

SUD BOSNE I HERCEGOVINE



СУД БОСНЕ И ХЕРЦЕГОВИНЕ

COURT OF BOSNIA AND HERZEGOVINA

Case number: X-KRŽ-06/294

Date: 20 January 2011

Before the Panel of the Appellate Division composed of:

Judge Hilmo Vučinić, Presiding Judge

Judge Miloš Babić, PhD, member

Judge Phillip Weiner, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

vs.

ŠEFIK ALIĆ

SECOND INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:

Jude Romano

Counsel for the Accused, attorney:

Senad Kreho

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Number: X-KRŽ-06/294
Sarajevo, 20 January 2011

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division composed of Judge Hilmo Vučinić as the Presiding Judge, Judge Miloš Babić, PhD, and Judge Phillip Weiner, as Members of the Panel, with the participation of Legal Adviser Dženana Deljić Blagojević as the Record-taker, in the criminal case against the Accused Šefik Alić, for the criminal offense of War Crimes against Prisoners of War in violation of Article 175(a) in conjunction with Articles 21, 35 and 180(1) and (2) of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding upon the Indictment of the Prosecutor's Office of BiH number: KT-RZ-141/06 of 30 January 2007, as amended on 7 June 2007, following a trial held before the Appellate Panel which was partly closed to the public, pursuant to Article 317(1) in conjunction with Article 235 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), in the presence of the Prosecutor of the Prosecutor's Office of BiH, Jude Romano, the Accused and his Defense Counsel Senad Kreho, attorney from Sarajevo, following a deliberation and voting session on 20 January 2011, delivered the following:

VERDICT

THE ACCUSED:

ŠEFIK ALIĆ, son of Mumin and Fatima, born on 3 March 1968 in Dobro Selo, Municipality of Bužim, Bosniak, citizen of BiH, residing at Blatište b.b, Municipality of Bosanska Krupa, forestry technician by occupation - forest ranger, married, father of three minor children, completed military service in 1988 in Kovina, the Republic of Serbia, with the rank of a Corporal, registered in the Bužim Military Records as a First Lieutenant, Personal Identification Number 0303968111054, ID card number 04CSA2399,

IS FOUND GUILTY

Inasmuch as:

During the armed conflict in the territory of Bosnia and Herzegovina and the Republic of Croatia between the forces of the Army of Bosnia and Herzegovina and the Army of Serb Krajina, in the capacity of the Assistant to the Commander of the *Hamza* Battalion for Security, the IV Battalion of the 505th Brigade of the 5th Corps of the Army of BiH, whose duties and responsibilities included interrogation of prisoners, protecting them and ensuring their safe passage to the Brigade Command, he acted contrary to Common Article 3(1)(a) and (c) of the Geneva Conventions, dated 12 August 1949, by participating in the physical and mental abuse of war prisoners and in their killings, while it was his duty to protect them, which he failed to do, and because:

1. On 5 August 1995, together with other members of the “Hamza” Battalion and Tewfik Al Harbi, an irregular soldier, he participated in the military operation named “Oluja”, conducted by the 505th Brigade (also known as the Bužim Brigade), during which operation four members of the Army of Serb Krajina were captured by the members of the “Hamza” Battalion in the vicinity of elevation Hleb on the territory of the Republic of Croatia close to the border of Bosnia and Herzegovina, and by the function he performed in the “Hamza” Battalion he took custody of and was responsible for the protection and well-being of the prisoners, who were captured, mistreated and killed in the following manner.

2. Mirko Devetak was captured in the vicinity of elevation Hleb in the direction of Devetaci by Hasan Čatić, the “Hamza” Battalion Company Commander; immediately afterwards, Tewfik Al Harbi tried to kill this prisoner by asking other soldiers to give him a knife but was prevented from doing so by W3 and other members of the 1st Company; shortly afterwards the prisoner was placed in the custody and control of the Accused, who interrogated and intimidated him together with Tewfik Al Harbi, during which Al Harbi introduced himself to the prisoner as a *mujahedin* and said that “I come and kill one, two”, while the Accused at the same time told the prisoner he (referring to Al Harbi) *only slits throats*; this prisoner was then handed back his rifle, without ammunition, and exposed to danger by being forced to march at the head of the column of “Hamza” Battalion soldiers in the direction of the Serb lines and the Serb Battalion Command, towards Pavlovo Brdo (Majdan), as a scout and as a “lure” to capture other soldiers of the Army of Serb Krajina.

3. Shortly afterwards, W1, an officer in the “Hamza” Battalion, with the help of his escort, independently captured two other Serb soldiers – Petar Stambolija and Pero Borosina – in the vicinity of elevation Hleb in the direction of Pavlovo Brdo (Majdan), and within minutes after the capture he delivered them into the custody and control of the Accused, who arrived at the scene and who, with some members of the 1st Company, separated from the first prisoner who was moving with the

other soldiers including Tewfik Al Harbi; meanwhile, a fourth Serb soldier – Branko Bašić – was separately captured by members of the “Hamza” Battalion in the same area and at approximately the same time, and he too was placed into the custody and control of the Accused; following which these newly captured soldiers joined the first prisoner, all under the control of the Accused.

4. During the course of these events, at least three of the prisoners in the custody of the Accused – Mirko Devetak, Petar Stambolija and Pero Borosina – were subjected to threats and intimidation and physical abuse while walking through a forest, during which the Accused, while physically restraining and pointing his gun at the prisoner Pero Borosina, threateningly said to the camera operated by Meho Veladžić, the Brigade cameraman, that he would make him (i.e. the prisoner) his “*kum*” [translator’s note: *This term can mean “best man” and “godfather” and is very often used in dialect for a close family friend*] and then indicated that Tewfik Al Harbi would make the prisoner whom he was physically restraining, Petar Stambolija, his (i.e. Al Harbi’s) “*kum*”; Al Harbi aggressively held the prisoner Petar Stambolija by the prisoner’s hair while questioning him without any intervention by the Accused, and while the Accused continued to physically restrain Pero Borosina, Al Harbi struck that prisoner twice to the chin with his hand, again without any intervention by the Accused; while they were on a wide forest road the Accused and Al Harbi together struck the fourth prisoner, Branko Bašić, to the back of his head.

5. After orders were given to withdraw to elevation Hleb because of the death of Brigade Commander Izet Nanić, all four prisoners were taken together to or near to elevation Hleb in the company of members of the “Hamza” Battalion including the Accused and Tewfik Al Harbi; thereafter the Accused failed to take all necessary and reasonable steps to ensure the further safety of the prisoners, which included failing to prevent Al Harbi from having further contact with the prisoners and from further harming them, despite being aware of the real danger and risk which Al Harbi posed to the prisoners; at some later point in time, all four prisoners were shot dead execution style while next to each other by Al Harbi, without justification, with the assistance of regular soldiers of the “Hamza” Battalion, in the vicinity of Hleb on the edge of a wide forest road, where the bodies remained side by side for withdrawing soldiers to see; after the killings Al Harbi boasted to the camera operated by Meho Veladžić that he killed them and encouraged Meho Veladžić to film the bodies, which he did.

Thus,

during the armed conflict in the territory of Bosnia and Herzegovina and the Republic of Croatia between the forces of the Army of Bosnia and Herzegovina and the Army of Serb Krajina, violating the rules of international law, together with

Tewfik Al Harbi, the Accused participated in the inhuman treatment of prisoners of war and, knowing that the prisoners would be killed, in the capacity of the Assistant Commander for Security, he failed to take the necessary and reasonable measures to prevent that.

By doing so,

he committed the criminal offense of War Crimes against Prisoners of War in violation of Article 175(a), in conjunction with Articles 21, 29 and 180(1) of the CC BiH, therefore, pursuant to Articles 39, 42 and 48 of the CC BiH, the Court of BiH

SENTENCES
HIM TO THE PRISON SENTENCE OF 10 (ten) YEARS

Pursuant to Article 56 of the CC BiH, the time the Accused Šefik Alić spent in custody from 4 November 2006 to 3 October 2007 and the time he will have spent in custody since 20 January 2011, shall be credited towards the sentence of imprisonment.

Pursuant to Article 188(1) of the CPC BiH, the Accused shall be obliged to reimburse the costs of criminal proceedings in the amount of KM 31,177.05.

REASONING

I. PROCEDURAL HISTORY

1. By the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-06/294 of 11 April 2008, the Accused Šefik Alić was acquitted of the charges for the criminal offense of War Crimes against Prisoners of War under Article 175(a) of the CC BiH, in conjunction with Articles 21, 35 and 180(1) and (2) of the same Code, and Common Article 3(1)(a) of the 1949 Geneva Conventions.

2. The Prosecutor's Office of BiH filed an appeal from the referenced Verdict in a timely manner, and moved the Appellate Panel to revoke the first instance Verdict and order a trial before the Appellate Panel. The appeal by the Prosecutor's Office of BiH was granted and the Verdict of the Court of BiH was revoked by the Decision of 23 March 2009, and a retrial before the Appellate Panel was ordered.

3. The Appellate Panel found that the Prosecution appeal was reasonable in that the Trial Panel had erroneously and incompletely established the state of facts and that the contested Verdict erroneously found the decisive facts, which resulted in the erroneous application of substantive law by the Trial Panel.

4. After the trial, the Appellate Panel rendered its verdict of guilty for the reasons that follow.

II. EVIDENCE PRESENTED AND DECISIONS

5. Pursuant to Article 317(2) of the CPC BiH, a trial was held before the Appellate Panel of the Court of B-H and during the evidentiary proceedings the Prosecution and the Defense proposed to present the evidence adduced in the first instance proceedings. In a subsequent written submission the Prosecution specified a list of witnesses whose evidence was to be heard before the Appellate Panel, while the Defense reiterated its position that all witness statements should be replayed.¹

6. Having reviewed the submissions, the Appellate Panel, guided by Article 317(2) of the CPC B-H, established that it was not necessary to re-present all the evidence adduced in the first instance proceedings, witness testimony as well as documentary evidence, and, in addition to the major part of the heard witness statements, it admitted the remaining evidence without its repeated reading or reproducing, and all pieces of evidence were treated as a single body of evidence. All the pieces of evidence (the reproduced and the admitted ones alike) were treated and evaluated equally, individually and in their correspondence with all the other evidence.

7. During the trial, pursuant to Article 317(2) of the CPC B-H, the Appellate Panel replayed the testimonies of Prosecution witnesses W3, W4, W1, W5, Hamdija Emrić, Safet Čordić, Hasan Ćatić, Alija Osmanović, Senad Šahinović, Šerif Kekić, Refik Duraković, Agan Elkasović, Zijad Nanić, Sead Jusić, Hamdija Mustafić, Mevlid Mustafić, Meho Veladžić, Agan Skenderović, Ibrahim Cinac, Sulejman Šekić, Fuad Kulauzović, Milorad Pribičević, Zuhdija Ćatić, Mirsad Selmanović.

8. Also admitted were the statements by witnesses Edhem Eminić, Merima Ćurt, Safet Isaković, Samir Šakanović and Abid Duraković, as well as the following documentary evidence of the Prosecution: **T1** - CD 1 – 5th Corps-ARBIH - 505th Brigade, 47 min - 53 min and 9 sec with the attachment: Transcript CD1; **T2** -

¹ Submissions by the Prosecution and the Defense of 17 September 2010.

