced to sing songs that were against their religious and ethnic beliefs.
62. The First Instance Panel found that the actions of the Accused were directed against two categories of the protected population (civilians and prisoners of war), and it evaluated the criminal quantity of his conduct in terms of the following two criminal offenses: War Crimes against Civilians and War Crimes against Prisoners of War. In this manner, according to the First Instance Panel, there is a notional concurrence of these two criminal offenses, given that they stem from the common underlying act of the Accused and that they concern one and the same incident.
63. Bringing this into connection with the above pertaining to the equal status of the protected population in accordance with the Common Article 3, the Appellate Panel

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<sup>4</sup> See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 616 ("Even if they were members of the armed forces...or otherwise engaging in hostile acts prior to capture, such persons would be considered 'members of armed forces' who are 'placed hors de combat by detention' ". Consequently, these persons enjoy the protection of those rules of customary international humanitarian law applicable to armed conflicts, as contained in Article 3 of the Statute.)

<sup>5</sup> See *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeals Judgment, 17 July 2008, fn. 460 (...if a victim was found to be detained by an adverse party at the time of the alleged offense against him, his status as either a civilian or combatant would no longer be relevant because a detained person cannot, by definition, directly participate in hostilities. Therefore, an attack against such person would automatically be unlawful.")

finds that the criminal quantity of actions of the Accused, based on the circumstances surrounding the relevant event, may be properly qualified as one criminal offense only. Finally, by considering the Accused's conduct in this manner, the purpose of punishment can still be achieved, that is, justice, as the universal principle can be done, which will be elaborated on in the discussion below on the application of the substantive law.

64. Therefore, bearing in mind the above observations regarding the persons protected under Article 3 of the Geneva Convention, the acts of the Accused concerning his treatment of those persons should have been qualified as War Crimes against Civilians in violation of Article 142(1) of the Criminal Code of SFRY, adopted pursuant to the Law on the Application of the Criminal Code of the Republic of B-H and the Criminal Code of SFRY (hereinafter: the Adopted CC)<sup>6</sup>, which is why **the legal evaluation and qualification of the criminal offense was modified, as stated in the operative part of the Verdict.**

#### **2.1 b) Temporal context of the commission of the criminal offense**

65. As part of his objection alleging erroneously established state of facts, the Defense Counsel contests the First Instance Panel's determination of the period of time in which the crimes were committed. The Defense Counsel does not deny that the events described in the Indictment had indeed taken place, but denies his client's involvement in them (an alibi defense). By providing an extensive elaboration of the relevant Prosecution and Defense witnesses' testimonies on this circumstance, the Defense Counsel points to the erroneous conclusion made by the First Instance Panel about the time when the crimes were perpetrated as well as the Accused's participation therein.

66. In this regard the First Instance Panel concluded:

*The inability to specify accurately the time period of detention is fully justified because, starting from the very trauma caused by capturing and then followed by the traumas they went through during the captivity, when the time was measured with the arrivals of the soldiers who came to ill-treat them, the detainees lost all connections with the external world and, with that, the possibility to remember the exact dates of the beginning and the end of their detention in the church. Although some of the prisoners indicated that the commencement date was 30 September and some others said it was 1 October 1993, the Court decided to accept the consistent statements of all detainees that the detention in the All Saints Church in Donja Drežnica lasted during late September and October 1993.<sup>7</sup>*

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<sup>6</sup> Decree Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia, which code was adopted as the Republic law at the time of the immediate war threat or the time of war (*Official Gazette of the Republic of B-H* 6/92) and the Law on the Ratification of the Decree Laws (*Official Gazette of the Republic of B-H* 13/94).

<sup>7</sup> See pp. 36-37 of the BCS version of the Trial Verdict.

67. With respect to the time of the crimes in question, the Prosecution witnesses (victim witnesses) primarily testified about it, including Marinko Drežnjak, Ivan Pavlović, Kamilo Dumančić, Mirko Zelenika, Ivan Kostić, witness B, and Matija Jakšić, whose testimonies were in accord with respect to the time when the crime was committed and the duration of their captivity. It follows from the testimony of the witnesses–victims, namely, Ivana Pavlović, Ivana Kostić, Kamilo Dumančić, witness B, and Mirko Zelenika, among others, that they were brought to the Parish Office and then to the Church in late September 1993, that is, early October, and that they spent 20-30 days in the Church, that is, until late October. The testimony of the witness Ivan Kostić is particularly convincing in this regard; he underlined that they were brought to Drežnica in late autumn, during the pomegranate season, and added that it was the month of September and that they were in the Church until late October. Mirko Zelenika's testimony was also convincing in this regard and he was explicit as to the date when they were brought to Drežnica stating that it was "the last day of September"<sup>8</sup>, and it is logical that the injured party would remember the date bearing in mind what he went through from the very first night of his captivity in the Church onwards. The witness Halil Ćučurović further testified that in the evening of 30 September 1993 he heard that prisoners were brought to the Church.
68. The discrepancies between witnesses' (victims') statements that were raised in the Appeal by the Defense Counsel are of such quality that they do not by any means question the correctness of the established state of facts, or the validity of the findings made by the First Instance Panel, primarily given the lapse of time and differences in perception and the overall circumstances surrounding the event. Specifically, when giving evidence spontaneously about the overall events covered by the Indictment, the witnesses-victims would start their testimony by describing different detention camps in which they had been held before they came to the Church. For instance, witness Branko Jurić mentioned the following detention camps as places where he was held prisoner: the Elementary School in Parsovići (Konjic Municipality; where their camouflage uniforms were seized), Buturović Polje, the Museum in Donja Jablanica, and Zuka's base, to be then taken to the Parish Office and then transferred to the Church of All Saints in Donja Drežnica. Witness Ivan Kostić gave evidence that he had spent 11 and one half months in different camps.
69. Bearing this in mind, it is quite logical to expect somewhat different interpretation of the event in question by witnesses-victims and in the instant case the discrepancies are not of such intensity and quality to shed any doubt to the credibility of their statements, which is why the First Instance Panel acted properly in deciding not to attribute any crucial importance to these minor conflicts in the testimony.
70. Contrary to the grievances of the appeal by the Defense to this end, the Appellate Panel finds that the First Instance Panel, based on the adduced evidence, properly identified both the temporal context within which the incidents took place and the Accused's role, therefore, this grievance of the appeal has also been dismissed as ill-founded.

