SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KR-06/294
Sarajevo, 11 April 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel comprised of Judges Minka Kreho, as the President of the Panel, and Roland Dekkers and Tore Lindseth as members of the Panel, with the participation of the Legal Advisor Amela Skrobo, as the Minutes-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 item a), in conjunction with Articles 21, 35, and 180 (1) and (2) of the Criminal Code of Bosnia and Herzegovina, deciding upon the Indictment brought by the Prosecutor's Office of Bosnia and Herzegovina, number KT-RZ-141/06 of 30 January 2007, specified on 7 June 2007, after the main trial from which the public was excluded in part, which was attended by the Accused and his defense counsels, and the Prosecutor of the BiH Prosecutor's Office, rendered in the presence of the Accused and his defense counsels – attorneys Senad Kreho and Mirza Kovač, and the Prosecutor of the BiH Prosecutor's Office, Peter Kidd, and publicly announced the following

V E R D I C T

THE ACCUSED

ALIĆ ŠEFIK, son of Mumin and Fatima, born on 3 March 1968 in Dobro Selo, the municipality of Bužim, ethnicity …, citizen of …, resides at …, municipality of …, forestry technician by occupation, forest ranger, married, father of three minor children, compulsory military service completed in 1988 in Kovina, the Republic of Serbia, with the rank of a Corporal, kept with the Bužim Military Records – rank of a First Lieutenant, JMBG …, ID card number …, currently at liberty

Pursuant to Article 284 item c) of the Criminal Procedure Code of Bosnia and Herzegovina

IS HEREBY ACQUITTED OF THE CHARGES

That:

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 Srpska 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 questioning prisoners, protecting them and ensuring their safe passage to the Brigade Command, he acted contrary to the provision of Common Article 3, Paragraph 1, Item a) of the Geneva

Conventions, dated 12 August 1949, by participating in the physical and mental abuse of war prisoners and instigating, perpetrating or otherwise aiding and abetting their killings, and failing to undertake all necessary and reasonable measures to prevent or punish the perpetrators, because:

1. On 05 August 1995 together with other members of the Hamza Battalion and Al Harbi Tewfik, an irregular soldier over whom he had effective control, he participated in the military operation named „Oluja“, which operation was conducted by the 505th Brigade (also known as the Bužim Brigade), during which operation four members of the Army of Srpska Krajina were captured by the members of the Hamza Battalion in the wider vicinity of elevation Hleb on the territory of the Republic of Croatia near to the border of Bosnia and Herzegovina, and by the function he was performing in the Hamza Battalion he took custody of and was responsible for the protection of the lives and well-being of the prisoners, who were captured, mistreated and killed in the following manner.

2. Devetak Mirko was captured in the vicinity of elevation Hleb in the direction of Devetaci by W3, a Platoon Commander in the 1st Company of the Hamza Battalion; immediately afterwards, Al Harbi Tewfik 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 questioned and intimidated him together with Al Harbi Tewfik, during which Al Harbi Tewfik 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 Tewfik) 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 the soldiers of the Hamza Battalion 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 Srpska Krajina.

3. Shortly afterwards, W1, the Operations Officer in the Hamza Battalion, with the help of his escort, independently captured two other Serb soldiers – Stambolija Petar and Borosina Pero – 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, had separated from the first prisoner who was moving with the other soldiers including Al Harbi Tewfik; meanwhile, a fourth Serb soldier – Bašić Branko – was separately captured by members of the Hamza Battalion in the same vicinity 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 – Devetak Mirko, Stambolija Petar and Borosina Pero – were subjected to threatening and intimidating behavior and physical abuse while walking through a forest, during which the Accused, while physically restraining and pointing his gun at the prisoner Borosina Pero, threateningly said to the camera operated by Veladžić Meho, the Brigade cameraman, that he will make him (i.e. the prisoner) his "*kum*" and then indicated that Al Harbi Tewfik will make the prisoner whom he was physically restraining, Stambolija Petar, his (i.e. Al Harbi Tewfik's) "*kum*"; Al Harbi Tewfik aggressively held the prisoner Stambolija Petar by the prisoner's hair while questioning him without any intervention by the Accused; the Accused slapped the prisoner Borosina Pero on his back in an intimidating manner while questioning him, and while the Accused continued to physically

restrain Borosina Pero, Al Harbi Tewfik struck that prisoner twice with force to the chin with his hand again without any intervention by the Accused; while on a wide forest road the Accused and Al Harbi Tewfik together aggressively slapped the fourth prisoner, Bašić Branko, to the back of his head; at some point when all four prisoners were together at the head of the column of soldiers of the Hamza Battalion they were physically mistreated by Al Harbi Tewfik, who beat and kicked one or more of them.

5. After orders were given to withdraw to elevation Hleb because of the death of the Brigade Commander Nanić Izet, 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 Al Harbi Tewfik; 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 Tewfik from having further contact with the prisoners and from further harming them, despite being aware of the real danger and risk which Al Harbi Tewfik 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 Tewfik, without justification, with the assistance of regular soldiers of the Hamza Battalion, in the wider 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 Tewfik boasted to the camera being operated by Veladžić Meho that he killed them and encouraged Veladžić Meho to film the bodies, which he did.

6. After the event, and despite knowing or having reason to know of the execution of the prisoners, the Accused failed to report the killings to his superiors including to his immediate security superior Nanić Zijad, the Assistant to the 505th Brigade Commander for Security, and he otherwise took no action, or adequate action, to have the killings and the perpetrators investigated and punished.

Thus, as described above, and in the context of an armed conflict, the Accused by his acts and omissions, instigated, perpetrated, or otherwise aided and abetted the crimes described above and is also responsible by virtue of his position as a superior for offences perpetrated by his subordinates, including Al Harbi Tewfik, 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 depriving another person of his life, he committed the criminal offence of War Crimes against Prisoners of War contrary to Article 175 (a) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Articles 21, 35 and 180 (1) and (2) of the same Code, and in violation of Common Article 3 (1) (a) of the Geneva Conventions of 1949.

I

Pursuant to Article 189 (1) of the Criminal Procedure Code of Bosnia and Herzegovina, the costs of the criminal proceedings referred to Article 185 (2) items a) through f) of this Code, and the necessary expenditures and remuneration of defense attorney shall be paid from within budget appropriations.

II

Pursuant to Article 198 (3) of the Criminal Procedure Code of Bosnia and Herzegovina, the injured party shall be instructed that he may pursue his possible claims under property law in a civil action.

R e a s o n i n g

1. Charges

By the Indictment of the BiH Prosecutor's Office, number KT-RZ-141/06 of 30 January 2007, Alić Šefik was charged that in the manner described under Counts 1 through 6, namely by inhuman treatment and depriving another person of his life, he committed the criminal offense of War Crimes against Prisoners of War in violation of Article 175, item a), in conjunction with Articles 21, 35, and 180 (1) and (2) of the CC BiH, in violation of Common Article 3 (1) (a) of the Geneva Conventions of 1949.

The Indictment was confirmed on 31 January 2007, and the Accused pled not guilty under any Count of the Indictment, after which the case was referred to the Trial Panel which commenced the main trial on 11 May 2007.

In the opening statements, the Prosecutor pointed out that he would prove the allegations referred to in the Indictment through the statements of members of the unit whose members the prisoners were, but also with the video-recording of the military operation made by a member of the 505th Bužim Brigade, Meho Veladžić, who will also be summoned to testify. The charges will be also supported by the statements of the witnesses –participants in the critical operation.

Already in the opening statement, the Defense contested the authenticity of the video-recording, which constitutes the principal evidence for the Prosecution, and introduced the introduction of its – original video recording of the operation, pointing out that the scenes very important for the Accused were deleted from the Prosecution video-recording.
The Defense also stated that it would use the Prosecution evidence, and it paid a particular attention to the personal file of the Accused proposed under the Indictment which shows the position of the Accused during the critical time, as well as the deficiencies of the basic elements of the command responsibility.

At the beginning of the main trial, and after rendering the decision on granting protection and pseudonym for one of the witnesses whose full name and surname was indicated in the Indictment, and the decision not to disclose the function which one of the already protected witnesses had performed at the critical time, and also due to the fact that the last name of one victim was incorrectly stated throughout the entire Indictment, on 8 June 2007, the Prosecutor submitted the "*corrections in the Indictment*", and thereafter, on 11 June 2007, the corrected version of the Indictment, number KT-RZ-141/06.

Evidence Adduced

During the main trial, the following witnesses for the Prosecution, as proposed under the Indictment, were examined: protected witnesses W1, W3, W4 and W5, Emrić Hamdija, Hasan Ćatić, Alija Osmanović, Safet Čordić, Senad Šahinović, Šerif Klekić, Refik Duraković, Agan

Elkasović, Zijad Nanić, Sead Jusić, Hamdija Mustafić, Edhem Eminić, Mevlid Mustafić, Meho Veladžić, Agan Skenderović, Merima Ćurt, Ibrahim Cinac, Safet Isaković, Fuad Kulauzović, Mirsad Selmanović, Milorad Pribičević, Samir Šakanović, Zuhdija Ćatić and Abid Duraković, while in the supplement to the evidentiary proceedings the witness Safet Čordić was re-examined.