Photographs (from the CD which is Exhibit T1); **T3** -- Drawing – Sketch made by witness W3; **T4** -- Witness Examination Record for Refik Duraković, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 18 August 2006; **T5** -- Drawing – Sketch made by witness Refik Duraković at the main trial on 4 September 2007; **T6** -- Record on examination of witness Refik Duraković, SIPA, No. 14-11/3-103-65-2/05, dated 24 November 2005; **T7** -- Record on examination of witness W3, SIPA, No. 14-11/3-103-47/05, dated 13 October 2005; **T8** -- Witness Examination Record for witness W3, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 3 August 2006; **T9** -- Record on examination of witness W4, SIPA, No. 14-11/3-103-71-2/05 dated 28 November 2005; **T10** -- Witness Examination Record for witness W4, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 2 August 2006; **T11** -- Drawing – Sketch made by witness W4; **T12** -- Original-topographic map (concerning W1); **T13** -- Copy-topographic map marked by witness W1; **T14** -- Examination Record for witness W1, SIPA, No. 17-12/3-04-2-193/06, dated 22 September 2006; **T15** -- Witness Examination Record for witness W1, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 4 October 2006; **T16** -- Witness Examination Record for Hamdija Emrić, SIPA, No. 14-11/3-103-68-2/05, dated 29 November 2005; **T17** -- Witness Examination Record for Hamdija Emrić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 17 August 2006; **T18** -- Witness Examination Record for Hasan Ćatić, SIPA, No. 14-11/3-103-63-2/05, dated 24 November 2005; **T19** -- Witness Examination Record for Hasan Ćatić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 1 August 2006; **T20** -- Witness Examination Record for Alija Osmanović, SIPA, No. 14-11/3-103-94-2/05, dated 13 December 2005; **T21** -- Witness Examination Record for Alija Osmanović, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 9 January 2007; **T22** -- Witness Examination Record for Safet Čordić, SIPA, No. 17-12/3-04-2-175/06, dated 1 September 2006; **T23** -- Witness Examination Record for Senad Šahinović, SIPA, No. 14-11/3-103-79-2/05, dated 5 December 2005; **T24** -- Witness Examination Record for Senad Šahinović, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 18 August 2006; **T25** -- Copy – topographic map marked by witness Šerif Kekić; **T26** -- Witness Examination Record for Šerif Kekić, SIPA, No. 17-12/3-04-2-192/06, dated 22 September 2006; **T27** -- Witness Examination Record for Šerif Kekić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 8 January 2007; **T28** -- Witness Examination Record for Agan Elkasović, SIPA, No. 14-11/3-103-70-2/05, dated 5 December 2005; **T29** -- Witness Examination Record for Zijad Nanić, SIPA, No. 14-11/3-103-87-2/05, dated 9 December 2005; **T30** -- Witness Examination Record for Zijad Nanić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 9 January 2007; **T31** -- Witness Examination Record for Sead Jusić, SIPA, No. 14-11/3-103-80-2/05, dated 8 December 2005; **T32** -- Witness Examination Record for Sead Jusić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 22 January 2007; **T33** -- List of the Commanders of the 505th Bužim Brigade; **T34** -- Military Officer's Personal File (for Šefik Alić); **T35** -- Order No. 05/1-950/94 of 31 December 1994; **T36**- Report, No. 01-18/95 of 9 March 1995; **T37** -- Proposal No. 05-1189/95 of 29 October 1995; **T38** --

Order, No. 05/53-1813 of 26 November 1995; **T39** -- Witness Examination Record for Hamdija Mustafić, SIPA, No. 17-12/3-04-2-169/06, dated 30 August 2006; **T40** -- Copy – topographic map marked by witness Edhem Eminić; **T41** -- Witness Examination Record for Edhem Eminić, SIPA, No. 14-11/3-103-72-2/05, dated 1 December 2005; **T42** -- Witness Examination Record for Edhem Eminić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 3 August 2006; **T43** -- Witness Examination Record for Mevlida Mustafić, SIPA, No. 17-12/3-04-2-196/06, dated 4 October 2006; **T44** -- Copy – topographic map marked by witness Mevlida Mustafić; **T45** -- Witness Examination Record for Meho Veladžić, SIPA, No. 14-11/3-103-55-2/05, dated 15 November 2005; **T46** -- Witness Examination Record for Edhem Veladžić, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 5 October 2006; **T47** -- Witness Examination Record for Agan Skenderović, SIPA, No. 14-11/3-103-54-2/05, dated 16 November 2005; **T48** -- Witness Examination Record for Merima Ćurt, SIPA, No. 14-11/3-103-56-2/05, dated 15 November 2005; **T49** -- Witness Examination Record for Ibrahim Cinac, SIPA, No. 14-11/3-103-100-2/05, dated 17 December 2005; **T50** -- Order for logistics, dated 4 August 1995; **T51** -- Witness Examination Record for Sulejman Šekić, SIPA, No. 17-12/3-04-2-173/06, dated 31 August 2006; **T52** -- Witness Examination Record for Safet Isaković, SIPA, No. 14-11/3-103-61-1/05, dated 22 November 2005; **T53** -- Witness Examination Record for Fuad Kulauzović, SIPA, No. 14-11/3-103-92-1/05, dated 13 December 2005; **T54** -- Witness Examination Record for Mirsad Selmanović, SIPA, No. 17-12/3-04-2-167/06, dated 29 August 2006; **T55** -- Geographical map of the area around Makarovača marked by witness Milorad Pribičević; **T56** -- Record on recognition of a person by witness Milorad Pribičević, SIPA, No. 14-11/3-103-1/05, dated 19 October 2005; **T57** -- Set of 7 color photographs (the victims' photographs)- MP1-MP7; **T58** -- Witness Examination Record for Samir Šakanović, SIPA, No. 17-12/3-04-2-211/06, dated 20 October 2006; **T59** -- Witness Examination Record for Samir Šakanović, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 8 January 2007; **T60** -- Witness Examination Record for Zuhdija Ćatić, SIPA, No. 14-11/3-103-64-2/05, dated 24 November 2005; **T61** -- Witness Examination Record for Abid Duraković, SIPA, No. 14-11/3-103-57-1/05, dated 15 November 2005; **T62** -- Cards of missing or captured persons issued by Government of Republika Srpska, Office for the search for missing and captured persons (for Mirko Devetak, Branko Bašić, Pero Boromisa, Petar Stambolija); **T63** -- Death certificate for Branko Bašić dated 21 October 2005; **T64** -- Death certificate for Mirko Devetak with the Decision declaring the missing person dead, No. R.I.12/98-8; **T65** -- Letter of the *Veritas* Documentation and Information Center, Banja Luka, with the documentation for missing persons (for Mirko Devetak, Branko Bašić, Pero Boromisa, Petar Stambolija); **T66** -- Lists of the missing and captured persons, issued by Government of Republika Srpska, Office for the search for missing and captured persons, dated 21 October 2005 and 7 February 2006; **T67** -- Excerpt from the Bužim Police Station's criminal record for Šefik Alić, No. 05-5/03-04-3-185/06 of 28 November 2006; **T69** -- SIPA Report on the search and temporary

seizure of items dated 2 November 2006 with the Letter of the Court of BiH, No. X-KRN-06/294 of 3 November 2006; **T70** -- Record on the opening and examination of the temporarily seized items and documents, No. KT-RZ-141/06, Prosecutor's Office of B-H, dated 23 January 2007; **T71** -- Military Book of Šefik Alić (blue color); **T72** -- Military Book of Šefik Alić (brown color); **T73** -- Movement permit issued to Šefik Alić; **T74** -- A green military beret with the Army of BiH insignia; **T75** -- Order issued by the Commander of the 505th *Viteška* Brigade of the RBiH Army, No. 05/3-665/94, dated 31 December 1994; **T76** -- Report of the Hamza Unit dated 25 February 1995; **T77** -- Instruction on the application of the rules of international law on war in the Armed Force of the RBiH (*Official Gazette of the Army of the RBiH*, No. 2/92, dated 5 December 1992); **T78** -- Rules on publication of the regulations and other acts in the Army of the RBiH (*Official Gazette of the Army of the RBiH*, No. 1/92, dated 15 November 1992); **T79** -- Rules for Operations of the Military Security Service in the RBiH Armed Force from 1992; **T80** -- Instruction by the Administration of the Military Security Service Sarajevo for foreign citizens recruitment in the Army of RBiH, No. 7-2/73-40 of 22 August 1995; **T81** -- Query on the recruitment of foreign citizens in the Army of RBiH by the Military Security Service Department of the 5th Corps Command, No. 03/632-2, dated 25 August 1995; **T82** -- Report of the Military Security Service Sector of the 505th *Viteška* Mountain Brigade on the recruitment of foreign citizens, No. 03/27-1-53, dated 26 August 1995; **T83** -- Information by the Military Security Service Department of the 5th Corps Command on recruitment of foreign citizens in the Army of RBiH, No. 03/632-12, dated 4 September 1995; **T84** -- Instruction of the Military Security Service Sector of the 5th Corps on treatment of foreigners in war zones, No. 06.1/2-719, dated 20 October 1994; **T85** -- Crime Scene Sketch -- Responsibility zone of the 3rd Battalion of the 505th *Viteška* Brigade --the place of Ćorkovača; No. SL/06, dated 23 August 2006; **T87** -- Order of the 5th Corps Commander to release witness Hamdija Mustafić, No. 05/53-88, dated 16 January 1995; **T88** -- Review of the 505th *Viteška* Mountain Brigade of the changes in personal data for witness Hamdija Mustafić dated 28 April 1999; **T89** -- Medical documentation of the Second Instance Military Medical Commission Bihac for witness Hamdija Mustafić: Finding No. 06/1067-2431 dated 21 October 1995; Finding No. 06/1067-3026 dated 6 May 1995; Finding No. 06/1067-3496 dated 24 June 1995; Finding No. 06/1067-4794 dated 16 October 1995; **T90** -- Examination Record for witness W5, SIPA No. 17-12/3-04-2-194/06, dated 28 September 2006; **T91** -- Examination Record for witness W5, SIPA, No. 17-12/3-04-2-79/07, dated 20 November 2007; **T92** -- DVD recording of the guard of honor of the *Hamza* Battalion; **T93** -- DVD recording - funeral of the *Hamza* Battalion Commander, Izet Nanić; **T94** - - Transcript of the DVD recordings T92 and T93.

9. During the trial the Appellate Panel replayed the evidence by Defense witnesses Dževad Jusić, Sulejman Čaušević, Hamdija Mustafić, Mevlid Mustafić, and

Meho Veladžić. The Panel also admitted the other statements by Defense witnesses, namely Nisvet Begović and Besim Avdić, as well as the documentary evidence by the Defense: **O1** -- DVD recording made during the relevant operation; **O1 A** -- Photo-documentation (clips) from the DVD recording - 12 pages - 72 clips; **O1 B** -- Transcript of the DVD recording; **O2** -- a dark red beret; **O3** – a photocopy of pages 66 and 276 of the ICRC Register of the missing persons from the former Yugoslavia territory; **O4** – a photocopy of the BOFORS Manual; **O5** – a photocopy of the MSS ID card; **O6** -- Order dated 3 October 1992, No. Pov-371-131, on the assignment of the Accused to the post of the Military Police Platoon Leader.

10. The Appellate Panel particularly evaluated the video evidence presented by the Prosecution and the Defense. The authenticity of the video footage was not contested, as it was verified by witness Meho Veladžić, the Brigade cameraman, who confirmed that he was in the field on the relevant day filming the ongoing events. A review of the videos established that both treat the same event but that the footage presented by the Defense was of a better quality and covered the event for a longer period. Therefore, in the further evaluation of the evidence and facts the Appellate Panel will refer to the video footage of the Defense.