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<sup>8</sup> Emphasis subsequently added.

## 2. 1 c) Putting the Accused in the context of the events

71. By challenging the finding made by the First Instance Panel about this decisive fact, the Defense Counsel tried to provide an alibi for his client through an analysis of the allegedly contradictory witness testimonies.

72. In this regard, after quoting some testimonies of the witnesses-victims (Matija Jakšić, Marinko Drežnjak and others), the First Instance Panel found:

*The other witnesses-former inmates remember the Accused Zijad Kurtović well, as will be detailed below, and although the Accused used an alibi defense and denied that he ever stepped into the All Saints Church while the detainees were there, and even that a Zijad, but not Kurtović, went to the church, the Court found beyond any reasonable doubt that the Accused indeed was in the church and behaved as described under Sections I through II of the operative part.<sup>9</sup>*

73. Additionally, the First Instance Panel also found:

*Considering the consistent testimonies of II witnesses – former prisoners who said that it was the Accused Zijad Kurtović who participated and often ordered their torture while they were in captivity in the Church of All Saints in Donja Drežnica, and on the other hand, the alibi offered for certain dates during the material time, the contradicting testimonies of the defense witnesses about (non)existence of the “camp” in the church and about it being destroyed or not, and in particular after considering that none of the defense witnesses was a guard in the church who would in that case be able to confirm whether or not the Accused was seen at the church. The Court found the defense of the Accused irrelevant and obviously devised to avoid criminal liability.<sup>10</sup>*

*The Court noted that it was irrelevant whether the Accused took part in the operations at Vrđi or Batačke Lazine because he could reach the church and abuse the prisoners who indeed testified that they had been abused mostly during the night.<sup>11</sup>*

74. A review of the testimony of Prosecution witnesses indicates the nature and extent of the Accused's activities at the Church of All Saints. Specifically, they testified that the Accused, together with his fellow-soldiers, met the prisoners when they were "unloaded" in front of the Parish Office. He then transferred them (that same night) to the Church of All Saints which was secured or locked. In addition, the witnesses (including Marinko Drežnjak, Kamilo Dumančić, Matija Jakšić, Branko Jurić, Ivan Kostić, witnesses A and B, and Miroslav Soko), link the Accused to all of the events covered by the Indictment. They testified that the Accused acted like the person in charge and that he was issuing orders based on which the evil deeds were carried out.

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<sup>9</sup> See p. 39 of the BCS version of the Trial Verdict.

<sup>10</sup> See p. 51 of the BCS version of the Trial Verdict.

<sup>11</sup> See Ibid.

75. Witness Ljoljo underlined that the Accused acted as the master of the place and was not in the Church all the time. He added: "However, he was there even if he wasn't around." Witness Miroslav Soko said that "he had the honor of having Zijad Kurtović stubbing out a cigarette on his forehead", and that he saw him wearing a signet ring. Witness A's testimony was by far the most striking. This witness recalled well several situations involving the Accused. The first time the Accused "caught his eye", as the witness put it, was when he walked holding a crucifix upside-down, which bothered the witness very much as he was a man of faith, and it was for that reason that the witness "closely observed" the Accused. The witness recalled one situation when Zijad Kurtović offered him a bite of an apple during his detention in the Church, but when the witness tried to take it, he threw it on the floor and the witness A picked it up. Finally, he mentioned that even today when he goes to church he recalls Zijad Kurtović and the torture that occurred there.
76. All Prosecution witnesses–victims were in accord when it concerned the Accused's coming and going to the Church on a daily basis during their captivity. The witnesses were clear that the Accused would come to the church in the evening hours (at night), when the mistreatment took place, and that he would leave the church in early morning hours (before dawn), and that two guards would be there during the day.
77. The Appellate Panel notes that it was within the First Instance Panel's discretion to give credence to the witnesses who tied the Accused to the specific, non-everyday experiences and events, which, despite the fragile nature of human perception, tend to etch deeply in one's memory.
78. The Appellate Panel further notes that the First Instance Panel acted within its discretion in crediting the testimony of the Prosecution witnesses who gave consistent testimony when speaking about (1) the presence of the Accused in the Church, (2) his arrival and departure from the Church, and (3) his participation in the relevant incidents; and rejecting the testimony of Defense witnesses who generally were not present when the crimes occurred.
79. The First Instance Court could have also reasonably found that the testimony introduced by the Defense (indicating that the Accused was serving at the front lines during the period when the crimes were committed) did not establish an effective alibi. Specifically, the Accused could have traveled to the Church on his own initiative during the evening hours (which was when the crimes occurred) and returned to the Command for assignments in the morning, since the Command was located only 3 km from the Church.<sup>12</sup>
80. Therefore, bearing in mind the established facts, the Appellate Panel concludes that a reasonable trier of fact would establish responsibility of the Accused in relation to the events in question in the way the First Instance Panel did. In line with that, the Appeal by the Defense Counsel, filed pursuant to Article 299 of the CPC B-H and alleging that the First Instance Panel wrongly established the facts in this case, has been refused as unfounded.