The documentary evidence of the Prosecution, adduced during the main trial, is as follows: CD 1 – 5.Corps-ARBIH-505th Brigade, 47 min - 53 min and 9 sec. with the attachment: Transcript CD1; Photos (from the CD which is Exhibit T1); Drawing – Sketch made by the witness W3; Witness Examination Record for Refik Duraković, number KT-RZ-141/06, BiH Prosecutor's Office, dated 18 August 2006; Drawing – Sketch made by the witness Refik Duraković at the main trial on 4 September 2007; Record on examination of witness Refik Duraković, SIPA, No. 14-11/3-103-65-2/05 dated 24 November 2005; Record on examination of witness W3, SIPA, No. 14-11/3-103-47/05 dated 13 October 2005; Witness Examination Record for witness W3, number KT-RZ-141/06, BiH Prosecutor's Office, dated 3 August 2006; Record on examination of witness W4, SIPA, No. 14-11/3-103-71-2/05 dated 28 November 2005; Witness Examination Record for witness W4, number KT-RZ-141/06, BiH Prosecutor's Office, dated 2 August 2006; Drawing – Sketch made by the witness W4; Original-topographic map (concerning W1); Copy-topographic map - marked by W1; SIPA Examination Record for W1, No. 17-12/3-04-2-193/06 dated 22 September 2006; Witness Examination Record for witness W1, number KT-RZ-141/06, BiH Prosecutor's Office, dated 4 October 2006; SIPA Witness Examination Record for Hamdija Emrić, No. 14-11/3-103-68-2/05 dated 29 November 2005; Witness Examination Record for Hamdija Emrić, number KT-RZ-141/06, BiH Prosecutor's Office, dated 17 August 2006; SIPA Witness Examination Record for Hasan Ćatić, No. 14-11/3-103-63-2/05 dated 24 November 2005; Witness Examination Record for Hasan Ćatić, number KT-RZ-141/06, BiH Prosecutor's Office, dated 1 August 2006; SIPA Witness Examination Record for Alija Osmanović, No. 14-11/3-103-94-2/05 dated 13 December 2005; Witness Examination Record for Alija Osmanović, number KT-RZ-141/06, BiH Prosecutor's Office, dated 9 January 2007; SIPA Witness Examination Record for Safet Čordić, No. 17-12/3-04-2-175/06 dated 1 September 2006; SIPA Witness Examination Record for Senad Šahinović, No. 14-11/3-103-79-2/05 dated 5 December 2005; Witness Examination Record for Senad Šahinović, number KT-RZ-141/06, BiH Prosecutor's Office, dated 18 August 2006; Copy – topographic map – marked by the witness Šerif Kekić; SIPA Witness Examination Record for Šerif Kekić, No. 17-12/3-04-2-192/06 dated 22 September 2006; Witness Examination Record for Šerif Kekić, number KT-RZ-141/06, BiH Prosecutor's Office, dated 8 January 2007; SIPA Witness Examination Record for Agan Elkasović, No. 14-11/3-103-70-2/05 dated 5 December 2005; SIPA Witness Examination Record for Nanić Zijad, No. 14-11/3-103-87-2/05 dated 9 December 2005; Witness Examination Record for Nanić Zijad, number KT-RZ-141/06, BiH Prosecutor's Office, dated 9 January 2007; SIPA Witness Examination Record for Jusić Sead, No. 14-11/3-103-80-2/05 dated 8 December 2005; Witness Examination Record for Jusić Sead, number KT-RZ-141/06, BiH Prosecutor's Office, dated 22 January 2007; List of the Commanders of the 505 Bužim Brigade; Military Officer Record (for ALIĆ ŠEFIK); Order No. 05/1-950/94 of 31 December 1994; Report, No. 01-18/95 of 9 March 1995; Proposal No. 05-1189/95 of 29 October 1995; Order, No. 05/53-1813 of 26 November 1995; SIPA Witness Examination Record for Hamdija Mustafić, No. 17-12/3-04-2-169/06 dated 30 August 2006; Copy – topographic map – marked by the witness Edhem Eminić; SIPA Witness Examination Record for Edhem Eminić, No. 14-11/3-103-72-2/05 dated 1 December 2005; Witness Examination Record for Edhem Eminić, number KT-RZ-141/06, BiH Prosecutor's Office, dated 3 August 2006; SIPA Witness Examination Record for Mevlida Mustafić, No. 17-12/3-04-2-196/06 dated 4 October 2006; Copy – topographic map – marked by the witness Mevlida Mustafić; SIPA Witness Examination Record for Meho Veladžić, No. 14-11/3-103-55-2/05 dated 15 November 2005; Witness Examination Record for Edhem Veladžić, number KT-RZ-141/06, BiH Prosecutor's Office, dated 5 October 2006; SIPA Witness Examination Record

for Agan Skenderović, No. 14-11/3-103-54-2/05 dated 16 November 2005; SIPA Witness Examination Record for Merima Ćurt, No. 14-11/3-103-56-2/05 dated 15 November 2005; SIPA Witness Examination Record for Ibrahim Cinac, No. 14-11/3-103-100-2/05 dated 17 December 2005; Order for logistics, dated 4 August 1995; SIPA Witness Examination Record for Sulejman Šekić, No. 17-12/3-04-2-173/06 dated 31 August 2006; SIPA Witness Examination Record for Safet Isaković, No. 14-11/3-103-61-1/05 dated 22 November 2005;
SIPA Witness Examination Record for Fuad Kulauzović, No. 14-11/3-103-92-1/05 dated 13 December 2005; SIPA Witness Examination Record for Mirsad Selmanović, No. 17-12/3-04-2-167/06 dated 29 August 2006; Geographical map of the area around Makarovača marked by the witness Milorad Pribičević; SIPA Record on recognition of a person by the witness Milorad Pribičević, No. 14-11/3-103-1/05 dated 19 October 2005; Set of 7 color photos (the victims' photos)- MP1-MP7; SIPA Witness Examination Record for Samir Šakanović, No. 17-12/3-04-2-211/06 dated 20 October 2006; Witness Examination Record for Samir Šakanović, number KT-RZ-141/06, BiH Prosecutor's Office, dated 8 January 2007; SIPA Witness Examination Record for Zuhdija Ćatić, No. 14-11/3-103-64-2/05 dated 24 November 2005; SIPA Witness Examination Record for Abid Duraković, No. 14-11/3-103-57-1/05 dated 15 November 2005; Cards of missing or captured persons issued by Government of the Republic of Srpska, Office for the search for missing and captured persons (for Mirko Devetak, Branko Bašić, Pero Borosina, Petar Stambolija); Death certificate for Branko Bašić dated 21 October 2005; Death certificate for Mirko Devetak with the Decision confirming the death of a person. R.I.12/98-8; Letter of the Center for Collecting documentation and information VERITAS, Banja Luka with the documentation for missing persons (for Mirko Devetak, Branko Bašić, Pero Borosina, Petar Stambolija); Lists of the missing and captured persons, issued by Government of the Republic of Srpska, Office for the search for missing and captured persons, dated 21 October 2005 and 07 February 2006; Excerpt from the criminal record for Šefik Alić, No. 05-5/03-04-3-185/06 of 28 November 2006; 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; Record on the opening and examination of the temporarily seized items and documents, No. KT-RZ-141/06, BiH Prosecutor's Office, dated 23 January 2007; Military Book of Šefik Alić (blue color); Military Book of Šefik Alić (brown color); Movement permit No. 001712 issued to Šefik Alić; Military beret of the Accused, green color, with the Army of BiH insignia; Order issued by the Commander of the 505th Viteška Brigade of the R BiH Army, No. 05/3-665/94 dated 31 December 1994; Report of the Hamza Unit, dated 25 February 1995; Instruction on the application of the rules of the international law on war in the Defense Forces of the R BiH (Official Gazette of the Army of BiH, No. 2/92, dated 5 December 1992); Rules on publication of the regulations and other acts in the Army of the R BiH (Official Gazette of the Army of the R BiH, No. 1/92 dated 15 November 1992); Rules for Operations of the Military Security Service in the R BiH Armed Forces from 1992); Instruction by the Administration of the Military Security Service Sarajevo for foreign citizens recruitment in the R BiH Army, No. 7-2/73-40 of 22 August 1995; Query on the recruitment of the foreigners in the Army of BiH by the Military Security Service Department of the 5th Corps Command, No. 03/632-2 dated 25 August 1995; Report of the Military Security Service Sector of the 505th Viteška Brigade on the recruitment of the foreigners in the Army of BiH, No. 03/27-1-53 dated 26 August 1995; Information on recruitment of the foreigners in the Army of BiH the Military Security Service Department of the 5th Corps Command, No. 03/632-12 dated 4 September 1995; 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; Crime Scene Sketch – Responsibility zone of the 3rd Battalion of the 505th Viteška Brigade-the place of Ćorkovača; NoSL/06 dated 23 August 2006; Order of the 5th Corps Commander to release the witness Hamdija Mustafić, No. 05/53-88 dated 16 January 1995; Review of the 505th Mountain Brigade of the changes in personal data fro the witness Hamdija Mustafić dated 28 April 1999: Medical documentation of the Second Instance Military Medical Commission

Bihać for the 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; SIPA Examination Record for W5, No. 17-12/3-04-2-194/06 dated 28 September 2006; SIPA Examination Record for W5, No. 17-12/3-04-2-79/07 dated 20 November 2007; DVD recording of the guard of honor of the *Hamza* Battalion; DVD recording-funeral of the Hamza Battalion Commander, Izet Nanić; Transcript of the DVD recordings T92 and T93.

The Defense witnesses examined during the main trial are as follows: Mevlid Mustafić, Sulejman Čaušević, Nisvet Begović, Besim Abdić, Meho Veladžić, Dževad Jusić and Hamdija Mustafić.

The Defense presented the following documentary evidence: the DVD recording made during the critical operation; Photo-documentation (clips) from the DVD recording-12 pages-72 clips; Transcript of the DVD recording; a dark red beret; a copy of pages 66 and 276 of the ICRC Register of the missing persons from the former Yugoslavia territory; a copy of the BOFORS Manual; a copy of the MSS ID card; Order dated 3 October 1992, No. Pov-371-131 on the assignment of the Accused to the post of the Military Police Platoon Leader.

3. Procedural Decisions

a) Protection and manner of examination of witnesses pursuant to the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses

The Indictment of the Prosecutor's Office of B-H No. KT-RZ-141/06 of 30 January 2007 proposed, inter alia, the examination of witnesses under pseudonyms W1 and W2, whose identity was protected by the use of the aforementioned pseudonyms pursuant to the Decision of the Preliminary Hearing Judge of the Court of B-H of 31 January 2007.

The necessity of such protection was also confirmed by the Court's decision of 15 May 2007, while the manner of examination of these witnesses was considered following the direct communication with the witnesses (as will be explained below).

However, during the main trial, some of the witnesses proposed in the Indictment expressed fear for their personal and their families' safety, which resulted in granting protection to three more witnesses.

Deciding on the Motion of the Prosecutor's Office of B-H No. KT-RZ-141/07 of 14 May 2007, following a non-public oral deliberation attended by the witness as well as the parties and the Defense Counsel, on 18 May 2007, the Court rendered a decision granting this witness pseudonym W3 and ordering testimony by way of use of technical equipment.

The same security reasons also led to the Motion of the Prosecutor of the Prosecutor's Office of B-H, filed on 15 June 2007 during the main trial, requesting that identity protection measures be granted to another witness identified in the Indictment, particularly the measure of testimony by way of use of technical equipment.

Following the same-type non-public session, on the same day the Court rendered a decision granting pseudonym W4 to the proposed witness and protection manifested in the manner of examination.

On 21 January 2008, the Prosecutor's Office filed another motion for witness protection, which was deliberated on during the non-public parts of the main trial held on 21 January and 12 February 2008, whereupon, on 13 February 2008, a decision was rendered granting pseudonym W5 to the witness and ordering identity protection by means of technical equipment.