11. During the proceedings and with the consent of the parties, the Appellate Panel decided to maintain the measures protecting the identity of witnesses W1, W3, W4 and W5. Also, in the manner identical to that employed by the Trial Panel and pursuant to Article 235 of the CPC B-H, with a view to protecting the interests of witnesses under pseudonym and with the consent of the parties, the Appellate Panel decided to exclude the public from the trial during every reproduction of the video footage with the prisoners of war and presentation of the photo-documentation (clips) from the DVD footage.

12. During the trial before the Appellate Panel, the 30-day deadline for adjournment of trial set forth in Article 251(2) of the CPC B-H expired between the hearings held on 5 July 2010 and 23 August 2010 respectively. Both parties to the proceedings, including the Accused, agreed with this adjournment and proposed in consent that the trial before the Appellate Panel should resume without replaying anew the witness testimonies already replayed.

III. CLOSING ARGUMENTS

13. While presenting its closing argument, the Prosecution submitted that the Accused, together with Tewfik, personally and directly participated in the inhuman treatment of the captured Serb soldiers and that, because he failed to intervene

while Tewfik Al Harbi ill-treated the captives, he thus encouraged and incited Tewfik's ill-treatment of the prisoners. The Prosecution further argued that the Accused, in his capacity as Assistant for Security of the "Hamza" Battalion, had effective control over his subordinates, including Tewfik Al Harbi, and consequently, a duty to protect the lives and safety of the captives and to escort them to the Brigade Command. The Prosecution also alleged that the Accused's failure to do so led to the prisoners' execution.

14. The Prosecution moved the Court to find the Accused guilty of the criminal offense of War Crimes against Prisoners of War in violation of Article 175 of the CC BiH, specifically of inhuman treatment and depriving another person of their life under subparagraph (a) of this Article. The Prosecution submitted that the Accused was responsible under Article 180(1) and (2) of the CC BiH.

15. The Defense did not contest that, in August 1995, on the territory of BiH and the Republic of Croatia, there was an armed conflict between the Army of BiH and the Army of Serb Krajina, and that the Accused participated in the operation "Oluja" during the relevant period of time. The Defense also did not contest that the prisoners were captured on the referenced date. However, the Defense did contest the issue of the Accused's status, the form of his participation and the issue of his command responsibility.

16. With regard to inhuman treatment, the Defense argued that no witness testified to observing the Accused participating in the physical and mental abuse of the captives. The Defense further argued that Accused's actions as depicted on the DVD footage do not reach the threshold required to establish inhuman treatment under international standards. With regard to the alleged killings, the Defense submits that the Accused is not and cannot be responsible for the killing of the prisoners. The Defense also noted that it has not been proven that the bodies depicted on the DVD footage were the remains of those four persons captured during the operation.

17. With regard to the Accused's command responsibility, the Defense states in its closing argument that the Prosecution has failed to prove beyond a reasonable doubt that the Accused was *de iure* or *de facto* Assistant Commander for Security or that he had effective control over Tewfik Al Harbi.

IV. EVALUATION OF EVIDENCE

A. GENERAL CONSIDERATIONS

18. When conducting the trial and evaluating the evidence, the Appellate Panel was guided by the principle of legality² and the need that no innocent person be sentenced and that a perpetrator of an offense be convicted under the conditions provided by the CC B-H.

19. Article 3 of the CPC B-H mandates a presumption of innocence according to which an accused shall be considered innocent of a crime until his guilt has been established by a final verdict. That is why the burden of evidence lies with the prosecution. The prosecution must prove it beyond any reasonable doubt. Any obscurity or doubt shall be resolved in favor of the accused in accordance with the *in dubio pro reo* principle.

20. In accordance with the principle of free evaluation of evidence, the Appellate Panel evaluated all evidence of the Prosecution and the Defense, paying particular attention to evaluate contradictory evidence and providing arguments regarding the proven facts. The Appellate Panel was also mindful of giving clear and comprehensible reasons on which it based its decision, although it is not required to provide a detailed answer to every argument. However, if a fact or a piece of evidence is of essential importance for the outcome of a case, the Court must deal with it in its verdict.³

V. FACTS OF THE CASE

A. STATUS AND DUTIES OF THE ACCUSED

21. The Accused Alić is alleged to have been responsible for the questioning of prisoners, protecting them and ensuring their safe passage to the Brigade Command, in his capacity as Assistant Commander for Security of the “Hamza” Battalion, the IV Battalion of the 505th Brigade of the 5th Corps of the Army of BiH.

² Article 2 of the CPC B-H.

³ Judgment of the European Court in Strasbourg, *Van de Hurk v. the Netherlands*, 19 April 1994, para. 61.

22. The Defense argued that the Prosecution had failed to demonstrate that the Accused was either *de iure* or *de facto* the Assistant Officer for Security in this Battalion. The Defense also argued that the Prosecution had failed to substantiate the three elements of the doctrine of command responsibility, insofar as the Prosecution had failed to prove the existence of a superior-subordinate relationship, (that is, Alić's effective control over Tewfik al Harbi), that Alić knew or had reason to know that Tewfik would commit or had committed the impugned acts, and that Alić had failed to take reasonable measures to prevent the crime or punish the perpetrator. The Defense argued that Tewfik was an irregular soldier who was not a part of the *Hamza* Battalion, and, accordingly, the Accused could not be held responsible under the doctrine of command responsibility for any act or omission.

23. The Defense also argued that the presence of Battalion Commander Asim Bajraktarević, the only person authorized to deal with prisoners, at the location where the prisoners were captured, interrogated and ultimately executed, also exonerated the Accused from responsibility. In addition, the Defense referred to witnesses Šerif Kekić, Refik Duraković, Senad Šahinović, Hamdija Emrić and others who testified that they had not seen the Accused on the referenced day or they at least had not seen him ill-treating the captured Serb soldiers. The Defense also referred to the testimony of witness Sead Jusić, who stated that he had known that a certain position was planned for the Accused but he did not know if the official appointment had taken place.

1. Status of the Accused

24. On the basis of the presented evidence, the Appellate Panel was satisfied that it was proven beyond a reasonable doubt that, on 5 August 1995, the Accused Šefik Alić had the status as an Assistant Commander for Security of the "Hamza" Battalion and that he was in the field together with the Battalion on the referenced day, as argued in the Indictment.

25. Witness Zijad Nanić provided the most convincing testimony regarding the status of the Accused Alić. This witness served as the Brigade Assistant Commander for Security at the referenced time. The witness testified that, prior to forming the battalion, the Commander Izet Nanić stated that he intended to appoint Šefik Alić as Battalion Assistant Commander for Security. The witness stated that he had opposed this decision. In that regard, he provided the following testimony:

When the Brigade Commander, the late Izet Nanić, decided to form a battalion to be named Hamza, he said to me, among other things, that he planned to appoint Mr. Šefik Alić as

Assistant Commander for Security. I disapproved of the appointment, explaining to the Commander that I could not expect a quality security work from Šefik because he was not versed in those matters (...) However, the Commander explicitly said that he would nevertheless make the appointment and that, in the battalion which was solely formed to take the maneuver actions, he did not need anyone to do a lot of writing, but he needed someone brave enough to engage in combat, and that he would appoint such persons, from the Commander to the last man. Considering that the Commander wished so, he did that because he was the only one who was in charge of everything in the brigade and he therefore did not take into account my disagreement.

He also testified that the appointment was effectuated, but not formally confirmed due to the lack of time, and that he was certain that the Accused held this position until mid-August 1995.

26. The statements of witnesses Sead Jusić, W5, Sulejman Šekić, W1, W3 and Hasan Čatić also confirm the status of the Accused as the Assistant Officer for Security of the “Hamza” Battalion. Witness W5, a member of the “Hamza” Battalion Logistics Platoon, referred to him as a “security officer”. Sead Jusić, a member of the 505th Bužim Brigade and present at Čorkovača on the referenced date, confirmed the status of the Accused. Sulejman Šekić and W3 also believe that Alić occupied that position, while witness Hasan Čatić, a member of the “Hamza” Battalion 1st Company that captured the first prisoner, stated that “Šefik Alić” was the only senior officer in close proximity at the time of the capture.

27. Witness W1 also stated that Alić was a “security officer”. Witness W1, who was a Battalion officer, clearly and thoroughly described Alić’s appointment to the position by means of an oral order by Brigade Commander Izet Nanić issued on the day that the Battalion was formed. This testimony corresponded to that of Zijad Nanić. According to the witness, under the chain of command Alić reported to the Battalion Commander, Asim Bajraktarević, and under the official line to the Brigade Security Officer, Zijad Nanić.

28. With respect to the question of the Accused’s status, the Appellate Panel is satisfied that several witnesses confirmed his status of Assistant Officer for Security in the Battalion in the investigation stage, although they endeavored to deny or change such averments during the trial. The Appellate Panel refers in particular to the testimony of Refik Duraković who stated that Alić was “some senior officer” in his statement to the Prosecutor’s Office of BiH on 18 August 2006, but who stated

that Alić was an “ordinary soldier” during his testimony before the Court. The Appellate Panel also refers to the testimony of Sulejman Čaušević, Fuad Kulauzović, Hamdija Emrić, Šerif Kekić, Agan Elkasović, and Defense witnesses Besim Jusić, Nisvet Begović, Sulejman Čaušević, who either denied his status as an Assistant Officer for Security or his presence as alleged in the Indictment. However, the Appellate Panel finds these witnesses to be absolutely unconvincing, insofar as they were well informed of his previous position of Military Police Company Commander and were, together with the Accused, in the field at the time of the referenced events. Moreover, the presence of the Accused was undoubtedly proven by the DVD footage.

29. One of the main contentions of the Defense was that the Accused Alić did not hold the position of Security Assistant Commander of the Hamza Battalion, which it attempted to contest by stating that the Accused had never been appointed *de iure* to that position, nor had executed the duties required by that position *de facto*. The Defense also presented the testimony of military analyst Dževad Jusić and argued that command responsibility, as the doctrine that has been referred to in international theory and practice, was lacking on the part of the Accused.

30. Defense Witness Dževad Jusić, who was a professional officer of the Military Security Service at the relevant time, testified about the appointment procedure in the Military Security Service (MSS) and about the status of the Accused based on the available documents. In concluding that the Accused had never belonged to the Military Security Service as a member or an assistant, the witness referred to Exhibit T34 and the Personal File of the Accused, according to which the Accused was registered as *Bofors* Battery Commander from 1 January 1995 to 5 October 1995.

31. The Appellate Panel does not accept the conclusion reached by this witness as being reasonable since the witness based his opinion solely on documents that were made available to him and reached his conclusion without the benefit of having reviewed evidence on the formal appointment of the Accused to MSS.

32. Nevertheless, the testimony of this witness was consistent with other evidence presented in support of the argument that the Accused held the position as the Battalion Security Assistant Commander. It is clear that the appointment of the Accused was never formalized in an official document, which would have been expected had he remained at that position after the “Oluja” operation. However, witness Nanić stated that he was certain that the Accused had not kept that position after the *Oluja* operation. Also, witness Sead Jusić, who assumed the duties of the Brigade Commander after Commander Nanić was killed, confirmed that Alić was not in that position during the “Sana 95” operation in September 1995. Based on these

testimonies, the Appellate Panel does not accept this witness' conclusion that was in favor of the Accused and presented by the Defense.