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<sup>12</sup> See testimony of witness Omer Pinjić.

81. However, within the context of incorrectly established facts, the Defense Counsel keeps raising the issue of an incorrect finding on the capacity of the Accused in the Drežnica Battalion during the relevant time in relation to the offenses the First Instance Panel found him guilty of. The Defense Counsel provided a detailed analysis of the Defense witnesses' statements (Hasan Delić, Ramiz Alić, Zijad Mušić and others).
82. Having elaborated on the documentary evidence pertaining to the capacity of the Accused at the relevant time, the First Instance Panel concluded:
- The Court concludes that a 30-soldier or so strong unit existed within this battalion and that apart from its regular duties it also had army-and-police duties, as well as that the Accused was its member; however this unit was the Unit for Physical Security of the Command rather than a Military Police unit.*<sup>13</sup>
83. Taking into account the conclusion of the First Instance Panel about the membership and capacity of the Accused at the relevant time, which is identical to the Defense's theory, the allegation by the Defense is moot.

## **I 2.2. Incompletely established facts**

84. The Defense Counsel argues that the state of the facts was not established completely in the first instance proceedings because the Defense did not have an opportunity to adduce new evidence after the Indictment was specified, which ultimately resulted in the violation of the Accused's right to a defense and other rights stipulated in Article 6 of the European Convention on Human Rights (ECHR).
85. In the first instance proceedings, the Defense proposed to adduce new evidence as follows: to confront witness Hasan Delić with witnesses A and B; to confront witnesses Mirko Zelenika and Sedin Mahmić; to hear Mili Karačić-Hrnjez as a witness; to hear Sefer Halilović as an expert witness; and to tender into the case file the following documentary evidence – the historical note and the wartime log kept by the Commander for Security (the latter two pieces of documentary evidence were tendered into the file by the Defense Counsel at the appellate hearing as a part of the Appeal from the Trial Verdict).
86. The First Instance Panel refused the Defense Counsel's motion to adduce new evidence, reasoning as follows:<sup>14</sup>

### **d) Refusal of the presentation of certain evidence**

*On 29 April 2008, stating his position regarding the specified Indictment, the defense counsel proposed the presentation of new evidence, namely two*

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<sup>13</sup> See p. 38 of the BCS version of the Trial Verdict.

<sup>14</sup> See pp. 13-14 of the BCS version of the Trial Verdict.

*documentary pieces of evidence – a historical note and a record book (war diary) of the Assistant Commander for Security, as well as the summoning of the witness – expert Sefer Halilović, confrontation of Hasan Delić with Witnesses A and B, confrontation of the witness Mirko Zelenika and Sedin Mahmić, and the summoning of the witness Mili Karačić – Hrnjez.*

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

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

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

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

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

*This particularly refers to the motion to confront certain witnesses.*

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

87. Pursuant to Article 263(2) of the CPC B-H, the First Instance Panel found that the Defense wanted to introduce evidence related to the circumstances which were irrelevant to the case, that is, that the proposed evidence was unnecessary. In accordance with this, the First Instance Panel presented sufficient reasons for its decision and elaborated on them clearly on pages 13 and 14 of the Verdict. On the other hand, pursuant to Article 239(2) of the CPC B-H, it is the duty of the judge or the presiding judge to ensure that the subject matter is fully examined and that everything is eliminated that prolongs the proceedings but does not serve to clarify

the matter, which the First Instance Panel undoubtedly did.