All the aforementioned witnesses, except witness W2 (which will be explained below), testified in the public main trial, but behind a screen concealing their faces from the public. Following the consent of the parties and the Defense Counsel, the public was excluded during the presentation of a video footage on which the witnesses could identify many protagonists of the events.

On 11 December 2007, after the Prosecutor of the Prosecutor's Office of B-H proposed additional protection measures for witness W2, at a non-public session the Court interviewed the witness on the need for such protection. However, the witness waived every kind of protection, the use of pseudonym included, stressing that he wanted to testify at the public trial, which neither the parties nor the Defense Counsel opposed. Therefore, pursuant to Article 13 (3) of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, the Court rendered a decision revoking the protection measures granted to this witness pursuant to the respective Decisions of 31 January and 15 May 2007.

b) Decision not to admit certain evidence

When presenting the documentation on 14 January 2008, the Prosecutor offered the following statements of the accused Šefik Alić as evidence: Record of Šefik Alić's questioning by officials of the State Investigation and Protection Agency (SIPA) No. 14-11/3-103-74-2/5 of 1 December 2005, and Record of questioning suspect Šefik Alić at the Prosecutor's Office of B-H No. KT-RZ-141/06 of 2 November 2006.

The Court refused the presentation of the aforementioned evidence, pursuant to Article 263 (2) of the CPC B-H.

In other words, starting from the fact that the Accused is not bound to present his defense or to answer questions, which is a right guaranteed by Article 6 (3) of the CPC B-H and which the Accused used by not presenting his defense during the main trial, the Court could not depart from the principle of imminent presentation of evidence and admit the offered evidence.
The admission of this evidence would have been in contravention of Article 273, especially Paragraph (2), which explicitly sets forth the situations in which the records of statements given at the investigation stage may be read out, that is, which lists exceptions from the imminent presentation of evidence, and Article 281 (1), which guarantees imminent presentation of evidence, that is, that a verdict shall be based only on the evidence presented at the main trial.
The admission of this evidence would have only been possible if the Accused had presented his defense during the main trial, and even then, under the restrictions referred to in Paragraph (1) of Article 273 and, by analogy, the ones referred to in Article 84 (1) of the CPC B-H.

It is, therefore, clear that the right of the Accused to remain silent is not and cannot be restricted.

When rendering this decision, the Court also took into consideration the right to a defense guaranteed in Article 230 (3) and Article 231 (6) of the CPC B-H, setting forth that the statement on the admission of guilt, that is, the admission of guilt following the agreement with the Prosecutor's

Office is inadmissible as evidence in the criminal proceedings in case the agreement is not admitted by the Court.
Finally, bearing in mind Article 6, Paragraph 3 of the CPC BiH, and Article 6 of the European Convention on Human Rights, which prescribe that the accused is not bound to present his defense or answer questions posed to him, which the Accused exercised, clarifies to a sufficient extent the view of the Court not to accept the Prosecution's motion to accept the statements of the Accused given in the investigative proceedings.

4. Closing Arguments

a) Prosecutor's Office

The Prosecutor argues that the alleged acts took place in the context of an armed conflict and that the victims of these acts were "protected persons" under the common Article 3 of the Geneva Conventions.

Thus, by submitting that the acts described under Counts 1 through 6 of the Indictment constitute serious breaches of the Geneva Conventions in the form of crimes of inhuman treatment and murder of four prisoners of war as recognized by Article 175 (a) of the CC BiH, the Prosecutor considers it proved that the Accused is held criminally responsible pursuant to Article 180 (1) of the CC BiH for his direct or constructive participation in the above-mentioned acts. Moreover, the Prosecution contends that the Accused is criminally responsible pursuant to Article 180 (2) of the CC BiH for failure to report the killings to his superiors when he knew or had reason to know that Al Harbi Tewfik executed the prisoners of war and took no action to have the killings investigated and the perpetrator punished. In this regard, the Prosecution emphasizes that individuals in positions of authority may be held criminally responsible on the basis of their *de facto* as well as *de jure* position as superiors.

The Prosecutor finds it proved that the Accused, together with Tewfik, personally and directly participated in the inhuman treatment of the prisoners. He did so by uttering threatening and intimidating words; by physically restraining and abusing the prisoners; and by using one of the prisoners of war as lure or scout to find the Serb command post. The Prosecutor contends that the conduct of the Accused (which is described below in more details) clearly amounts to inhuman treatment and is contrary to international humanitarian law.

The Prosecutor argues that immediately after Mirko Devetak, the first prisoner of war, was captured, Al Harbi Tewfik tried to obtain a knife to attack the prisoner. He was prevented from doing so by witness W3 and other members of the 1st Company of the Hamza Battalion. The Prosecutor concedes that the Accused was not immediately present during the knife scene and does not seek to impute Tewfik's animosity to Alić's knowledge based on that scene. The Prosecutor further argues that shortly after the knife scene, the prisoner was placed into the custody and control of the Accused who together with Al Harbi Tewfik, threatened and intimidated the prisoner. The Prosecutor states that one of the threatening moments took place after a preliminary interrogation when Tewfik introduced himself to the prisoner as a *mujahedin* and told the prisoner ″I come, I kill one by one″ to which Accused responded that he (i.e. Tewfik) only slits throats. The Prosecutor argues that the reference of the Accused to the perpetrator's inclination to slit throats constitutes inciting and inflammatory language. He also argues that this comment was intended to instill fear in the prisoner's mind and signaled the callous indifference of the Accused.

The Prosecutor further contends that the Accused took the lead in treating the prisoners of war inhumanely when he used humiliating language identifying the POWs as his *kum* and the Tewfik's *kum.* Accordingly, the Prosecutor argues it was proved that Alić was not just merely present but was Tewfik's teammate, egging him on, lending him moral and practical support in the effort to terrify the prisoners.

The Prosecutor further asserts that the threats continued and escalated to the callous physical manhandling and intimidation of the prisoners of war. To support his argument, the Prosecutor relies on the video footage depicting Tewfik holding Stambolija Petar, in the presence of the Accused, by his hair and telling the prisoner that he was guaranteed to stay alive only if he was telling the truth. In addition, the Prosecutor asserts that the Accused joined Tewfik in tormenting the prisoners when he slapped (once) Boromisa Pero on his back during questioning and allowed Tewfik to struck the prisoner twice on his face while physically restraining him. Finally, the Prosecutor draws the Panel's attention to the physical abuse endured by the fourth prisoner, Branko Bašić, whom Tewfik pulled by his ear and received a slap on his face from the Accused. In conclusion, the Prosecutor refers to the video footage depicting Tewfik shepherding the prisoners with a long stick as if they were sheep.

In addition, the Prosecutor argues that the first prisoner of war was exposed to danger in violation of international humanitarian law when he was handed a rifle, without ammunition, and was forced to march at the head of the column of the soldiers of the Hamza Battalion 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 Srpska Krajina. The Prosecutor argues that exposing prisoners to the unnecessary danger without regard to their safety created additional torment to the prisoners.

Finally, the Prosecutor argues that, based on the witness testimony, the mistreatment of prisoners by Tewfik continued for a greater period of time than what appears on the video footage. The Prosecutor alleges that such abuse is inextricably linked to the abuses which took place in Alić's presence and that such abuse is all part of one continuing transaction in which the Accused himself was an active participant.

The Prosecutor states that it is beyond dispute, based on witness testimony as well as the video footage, that Tewfik killed the prisoners. The Prosecutor, however, argues that the ultimate killings were intimately connected to the earlier ″disquieting misconduct″ of the Accused, including the inflammatory and inciting language of the Accused, which sent a message to Tewfik and other soldiers of the Hamza Battalion that he both condoned and approved violence against the prisoners. The Prosecutor, hence, argues that the Accused had a duty to undertake a decisive action to alleviate mistreatment, having knowledge that the prisoners were exposed to the ongoing danger, and his failure to do so rendered him criminally liable for the subsequent murders of the prisoners.

The Prosecutor argues that the Accused enjoyed the privileges of leadership in the Hamza Battalion and, as a battalion security officer, had a specific functional role with respect to the prisoners such as questioning the captives and escorting the prisoners to the battalion command. In addition, The prosecutor argues it is proved that the Accused was in a position of superiority over Tewfik, had effective control over Tewfik even if temporarily or on an *ad hoc* basis, and had the material ability to prevent Tewfik from committing the crimes, i.e. killing the prisoners of war.

b) Defense

In response to the Prosecutor's main arguments, the Defense does not dispute that an armed conflict existed in the territory of Bosnia and Herzegovina and Republic of Croatia between the forces of the Army of Bosnia and Herzegovina and the Army of Srpska Krajina in August 1995. The Defense also does not dispute that the Accused participated in the military operation ″Oluja″ on August 5, 1995. It, however, denies that the Accused held a position of the Assistant to the Commander for Security and that his duties and responsibilities included interrogation and safety of the prisoners of war as alleged in the Indictment. Accordingly, the Defense challenges the Prosecution's argument that the Accused is criminally responsible for the killings of the prisoners of war under the doctrine of command responsibility, i.e. that the Accused was an Assistant Commander for Security, had effective control over Tewfik, knew or had reason to know that the killings were about to be committed and failed to prevent or punish the perpetrator.

The Defense also does not dispute that prisoners were captured on August 5, 1995. It, however, rejects the Prosecutor's contention that the Accused had control over the prisoners and that he subjected the prisoners to inhuman treatment. The Defense concedes that the Accused made a verbal statement about one of the prisoners (i.e. calling Pero Boromisa his *kum*) and had a physical contact with the prisoners of war while he was marching him to the elevation Hleb (i.e. holding one of the prisoners of war by the shoulder). The Defense, however, submits that the restraining measures were in accordance with what was objectively acceptable at that time and that the alleged intimidating statement of the Accused did not contain any possible threat because, according to the Defense, calling a person a *kum* is an honor and not a threat. The Defense further contends that the Prosecutor fabricated the facts of the case when he stated that all four prisoners were together at the head of the column, they were physically mistreated and kicked by the foreign soldier and that they were taken together to the elevation Hleb in the company of the Accused, the foreign soldier and other members of the Hamza Battalion. In relation to the allegation pertaining to Mirko Devetak being used as a ″lure″, the Defense does not dispute that the prisoner walked with the soldiers of the Hamza Battalion in the vicinity of the Hleb elevation. It contests, however, that the prisoner was forced to march ahead of the column and that he was used as a scout and a ″lure″ for other Serb soldiers. In conclusion, the Defense argues that the Prosecutor failed to prove beyond a reasonable doubt that the acts and omissions of the Accused caused great mental and physical suffering or injury or represented a serious attack on human dignity.