33. The testimony of this witness was further clarified by the testimony of Zijad Nanić, who stated that Alić was appointed Assistant Commander before the *Oluja* operation, and that he (Zijad Nanić) personally removed the Accused from office mid-August 1995. The witness explained that there was no official trace of the appointment of the Accused, stating that at that time, the “events followed each other” so quickly that a formal appointment did not follow in a timely manner. The Panel finds this explanation reasonable given the state of war that existed at that time, insofar as the state of war constituted an extraordinary circumstance in which such situation could be expected.

34. Based on the foregoing, the Appellate Panel has concluded beyond a reasonable doubt that the Accused served as the Battalion Assistant Commander for Security during the relevant period of time, as charged.

2. Duties of the Accused as Assistant Commander

35. The Defense contested that the Accused possessed the responsibilities to care for and supervise the prisoners. The Defense argued that the witnesses who testified that the Accused was responsible for the prisoners were merely expressing opinions which did not necessarily reflect the realities of the situation.

36. However, having analyzed all of the relevant evidence in this regard, the Appellate Panel concluded that the Prosecution has established that the Accused, as Assistant Battalion Commander for Security, was responsible for the life and wellbeing of the captives.

37. This fact was explicitly corroborated by clear and reliable testimony of witnesses W1, Edhem Eminić, Sead Jusić, Safet Isaković, Samir Šakanović and Mirsad Selmanović, who stated that the duties of the Battalion security officer included providing for the care of prisoners in the field, questioning them and securing their safe passage to the Brigade Command.

38. Witness Hasan Čatić (member of the 1st Company of the “Hamza” Battalion) testified concerning the allegations under Count 2 of the Indictment and stated that Šefik Alić was the most senior officer among the 1st Company troops when the first prisoner Mirko Devetak was captured. The Appellate Panel notes that, even though this witness expressed his belief that Asim Bajraktarević was responsible for the captive, he acknowledged that when the company moved toward the Serb Army

Command, with a captured soldier leading the column, Bajraktarević was not there and Alić led the company.

39. Witness Mirsad Selmanović testified that all of the commanders received the International Red Cross training on permissible conduct during war, including the treatment of prisoners of war. With respect to this training, witness W1 noted in his statement given to the Prosecutor's Office of BiH on 4 October 2011 that he had participated in capturing two prisoners during the "Oluja" operation and that he had handed them over to Alić, a security officer. He stated that, during the training, they received directives and instructions to hand captured enemy soldiers over to the security officer and, if no such officer was present, to the military police.

40. In the course of the proceedings, the video footage taken at the beginning and during the "Oluja" operation by witness Meho Veladžić was replayed. During his testimony, this witness confirmed that the recording was authentic and that the recorded events depicted in the video took place on 5 August 1995. It can be clearly seen in the footage that the Accused Alić was present among the members of the Battalion, that he was armed and wearing a dark green beret, military vest and yellow T-shirt.

41. The Appellate Panel also observed that the Accused treated others as though he possessed certain authority. For example, in the presence of Commander Bajraktarević, the Accused questioned one of the captives about the identity and position of the enemy. He repeated this with a second captive but this time in the presence of Tewfik Al Harbi. His actions were consistent with the foregoing witness statements regarding the proactive duties of "security officers".

42. In contesting this argument, the Defense relied on the testimony of witness Zijad Nanić, who stated that it was not Alić's explicit obligation to care for prisoners of war, as well as the testimony of witness Dževad Jusić, according to whom the Accused did not have a position associated with such responsibility.

43. The witness Fuad Kulauzović, who was the Chief of Staff of the 505th Bužim Brigade at the relevant time, testified as to the authorities and duties of Zijad Nanić as the Brigade Assistant Commander for Security. He stated that Zijad Nanić's duties included taking care of prisoners of war.

44. Witness Kulauzović also explained that the role of Battalion Assistant Commander for Security was to take custody of the prisoners from those who had captured them, to take brief statements, and then forward the prisoners to the Brigade Command. This witness further explained that, at the Battalion level, the Battalion Commander was primarily responsible for managing prisoners of war, but

that the Battalion Commander could delegate some of these responsibilities to the security officer.

45. Therefore, even if we accept Nanić's assertion that the Accused had no authority over the prisoners and Kulauzović's statement that responsibility in the field could be transferred pursuant to the orders of the Battalion Commander, since Zijad Nanić was not in the field with the Accused, we cannot accept his statement as conclusively demonstrating that the authority in question had not been delegated to Alić. Accordingly, witness Nanić's testimony that Alić had no authority over the prisoners cannot be accepted as accurate and reliable.

46. Indeed, all other facts suggest that the opposite was the case, which is why this statement could not be accepted as reliable. This may be seen from the statement of Mevludin Mustafić, who stated that on one occasion Battalion Commander Asim Bajraktarević expressed remorse that Alić did not escort the prisoners to Bužim, but handed them over to someone else.

47. Accordingly, whether prisoners were *a priori* the responsibility of the Assistant Commander for Security, or this responsibility was delegated *ad hoc* on the field, the Accused Alić had the *de facto* authority to care for the life and well-being of the prisoners in the field, and the responsibility to ensure that they were safely escorted to the brigade.

48. In addition, the Appellate Panel concludes that this portion of witness Nanić's statement is not reliable since it appears that Nanić is trying to protect himself, insofar as he may have been responsible by virtue of his position for the safety of the prisoners. Witnesses Dževad Jusić and Fuad Kulauzović stated that Zijad Nanić was responsible, as Assistant Commander for Security with the Brigade, for caring for prisoners of war.

49. Furthermore, witness Dževad Jusić stated that the MSS had a parallel system of subordination and that military security officers reported under both official and command lines of duty. This confirms the testimony of Zijad Nanić that Alić directly reported to him through reports about the situation on the field, as well as the statement that witness Sead Jusić gave during the investigation (exhibit T 31) that under professional line of duty Alić's superior was Assistant Commander for Security Zijad Nanić and under command line of duty Battalion Commander Asim Bajraktarević. This was further indirectly confirmed by evidence given by witness Nanić who testified that Alić, unlike Assistant Commanders for Security from other battalions, never submitted any written report to him. In fact, Nanić even addressed Alić on one occasion asking for a field situation report, and Alić answered "I'll prepare it". In this manner too Alić indirectly acknowledged that he understood

and accepted his obligations as Assistant Commander for Security with the Battalion and his subordination to the Assistant Commander for Security in the Brigade.

50. Based on the foregoing, this Panel concludes beyond a reasonable doubt that the Accused Alić was the Assistant Commander for Security with the “Hamza” Battalion at the relevant time and that he had the responsibility for protecting the lives and well-being of prisoners of war as well as the responsibility for safely escorting them to the Brigade. Finally, as described in the Indictment, all four prisoners of war were placed under Alić’s control.

B. FACTS UNDER COUNT 1 OF THE INDICTMENT

51. Certain facts related to the circumstances of the Indictment surrounding the armed conflict between the Army of BiH and the Army of Serb Krajina on the territory of BiH and the Republic of Croatia are not contested by parties to the proceedings. Specifically, the fact that, on 5 August 1995, during the “Oluja” operation in which the Accused participated as a member of the “Hamza” Battalion, four members of the Serb Army were captured is uncontested. It is also uncontested that the unit included an irregular soldier by the name of Tewfik Al Harbi nicknamed “Arab”.

52. All Prosecution and Defense witnesses confirmed that because of the loss in manpower the special-purpose *Hamza* Battalion was formed on 4 August 1995 by Izet Nanić, Commander of the 505th Bužim Brigade.

53. Witness Agan Elkasović, Deputy Commander of the “Hamza” Battalion, stated that the Battalion was formed on 4 August 1995 and on that day the unit was lined up and a flag handed over at the Command of the 505th Brigade in Bužim. On 5 August 1995, the “Oluja” operation was launched by the Army of BiH. Elkasović stated that all three companies of the Battalion took part in the operation and that his task was to lead the units and, once the enemy lines were breached, direct the units to particular areas. The units broke through in the area of “Vijenac.” The witness reached the units at about 08:00 hours, approximately at the same time as Battalion Commander Asim Bajraktarević. Having met up with the units, the witness directed them towards the elevation Hleb.

54. Meho Bašić, Intelligence Assistant Commander, who was tasked with gathering intelligence and conveying it to the Brigade Commander Izet Nanić, was present at that elevation. Bašić soon left that position and returned towards Čorkovača, where Commander Nanić was located. It was planned that others would move towards the village of Ljubine, facing Dvor. Bašić and Nanić were killed shortly

thereafter. During the course of these events, four members of the Serb Army were captured on the territory controlled by the Battalion, at the elevation Hleb. Witnesses Hamdija Mustafić, Sead Jusić, Zijad Nanić and others described these events in their testimony.

C. FACTS UNDER COUNT 2 OF THE INDICTMENT

55. From the footage (Defense exhibit – DVD footage made during the relevant operation) the Panel concludes that the events occurred in the summertime and the developments were filmed while the Battalion was moving through a forest. Witness Agan Elkasović explained that the Battalion advanced towards Pavlovo brdo (Majdan). The footage also depicts the time of the capture of four Serb soldiers, their interrogation and the behavior of the person named by the Prosecution as Tewfik Al Harbi, whose identity was confirmed by the examined witnesses.

56. According to Count 2 of the Indictment, Mirko Devetak was the first prisoner captured at the elevation Hleb. Witnesses W3 and Hasan Čatić testified in detail about that event. Witness Čatić stated that he was with W3 and other members of the “Hamza” Battalion 1st Company when, soon after the breakthrough, he came across a Serb soldier and disarmed him. According to the witness, the captured individual, who had black hair and was not older than 40 years, was moving towards them and surrendered without offering any resistance. This witness stated that, having spotted the soldier, Tewfik, who was also on the scene, wanted to kill him immediately and asked other soldiers to give him a knife “to slit his throat”. Witness Čatić testified, however, that he, W3 and other Battalion members prevented him from doing so.

57. This testimony is consistent in its entirety with the events depicted on the DVD footage, starting at 6:35 and stopping at 6:40 minutes. It shows a Serb soldier surrounded by the “Hamza” Battalion soldiers and the person identified by witnesses as Tewfik Al Harbi going from soldier to soldier asking for a knife to kill the prisoner.

58. The identity of the Serb soldier indicated under this Count of the Indictment was also confirmed by witness Milorad Pribičević, Commander of the 3rd Platoon, 1st Company of the 33rd Infantry Brigade of the Army of Republika Srpska, who knew him from before the war.

59. Witness W3 also testified about these circumstances and his testimony was entirely consistent with the testimony of Hasan Čatić with regard to the manner in

which the first Serb soldier was captured. He stated that he too was there with Hasan Čatić.

60. Although the Indictment states that Mirko Devetak was captured by W3, the Appellate Panel found that it was Hasan Čatić who captured the soldier, while W3 and others were in the vicinity. The operative part of the Verdict has been modified accordingly.

61. The Defense denied that the prisoner was placed under the supervision and control of the Accused, who interrogated and intimidated the prisoner together with Tewfik, that the Accused said that Tewfik "only slits throats", and that the prisoner was forced to march at the head of the column as a lure. However, these facts were corroborated by both the witnesses and the DVD footage, and the Defense's objections are accordingly dismissed.

62. Thus, having analyzed the DVD footage starting at 5:27 and stopping at 7:25 minutes, as well as the witness testimonies concerning the manner of capture of the prisoners, Tewfik Al Harbi's attempts to kill the prisoners, and involvement of other members of the Army of BiH in preventing him from having done so, the Appellate Panel has concluded that the facts as set forth in the Indictment are accurate. Additionally, two witnesses, W3 and Hasan Čatić, confirmed that the prisoner Devetak marched at the head of the column in order to show them the location of the Serb Command.