88. The proposals by the Defense followed the modification of the Indictment by the Prosecutor. The First Instance Panel correctly concluded that the modification was more stylistic than substantively changing the facts, thus, no additional preparation by the Defense was necessary. Therefore, the Panel correctly notes that certain evidence, that is, confrontation of witness Hasan Delić with witnesses A and B, and confrontation of witnesses Mirko Zelenika and Sedin Mahmić, could have taken place in the course of the presentation of evidence, which the Defense obviously did not find necessary.
89. In view of the foregoing and contrary to the arguments by the Defense Counsel, the First Instance Panel's legal conclusions with respect to this issue are sufficient and acceptable and are of such quality that they leave no doubt as to the completeness of the established facts, as the Defense Counsel argues groundlessly. Therefore, the Appellate Panel finds that every reasonable trier of fact would come to the same conclusion based on the contents of the case file.
90. Also, by so acting, the First Instance Panel did not deprive the Accused of the right to present his defense but, with its explicitly reasoned decision, it relieved the case file of the irrelevant (peripheral) evidence in order to avoid subsequent dealing with evidence irrelevant for the determination of the case. On the other hand, according to this Panel, the quantity and contents of the evidence adduced during the first instance proceedings do not show the need for additional clarification of the facts and for this reason the conclusion of the First Instance Panel regarding the evidence proposed by the Defense Counsel is justified.
91. In view of the foregoing, the Appellate Panel has not found a violation of the Accused's right to a defense (Article 7 of the CPC B-H), which forms a constituent part of a wider concept of a fair trial (as noted beforehand)<sup>15</sup>. Accordingly, there was no violation of the set of rights guaranteed by Article 6 of the ECHR, either, as was only arbitrarily alleged by the Defense Counsel.
92. The day the public hearing was held (25 March 2009), the Appellate Panel admitted into the case file two pieces of evidence proposed by the Defense Counsel<sup>16</sup> claiming these were new pieces of evidence. Since, as noted above, the First Instance Panel refused their presentation as unnecessary pursuant to Article 263(2) of the CPC B-H, he requested the Appellate Panel to review them.
93. Having reviewed the tendered documents, the Appellate Panel concluded that their contents do not indicate that the First Instance Panel established the facts incompletely, as the Defense Counsel argues, since all the decisive facts were established beyond any reasonable doubt based on the evidence adduced in the first

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<sup>15</sup> See paragraph 30.

<sup>16</sup> The evidence is listed in Paragraph 85, and we repeat that it contains the following: 1) Wartime log of the Assistant Commander for Security, with entry numbers 1-184 (regular notes and reports to the 4th Battalion Command); and 2) Historical Note of the *Drežnica* Independent Battalion, No. 02-219/96, of 27 February 1996.

instance proceedings. This Panel fully shares the First Instance Panel's factual and legal conclusions on the decisive facts. This Panel explained it in detail in the part of the decision pertaining to the Defense appeal arguments concerning Article 299 of the CPC B-H, hence it does not find it necessary to repeat the same reasons here.

On the other hand, it is evident from the contents of the first proposed piece of evidence (Wartime Log) that it does not cover the relevant time (the Log covers the May-July 1993 and January-March 1994 periods). The other proposed piece of evidence (Historical Note) points to certain information about the hierarchy of the 4th Drežnica Battalion (organizational structure), and this Panel finds that it is not necessary to prove this further considering that the First Instance Panel provided clear and valid reasons as to the membership of the Accused in the 4th Battalion and evaluated this circumstance in the context of his criminal liability for the events at issue.

94. The Historical Note also describes certain operations between the HVO and the 4th Battalion, which do not include the relevant event at all.
95. Bearing in mind the foregoing, this Panel also concludes that the First Instance Panel acted correctly when it found this evidence to be irrelevant for the case, pursuant to Article 263(2) of the CPC. This Panel accepts all arguments of the First Instance Panel on this matter, elaborated in paragraphs 88 and 89, and notes that granting these motions would not have added anything to the findings and conclusions of the First Instance Panel.
96. For the above reasons, the appeal allegations claiming otherwise have been dismissed as unfounded.

### **I 3. Violation of Substantive Law**

97. The Defense Counsel alleges that the substantive law has been violated to the detriment of the Accused because the First Instance Panel did not apply the Criminal Code of SFRY (the Adopted CC) as the law in effect at the time of the perpetration, which has resulted in a violation of the principle of legality as well as the principle of the mandatory application of a more lenient law, given the sentences prescribed under the Adopted CC for the offenses that the Accused was convicted of.
98. With respect to the application of substantive law, the First Instance Panel correctly found that the criminal offenses under Articles 173, 175 and 179 of the CC B-H of which the Accused was found guilty, are also provided for under the Adopted CC, or, more precisely, they constitute the underlying acts of the criminal offenses under the Adopted CC, too. Thus, the acts referred to under Article 173 of the CC B-H correspond to the acts referred to in Article 142 of the Adopted CC, the acts referred to in Article 175 of the CC B-H are contained in Article 144 of the adopted CC, and the acts under Article 179 of the CC B-H are also criminalized in Article 142(2), Article 148 and Article 151 of the Adopted CC.
99. However, the Panel subsequently noted that the criminal offenses for which the

Accused was convicted constitute criminal offenses under international customary law and, therefore, fall under the "general principles of international law", as defined in Article 4a of the CC B-H, that is, under the "general legal principles acknowledged by civilized nations", under Article 7(2) of the ECHR. The First Instance Panel concluded, based on these provisions, that the CC B-H should be applied. It added that this position was in line with the jurisprudence of the Court of B-H and the Decision of the Constitutional Court of B-H, No. AP 1785/06.<sup>17</sup>