With respect to the alleged murders of the prisoners, the Defense denies that the individual criminal responsibility for the killings of prisoners of war should be attributed to the Accused. First, the Defense rejects the Prosecutor's contention that the Accused instigated, aided and abetted their killings arguing that he lacked the prerequisite *mens rea.* Second, the Defense disputes the identity of the victims. Although it does not deny that four prisoners, as depicted by the video footage, were executed, the Defense contests that those victims were the prisoners mentioned in the Indictment. The Defense argues that the Prosecutor never established the identity of the victims depicted on the video footage and failed to prove that they were members of the Army of Serb Krajina. In addition, the Defense contends that the Prosecutor failed to prove the manner in which they were executed. Also, the Defense points out that after the completion of the proceedings the bodies of the prisoners mentioned in the Indictment have not been recovered, and no DNA testing has been performed to establish the identity of the victims. The Defense also argues that the written evidence offered by the Prosecutor fails to support the Prosecutor's allegations pertaining to the identity of the victims, their date of death and the location where they went missing. Accordingly, the Defense argues that when in doubt, the benefit should be given to the Accused.

In response to the Prosecutor's arguments, the Defense contends the conduct of the Accused does not rise to the level of inhuman treatment as required by the international standards. It notes that

none of the Prosecutor's witnesses testified to having seen the Accused take part in the physical and mental abuse of the prisoners. On the contrary, many witnesses testified that the Accused was a courageous soldier and that they had never heard or seen the Accused mistreating any prisoners. In addition, the Defense observes that any mistreatment of the prisoners can undoubtedly be attributed to Tewfik.

Furthermore, the Defense argues that the Accused did not exercise any control and power over the prisoners or that he had a duty to secure the safety of the prisoners. It notes that the Prosecutor's conclusion that the Accused exercised absolute control over the prisoners when he held one of the POWs by the back of his shirt and referred to Pero Boromisa and Petar Stambolija as *kums* is erroneous.

Also, the Defense challenges the Prosecutor's allegation that the Accused used Mirko Devetak as a scout to find the Serb command post. It notes that evidence clearly demonstrates that the prisoner volunteered to show the location to the soldiers of the Hamza Battalion and that the prisoner was walking freely, with his hands untied, when he took the column to the Serb command post.

Finally, the Defense further contends that the Prosecutor fabricated certain facts concerning physical mistreatment and that he did not prove beyond reasonable doubt that the Accused participated in the physical and mental mistreatment of the prisoners in the manner described in the Indictment.

On the other hand, the Defense emphasized that the Accused lacked the *mens rea* prerequisite and cannot be held criminally liable for the acts of others.

On the other hand, and in response to the charges concerning command responsibility, the Defense contends that the Prosecutor failed to prove beyond the reasonable doubt that the Accused was either *de jure* or *de facto* assistant commander for security. It notes that the Prosecutor's evidence pertaining to the Accused's position proves his innocence; many witnesses of the Prosecutor testified that they did not personally know about the rank of the Accused and only heard about his alleged appointment as an assistant commander from other soldiers. In addition, it notes that all documentary evidence clearly indicates that the Accused was not an assistant commander for security during the period indicated in the Indictment.

The Defense further argues that the Accused did not exercise effective control over Tewfik. Accordingly, the Accused had neither authority nor duty to punish Tewfik for his mistreatment of the prisoners. The Defense further contends that only Asim Bajraktarević, the Hamza Battalion Commander, had control over Tewfik, had direct knowledge of Tewfik's abusive behavior and failed to prevent and punish the perpetrator.

Finally, the Defense argues that the Prosecutor failed to prove that following the death of the Brigade Commander, all four prisoners were taken to the elevation Hleb and were executed there by Tewfik and other soldiers of the Hamza Battalion**.**

5. Applicable Law

As regards the applicable substantive law, it is necessary to point out why the provisions of the CC SFRY, which was applicable at the time of the events concerned, should not be applied.

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

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

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

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

The Court points out that the crimes for which the Accused has been found guilty constitute crimes under international customary law and thus fall under *"general principles of international law"* stipulated under Article 4a of the Law on Amendments to the CC BiH and *"general principles of law recognized by civilized nations"* stipulated under Article 7(2) of the ECHR, and thus the CC BiH can be applied in this case on the basis of these provisions.

Furthermore, the fact that the criminal-legal actions listed under Article 175 of the CC BiH can be also found in the law which was in force at the relevant period of time, at the time of the commission of the criminal offense, namely in Article 144 of the CC SFRY, namely that those criminal offenses were also punishable under at the time applicable criminal code, also additionally contributes to the conclusion of the Court regarding the principle of legality.

Finally, the application of the CC BiH is additionally justified by the fact that the punishment prescribed by the CC BiH is in any case more lenient than the death penalty which was in force at the time of the commission of the criminal offense, whereby the principle concerning the time frame of the applicability of the criminal code, namely the application of a more lenient law to the perpetrator has been satisfied.

Such view of the Court is in accordance with the position taken in the Verdict of Section I of the Appellate Division of the Court of BiH pronounced in the *Abduladhim Maktouf* case, number KPŽ 32/05 of 4 April 2006, and the Verdict in the Dragoje Paunović case, number KPŽ 05/16 of 27 October 2006, which was also upheld by the Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP-1785/06 dated 30 March 2007.

6. Findings of the Court

a) General considerations

Being primarily led by the principle of free evaluation of evidence, as guaranteed under Article 15 of the CPC BiH, the Court conducted the whole main trial with a view to *securing that no one innocent is convicted, and that the criminal sanction be imposed on the perpetrator of the criminal offense under the terms prescribed by the Criminal Code of BiH and in the proceedings prescribed by law*, due to which it allowed, for the purpose of detail hearing of the case and finally, establishment of the truth, that the witnesses for both the Prosecution and the Defense be summoned and the video footage be used of both Prosecution and the Defense.

During the main trial, the Trial Panel has assessed the evidence in this case in accordance with the applicable Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH).
Article 3(1) CPC of BiH provides that the Accused shall be presumed innocent until proven guilty. The Prosecutor therefore bears the burden of establishing the guilt of the Accused, and, in accordance with Article 3(2) of CPC of BiH, the Prosecution must do so beyond reasonable doubt. The fact that the Defense has not challenged certain factual allegations contained in the Indictment does not mean that the Court has accepted these facts to be proven. The burden of proof remained with the Prosecutor for each allegation throughout the entire trial. Accordingly, in determining whether the Prosecutor proved its case beyond reasonable doubt, the Trial Panel has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused and whether every element of the crimes and the forms of liability charged in the Indictment have been established. Any ambiguity or doubt has been resolved in favor of the Accused in accordance with the principle of *in dubio pro reo.*

Pursuant to Article 15 CPC of BiH, the Trial Panel is free to evaluate the evidence. Accordingly, the Trial Panel has carefully considered the charges against the Accused in light of the entire record, including all evidence put forth by the Prosecutor and the Defense. In evaluating the evidence given during main trial, the Trial Panel has given due regard, among other things, to the individual circumstances of the witnesses, including their possible involvement in the events and the risk of self-incrimination, and their relationship with the Accused. The Trial Panel has also considered the internal consistency of each witness' testimony during the direct and cross-examination and compared it to the witness statements given during the investigation phase.

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

Bearing in mind that the evidence in this case relates to events that occurred thirteen years ago, the Court did not treat minor discrepancies between the evidence of various witnesses or between the evidence of a particular witness and a statement previously made by that witness, as discrediting. If a witness recounted the essence of the events at issue, the peripheral deviations did not call into question the veracity of that evidence.
However, in cases of repeated contradictions within a witness testimony, the Court has disregarded such evidence unless it has been sufficiently corroborated. For example, during his direct examination, witness W5 testified that he saw the Accused marching away with the prisoners, Tewfik and three other Hamza soldiers. Within a few minutes, he heard the gun shots that allegedly killed the prisoners of war. However, when cross-examined by the Defense and questioned by the Trial Panel, the witness was unable to confirm his earlier statements regarding the presence of the Accused at the time the killings took place and recanted his earlier testimony. The Court did not accept the testimony of this witness as reliable.

Furthermore, the Court particularly considered the fact that during the main trial, it became apparent that the statements of certain witnesses were materially different on certain points from their prior statements. Some witnesses stated that the differences were due to the method of questioning when the prior statements were made, suggesting, in particular, duress from the SIPA investigators.
The Court considered these inconsistencies in the context of all testimonies, of both the Prosecution and the Defense, particularly bearing in mind the fact that during the investigation, the witnesses gave statements to authorized official persons – SIPA employees, who are obliged to act pursuant to the CPC BiH rules.
Having reviewed the Records made during the examinations carried out by SIPA, the Court established their lawfulness, namely the regular course of conduct, creation and, finally signing the record by the witnesses.
It is therefore obvious that the changes in the parts concerning the role of the Accused in the critical action were obviously directed to the prevention of proving the allegations under the Indictment, thus the statements of these witnesses given at the main trial were considered in the light of those given during the investigation.

Additionally, in light of the factors mentioned above, particularly the risk of self-incrimination, the Trial Panel is not fully satisfied that the evidence it has heard from certain witnesses was entirely reliable. The Trial Panel has therefore treated their testimony with caution and has relied on it only if corroborated by other evidence.

In addition to direct evidence, the Court has admitted hearsay and circumstantial evidence, which is a well-settled practice of this Court. Hearsay evidence is evidence of facts not within the testifying witness' own knowledge. In evaluating the probative value of hearsay evidence, the Court has carefully considered indicia of its reliability and, for this purpose, it has evaluated whether the statements were voluntary, truthful and trustworthy. In some instances, the Court has relied upon circumstantial evidence, i.e. evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred, to determine whether or not a certain factual conclusion could be drawn. The Court, however, drew a reasonable conclusion if it were the *only* reasonable conclusion available.[1]

[1] During the main trial, the witness said that he had seen the footage of the Prosecution edited and directed with regard to the sequence of the events.