63. The footage starting at 5:27 and stopping at 7:25 minutes depicted Tewfik Al Harbi rushing at the prisoner Devetak and moving from one soldier to another asking for a knife to kill him, and witness W3, Hasan Čatić and others preventing him from doing so. In the footage, Tewfik introduced himself to Devetak as a *mujahedin* and told the prisoner "I come, I kill one, two". The Accused Alić confirmed that Tewfik "only slits throats". The footage also depicted this witness crossing over the terrain in the direction which witness Hasan Čatić states was supposed to have taken them to the Command of the Army of Serb Krajina.

64. Witness Refik Duraković testified that he observed four members of the Serb army being captured during the breakthrough. In fact, just before the breakthrough, a Serb soldier was captured, handed a rifle without ammunition and forced to march in front of them towards the enemy lines. Three other prisoners were brought there soon afterward. Witness Duraković also noted that Tewfik Al Harbi was with them and that he rushed at one of the prisoners and asked for a knife to slit his throat, but that both the witness and other soldiers present there prevented him from doing this.

D. FACTS UNDER COUNT 3 OF THE INDICTMENT

65. In part, the Appellate Panel bases its conclusions on the factual findings related to Count 3 of the Indictment on the testimony of witness W5, a member of the Logistics Platoon of the "Hamza" Battalion. He testified that he escorted witness W1 in the morning of 5 August 1995, at about 08:00 hours, during the breakthrough operation. He and W1 spotted two Serb soldiers, disarmed them, and took them to a resting place before transferring them. The Serb soldiers were captured just before the elevation Hleb. This witness stated that he handed the prisoners over to the Command post situated at the Hleb elevation where the Battalion Commander Asim Barjaktarević, his Deputy Agan Elkasović, Security Officer Šefik Alić and witness W-1 were present. The prisoners were interrogated at this post. The witness also stated that, upon reaching the resting site with the prisoners, he found that additional two Serb soldiers had been captured. All four Serb soldiers were questioned about the military and orders.

66. Witness W5 testified that, after the captives had been interrogated, Tewfik and the Accused each took control of one of the captives while other members took control of the remaining two captives. The witness stated that the prisoners were taken in the direction opposite to the direction of their movement. Within minutes, the witness heard rapid gunfire, after which the four men from their unit returned to the post.

67. In evaluating the evidence of witness W5, the Appellate Panel considers that this evidence is not reliable in its entirety. Specifically, with regard to the alleged removal and execution of the prisoners by Alić and others, the Appellate Panel notes that W5 was the only witness to describe the events as occurring in this manner. There is no corroborating evidence which may be relied upon to validate the reliability of this testimony; particularly in light of the fact that the witness described the aforementioned events in a different manner in his statement to the SIPA investigators on 28 September 2006. However, W5's testimony is accepted to the extent to which it has been corroborated by the testimony of W1.

68. Witness W1 testified that he captured the two prisoners, while his comrade W5 protected him by ordering them to drop their weapons and put their hands up. W1 recalled he later saw another two captured Serb soldiers at the elevation Hleb. Initially, the witness provided vague testimony about whether he had handed them over to somebody. However, in his statement to the SIPA investigators, he stated that he had given them over to Šefik Alić and Asim Prošić. He confirmed at the trial

that, at that time, those were his recollections and that "according to his knowledge and findings, the battalion security officer was the one who could accept such persons, conduct brief interrogations and send them further on..."⁴

69. The Serb soldiers captured by W1 were Petar Stambolija and Pero Borosina, and their identities were confirmed by witness Milorad Pribičević, who knew both of them from before their capture and who identified their dead bodies.

70. According to the testimony of witness W1, Pero Borosina and Petar Stambolija were interrogated after their capture. Alić was also present during the process. The witness believed that he had no responsibility for the prisoners once they were brought to the Security Officer. Pursuant to this testimony, the Appellate Panel concludes that the Accused Alić solely and primarily held authority over those captured persons.

E. FACTS UNDER COUNT 4 OF THE INDICTMENT

71. The events described under Count 4 were partially described by witness W5 and partly recorded on the DVD footage. Witness W5 testified that he spotted Tewfik slapping one of the prisoners in the face while Alić "tripped another up".

72. The Defense argued that the testimony of witness W5 conflicted with his statements given during the investigation phase. However, the Appellate Panel accepts the testimony of witness W5 to the extent to which it is corroborated by the DVD footage and with regard to the actions that have not been contested.

73. The DVD footage starting at 11:22 and stopping at 14:45 depicts Tewfik grabbing Pero Borosina. Tewfik first grabbed the captive's uniform by the collar, pushed him forward over the terrain, and then pulled back his head aggressively by pulling back on the captive's hair while interrogating him about the positions of the Serb army. Tewfik then slapped and punched Pero Borosina twice in the chin while continuing to interrogate him. The Accused is seen standing next to the two of them while this is taking place.

74. In the same footage segment, the Accused is seen pointing an automatic rifle at Petar Stambolija while holding him by his neck and stating in a clearly audible voice that he (Petar Stambolija) was his "kum" and, pointing at prisoner Pero Borosina, that Borosina would be Tewfik's "kum". Witness Meho Veladžić

⁴ Testimony of witness W1 at the hearing held on 12 July 2007.

confirmed that he operated the camera during this segment. One segment of the DVD depicts the Accused holding Pero Borosina after he stumbled and fell down and the Accused lifted him up, but it did not appear that Alić intended to cause the captive to fall.

75. Additionally, beginning at 13:45 and ending at 14:00, the DVD depicts Tewfik Al Harbi and the Accused Alić hitting (the fourth) captive Branko Bašić in the back of his head as he walked in front of them. Witness Milorad Pribičević also identified this prisoner and, later on, his dead body among the killed prisoners.

76. The Appellate Panel did not uphold the parts of the Indictment charging Tewfik Al Harbi with ill-treatment of the captives by punching and kicking them as they marched at the head of the column, as it considers these facts unproven. This Panel therefore excludes them from the factual findings in the operative part of the Verdict.

F. FACTS UNDER COUNT 5 OF THE INDICTMENT

77. With regard to the facts under this Count, witness W1 testified that on 5 August 1995 Brigade Commander Izet Nanić was killed and the Battalion was ordered to return to the elevation Hleb. The troops subsequently learned that the operation was stopped because of the death of Brigade Commander Nanić. This was corroborated by witness Meho Veladžić.

78. Witness Samir Šakanović, of the Battalion's 3rd Company, testified that that day he saw Tewfik and one more soldier taking two Serb soldiers in the direction of Čorkovača, opposite from the direction in which the Battalion moved. Witness W3 testified that he saw the dead bodies of the prisoners in the course of retreating along the same route by which he had advanced earlier, and that all of the soldiers could see those bodies while retreating towards Čorkovača along that route following Commander Nanić's death.

79. Witness Meho Veladžić, who filmed the events on the referenced day and whose footage served as evidence in this case, testified that he had filmed the bodies of the dead soldiers about half an hour after they learned about the death of the Commander.

80. Witness Mevludin Mustafić, Commander of the Battalion of the 505th Bužim Brigade, testified that, four or five days after Commander Nanić was killed, he was informed that Serb soldiers had been captured on 5 August 1995 and that Tewfik had subsequently executed them. The witness also described his conversation with

the *Hamza* Battalion Commander, Asim Bajraktarević, who told him during the course of a conversation in a coffee bar that Šefik Alić had handed those prisoners to someone else and that he was sorry for not taking them to the Brigade Command in Bužim.

81. A segment of the DVD footage starting at 15:44 and ending at 16:20 shows Tewfik calling over the cameraman to film the bodies and boasting that he had killed them. The footage shows four dead bodies with visible bullet wounds laid out on the side of the road.

82. Although the Defense disputed that the filmed bodies were those of the prisoners, the Appellate Panel has no dilemma in that respect. Witness Pribičević identified the bodies based on their physical features, hair color, general appearance and clothing, as well as his recollection of their appearance the last time he saw them before their capture. The Appellate Panel is satisfied that the bodies visible in the footage were those of the executed prisoners of war identified in the Indictment.

VI. CONCLUSION ON GUILT - ESSENTIAL ELEMENTS OF CRIMINAL OFFENSE OF WAR CRIMES AGAINST PRISONERS OF WAR IN VIOLATION OF ARTICLE 175(A) OF CC B-H

83. The Accused is charged that by his acts and omissions he instigated, perpetrated or otherwise aided and abetted the acts described in the operative part, and is also responsible by virtue of his position as a superior for the acts perpetrated by his subordinates, including Tewfik Al Harbi, over whom he had effective control, when he knew or had reason to know that his subordinates were about to commit such acts, or had done so, and he failed to take the necessary and reasonable measures to prevent or punish the perpetrators thereof, whereby, by inhuman treatment and failure to prevent the killing of another he committed the criminal offense of War Crimes against Prisoners of War in violation of Article 175(a) of the CC B-H, as read with Articles 21, 35 and 180(1) and (2) of the CC B-H, and in violation of Common Article 3(1)(a) of the 1949 Geneva Conventions.

84. Article 175(a) sets forth the criminal offense of War Crimes against Prisoners of War as follows:

"Whoever, in violation of the rules of international law, orders or perpetrates in regard to prisoners of war any of the following acts:

a) *Depriving another persons of their life (murders), intentional infliction of severe physical or mental pain or suffering upon persons (tortures), inhuman treatment ...“*

85. It ensues from the legal definition of the criminal offense of War Crimes against Prisoners of War that the referenced offense has a “blanket” character. Therefore, as is the case with all such criminal offenses, in order to establish whether certain acts satisfy the essential elements of a given offense, it is necessary to consult the requirements and rules of international law as the relevant “blanket” regulations for the criminal offenses set forth by Article 175 of the CC B-H.

86. Therefore, in order to have the criminal offense set forth by Article 175 of the CC B-H, it is primarily necessary to prove that the *actus reus* of the referenced criminal offense constitutes a violation of the rules of international law. More precisely, it is necessary to establish that the acts of the Accused were perpetrated contrary to fundamental principles the compliance with which is ordained by international law. In addition to the condition that the perpetrator has committed the act contrary to the rules of international law, the other important elements of this offense, whose existence must be established in every specific case, are as follows: a) the commission must be directed against prisoners of war; b) the perpetrator must order or commit some of the acts set forth in Sub-Paragraphs (a)-(c).

A. VIOLATION OF RULES OF INTERNATIONAL LAW

87. The Indictment by the Prosecutor's Office of B-H charges the Accused that he acted contrary to Common Article 3 of the Geneva Conventions of 12 August 1949. The rules contained in this Article are considered customary law and constitute the minimum standard that parties to a conflict must never depart from and that they are obliged to honor.

88. Common Article 3 of the Geneva Conventions stipulates:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated

humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

89. As required by the provisions of Common Article 3 of the Geneva Conventions, in order to establish the existence of this first *chapeau element* as a prerequisite for the existence of the offense, the Panel had to primarily establish whether his acts were directed against a category protected under Common Article 3 – prisoners of war, and then whether the Accused acted contrary to the provisions of Common Article 3, that is, whether he violated the prohibitions stipulated in Common Article 3 (which are relevant to the instant case).