100. The Trial Verdict provides the following reasoning:

*In the opinion of the Panel, the principle of mandatory application of a more lenient law is ruled out in the trial of criminal offenses for which at the time of the commission it was absolutely predictable and commonly known that they were contrary to the general rules of international law. In the specific case, it is taken as established that the Accused had to know that in the state of war application of international rules has priority and that a violation of internationally protected values carries heavy consequences. If the provision of Articles 173 and 175 of the CC B-H is analyzed, it is obvious that it has been clearly stated that the body of this criminal offense includes, inter alia, elements of violation of international rules. This makes this group of offenses special, because it is not sufficient only to commit such criminal offenses through certain physical activity, but what is necessary is the awareness that the international rules are being violated by the commission and the assumption that the accused must know that the period of war or conflict or hostilities is especially sensitive and especially protected by the commonly accepted principles of international law and, as such, the offense gains an even greater significance and its commission carries even more serious consequences than an offense committed in another period.*<sup>18</sup>

101. However, this Panel finds that such legal qualification, as well as the interpretation of the notion of a more lenient law, is erroneous.

102. The Appellate Panel will initially consider the legal qualification chosen by the First Instance Panel, and then the question of the application of substantive law in general.

103. In applying substantive law, the Trial Panel primarily had a duty to place the conduct of the Accused under the legal norm which provides the most precise definition thereof.

104. After deciding to apply the CC B-H, the First Instance Panel qualified the conduct of the Accused as follows:

- *War Crimes against Civilians* under Article 173(1) (c), (e) and (f) of the CC B-H – Sections 1, 2, 3, 5, 6, 7, 8, 9 and 10 of the operative part
- *War Crimes against Prisoners of War* under Article 175(1) (a) and (b) of the CC B-H, Sections 1, 2, 3, 4, 5 and 6 of the operative part, and

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<sup>17</sup> See Decision of the Constitutional Court in the Maktouf case, No. Ap 1785/06, Decision on the Appeal from the Verdict of the Court of B-H, No. KPŽ 32/05 of 4 April 2006.

<sup>18</sup> See p. 18 of the BCS version of the Trial Verdict.

- *Violating the Laws and Practices of Warfare* under Article 179(1) and (2)(d) of the CC B-H – Section 11 of the operative part.

105. However, under the CC B-H, there are two criminal offenses prohibiting destruction of cultural, religious, historical and similar institutions. One is the criminal offense under Article 179 (*Violating the Laws and Practices of Warfare*), specifically Paragraph (2)(d), which the Accused was found guilty of, and the other one is the criminal offense under Article 183(1) of the CC B-H (*Destruction of Cultural, Historical and Religious Monuments*).

**Article 179 of the CC B-H reads:**

### **Violating the Laws and Practices of Warfare**

#### **Article 179**

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

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

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

- a) Use of poison gases or other lethal substances or agents with the aim to cause unnecessary suffering;*
- b) Ruthless demolition of cities, settlements or villages or devastation or ravaging not justified by military needs;*
- c) Attack or bombarding by any means of undefended cities, villages, residences or buildings;*
- d) Confiscation, destruction or deliberate damaging of establishments devoted to for religious, charitable or educational purposes, science and art; historical monuments and scientific and artistic work;*
- e) Plundering and looting of public and private property.*

**Article 183 of the CC B-H reads:**

### **Destruction of Cultural, Historical and Religious Monuments**

#### **Article 183**

*(1) Whoever, in violation of the rules of international law at the time of war or armed conflict, destroys cultural, historical or religious monuments, buildings or establishments devoted to science, art, education, humanitarian or religious purpose,*

*shall be punished by imprisonment for a term between one and ten years.*

*(2) If a clearly distinguishable object, which has been under special protection of the international law as people's cultural and spiritual heritage, has been destroyed by the criminal offense referred to in paragraph 1 of this Code, the perpetrator*

*shall be punished by imprisonment for a term not less than five years.*

106. The Appellate Panel notes that the criminal offense under Article 179 of the CC B-H includes criminal acts of a considerable criminal quantity, placing on the same level acts such as use of poison gases, ruthless demolition of cities, settlements and villages, plundering and looting of public and private property, along with the confiscation, destruction or deliberate damaging of establishments devoted to religious purposes, which is reflected in the length of the prescribed sentence (ten-year or long-term imprisonment), unlike the criminal offense under Article 183(1) of the CC B-H which incriminates *only* the destruction of cultural, historical and religious monuments and carries the imprisonment sentence from one to ten years.
107. Therefore, Article 183 of the CC B-H (specifically its Paragraph 1) criminalizes the destruction of religious institutions, which was the case here.
108. Starting from the obligation of the Court to find the most adequate legal qualification for the Accused's conduct, and evaluating the state of facts in Section 11 of the operative part, the entire conduct of the Accused as well as his awareness about the relevant offenses, the Appellate Panel finds that the First Instance Panel, having decided to apply the CC B-H, should have qualified the conduct of the Accused under Section 11 of the operative part of the Verdict as acts set forth in Article 183(1) of the CC B-H.
109. However, the Appellate Panel considered the Defense Counsel's objection that the Court should have applied the Adopted CC as a more lenient law to the perpetrator and concluded that it is well-founded.
110. In other words, Article 3 of the CC B-H prescribes the principle of legality as one of the fundamental principles of the criminal law. This Article reads:
- (1) Criminal offenses and criminal sanctions shall be prescribed only by law.*  
*(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law.*
111. Article 4 of the CC B-H prescribes the principle of time constraints regarding applicability, and it reads:
- (1) The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense.*  
*(2) If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied.*
112. Article 4a of the CC B-H provides for an exception to the application of Articles 3 and 4 of the CC B-H, since it prescribes as follows:
- Articles 3 and 4 of this Code shall not prejudice the **trial and punishment** of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.*