Of particular importance in this case is the evidence of video-recordings introduced by the Prosecutor and the Defense. The Trial Panel did not consider this documentary evidence to be void of authenticity yet it did not automatically accept it to be an accurate portrayal of the facts at issue. The Trial Panel evaluated this evidence within the context of the trial record as a whole, including the testimony of Witness Veladžić Meho, the Brigade cameraman who was an indisputable author of the video recordings. The Panel also considered the fact that the Prosecutor did not challenge the authenticity of the Defense video footage (while the Defense zealously contested the authenticity of Prosecutor's video evidence); as a matter of fact, the Prosecutor heavily relied on it during his closing argument. Based on the witness testimony pertaining to the accuracy of the Prosecutor's video[1] his reliance on the Defense video footage to build the case, and the fact that the Defense video depicts the same events while having a superior quality and a longer coverage of the events at issue, the Trial Panel relied solely on the Defense video footage in reconstructing the events at issue and reaching certain factual conclusions with respect to the criminal liability of the Accused. To wit, although aware of the sensibility of such type of evidence – media, through repeated showing of the Prosecution video footage, repeated returning to certain segments, and all this bearing in mind the statements of many witnesses who were present at the sight of the event, the Court undoubtedly concluded that this video footage does not constitute an integral recording of one period of time, considering that one part which actually happened, as undoubtedly arises from the testimonies of all the witnesses, is obviously "cut out" from the video footage presented by the Prosecution.

The Court concludes that certain lack of logic in the sequences of the presented events is obvious, which only subsequently, in the further course of the main trial, when the Defense presented its video footage, the recording of the identical action, pointed to the intention of the Prosecution to contest, by not presenting certain segments, particularly the moment since when the accused Šefik Alić hands over the prisoners to the battalion commander and then leaves the spot, the real behavior and participation of the Accused in the critical action.

Bearing in mind these particular reasons, the Trial Panel will refer only to the Defense video-recordings in its future discussion of the evidence and facts.

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

The Defense submitted that some of the documents 'for which there is no evidence of authorship or authenticity' are unreliable, and can carry no weight. In particular, the Defense contests the admissibility of certain evidence tendered by the Prosecutor, which does not bear a signature and is thus devoid of an element required for its authenticity.

The fact that a document is unsigned or unstamped does not necessarily render the document non-authentic. The Trial Panel did not consider the unsigned or unstamped documents to be a priori void of authenticity. All the time keeping in mind the principle that the burden of proving the authenticity remains with the Prosecutor, the Trial Panel reviewed all the presented documents, one

[1] *Prosecutor v. Radisav Ljubinac* case, number X-KR-05/154, Judgment of 8 March 2007, upheld by the second instance verdict of the Appellate Panel of the Court of BiH dated 4 October 2007. See also the *Prosecutor v. Gojko Janković* case, number X-KR-05/161, verdict dated 16 February 2007, upheld by the second instance verdict of the Appellate Panel of the Court of BiH dated 23 October 2007.

by one, and is satisfied that the Prosecutor has proved their authenticity beyond reasonable doubt. In order to access the authenticity of documents, the Trial Panel considered them in light of evidence such as other documentary evidence and witness testimonies. In addition, even when the Trial Panel was satisfied of the authenticity of a particular document the Trial Panel evaluated these statements in light of the entire evidence before it.

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

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

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

Article 274(2) of the CPC BiH speaks about the authenticity of particular pieces of evidence, which have to be the original writing, document, record, recording, photograph or similar counterpart. The CPC BiH defines the term “original” under Article 20(p), stating that it refers to a writing, recording or similar counterpart intended to have the same effect by a person writing, recording or issuing it. This subparagraph defines the term "original" so as to include photographs, and/or negatives or any copy therefrom. Article 20(r) of the CPC BiH defines the term “duplicate” for the purpose of criminal proceedings, stating that, by using scientific advancements, certain procedures (copying, enlarging, minimizing, re-recording, reproduction) are used to make duplicates from the original and matrix. Various technical recordings, if they were obtained under the conditions and in the manner stipulated by the CPC BiH, may be used as evidence in criminal proceedings. However, a verdict may not be based only on recordings as the sole evidence, because that challenges Article 6(2) (the presumption of innocence) and Article 8 of the ECHR (the right to respect for private and family life) – see Schenk v. Switzerland, Judgment of 12 July 1998, Series A, number 140. Furthermore, Article 20(s) of the CPC BiH defines the term “telecommunication address”, which, according to this code and for the purposes of criminal proceedings, means any telephone number, either landline or cellular, or e-mail or internet address. What is important for the term “telecommunication address”, as specified under subparagraph (s), is that a certain address is held or used by a person.

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

> *“The accused are right when they say that all documents which have probative value should be submitted in original, which in the present case was not done with the record of the questioning of the suspect NŠ, dated 8 May 1999 (sheet 72-74 of the case file), nor did the first instance court, despite its efforts, succeed in obtaining the original during the proceedings. However, contrary to the arguments stated in the appeal, it cannot be accepted*

that this is unlawful evidence in terms of Article 9(2) of the CPC only because of this formal omission, given that the accused Š does not challenge the authenticity of that record, and that it was not obtained by breaching the defense rights guaranteed by the Constitution, the law or international law, while, also during the main trial when he presented his defense, the Accused himself stated he maintained that defense, which was then read out and for which he said that what was read out was exactly what he had stated to the law enforcement authorities. In addition, given that the accused Š completely denies the commission of the offense, it is inadmissible that the contested judgment be based on that evidence, and therefore, even if it would be accepted that this is evidence referred to in Article 9(2) of the CPC, the ground for appeal for the unlawful violation referred to in Article 367(2) of the CPC would not be satisfied."

In conclusion, the Court recalls Article 6 (3) of the CPC BiH and Article 6 of the European Convention on Human Rights[31] prescribing that the accused is not obliged to present his defense or to answer the questions posed to him. In this particular case, the Accused exercised his right to remain silent; and no adverse conclusion was drawn from the fact that he did not testify.

b) General elements of the criminal offense of War Crimes against Prisoners of War referred to in Article 175 of the CC BiH

The Indictment charges the Accused with committing a criminal offence of inhuman treatment (physical and mental mistreatment of the four prisoners) as well as depriving other persons of life (murder of the four prisoners) as War Crimes against Prisoners of War pursuant to Article 175 (a) CC of BiH and in violation of Article 3 common to the four Geneva Conventions of 12 August 1949. The Accused is charged both under the doctrine of individual criminal responsibility pursuant to Article 180(1) CC of BiH and under the doctrine of command responsibility pursuant to Article 180(2) CC of BiH in conjunction with Articles 21 and 35.

Before it determines the individual and superior responsibility of the Accused for the alleged conduct, the Court will first discuss the applicable law for each charge in light of the witness testimony and material evidence presented during the trial.

ba) Article 175, item a) of the CC BiH and common Article 3 of the Geneva Conventions

The charges against the Accused have been brought under Article 175(a) CC of BiH and Article 3 common to the four Geneva Conventions of 12 August 1949 ("Common Article 3"). Article 175(a) in its relevant parts states that ″whoever, in violation of the rules of international law, orders or perpetrates in regard to the 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... shall be punished by imprisonment for a term not less than ten years or long-term imprisonment″.

[31] Although it is not specifically mentioned in Article 6 of the European Convention of Human Rights, the European Court of Human Rights held that the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair criminal procedure under Article 6(1) of the Convention. These rights are closely linked to the principle enshrined in Article 6(2), that a person accused of a crime is innocent until proved guilty according to law. See, *Saunders v. United Kingdom* (App. 19187/91), Judgment of 17 December 1996 (1997); *R. v. Director of Serious Fraud Office, ex parte Smith*, 3 WLR 66 (1992);

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

For the existence of the criminal offense referred to under Article 175(a) CC of BiH and Common Article 3 of the Geneva Conventions, two preliminary requirements must be satisfied. First, there must be an armed conflict, whether international or internal, at the time material to the Indictment. Second, the acts of the Accused must be closely related to this armed conflict. Moreover, two additional conditions must be fulfilled for a crime to be prosecuted under Common Article 3 of the Geneva Conventions and Article 175(a) CC of BiH. Article 175 CC of BiH confers jurisdiction on the Court, provided that the violation constitutes an infringement of the rules of international law. Whereas, Common Article 3 of the Geneva Conventions requires that a victim is a person taking no active part in the hostilities at the time the crime was committed.

General requirements

As stated above, the law does not apply unless the alleged offences were committed in the context of an armed conflict and with a sufficient nexus between the alleged offence and the armed conflict.

1. Existence of armed conflict

First, the Trial Panel notes that although Article 175(a) CC of BiH does not explicitly require the existence of a war or an armed conflict, it makes a reference to the violations of applicable international rules. The international laws or customs of war are intimately attached to a state of armed conflict so that no war crime is possible in the absence of an armed conflict and a sufficient nexus between the acts of the accused and that conflict. Accordingly, the Court concludes that Article 175 requires the existence of an armed conflict.

It is settled in the jurisprudence of the international law that an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State."[32] It is also settled that international humanitarian law continues to apply "in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat takes place there*," until a general conclusion of peace or a peaceful settlement is reached. [34]

The provisions of common Article 3 of the Geneva Conventions contain the core of fundamental standards, which are applicable at all times, in all circumstances and to all parties, and from which

[32] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković,* Case Nos. IT-96-23 and IT-96-23/1-A, Judgment dated 12 June 2002 (*Kunarac et al.* Appeal Judgment), para. 56

[34] *Kunarac et al.* Appeal Judgment, paras. 57, 64. In para. 64, the Appeals Chamber held that: "the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties."

no derogation is permitted.[35] Hence, when an accused is charged with a violation of Article 175(a) CC of BiH based on a violation of common Article 3, as in the present case, it is immaterial whether the armed conflict was international or non-international in nature.[36] Accordingly, there is no need for the Trial Panel to define the nature of the conflict in the present case in light of this general applicability of the provisions of common Article 3.[37]

In the present case, it is not disputed that the forces of the Army of Bosnia and Herzegovina were involved in an armed conflict with the Army of the Srpska Krajina during the period specified in the Indictment. The existence of the armed conflict in Bosnia and Herzegovina during the period relevant to the Indictment is also supported by the jurisprudence of the ICTY. For example, the *Čelebići* Trial Chamber held that in Bosnia and Herzegovina as a whole there was continuing armed violence at least from the date of its declaration of independence – 6 March 1992 – until the signing of the Dayton Peace Agreement in November 1995.[38] The Trial Panel was presented with a significant amount of evidence regarding the military operation ″Oluja″ that took place on August 5, 1995, the military structure of the BiH Army, and the combat activities of the BiH Army before, during and after the period specified in the Indictment. Having reviewed the witness testimony and the documentary evidence presented during the main trial, the Trial Panel concludes that there was an armed conflict in August 1995, the period relevant to the Indictment. On the other hand, the Defense itself, at the very start of the main trial, did not contest the existence of this conflict.