1. Existence of Armed Conflict and the nexus to the Accused

90. The Accused is charged with having committed this offense during an armed conflict in the territory of Bosnia and Herzegovina and the Republic of Croatia between the Army of B-H and the Army of Serb Krajina, as the *Hamza* Battalion Assistant Commander for Security, the 4th Battalion of the 505th Brigade of the 5th Corps of the Army of B-H, whose duties and responsibilities included questioning

prisoners, protecting them and ensuring their safe passage to the Brigade Command.

91. The international jurisprudence regards that "an armed conflict is said to exist 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".⁵

92. The Accused Alić is charged with the criminal offense in violation of Article 175(a) of the CC B-H, the commission of which implies a violation of Common Article 3 of the Geneva Conventions. Given the fact that the provisions of Common Article 3 contain the core of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted⁶, the nature of the armed conflict is irrelevant in this case.⁷

93. However, the issue of existence of the armed conflict as described in the Indictment was not challenged during the proceedings. The forces of the Army of B-H were indeed in conflict with the Army of Serb Krajina during the period relevant to the Indictment, which is the period that marks the beginning of the *Oluja* operation that all witnesses testified about.

94. In light of international jurisprudence it is necessary to establish the nexus between the Accused and the conflict. "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."⁸

95. The Defense did not contest that the Accused was a member of the Hamza Battalion and that the Battalion was formed one day prior to the *Oluja* operation. However, it did contest the Accused's status and duties.

96. As the Panel has already established the Accused's status as the Assistant Commander for Security of the Hamza Battalion and his duties ensuing from that position (paragraphs 15-44 of Section IV A), it will now only reiterate that it thereby also established that the Accused, as an assistant to the commander of a military formation that took part in the armed conflict on the side of the Army of B-H, was

⁵ *Prosecutor v. Dragoljub Kunarac et al.*, case No. IT-96-23, Appeals Chamber Judgment, 12 June 2002, para 56.

⁶ Appeals Chamber Judgment in the *Čelebići* case, para 149.

⁷ *Prosecutor v. Duško Tadić*, case No. IT-94-1-AR-72 (Decision on Jurisdiction of 2 October 1995); Appeals Chamber Judgment in the *Čelebići* case, paras. 149, 150.

⁸ Appeals Chamber Judgment in the *Kunarac* case; para 58.

beyond a doubt part of that conflict, therefore these facts will not be further explained.

2. Status of Victims

97. Therefore, the first task when establishing whether the acts of the Accused satisfied the elements of a violation of the rules of international law was to establish the status of the persons against whom the referenced acts were taken. That is to say, the contents of Common Article 3 of the Geneva Conventions lead to a conclusion that the protected category of population includes persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and/or those placed 'hors de combat'⁹.

98. In the instant case, there is no dilemma that the victims were four members of the Army of Serb Krajina who had laid down their arms, so the Defense did not contest the status of victims. Also, it is clear from the footage and the evidence given by all Prosecution witnesses that these persons were prisoners of war, captured in the zone of war operations during the *Oluja* military operation, and that, as such, they fell in the category of protected persons defined in Common Article 3 of the Geneva Conventions.

3. Do the acts fall within the framework of international provision?

99. Based on the adduced evidence and established facts, the Appellate Panel concluded that the acts of the Accused satisfied the elements of the referenced offense in the specific acts of inhuman treatment, described in Counts 2 and 4 of the Indictment, and the omission to prevent the killing of the captives that he knew was about to happen, described in Count 5. As the referenced acts fall in the category of acts prohibited by Article 3 of the Geneva Conventions, it is clear that they were perpetrated in violation of international principles.

B. THE PERPETRATION

100. The next element of the charged offense that is necessary to prove is that the perpetrator ordered or committed the crime. In the instant case, the Accused Alić is

⁹ See Verdict of the Court of B-H No. X-KRŽ-05/42 in the *Nikola Andrun* case, p. 16, making reference to the Judgment by the ICTY Trial Chamber in the *Blagojević and Jokić* case of 17 January 2005, para. 544.

charged with perpetration of the offense by participating in the physical and mental abuse of prisoners of war and in their killing by failing to protect them although he had a duty to do so as the Assistant Battalion Commander for Security. Therefore, he is charged that he committed the offense.

101. This element of the offense was heavily contested by the Defense, insofar as the Defense attempted to demonstrate that the Accused did not have the status of Assistant Commander for Security of the *Hamza* Battalion, and, by extension, lacked the authority over the captives or the effective control over Tewfik Al Harbi as attributed to him in the Indictment.

102. The Defense also contested the character of the acts that the Accused Alić personally perpetrated, which the Prosecution characterized as inhuman treatment. The Defense contested the Prosecution's assertion that, by his acts and omissions, the Accused instigated, perpetrated or otherwise aided and abetted the perpetration of the acts of physical and mental abuse by allowing Tewfik Al Harbi, as his subordinate over whom he had effective control, to perpetrate them. It also contested the Prosecution's allegation that the Accused failed to prevent the killing of the captives that he knew or had reason to know was about to happen, failed to inform his immediate superiors about it, and to take measures to punish the perpetrator.

1. Inhuman Treatment

103. First, based on the foregoing established facts, the Appellate Panel concluded that on 5 August 1995 the Accused Alić was the Assistant Commander for Security of the *Hamza* Battalion and that his duties in that capacity included protection of captives' lives and care for their well-being.

104. Although Common Article 3 of the Geneva Conventions stipulates the obligation of human treatment, it does not define the term. In fact, the scope of human treatment makes it difficult to define. In addition to this, acknowledging the necessity to punish conduct deviating from the principle of humanity, legal institutions have endeavored to articulate through international jurisprudence, as well as constitutions, laws, conventions and commentaries the parameters constituting inhuman treatment and ensure protection of individuals against such inhuman treatment.

105. The Geneva Conventions are not the only source of prohibition of inhuman treatment. The European Court and the European Commission of Human Rights have also dealt with this matter.¹⁰ The ICTY defines inhuman treatment as "an intentional act or omission against a protected person which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."¹¹ It emanates from this jurisprudence that inhuman treatment is conduct which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offense of torture.

106. In its closing argument the Prosecution provided one definition of inhuman treatment that this Appellate Panel considers relevant in the present case. It argued that inhuman treatment includes "*acts that violate the fundamental principle of human treatment, especially the respect for human dignity.*"¹² Consequently, the Appellate Panel considers that when defining whether or not an act amounts to inhuman conduct, both the consequences that the acts have on a victim (the *objective* element), as well as how the acts are perceived by the victim (the *subjective* element) should be taken into account. Accordingly, although the combined acts of the Accused and Tewfik did not cause visible bodily injuries on the captured Serb soldiers, the victims' subjective perception of the impugned acts should be taken into account, including the temporal, spatial and overall context in which they were committed as well as the necessity of the acts in a given situation.

107. In order for an act to be characterized as inhuman, it is necessary to consider in every specific case the nature, duration and intensity of act in question, the consequences of the act on the bodily and mental integrity of its victims, the circumstances in which the acts against the victims were committed.

108. In the revoked first instance Verdict, the Court acquitted the Accused Alić of the charges for inhuman treatment. After analyzing the legal definition of inhuman treatment, the First Instance Panel concluded that the acts referred to in the Indictment and shown on the DVD footage were "perhaps strict" or "unpleasant", but did not rise to the level of "inhuman", a term that carries great weight. According to the first instance Verdict, the impugned acts did not pass the threshold of "atrocious" or "barbarous" necessary for a finding of inhuman treatment.¹³

¹⁰ *A. v. the United Kingdom*, Judgment, 23 September 1998; *Costello-Roberts v. the United Kingdom*, Judgment, ECtHR (ser. A) 1993: *Tomašić v. France*, 13 EHRR, para 115; *Lorse and Others v. the Netherlands*, No. 52750/99, 4 May 2003.

¹¹ Judgment in the *Čelebići* case, paras. 542-543; Appeals Chamber Judgment in the *Dario Kordić and Mario Čerkez* case, No. IT-95-14/2-A, 17 December 2004, para 39.

¹² Prosecution Closing Argument, p. 1.

¹³ Page 35, paragraph 1 of the first instance Verdict.

109. The Appellate Panel finds that any consideration of the term inhuman treatment actually represents a consideration and qualification of the acts which might be subsumed under that term and which, by their character, have such characteristic of ill-treatment that they almost reach the threshold of torture. However, the basic threshold of differentiation is that the acts are not of such intensity to indeed constitute torture. More simply, those are all the acts that might be subsumed under the interval ranging from ill-treatment to torture, but which, by their nature, intensity, character and effect, do not reach the threshold sufficient to be characterized as torture given that they do not carry the same weight or the same consequences.

110. The essence of legal disagreement regarding the finding of inhuman treatment between the First Instance Panel and the Appellate Panel lies in the standards used for determining whether acts constitute inhuman treatment. In the opinion of the Appellate Panel, the standards proposed by the First Instance Panel would satisfy the requisites for torture.

111. For that reason, having taken into consideration the witness statements and the DVD footage, the Appellate Panel arrives at a different conclusion in this retrial. The Appellate Panel notes that it is impossible to disregard the terrifying effects of these actions and conclude, as the First Instance Panel did, that they did not reach the level of "atrocities" and "barbarism" necessary to meet the criteria of inhuman treatment,

112. Quite to the contrary, under the criteria established by the First Instance Panel only acts rising to the level of torture or satisfying a similarly high criterion such that they may be characterized as "atrocities" would be considered, which would have the tacit effect of tolerating lesser acts of ill-treatment against particularly sensitive and endangered categories of persons, including "prisoners of war".

113. In the instant case, the Indictment charged the Accused Alić with the intimidation of Mirko Devetak (Section 2), the aggressive treatment of captives Petar Stambolija and Petar Borosina (Section 4) and the slapping of captive Branko Bašić on the back of his head. The perpetration of these acts were proven.

114. The first act that the Prosecution charges the Accused with as an act of inhuman treatment is intimidation of prisoner Mirko Devetak, which occurred immediately after his capture. The footage shows an episode in which Tewfik first looks for a knife to kill Mirko and then assaults him, while Battalion members protect him physically. The footage then depicts the Accused, in Tewfik's company, addressing and interrogating the prisoner about the troop deployments. At one

point Tewfik tells the prisoner Devetak that he is a mujahedin and "I come and kill one, two". At that moment, the Accused tells the prisoner that "He only slits throats", referring to Tewfik. The Accused Alić could certainly notice the prisoner's fear, as the other soldiers did, and one of the soldiers even told the prisoner: *"Don't be afraid, why are you afraid?"*

115. The next allegation against the Accused concerns his conduct toward Pero Borosina (Section 4 of the operative part), whom the Accused aggressively grabbed by his neck with one hand while pointing a rifle at his face while threatening to make him his and Tewfik's "kum". In the context of these events the mention of "kumstvo" must have had only a negative connotation. In the same column at the same time were prisoners Mirko Devetak and Petar Stambolija, with Tewfik Al Harbi leading the latter and treating him aggressively. Tewfik hit Pero Borosina twice in the chin during questioning, while the Accused was standing next to him. The Accused is also seen on the DVD footage slapping Branko Bašić on the back of his head with Tewfik, as the prisoner walked in front of them, which is the last of the acts the Accused is charged with.

116. By their intensity these acts might be classified as infliction of light bodily injuries, mere mild blows. However, they occurred very soon after the capture of these persons, who were soldiers of the enemy army fresh from the frontline, in a state of shock. They were alone and disarmed among a dozen of soldiers of the enemy army.

117. These circumstances would be considered serious, frustrating and severe by any individual who found himself in such situation. The Accused additionally intimidated the first captive by making reference to the manner in which "Tewfik kills", which generated a strong psychological pressure with the captive, which anyone can infer if thinking rationally. The captive must have felt fear for his life knowing that his life then, as a prisoner of war, was practically in the hands of enemy soldiers.