113. It follows from the aforementioned legal provisions that, as a rule, the law in effect at the time of commission shall primarily apply to the perpetrator (the *tempus regit actum* rule).
114. It is possible to depart from this principle only if it is beneficial to the Accused, that is, only if after the commission of the crime the law has been amended in a way to become more lenient to the perpetrator.
115. The issue as to which law is more lenient to the perpetrator is resolved *in concreto*, that is, by comparing the old and new law (or laws) in each individual case.
116. Comparing the text of the laws, however, can provide a conclusive answer only if the new law decriminalized some offenses prescribed under the previous law, in which case the new law is obviously more lenient. In all other cases, when a criminal offense is punishable under both laws, it is necessary to establish all the circumstances that may be relevant for the decision as to the more lenient law.
117. These circumstances primarily relate to the provisions on sentencing and meting out or reducing the sentence (which law is more lenient in that regard), measures of warning, possible accessory punishments, new measures that substitute the punishment (community service, for example), security measures, legal consequences of the conviction, as well as the provisions pertaining to the criminal prosecution, whether the new law envisages the basis for excluding unlawfulness, criminal liability or punishability.
118. It is possible to depart from the principle of the application of a more lenient law only in cases referred to under Article 4a, that is, only if the application of a more lenient law would **prejudice the trial or punishment** for acts that constitute criminal offenses according to the general principles of international law
119. **Trial or punishment** for any action would not be possible only if that action was not **prescribed as a criminal offense**, that is, as **an underlying act of a criminal offense**, given that, pursuant to Article 3(1) of the CC B-H, criminal offenses and criminal sanctions may only be prescribed by the law.
120. In that way, for example, Article 4a of the CC B-H applies to the criminal offense of Crimes against Humanity committed at the time when the Adopted CC was in effect, since the latter law did not provide for that criminal offense at all. If Article 4(2) of the CC B-H applies, it would follow that the Adopted CC is more lenient for the perpetrator because it does not criminalize the act committed by the Accused at all, and, accordingly, the perpetrator **could neither be tried nor punished for the aforementioned criminal offense**. In such case, it is necessary to apply Article 4a of the CC B-H or directly apply Article 7(2) of the ECHR. Pursuant to Article 2/II of the B-H Constitution, ECHR is directly applicable in B-H; it has primacy over other laws and does not allow the perpetrators **to evade trial and punishment** in cases where specific conduct, which constitutes criminal offense according to the general principles of international law, is not criminalized.

121. **Accordingly, Article 4a of the CC B-H provides for an exceptional departure from the principles under Articles 3 and 4 of the CC B-H in order to ensure the trial and punishment for such conduct which constitutes criminal offense under international law, that is, which constitutes a violation of norms and rules that enjoy general support of all nations, that are of general importance and/or are considered or constitute universal civilization achievements of the modern criminal law, where such conduct was not defined as criminal in national criminal legislation at the time of perpetration.**
122. In this case, the law in effect at the time of the commission of the crimes as well as the law currently in effect qualifies the criminal conduct of which the Accused was found guilty as criminal offense. The acts under Sections 1-10 of the operative part of the Trial Verdict are included in Article 142(1) of the Adopted CC – War Crimes against Civilians, while the acts under Section 11 of the operative part are included in Article 151(1) of the same law – Destruction of Cultural and Historical Monuments.
123. Although Article 151(1) of the Adopted CC does not explicitly include religious facilities and their property, this Article constitutes a blanket norm which invokes provisions of international law.

Article 151(1) of the Adopted CC reads:

*Whoever in violation of **rules of international law** in time of war or armed conflict destroys cultural and historical monuments and buildings, establishments intended for science, art, educational and humanitarian purposes, shall be sentenced to not less than one year-imprisonment.*

124. In this case, within the context of international law to which this stipulation refers, the provisions apply that are set forth under Article 56 of the Hague Convention on the Laws and Customs of War on Land (Hague Convention IV) (including the Hague Book of Rules, the so-called Hague Regulations on the War on Land) of 1907 (as stated in the Indictment), which the International Military Court in Nuremberg found **to constitute part of Customary International Law.**<sup>19</sup>

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<sup>19</sup>**Customary International Law, IRC (Jean Marie Henckaerts, Louise Doswald-Beck), 2005, p. XXVIII** "The great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law, the same applies to the Hague Book of Rules of 1907"; **The example of the Nuremberg Judgment mentioned in the History of the UN War Crimes Commission and the Development of the Laws of the War, London, 1948, p. 220, to which the study Penal and Historical Aspects of the Bleiberg Crime by Dominik Vuletić, LLB, refers on its page 133:** "The Hague Convention of 1907 prohibited certain methods of warfare and those prohibitions include inhuman treatment of prisoners, use of war gases, improper use of a flag of truce and similar issues. Many of those prohibitions were being implemented (were in force) long before the Convention was adopted, but as of 1907 they became punishable as criminal offenses that constitute violation of laws of war. Nowhere in the Hague Convention such actions are proscribed as criminal offenses or any punishment is foreseen or any court mentioned that would try the perpetrators thereof. However, it has been a while since military courts bring to trial and convict individuals who are guilty of violating laws on war on land set forth in the Convention".