2. Nexus between the Accused and the armed conflict

In addition to the existence of an armed conflict, the Prosecution must establish a sufficient link between the alleged acts of the accused and the armed conflict.[39] The armed conflict need not have been causal to the commission of the crime charged, but it must have played a substantial part in the perpetrator's ability to commit that crime.[40] In determining whether such nexus exists, the Trial Panel may take into account, *inter alia*, whether the perpetrator is a combatant, whether the victim is a non-combatant, whether the victim is a member of the opposing party, whether the act may be said to serve the ultimate goal of a military campaign, and whether the crime is committed as part of or in the context of the perpetrator's official duties.[41]

In the present case, all of the alleged acts of the Accused and his subordinates took place on August 5, 1995 during a military operation conducted on behalf of the Government of Bosnia and Herzegovina and in the course of an armed conflict to which it was a party. The Accused is alleged to have been involved in a combat in the capacity of the Assistant Commander for Security and the acts for which he has been indicted are alleged to have been committed in the performance of his official duties as a member of the Bosnian armed forces during that military operation. Accordingly, the Trial Panel concludes that there is a clear nexus between the armed conflict and the acts alleged in the Indictment.

[35] *Celebici* Appeal Judgment, para. 149.
[36] *Prosecutor v. Duško Tadic*, Case No. IT-94-1-AR-72, Decision on the Defense for Interlocutory Appeal on Jurisdiction, dated 2 October 1995 (*Tadic* Jurisdiction Decision), para. 137; *Čelebići* Appeal Judgment, paras. 140, 150.
[37] *Čelebići* Appeal Judgment, paras 147-150 and 420, where the Appeals Chamber held that the provisions of Common Article are applicable to international and non-international conflicts alike.
[38] *Prosecutor v. Zejnil Delalić, Zdravko Musić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga",* Case No. IT-96-21-T, Judgment dated 16 November 1998 (*Čelebići* Trial Judgment), para. 186
[39] *Čelebići* Trial Judgment, para. 193.
[40] *Kunarac* Appeal Judgment, para. 58
[41] *Kunarac* Appeal Judgment, para. 59

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

1. Violation of international law under Article 175(a) CC of BiH

The charge of inhuman treatment and killing of four prisoners as a violation of the laws and customs of war in the present case is based on common Article 3 of the Geneva Conventions, which sets forth a minimum core of mandatory rules and reflects the fundamental humanitarian principles upon which the Geneva Conventions are based in their entirety. It is also widely accepted that common Article 3 is a part of international customary law,[42] and that inhuman treatment and murder are serious violations of international humanitarian law.[43] As such, they entail individual criminal responsibility.[44] Accordingly, the Trial Panel concludes that the alleged criminal acts constitute a violation of the international law and fall within the jurisdiction of Article 175(a) CC of BiH.

2. Persons taking no active part in hostilities under common Article 3 of the Geneva Conventions.

Finally, common Article 3 of the Geneva Conventions requires Prosecution to prove that a victim was a person taking no active part in the hostilities at the time the crime was committed.[45]

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

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

In determining the status of the victims in the present case, the Trial Panel recalls its finding that a military operation was conducted on August 5, 1995 within a broader scope of an armed conflict between the Army of BiH and the Army of Srpska Krajina and that it was due to that military operation that the four soldiers of the Army of Srpska Krajina were captured, disarmed and brought to the Hamza Battalion command post at the elevation Hleb. Accordingly, the Trial Panel concludes

[42] *Tadic* Jurisdiction Decision, para. 89; *Čelebići* Appeal Judgment, para. 143.
[43] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment dated 3 March 2000 (*Blaskić* Trial Judgment), para. 176.
[44] *Celebici* Appeal Judgment, paras. 153-174, in particular para. 167. The Trial Panels notes that the provisions of the Criminal Code of the SFRY, which were adopted by Bosnia and Herzegovina in April 1992 (Criminal Code of SFRY, 1990 ed., Art. 142-143), established the jurisdiction of the Bosnian courts over war crimes committed at the time of war, armed conflict or occupation, drawing no distinction between internal and international armed conflicts. Thus, the Accused in the present case can be held individually criminally responsible under the national law for the crimes alleged in the Indictment.
[45] *Celebici* Appeal Judgment, para. 420
[46] *Prosecutor v. Stanislav Galic*, Case No. IT-98-29 T, Judgment dated 5 December 2003 (*Galic* Trial Judgment), para. 50
[47] *Prosecutor v. Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Štela"*, Case No. IT-98-34-T, Judgment dated 31 March 2003 (*Naletilić and Martinović* Trial Judgment) par. 229. See also *Blaškić* Trial Judgment, para. 177, citing *Tadić* Trial Judgment, para. 615

that the four soldiers were prisoners of war and enjoyed protected status at the time the alleged crimes were committed.

bb) Inhuman Treatment

The Indictment charges the Accused Šefik Alić with inhuman treatment punishable under Article 175(a) CC of BiH and Common Article 3 of the Geneva Conventions dated 12 August 1949, for his alleged acts and omissions with respect to the four members of the Army of Srpska Krajina who were captured in the vicinity of the Hleb elevation on August 5, 1995.

In order to determine the responsibility of the Accused for the alleged acts, a thorough understanding of the offence is required. For this reason, the Trial Panel will now discuss the authorities it relied on for the specifics of this case and which lead it to reach its decision as detailed in the operative part of this Verdict.

The Accused is charged with the crime of inhuman treatment pursuant to Article 175(a) CC of BiH and Common Article 3 of the Geneva Conventions. Yet, neither Article 175(a) of the BiH CC nor the Geneva Conventions has attempted to fashion a definition of inhuman treatment. It thus falls to this Trial Panel to identify the essential meaning of the offence.

The Geneva Conventions are based upon the principle of respect for the human person and the inviolable character of the basic rights of individuals. Hence, the principle of humane treatment constitutes the fundamental basis underlying common Article 3 of the Geneva Conventions, which prohibit a number of acts including murder, cruel treatment, outrages on personal dignity and humiliating and degrading treatment.

The Geneva Conventions, however, are not the only source of the prohibition of inhuman treatment. Both the European Court and the European Commission of Human Rights have developed a substantial body of jurisprudence addressing the various forms of ill-treatment,[48] which are prohibited under Article 3 of the European Convention on Human Rights ("ECHR")[49]. Using a sliding scale, based on the level of severity of the suffering occasioned by the ill-treatment, they classified alleged offences into three distinct groups: torture, inhuman and degrading treatment.

With respect to inhuman treatment, the European Court made an explicit finding of that offense when the applicant had been slapped, kicked, punched, given forearm blows, made to stand for long periods without support, had his hands handcuffed behind his back, been spat upon, made to stand naked in front of an open window, deprived of food and threatened with a firearm. The European Court held that the large number of blows inflicted on the victim and their intensity were two elements which are sufficiently serious to render such treatment inhuman.[50] The Court has further held treatment to be ″inhuman″ if it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering.[51]

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[48] In order for ill-treatment to fall within the scope of the prohibition contained in Article 3, it must attain a minimum level of severity. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim. See *A v. United Kingdom*, Judgment 23 Sept. 1998, Eur. Ct. H.R., para.20 (citing: *Costello-Roberts v. United Kingdom*, Judgment 25 March 1993, 247-C Eur. Ct. H.R. (Ser.A) 1993).

[49] Article 3 of ECHR states that '[N]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

[50] *Tomasi v. France*, 13 EHRR 1, 1993, para. 115

[51] *Lorse and Others v. The Netherlands*, Judgment, Application No. 52750/99, 4 May 2003, para 60.

In addition, the Human Rights Committee ("the Committee") found that being forced to stand blindfolded and bound for 35 hours, while listening to the cries of other detainees being tortured, being threatened with punishment, and being forced to sit blindfolded and motionless on a mattress for many days, constituted inhuman treatment.[52] Also, when a person is subjected to ill-treatment during imprisonment such as truncheon blows to the knees, threats with knives, kicks while lying on the ground, repeated beating with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to the head and the body, amounts to cruel and inhuman treatment.[53]

Finally, the ICTY jurisprudence 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"[54]. The required *mens rea* is met where the principal offender at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his acts or omission.[55] For example, the Trial Chamber found inhuman treatment where the accused intentionally caused serious physical and mental suffering by using an electric shock device on prisoners, causing pain, burns, convulsions, twitching and scaring, frightening victims and reducing them to begging for mercy.[56]

It is clear that the various international adjudicative bodies that have considered the application of the offence of inhuman treatment have defined it in relative terms[57] taking into account all the factual circumstances, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health. Accordingly, this Trial Panel finds that considerations on this issue have to be made on a case by case basis and that all circumstances of the situations have to be taken into account, including the personal circumstances of the victim.

bc) Murder

The Accused is also charged with murder as a violation of the laws of war, pursuant to Article 175 (a) CC of BiH, and under common Article 3(1)(a) of the Geneva Conventions.

In order to establish the offense of murder, the Prosecution must prove three elements (a) the death of a victim taking no active part in the hostilities, (b) that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible, and (c) the intent of the accused or of the person for whom he is criminally responsible to kill the

[52] *Soriano de Bouton v. Uruguay*, No. 37/1978. Referenced in *supra* note 12, p. 163.
[53] *Leslie v. Jamaica*, No. 564/1993, para 9.2.; *Bailey v. Jamaica*, No. 759/1997, para 9.3.
[54] *Čelebići* Trial Judgment, paras 542-543; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment dated 17 December 2004 (Kordić and Čerkez Appeal Judgment), para 39.
[55] *The Prosecutor v. Hadžihasanović*, Trial Judgment dated 15 March 2006, Case No. IT-01-47-T, para. 34, citing *Krnojelac* Trial Judgment, para. 132.
[56] *Čelebići* Trial Judgment, para 1058.
[57] That is, inhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.

victim or, in the absence of such a specific intent, to willfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[58]

The Trial Panel notes that the *mens rea* of the accused or the person for whom he is criminally responsible must encompass the fact that the victims were persons taking no active part in the hostilities. The Trial Panel has previously found that the status of the victims as persons taking no active part in the hostilities is a condition for the applicability of common Article 3 of the Geneva Conventions. Accordingly, the knowledge of the status of the victims is one aspect of the *mens rea* that needs to be proven for the conviction under the Article 175(a) CC of BiH charge based on common Article 3.

bd) Individual criminal responsibility and superior responsibility

It is alleged in the Indictment that the Accused is responsible for the crimes charged pursuant to both Article 180(1) and 180(2) CC of BiH.