118. In these same circumstances the captives were treated inhumanly only by Tewfik and Alić, as depicted in the footage. No other soldier engaged in any unlawful act against the captives, at least according to the DVD footage. Quite to the contrary, the Appellate Panel witnessed on the DVD the laudable willingness of other soldiers to protect the first captive from Tewfik. Tewfik, however, maintained a hostile attitude toward the prisoners while Alić was obviously passive. So, not only had Alić failed to even once prevent or warn Tewfik against the inhuman degrading mistreatment of the prisoners, manifested as blows to the chin, hair-pulling, etc., but he actually participated in such inhuman treatment with Tewfik.

119. The Accused's acts of physical abuse and intimidation, combined with the acts committed by Tewfik, which were tacitly encouraged by the Accused, viewed in context and taking into account the timing, location and circumstances, constitute inhuman treatment of the prisoners referred to in Article 175(a) of the CC B-H. These acts intensified the mental anguish of prisoners who were helpless at that moment, afraid for their lives and left absolutely at the mercy of the soldiers who exercised control over them.

120. The actions of the Accused are made all the more egregious by the fact that the Accused was a security officer with knowledge of his duties. Prior to being assigned to this duty the Accused had been a commander in the Military Police. Witness Zijad Nanić also stated that all soldiers underwent training and, considering the fact that it was as late as 1995, that is, three years after the war started, and that witness Nanić stated that on one earlier occasion the Accused had captured members of the enemy army and taken them to the Brigade Command, it is clear that the Accused knew what his duties were and what he had to refrain from as a soldier and in particular as a security officer.

121. With respect to the Accused's *mens rea* toward the commission of these acts, it is clear that he knowingly and willingly participated in them, and that he committed them with direct intent.

122. The Indictment averred that the criminal offense was committed in violation of Common Article 3 of the 1949 Geneva Conventions, Sub-Paragraph (a). However, the Accused's acts described above could fall only under Sub-Paragraph (c) of Article 3, so, in order to have a precise legal definition, the Appellate Panel concluded that a violation of international norm was manifested as a violation of both these Sub-Paragraphs of Article 3(1) of the Geneva Conventions, whereby the first general element of the crime referred to in Article 175 of the CC B-H has been satisfied.

2. Killing Another (Murder)

123. The Accused is charged with the perpetrating, that is, aiding and abetting murder, and with omission to take all necessary and reasonable measures to prevent or punish the perpetrators. Based on the statement of witness Milorad Pribičević and the DVD footage on which Tewfik admits to cameraman Meho Veladžić the murder of these persons, the fact that all four captives were eventually killed was established in the proceedings.

124. The Appellate Panel reviewed the *Instruction on the Application of the Rules of International Law on War in the Armed Forces (Official Gazette of the Army of the*

RBiH, No. 2/92) ("the Instruction"), Prosecution Exhibit T 77, whose Article 17 sets forth: "A prisoner of war is a member of the armed force who has fallen into the power of the enemy".

125. Article 19 of the Instruction reads:

Prisoners of war are in the hands of the enemy power and it is responsible for the treatment given them, but this does not exclude individual responsibilities. Measures of reprisal against prisoners of war are prohibited. Prisoners of war must be treated humanely, without violence, insults or intimidation, with respect for their persons and their honor. Women shall be treated with all the regard due.

It is prohibited to wound or kill a member of enemy force who has laid down arms and who is surrendering ...

126. The *Rules for Work of the Military Security Service in the Armed Force of the Republic of B-H* were passed in 1992¹⁴ ("the Rules"). Article 36 reads that *an officer of the Military Security Service has a duty to carry out the tasks from the Military Security Service's scope of work assigned to him by authorized senior officer, irrespective of whether these tasks are included in the duties regularly carried out in his establishment post.* Article 38 sets forth: *"For negligence in performance of duties from one's scope of work and for non-adherence to or violation of the provisions of this Rule, officers of the Military Security Service shall be held responsible pursuant to the general rules."*

127. The Appellate Panel has already concluded that both the protection of life and the care for the well-being of the prisoners were within the competencies of the Accused by virtue of his function. Also, the Instruction referred to above sets forth the treatment of captured persons at the time of hostilities, and which acts are prohibited. It was also established that the order of Commander Izet Nanić prior to the *Oluja* operation was that potential captives were to be taken to the Command in Bužim. As Zijad Nanić stated, the Accused Alić had had experience with captives earlier, therefore, even without the commander's explicit instruction he knew which procedures he should have applied in the given situation.

128. Also, Battalion Commander Bajraktarević told witness Mevlid Mustafić after the operation that he regretted the fact that Alić did not bring the captives to the

¹⁴ Authenticity verified with the seal of the Archives of the Security and Intelligence Sectors of the Former Federation Ministry of Defense (SsiObP PFMO).

Command in Bužim but handed them over to someone else. It can be concluded that Alić failed to act pursuant to Article 38 of the Rules by his omission to protect prisoners of war. The provisions on criminal offenses and the provisions set forth in general rules punish negligence in the Military Security Service when a prohibited consequence occurs.

129. The DVD footage depicted the atmosphere of their capture and their treatment. Witness Šerif Kekić stated that Tewfik attempted to kill them all the time, but that the Battalion Commander did not allow it, that he even offered money for that. As stated earlier, Tewfik himself said that he was a "mujahidin" and that he was killing people. Witness W4 stated when he saw Tewfik's conduct toward the captives that "it is not human to behave like that".

130. The Appellate Panel established five indicative facts from the foregoing.

131. In those segments of the event depicted on the DVD footage at least, the Accused Alić could conclude, as any reasonable person and as an experienced soldier (that he was), that Tewfik was an impetuous and aggressive person with clear intention and readiness to kill the "enemy", which he regarded the captives to be, and they indeed were members of the enemy army. Tewfik did not even hide it and that was also confirmed by the witnesses.

132. Second, Tewfik was not officially a member of the Battalion, but it is a fact that he was present as a soldier, armed and in uniform, wearing a blue headband, as were several other members of the Battalion. So, although he was not a regular member of the formation, that does not exculpate the Accused Alić of responsibility. On the contrary, it was exactly because of these circumstances that the Accused was aware that Tewfik was absolutely free of discipline and responsibility required by regular membership in the Battalion. Tewfik's position and arbitrary behavior in situations, as shown here, called for extreme caution, and it was exactly in such situations that the Accused should have demonstrated his authority. After all, protection of prisoners from such aggressive person was also Alić's moral obligation.

133. Third, the presence of the Accused during the intimidation of the first captive and his subsequent inhuman treatment must have been encouraging for Tewfik. The Accused failed to protect the captives from humiliation and mistreatment by Tewfik, although he was present and aware of Tewfik's acts. In this way he tacitly approved of Tewfik's actions and thus encouraged Tewfik to implement his plan to ultimately kill the prisoners, which plan he obviously had from the very beginning. With his acts and active participation in the inhuman treatment, the Accused Alić let Tewfik know that such conduct was correct and justified, and in this way established himself and Tewfik as peers, especially by referring to his and Tewfik's joint *kumstvo*

with two prisoners. Such conduct leads to a reasonable conclusion that Tewfik was additionally encouraged and motivated for the abuse of prisoners by Alić's behavior, knowing that only in the presence of the Accused was he enabled to do that, given that previously he had been explicitly prevented by other Battalion members from carrying out his intention to kill the first prisoner.

134. Fourth, as the Assistant Commander for Security the Accused was responsible for the captives, which he demonstrated by interrogating them even in the presence of the Battalion Commander. At one moment the captives were separated from the group they moved with and executed by Tewfik. This is confirmed by the DVD footage when Tewfik is depicted boasting that he killed them. The execution occurred immediately after Commander Nanić got killed, when due to the state of shock, disbelief and anger, it could be expected that the captives might be killed in retribution. Further, Prosecution witness Šerif Kekić stated that after Commander Izet Nanić had been killed, they all "suffered a mental blockade". As established earlier, the result was the death of four captives and such development must have been foreseen based on the previous pattern of behavior and Tewfik's manifested readiness to kill them. Tewfik's view of them is clear from his behavior, and the general sentiment of the Battalion soldiers of the captives was partially confirmed by witness Meho Veladžić, who testified that he "does not see anything bad" in the fact that he saw dead captives.

135. Fifth, the Accused Alić was in the formation all the time, that is, both at the time of the capture and of the interrogation, which the footage also shows. Alić even personally led one of them on a stretch of a forest path. According to the footage, the captives were killed from firearms. Their bodies lay next to the forest path, visible to everyone.

136. All these five facts, in the context of time and events, indicate Alić's omission to protect the persons he knew were prisoners. Based on Tewfik's overall behavior the accused also knew that the prisoners lives were threatened and that they would be killed.

137. An analysis of Alić's conduct up to that moment leads to an indisputable conclusion on his involvement in their killing.

VII. THE MANNER OF PERPETRATION AND THE INTENT RELATED TO BOTH ACTS -- INHUMAN TREATMENT AND KILLING

138. The Accused is charged that by his acts and omissions he instigated, perpetrated, or otherwise aided and abetted the crimes described in the Counts of

the Indictment, and he is also responsible, by virtue of his position, for the acts perpetrated by his subordinates, including Tewfik Al Harbi, over whom he had effective control, when he knew or had reason to know that his subordinates were about to commit such acts, or had done so, but failed to take the necessary and reasonable measures to prevent or punish the perpetrators thereof.

139. Article 29 sets forth that perpetrators act as accomplices if several persons commit a criminal offense by participating or making a decisive contribution to its commission. Article 180(1) sets forth that a person who perpetrates the criminal offense referred to in Article 175 of the CC B-H, *inter alia*, is responsible for that offense. The Accused personally and with intent, together with Tewfik, participated in the inhuman treatment of the captured soldiers pursuant to Articles 29 and 180(1) of the CC.

140. With respect to the act of killing, the Panel established that the Accused committed the criminal offense of War Crimes against Prisoners of War by killing, and that the Accused's acts, that is, his omission, satisfy the elements of deliberate omission as a manner of perpetration.

141. Article 21 of the CC B-H sets forth manners of perpetrating criminal offenses, reading that a criminal offense can be perpetrated by an act or an omission to act and that an offense is perpetrated by omission when the perpetrator, who is legally obliged to avert the consequence of a criminal offense defined by law, fails to do so, and such failure to act is tantamount in its effect and significance to the perpetration of such an offense by an act.

142. Within the scope of his regular duties as the Assistant Battalion Commander for Security, the Accused Alić had an obligation to escort the captives to the Brigade Command, which was also an explicit instruction of Brigade Commander Nanić before the operation. He failed to take necessary and reasonable measures to prevent the killing of these persons, although he was legally obliged to protect them pursuant to Article 19 of the Instruction, Rule 38 of the Rules and Article 3 of the Geneva Conventions. Because of this omission the captives were killed.

143. As can be seen from the circumstances described above, the criminal offense was committed with intent and by omission to act, that is, failing to fulfill the obligation related to prisoners of war ensuing from his function as a senior officer and as the Assistant Commander for Security. This omission made him equivalent to the perpetrator of the killing, since, while no evidence that he personally killed these persons was adduced, he allowed it to occur, having willed or agreed to it; due to the death of the victims, the effect and significance of his acts is tantamount to killing.