*Article 56 of the IV Hague Convention reads:*

*The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.*

*All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.*

Also, the Preamble of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention of 1954)<sup>20</sup> reads:

***"Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935 ..."***

Pursuant to Article 1 of the Hague Convention of 1954, the term "cultural property" shall cover ***"movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular..."***. In addition, Article 18 of the Hague Convention of 1954 and Article 22 of its Protocol II define its application.<sup>21</sup> Article 19 of the Convention contains provisions governing the application of a minimum of the provisions which relate to respect for cultural property.<sup>22</sup>

**Protocol II additional to the Convention (Article 15) prescribes criminal liability for violations of the Protocol and the Convention (1954)**

***(1) Any person commits an offense within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:***

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***International Humanitarian Law (Laws of War), Prof. Dr. Zoran Vučinić, Belgrade, 2006, p. 442, quotes a part of the Study by Bogdan Zlatarić, The Hague Convention of 1907 and Individual Criminal Liability for War Crimes, JRMP, No. 2/58, p. 334: "The Hague Conventions of 1899 and 1907 did not foresee any incriminating stipulations in case their provisions be violated, which is, according to the French professor of law Renault, a consequence of the fact that 'at the time they were adopted, such issues simply were not considered'."***

<sup>20</sup> The Convention and its Protocol I were incorporated in the legal system of B-H; they were published in the *Official Gazette of SFRY – Treaties*, No. 4/1956, and has been in force since 7 August 1965; B-H signed the Protocol II on 22 May 2009.

<sup>21</sup> "Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict." (Article 18 of the Convention); ***"This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties."*** (Article 22 of Protocol II)

<sup>22</sup> ***"In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property."***

***e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention,***

which actually happened in this specific case.

Further, Article 16 of the Protocol II additional to the Geneva Convention of 1949 (adopted in 1977), **foresees protection of cultural objects and of places of worship.**<sup>23</sup>

125. Based on the foregoing, it clearly follows that Article 151(1) of the Adopted CC also protects the establishments dedicated to religion, and thus the conduct of the Accused, described under Section 11 of the operative part, includes all elements of the aforementioned criminal offense.
126. Taking into account the aforementioned, it is evident that the legal requirements to try and punish the perpetrator for his conduct by applying either of the two laws have been met.
127. Further assessment as to which of the laws is more lenient to the perpetrator shall be made by comparing the prescribed sentences.
128. The criminal offense of War Crimes against Civilians under Article 173 of the CC B-H, just as the criminal offense of War Crimes against Prisoners of War under Article 175 CC B-H, carries the same imprisonment sentence of not less than ten years or a long-term imprisonment. The criminal offense under Article 183(1) of the CC B-H carries the imprisonment sentence of one to ten years.
129. On the other hand, the criminal offense of War Crimes against Civilians under Article 142(1) of the Adopted CC carries the sentence of imprisonment of not less than five years or the death penalty, while the criminal offense set forth in Article 151(1) of the Adopted CC, Destruction of Cultural and Historical Monuments, carries the sentence of imprisonment of not less than one year.
130. As noted earlier, a more lenient law is always assessed *in concreto*, that is, through assessing all the circumstances of a specific case. In this case that means that it is necessary to bear in mind that the First Instance Panel, when meting out the punishment for the Accused, and after taking into account all the mitigating and aggravating circumstances, imposed the sentence of imprisonment of ten years for each of the offenses he was convicted of. It follows from this that the Panel imposed on the Accused the minimum of the prescribed sentences for each offense, which means that their intention was to impose a more lenient punishment on the Accused.
131. When the foregoing is taken into account in comparing the respective punishment

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<sup>23</sup> ***Without prejudice to the provisions of The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.***

prescribed under the Adopted CC and the CC B-H with respect to the minimal prescribed sentence, it follows that the Adopted CC is more lenient to the perpetrator because it carries a more lenient minimum for the relevant offenses (five years and one year).

132. Based on the foregoing and pursuant to Article 4 of the CC B-H, **the Appellate Panel holds that the Adopted CC, as the law that was in effect at the time of the commission of the offenses, is also the law which is more lenient to the Accused in this case, therefore it has modified the contested Verdict with regard to the legal assessment and qualification of the offense as stated in the operative part of the Verdict.**
133. The Panel notes that Paragraph 84 of the aforementioned Decision of the Constitutional Court of B-H reads: "*However, courts are allowed to apply the law to similar cases differently if they have objective and reasonable justification for doing so.*" This is because one law can be more lenient in one situation or more stringent in another, depending on the circumstances, so, when several laws might apply, it is necessary to assess which law might be more favorable for the perpetrator.
134. **Having reviewed the Trial Verdict pursuant to Article 308 of the CPC B-H (Extended Effect of the Appeal), the Panel concluded that the Defense Counsel's appeal argument concerning the compound sentence of imprisonment imposed on the Accused was unfounded. The Panel will provide reasoning concerning this ground for appeal in the section dealing with the Appeal by the Prosecutor.**