[58] *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Trial Judgment dated 3 April 2008, para. 124, citing *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgment dated 28 February 2005 (*Kvocka* Appeal Judgment), para. and 261

Law of Article 180(1) CC of BiH

The principles of individual criminal responsibility under Article 180(1) CC BiH reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of this Court is not limited to persons who directly commit the crimes in question. Article 180(1) states that ″a person who planned, instigated, ordered, perpetrated, or otherwise aided and abetted in the planning, preparation or execution of a criminal offence…shall be personally responsible for the criminal offence″.

1. **Participation**

"Participation covers physical commission of a crime or engendering a culpable omission in violation of criminal law".[60] The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in the Criminal Code, through positive acts or omissions, whether individually or jointly with others. The requisite *mens rea* is that the accused acted with intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.

2. **Instigation**

The term "instigating" has been defined to mean "prompting another to commit an offence."[61] Instigation can be done by both express and implied conduct.[62] In addition, both acts and omissions may constitute instigating, provided that in the latter case, the instigator is under a duty to act.[63]

A crime of instigation requires more than merely facilitating the commission of the principal offence. It requires influencing the principal perpetrator by way of inciting, soliciting, or otherwise inducing him or her to commit the crime. The instigator does not have to be the original author of the criminal plan; he, however, must bring about the final determination to commit the crime by his strong encouragement or persuasion.

A *nexus* between the instigation and the perpetration must be demonstrated but it need not be shown that the crime would not have occurred without the accused's involvement.[64] It suffices to prove that the instigation of the accused was a substantially contributing factor in the commission of the crime.[65]

[60] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment dated 2 August 2001 (*Krstić* Trial Judgment), para 601; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković,* Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment dated 22 February 2001 *(Kunarac* Trial Judgment), para 390.
[61] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment dated 3 March 2000 (*Blaškić* Trial Judgment), para. 280.
[62] *Blaskić* Trial Judgment, para 280
[63] *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgment dated 30 June 2006 (*Orić* Trial Judgment), para. 273, citing *Tadić* Appeal Judgment, para. 188.
[64] *Kordić and Čerkez* Appeal Judgment, para 27.
[65] *Kordić and Čerkez* Appeal Judgment, para. 27, *Limaj* Trial Judgment , para. 514.

The requisite *mens rea* for "instigating" is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.[66]

3. Aiding and Abetting

Aiding and abetting is a form of accessory liability. Thus, it must be demonstrated that the aider and abettor carried out an act which consisted of practical assistance, encouragement or moral support, which had a significant impact on the perpetration by the principal offender.[67] Although the act of assistance need not have actually caused the act of the principal offender, it must have had a substantial effect on the commission of the crime by the principal offender.[68]

The corresponding intent of aiding and abetting consists of the knowledge that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal.[69] It is not necessary that the aider and abettor shares the *mens rea* of the principal but he must know of the essential elements of the crime (including the perpetrator's *mens rea*) and take the conscious decision to act in the knowledge that he thereby supports the commission of the crime.

Law of Article 180(2) CC of BiH

The concept of command responsibility is explicitly recognized in Article 180 (2) of CC of BiH, which states that ″the fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof″. In addition, the concept of command responsibility has been also substantially developed in jurisprudence of the international tribunals**.**

The elements of the command responsibility

The superior or commander may be held criminally responsible for the acts of others if the following three conditions are met[70]:

1. **The existence of a superior-subordinate relationship between the commander or superior and the alleged principal offender;**
2. **The superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and**
3. **The superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.**

[66] *Kordic* Appeal Judgment, para 29, 32.
[67] *Krnojelac* Trial Judgement, par. 88.
[68] *Aleksovski* Appeal Judgment, par 162.
[69] *Kunarac* Trial Judgment, par 392.
[70] *Čelebići* Appeal Judgment, pars. 189-198, 225-226, 238-239, 256, 263 and 346; *Aleksovski* Appeal Judgment, pars. 72 and 76; *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment, Case No. IT-95-14-PT/2T dated 26 February 2001 (*Kordić and Čerkez* Trial Judgement), par. 401

1. Superior-subordinate relationship

The first condition is to establish the existence of a superior-subordinate relationship, whether direct or indirect, between the superior (the accused) and the subordinate who is alleged to have committed the crime at issue. Article 180(2) of CC BiH does not provide any guidance as to how such authority can be acquired. It is well established, however, that under the international law a hierarchical relationship may exist by virtue of the accused's *de facto* authority over his subordinates as well as by virtue of his *de jure* position of superiority[71]. Such relationship need not be formalized prior to the commission of a crime[72] and a tacit or implicit understanding between a commander and his subordinates as to their positioning *vis-a-vis* one another is sufficient[73].

An instrumental element in establishing a superior's authority over his subordinates and enabling the attribution of superior responsibility is the actual possession or non-possession of powers of control over the actions of subordinates.[74] Having control means having *effective* authority over subordinates[75]. In other words, to be held liable for crimes of subordinates, it must be shown that at the time the crimes were committed, the superior, whether *de jure* or *de facto*, had *effective control* over his subordinates who have committed the crimes[76]. According to the jurisprudence of the international tribunals, ″effective control″ means ″the material ability to prevent offences or punish the principal offenders″[77]. The *Blaškić* Appeal Chamber held that ″the indicators of effective control are more…a matter of evidence than of substantive law″,[78] which must be determined on the basis of the evidence presented in each case. In this respect, factors indicating the accused's authority and his effective control may include the official position held by the accused, his capacity to issue orders, whether *de jure* or *de facto*, the procedure of appointment, the position of the accused within the military structure and the actual tasks performed.[79] It is important to emphasize that the fact that the accused had the ability to give orders might be evidence relevant to the determination as to whether that person indeed exercised ″effective control over the perpetrator such that he may be held responsible for failing to prevent or punish crimes committed by the perpetrator.″[80]

Since command responsibility is predicated on a superior's power to control acts of his subordinates, a degree of control that falls short of the threshold of effective control is insufficient to hold a superior criminally responsible. ″Substantial influence″ as means of exercising command

[71] *Čelebići* Trial Judgment, par. 370 confirmed on appeal; *Čelebići* Appeal Judgment, pars. 205-206. The Court held that formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander. See also, *Kordić and Čerkez* Trial Judgment pars. 405-406.
[72] *Čelebići* Appeal Judgment, par. 193; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment dated 15 March 2002 (*Krnojelac* Trial Judgment), par. 93; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment dated 3 March 2000 (*Blaškić* Trial Judgment), par. 301; *Kordić and Čerkez* Trial Judgment, par. 424.
[73] *Prosecutor v. Kunarac* et al., Case No. IT-96-23-T&IT-96-23/1-T, Judgment dated 22 February 2001 (*Kunarac* Trial Judgment), par. 397
[74] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment dated 16 November 2005 (*Halilović* Trial Judgment), para. 58
[75] *Čelebići* Trial Judgment, par. 378 confirmed on appeal, *Čelebići* Appeal Judgment, pars. 256, 265-266.
[76] *Aleksovski* Appeal Judgment, par. 76; *Stakić* Trial Judgment, par. 459. It is this relationship of obedience and control (not influence), which justifies holding a superior liable for subordinate relationship.
[77] *Halilović* Trial Judgment, para. 58, citing *Čelebići* Appeal Judgment, par. 256.
[78] *Blaškić* Appeal Judgment, para. 69
[79] *Kordić and Čerkez* Trial Judgment, paras. 418-424.
[80] *Kordić and Čerkez* Trial Judgment, pars. 416, 419-424; *Kunarac* Trial Judgment, pars. 396-397; *Čelebići* Appeal Judgement, pars. 193 and 197; *Blaškić* Appeal Judgment pars. 68-69.

responsibility does not have the standing of a rule of customary international law to impose criminal liability.[81]

2. Mental element: "knew or had reason to know"

The second requirement is the knowledge of the superior that his subordinate was about to commit or had committed a crime. Superior responsibility is not a form of strict liability.[82] It must be proved either 1) that the superior had actual knowledge, which is established based either on direct evidence or indicia, that his subordinates were committing or about to commit crimes or 2) that he had in his possession information which would at least put him on notice of the risk of such offences[83].

Actual knowledge has been defined as ″the awareness that the relevant crimes were committed or were about to be committed″.[84] Actual knowledge cannot be presumed but must be established by direct or circumstantial evidence[85]. Evidence such as written reports informing the commander of crimes or testimony of witnesses establishing that the accused knew of the crimes, can establish such knowledge. It is not important, however, how the superior acquired the information so long as it is sufficient to make him aware of the unlawful actions[86].

The imputed form of knowledge, i.e. ″had reason to know″ requires that the commander possessed some general information which put him on notice of the likelihood of unlawful acts by his subordinates[88]. *Bagilishema* Appeal Chamber distinguished between the information which the accused may have had about the general situation in the relevant area (and which is not sufficient for him to be held responsible as a commander) and general information which put him on notice that his subordinates might commit crimes (which is sufficient for the commander to be found responsible for the acts of his subordinates, given that all other conditions are met).[89] Accordingly, the mental element for ″had reason to know″ is determined only by reference to the information in fact available to the superior[90] and that it is sufficient for the information to be of a nature which, at least, put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were or were about to be committed.[91] Thus, the mere awareness of a commander of the risk of a crime being committed by his subordinates is not sufficient to trigger his legal responsibility. It must be shown that the commander was aware of the substantial likelihood that a crime will be committed as a result of his failure to act and that, aware of that fact, he failed to do anything about it.[92]

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[81] *Čelebići* Appeal Judgment, para. 266.
[82] *Čelebići* Appeal Judgment, para. 239.
[83] *Čelebići* Appeal Judgment, paras. 223 and 241; *Krnojelac* Trial Judgment, par. 94.
[84] *Kordić and Čerkez* Trial Judgment, para. 427.
[85] *Čelebići* Appeal Judgment, para. 241.
[86] *Blaškić* Trial Judgment, par. 308; *Aleksovski* Trial Judgment, par. 80, *Krnojelac* Trial Judgment, par. 94.
[88] *Kordić and Čerkez* Trial Judgment, par. 437. The commander does not need to actually possess information but that he was provided with it and that it was available to him.
[89] *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-1, Judgment dated 3 July 2002 (*Bagilishema* Appeal Judgment), para. 42.
[90] *Čelebići* Appeal Judgment, paras. 238-239.
[91] *Čelebići* Appeal Judgment, para. 223, citing *Čelebići* Trial Judgment paras. 383 and 241.
[92] *Blaškić* Appeal Judgment, pars 41-42. *Kordić and Čerkez* Trial Judgment, par. 437, *Čelebići* Appeal Judgment, par. 238. The information in his possession must be sufficiently clear or alarming to indicate the likelihood of serious criminal offences having been or about to be committed and to trigger the commander's duty to investigate the matter further

It is also insufficient to show that the accused knew or had reason to know, in general terms, that crimes, regardless of their gravity and similarity to those being charged against him, were about to be committed or were committed by his subordinates. It must be established that the notice which the accused had received was notice of crimes of the same or similar nature with which he is now charged.[93] Nor can an accused be held responsible because he should have known of such crimes, i.e. for failing to seek and obtain information which would have put him on notice that crimes had been committed or were about to be committed.[94]

3. Failure to prevent or punish

Thirdly, it must be established that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates. Necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates.[97]Accordingly, what is necessary and reasonable depends primarily on the extent of the commander's actual and proven ability to do anything about the crimes that form the basis of the charges.