144. No evidence exists that the Accused tried or wanted to prevent it, which would exculpate him; nor has the Defense identified any reaction of Alić to Tewfik's conduct, which was mandatory due to his position and the circumstances that were unfolding before him. Finally, the Accused never officially informed anyone of these events, from which one can conclude that he fully neglected his duties.

145. The Defense insisted that the fact that Battalion Commander Asim Bajraktarević, who saw the captives, was sporadically present exculpates the Accused. However, the Appellate Panel does not agree with this assertion, since, as the Prosecution correctly noted in its closing argument, the commonly known and accepted legal and moral duty of every soldier or officer is protection of the mental and physical integrity of prisoners of war, which is a duty that ensues from international codes and practices of warfare. This even moreso applies to the Accused as he had the duty of security officer, thereby a formal obligation to provide continuous protection to prisoners. Moreover, the presence of the other commanding officer (Bajraktarević) did not relieve him of that responsibility, given the fact that Bajraktarević was not the kind of commanding officer to maintain continuous contact with the prisoners.

146. The Accused's immediate superior by virtue of office was the Assistant Brigade Commander for Security, witness Zijad Nanić. The Accused's duty while in the field was to inform the Battalion Commander about captives. Therefore, within the scope of his competencies, the Accused was obliged, both as any other soldier and by virtue of his office, to protect the captives, irrespective of Commander Bajraktarević's presence. In the opinion of the Appellate Panel, both persons, Bajraktarević and Alić, were equally responsible for prisoners of war within their competencies (the so-called chain of command), but only the Accused, as stated earlier, had a continuous contact with the captives and Tewfik and had the so-called vertical responsibility toward the superior security commander. This included his obligation to report about prisoners of war and hand them over to the Brigade Command.

147. The Defense claimed that the Accused did not have effective control over Tewfik al Harbi since he was not a regular member of the formation. The Appellate Panel has already established that, although he did not officially belong to the Battalion, he was a member in the field. It is clear to the Appellate Panel that the Accused undoubtedly had the obligation to protect the prisoners, especially from "irregular" members of the unit. This is particularly the case given the fact that the Accused did not even try to use his authority as an officer to protect the prisoners from Tewfik. Based on the foregoing, the Panel finds it pointless to consider the Accused Alić's effective control over Tewfik given that, by his conduct, the Accused

participated in the perpetration of the criminal offense together with Tewfik, that is, was an equal partner in undertaking the relevant acts of the offense concerned. Establishing this fact would only be justified if the Accused's liability were based on his command responsibility, which is redundant in the instant case given his direct participation in the act.

148. The Appellate Panel established that the Accused's personal contribution to the perpetration of the offense was manifested as his joint participation with Tewfik in inhuman treatment, as well as his personal responsibility for failing to take measures to prevent the killing of the prisoners. The Panel, therefore, considers that the Accused's conduct amounted to personal participation in perpetration by an act and omission to act pursuant to Articles 21 and 29, which also involves Article 180(1) of the CC B-H, and that, therefore, it was not necessary to specially consider the facts referred to in Count 6 of the Indictment and his command responsibility, that is, responsibility to punish or report the perpetrator pursuant to Article 180(2) of the CC B-H. For the foregoing reasons Count 6 of the Indictment was omitted from the Verdict, since, having established the Accused's guilt and personal participation in the killing of the prisoners of war by omission, the Court did not have to establish the Accused's guilt on the other ground, that is, on the ground of command responsibility.

VIII. APPLICATION OF THE CC B-H

149. The fundamental principle that guided this Panel as it determined which substantive law should be applied to the perpetrator is the principle of legality, set forth by Article 3 of the CC B-H. It provides that no punishment or criminal sanction may be imposed on any person for an act which, prior to being perpetrated, had not been defined as a criminal offense by law or international law, and for which a punishment had not been prescribed by law.

150. The principle of legality, as the fundamental principle of criminal law, is also set forth in Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which, pursuant to Article 2(2) of the Constitution of B-H, directly applies and has priority over other laws in Bosnia and Herzegovina.

151. Article 4 of the CC B-H stipulates that the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the offense.

152. The acts that the Accused is charged with were committed in the course of 1993, when the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) was in effect in Bosnia and Herzegovina as an adopted law. The criminal offense of War Crimes against Prisoners of War set forth in Article 175 of the CC B-H corresponds with the identical criminal offense set forth in Article 144 of the CC SFRY, the law that was in effect in the relevant period. Therefore, guided by the principle of time constraints regarding applicability set forth in Article 4 of the CC B-H, the Court should apply the CC SFRY on the specific criminal offenses.

153. However, the provision of Article 4(2) of the CC B-H should not be disregarded, either. It reads: "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."

154. Since a new Criminal Code, the CC B-H, came into effect in Bosnia and Herzegovina in 2003, in order to make a decision which law shall apply on the perpetrator of a criminal offense, it is necessary to compare the respective relevant provisions of the previous law (CC SFRY) and the new law (CC B-H), and establish which law is more lenient to the perpetrator.

155. The criminal offense of War Crimes against Prisoners of War carried a sentence of imprisonment for a term of five years or death penalty under the CC SFRY, whereas the new law sets forth the sentence of imprisonment for a term not less than ten years or a long term imprisonment.

156. Therefore, regarded from the aspect of the minimal prescribed imprisonment sentence, the CC SFRY would be more lenient, while the CC B-H is more lenient from the aspect of the sentence maximum.

157. When rendering a decision which law should be applied in the instant case the Panel took into account the decision of the Constitutional Court of B-H in the Maktouf case: "... 68. *At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law. 69. In this context, the Constitutional Court holds that it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned.*"

158. Although the Constitutional Court did not take a final position on this matter and although the matter of application of law must be reviewed in each specific case, which this Panel has done, the Panel finds the referenced view of the Constitutional Court to be directly applicable to the case at hand.

159. In case of application of the CC SFRY to the Accused in the instant case the Accused might receive the death penalty for the referenced offense, while in case of application of the CC B-H the maximum punishment that may be imposed for the offense is a long term imprisonment, which is undoubtedly more lenient. This fact was decisive for this Panel when rendering the decision that the CC B-H was more lenient in the instant case and that it should be applied to the perpetrator.

IX. DECISION ON THE SENTENCE

160. Under Article 175 of the CC B-H, the sentence for this offense is imprisonment for a term not less than ten years or a long term imprisonment.

161. Given the purpose of punishment stipulated in Articles 6 and 39 of the CC B-H, the Appellate Panel considered particular circumstances that affected the magnitude of punishment. Due to the foregoing, the Panel finds that the sentence of imprisonment for a term of 10 years is adequate to the purpose of punishment required by the law.

162. When meting out punishment for the Accused Šefik Alić, the Panel primarily took into account the provision of Article 2 of the CC B-H setting forth that the types and the range of criminal sanctions shall be based upon the necessity for criminal justice compulsion and its proportionality with the degree and nature of the threat to personal liberties, human rights and other basic values.

163. The Panel also took into account the purpose of punishment stipulated in Article 39 of the CC B-H which is: a) To express the community's condemnation of a perpetrated criminal offense; b) To deter the perpetrator from perpetrating criminal offenses in the future; c) To deter others from perpetrating criminal offenses; and d) To increase the consciousness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators.

164. Meting out a punishment is regulated by law, so, in addition to Panel's obligation to operate within the boundaries of the sentence prescribed by law for a given offense and take into account the purpose of punishment, there also exists an obligation for a Panel to honor the general parameters set forth by Article 48 of the

CC B-H, as well as all the other circumstances that may bear on the magnitude of the punishment.

165. Thus the Panel took into account the fact that the Accused was young at the time of the perpetration and that he spent a relatively short period of time in the post of Assistant Commander for Security in the Battalion. The Panel regards these facts, as well as the Accused's family status (father of three minor children), to be extenuating circumstances. In addition, the Panel did not disregard the fact that the Battalion Commander was obviously also present during the relevant event and that the higher ranking officers, who learned what had happened on the relevant day, never reacted.

166. On the other hand, although the Accused was in that post for a short period, he knew what his duties were, primarily as a soldier, but also as an officer, since he was appointed to the post from the position of command staff in the Military Police Company. Moreover, as witness Zijad Nanić noted, by having protected captured members of the enemy army in previous military operations, he proved his personal commitment which was lacking in this case.

167. The ultimate result of his contribution was the death of four prisoners, which the Panel regards as an aggravating fact. With respect to the degree of his responsibility for that ultimate consequence, it is obvious that the degree is not as high as it would have been if he had actively participated in their killing. However, the degree of responsibility is manifested in his active participation in several situations of mistreatment of the prisoners, in his absolute passivity toward Tewfik's mistreatment of the prisoners, and, finally, in the passivity manifested as indifference to their killing, as he obviously did not file an official report although he was obliged to do so, whereby he demonstrated that he did not condemn that act or consider it important as a fact that had occurred beyond a doubt and that should have been recorded.

168. The Appellate Panel considered that the sentence of 10 years of imprisonment was proportionate to the gravity of the relevant criminal offense and the ensuing consequences, and concluded that with the punishment imposed on this Accused both the special and the general deterrence will be achieved, that is, that the punishment will increase the consciousness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators.

X. DECISION ON CUSTODY

169. Pursuant to Article 56 of the CC B-H, the time the Accused Šefik Alić spent in custody from 4 November 2006 to 3 October 2007 and the time he will have spent in custody since 20 January 2011, shall be credited toward the imposed sentence of imprisonment.

XI. DECISION ON THE COSTS OF CRIMINAL PROCEEDINGS

170. Given the fact that the Accused Šefik Alić has been found guilty of the criminal offenses described in the operative part, pursuant to Article 188(1) of the CPC B-H the Court imposes on him the duty to reimburse the costs of the criminal proceedings in the amount of KM 31,177.05.

171. When rendering the referenced decision the Panel took into account the fact that none of the parties to the proceedings or the Defense Counsel submitted evidence on the facts stipulated in Article 188(4) of the CPC B-H that would have helped relieve the Accused of the duty to reimburse the costs of the criminal proceedings in whole or in part (if their payment would jeopardize the support of the Accused or of persons whom the Accused is required to support).

172. The Court calculated the amount of the costs of the criminal proceedings in the manner that follows:

-- Attorney Refik Serdarević was paid out KM 858.00 from the budget of the Court as an *ex officio* defense counsel,¹⁵

-- Attorney Senad Kreho was paid out KM 11,863.80 from the budget of the Court as an *ex officio* defense counsel,¹⁶

-- the Witness Support Section paid out a total amount of KM 13,230.60 as the costs of the Prosecution and Defense witnesses' attendance,

-- the Prosecutor's Office of B-H paid out a total amount of KM 4,924.65 as the costs incurred by witnesses and expert witnesses.

¹⁵ Decision of the Court No. X-KR-06/294 dated 18 April 2007.

¹⁶ The payment of the referenced amount was made in six installments from 12 May 2010 to 3 February 2011 conclusive.

173. Considering the duration and the complexity of the proceedings, pursuant to Article 185(1)(g) of the CPC B-H, the Court determined the scheduled amount at KM 300.00.

174. The sum of the foregoing amounts is KM 31,177.05, which makes the total amount of the costs of the proceedings.

175. As there has been no claim under property law pursuant to Article 193 of the CPC B-H, the Panel did not deliberate on the issue.

176. Based on the foregoing, the Panel rendered the decision as stated in the operative part of the Verdict.

PRESIDING JUDGE OF THE PANEL

JUDGE

Hilmo Vučinić

RECORD-TAKER:

Dženana Deljković Blagojević

LEGAL REMEDY: This Verdict is appealable with the third instance Panel of the Court.