## **II APPEAL BY PROSECUTOR OF THE PROSECUTOR'S OFFICE OF B-H**

135. The Prosecutor argues that the First Instance Panel correctly and completely established the state of the facts, but that it did not impose the appropriate sentence of imprisonment when considering the degree of the Accused's liability, the manner and the circumstances under which the offenses were committed, their gravity and consequences. Specifically, the Prosecutor notes that the Court did not properly evaluate the aggravating circumstances for the Accused, whereas it overestimated the extenuating circumstances. Therefore, based on the aforesaid, the general and the specific deterrence requirements cannot be met with the imposed sentence of 11 years of imprisonment.
136. The First Instance Panel imposed the sentence of 10-year imprisonment for each criminal offense for which the Accused was convicted and, by applying the rule of concurrence of criminal offenses, pursuant to Article 53(2)b) of the CC B-H, pronounced the compound sentence of 11 years of imprisonment. With respect to achieving the purpose of punishment through this sentence, the First Instance Panel concluded:

*Having considered all the foregoing aggravating and mitigating circumstances, the Court concluded that the imposed sentence is proportional to the gravity of the committed crimes, the degree of criminal liability of the defendant, the*

*circumstances under which it was committed and the motives that led the Accused to commit the crimes, and that the compound sentence will achieve the purpose of punishment in terms of special and general prevention.*<sup>24</sup>

137. Contrary to the Appellant's arguments, the Appellate Panel finds that the First Instance Panel correctly concluded that the compound sentence of 11-year imprisonment, considering all the circumstances, would achieve the purpose of punishment under Article 33 of the Adopted CC.
138. Considering all the circumstances on the part of the Accused, primarily, the degree of his criminal responsibility, the extent and variety of his criminal conduct, his motives for committing the crimes, the circumstances surrounding the offenses and the gravity of the consequences, this Panel also holds that the compound sentence of 11 year-imprisonment satisfies the requirements of general and special deterrence.
139. However, the manners in which the Appellate Panel and the First Instance Panel reached the compound sentence of 11-year imprisonment differ. Ultimately, the sentence is a result of the application of the law in effect at the time of commission, which envisaged more lenient sentences for some criminal offenses, as explained in detail in the part on the application of the substantive law. Additionally, it is a result of a different assessment of the total criminal quantity of the Accused's conduct within the framework of individual incriminations, on one hand and the consequences and the degree of jeopardizing protected values, on the other.
140. In other words, the protected value in case of the commission of the criminal offense set forth in Article 142(1) of the Adopted CC is human life, psychological and physical integrity of an individual and human dignity, while the protected value in case of the criminal offense set forth in Article 151(1) of the Adopted CC (as read with Article 56 of the Hague Convention and the relevant provisions of the 1954 Hague Convention) is the protection of establishments dedicated to religious, scientific and other needs. Therefore, the values protected by the respective referred provisions are not the same.
141. The values of human life, individual integrity and dignity have a higher degree of protection than the values protected by Article 151(1) of the Adopted CC, which transpires from the length of the prescribed punishment provided for these individual criminal offenses. Accordingly, the evaluation of the Accused's conduct in the context of his entire contribution to the violation of the protected values cannot be treated equally in the context of his punishment, either.
142. Bearing this in mind, the Appellate Panel holds that the conclusion on this circumstance presented in the Trial Verdict does not show what guided the First Instance Panel to regard on the same level the aforementioned values that the Accused was found to have violated and thus pronounce the same individual sentences of imprisonment.
143. For that reason, within the limits of the prescribed sentencing framework for the

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<sup>24</sup> See p. 54 of the BCS version of the Trial Verdict.

criminal offenses set forth in Articles 142(1) and 151(1) of the Adopted CC, this Panel has imposed the term in prison of 9 and 3 years respectively, and taking into account Article 48(1) and (2) 3) of the Adopted CC, issues a compound sentence of 11 years. The Panel finds this punishment to be proportional to the degree of the criminal responsibility of the Accused, his motives for committing the crimes, the circumstances surrounding the offenses, the degree of violation of the protected values and the consequences of the offenses, and that this compound sentence will achieve the purpose of punishment in terms of special and general deterrence.

144. The Appellate Panel further notes that when meting out punishments, courts should bear in mind that the purpose of punishment is to achieve a legitimate goal – to serve justice as the universal principle. For this reason, in every specific case a sentencing court must reflect upon whether this purpose is being achieved by the chosen type and duration of the sentence for the Accused.
145. For the foregoing reasons, the Prosecutor's grounds of appeal are dismissed as ill-founded.
146. Based on the foregoing and pursuant to Article 310, and in conjunction with Article 314(1) of the CPC B-H, the decision was rendered as quoted in the operative part.

**RECORD-TAKER:**  
**Sanida Vahida-Ramić**

**PRESIDING JUDGE OF THE PANEL**  
**Judge Dragomir Vukoje**

**LEGAL REMEDY:** No Appeal lies from this Verdict.

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

*Sarajevo, 10 September 2009*  
*Edina Neretljak*  
*Certified Court Interpreter for the English Language*