A commander has a duty to prevent his subordinates from committing the crimes when he knows or has a reason to know that they are about to commit them and also has a duty to punish the perpetrators of crimes when he knows or has reason to know that his subordinates have already committed them. The Trial Panel notes that these are two distinct obligations which apply at different times.

The duty to prevent the commission of a crime arises when the commander knows or has reason to know that a crime is being or is about to be committed, while the duty to punish arises when a crime has already been committed. Although the commander is required to take prompt and effective measures to punish or prevent serious offenses such as genocide, crimes against humanity, or war crimes, the measures required of the commander are limited to those which are feasible in all the circumstances which are within his power.[98] Hence, depending on the circumstances and commander's proven ability to do so, his ″duty to punish″ may entail investigating the alleged crimes to establish the facts or reporting crimes to competent authorities or taking appropriate disciplinary measures against the perpetrators.[99]

Deciding upon what measures would be appropriate in a particular case is an evidentiary matter, not a matter of substantive law, and must be done in light of all the circumstances of the case.[100] Accordingly, when determining whether a commander has adopted all necessary and reasonable measures, the Court must take into account all circumstances such as insufficient time to take particular measures or achieve a certain result or lack of resources to investigate, or obstructions from superior officers. Thus, the fact that the commander failed to take particular steps after crimes having been committed by his subordinates (such as reporting the acts to his superior) is not *per se* conclusive of his failure to abide by his duties.[101]

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[93] *Krnojelac* Appeal Judgment, para. 155. The Appeal Chamber pointed out that it was insufficient for the accused to have known that his subordinates had committed acts of beating to convict him of the crime of torture.
[94] *Čelebići* Appeal Judgment, paras. 226-239, explicitly rejecting Prosecutor's submissions to the contrary.
[97] *Čelebići* Appeal Judgment, par. 226; *Krnojelac* Trial Judgement, para. 95.
[98] *Krnojelac* Trial Judgment, para. 95; *Čelebići* Appeal Judgment, para. 226; *Kordić and Čerkez* Trial Judgment, paras 441 and 445.
[99] *Kordić and Čerkez* Trial Judgment, para. 446.
[100] *Blaškic* Appeal Judgment, para. 72.
[101] *Blaškić* Appeal Judgment, paras 68-69 and 72.

c) The responsibility of the Accused under the Counts of the Indictment

The accused is charged on Counts 1 through 6 of the Indictment that during the armed conflict between the forces of the Army of the RBiH and the Army of Srpska Krajina in the territory of Bosnia and Herzegovina and the Republic of Croatia, in the capacity of the Assistant to the Commander of the Hamza Battalion for Security - the 4th Battalion of the 505th Brigade of the 5th Corps of the BiH Army, by his acts and omissions, instigated, perpetrated, or otherwise aided and abetted the crimes described in the mentioned counts and that by virtue of his position as a superior to, among others, Al Harbi Tewfik, and the effective control he had over his subordinates, 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.

Such conduct of the accused - inhumane treatment and deprivation of another person of his life was, according to the Indictment, contrary to common Article 3 (1) (a) of the Geneva Conventions (1949), whereby he committed the criminal offence of War Crimes against Prisoners of War in violation of Article 175 (a) of the CC of BiH, in conjunction with Article 21 and 35, both in connection with Article 180 (1) and (2) of the CC of BiH.

It was made indisputable, at the very outset of the main trial and confirmed by the Defense, that at the time relevant to the charges there was an armed conflict which, at the material time, was also waged between the forces of the Army of the RBiH and the Army of Srpska Krajina, namely, that on 5 August 1995 the operation *Oluja* launched by the Army of the Republic of Croatia was ongoing and was being carried out, at the time relevant to the charges, in the territory of BiH, with the participation of the Army of the RBiH, including, among others, the Hamza Battalion of the 505th Bužim Brigade.

It is also undisputed that the accused was a member of the mentioned battalion and that he took part in the described operation.

It is undisputed that members of the Hazma Battalion captured 4 soldiers of the Army of Srpska Krajina and that those soldiers were killed thereafter.

What proved to be disputable, however, was whether these soldiers were treated inhumanely, that is, whether they were physically or mentally abused and whether the accused took part in this abuse and their subsequent killing.

The Prosecution argued that the accused had committed the contested actions in his capacity as the Assistant to the Battalion Commander for Security.

What also proved to be disputable was the issue of whether the accused was a plain solider with the Hamza Battalion - the 4th Battalion of the 505th Bužim Brigade, or the Assistant Commander for Security.
This position, as argued by the Prosecution, was of key importance in bringing charges against the accused, considering that its very nature obliged him to ensure the wellbeing of the captives and prevent any unlawful conduct towards them.

According to Prosecution, the command responsibility of the accused described in Count 6 of the Indictment, stem from this position and was reflected in his failure to inform his superiors about the killings, to inquire into the killings and to punish the perpetrators.

Bearing in mind the complexity of the allegations on inhumane treatment which derived from the specific nature of the relevant action, especially the terrain on which the operation was carried out, the Court has evaluated each separate segment of these allegations.

Likewise, the fact that the allegations about the killing of the captives were mostly corroborated by video recordings demands a broader analysis, which is provided in the following text.

ca) Inhuman Treatment

The Trial Panel has considered the charge of inhuman treatment of the POWs and divided it in two parts. The first part deals with the intimidation and slapping of the POWs while the second part addresses the marching of a prisoner at the head of the column, as alleged by the Prosecution, as a scout and as a ″lure″ in order to capture soldiers of the Army of Srpska Krajina.

Intimidation and slapping of the prisoners

The Trial Panel has examined the witness testimony and extensively studied the video footage as well as the accompanying transcript in evaluating the evidence pertaining to the treatment of the POWs upon their capture. The Trial Panel however notes that there is no witness testimony related to the physical mistreatment of the POWs by the Accused. Accordingly, in the absence of sufficient witness testimony, the Trial Panel relied heavily on the video footage related to the alleged mistreatment of the prisoners. The Trial Panel recalls its earlier finding to rely solely on the defense video footage (to reach certain factual conclusions. Accordingly, any future reference to the video footage refers exclusively to the defense video recordings.

Based on the testimony of witnesses, it is undisputed that Tewfik's behavior was abusive. For example, witnesses W3, W4, and Hasan Ćatić consistently testified about Tewfik's animosity towards the POWs. Witness W4 testified that he saw Tewfik physically abusing one of the POWs by slapping the prisoner on his face. Witness Hasan Ćatić testified that when the POW1 was captured Tewfik looked for a knife to attack the captive and that he and other members of the Hamza Battalion protected the POW1. The video recording also clearly depicts this scene. Finally, Witness W3 testified that he protected the POW1 from Tewfik while the prisoner was in his custody.

As for the mistreatment of the POWs by the Accused, the Prosecutor's witnesses consistently testified that they did not see Šefik Alić mistreating anyone. Witness W4, who according to the Prosecutor provided a more honest and accurate assessment of the situation, testified that he never saw the Accused mistreating any of the POWs. In addition, witness Senad Šahinović testified that the Accused treated the POWs in a right manner. Finally, witness Refik Duraković stated that the Accused's behavior towards the POWs was an ordinary behavior.

Despite favorable witness testimonies regarding the Accused's conduct, the Prosecutor argues that the Accused displayed a developing pattern of unlawful and threatening behavior, shortly after the capture of the first prisoner, which was aimed at terrifying the POW1. He supports his argument with the evidence that the Accused did not intervene after Tewfik threatened the prisoner to kill him if he was lying during Alić's questioning. Upon review of the evidence, the Panel notes that the Prosecutor conveniently failed to indicate that Asim Bajraktarević, a Battalion Commander, was also present at the time when the alleged threatening statement was uttered. According to the testimony of witness Jusić Dževad, Chief of the Military Department of the Ministry of Defense in

BiH and Fuad Kulauzović, Brigade's Chief of Staff, the battalion commander had an absolute authority in the unit, his presence excluded the duties of others, and he had exclusive authority to order the protection of the POWs in the manner he decided was appropriate. The Trial Panel further notes that no action was taken by either the Accused or the Battalion Commander in response to the alleged threatening statement. Such inaction is relevant to the determination of whether, in the circumstances of this case, it can serve as a proof of the Accused's escalating criminal behavior as alleged by the Prosecutor. Although the threatening statement was indeed uttered, the Court is not convinced that the statement *per se* constituted a credible threat or that the Accused intended his inaction to either threaten or terrify the prisoner. Especially when bearing in mind the fact that the Accused, without any detrimental consequences for the prisoners, handed them over to his superior, Hamza Battalion Commander, at a later point.

The Prosecutor also argues that the ill-treatment of prisoners escalated from verbal insults to physical abuse, all due to the omissions of the Accused to intervene and stop the abuse. In response, the Defense claims that the Accused intervened to stop or limit the abuse of the prisoners. The Defense relies on the testimony of witness Nisvet Begović, who stated that Alić had told Tewfik to stop threatening prisoners. In addition, the Defense used the video footage and the corresponding transcript to prove that the Accused had told Tewfik ″Don't! No! ″ when Tewfik threatened POWs with the rifle.

The Prosecutor contends that the Accused did not intervene in any of the ways suggested by the Defense and that the words uttered on the video footage cannot be attributed to him but to Pero Boromisa, one of the prisoners. The Prosecutor supports his contention stating that any intervention of the Accused would be incompletely inconsistent with the Accused's conduct as demonstrated by the video recordings.

The Panel carefully examined the video footage and reviewed the corresponding video transcript. The evidence clearly indicates that somebody indeed intervened during the rifle scene telling Tewfik to stop the threats. It is also clear that, in addition to Tewfik and the prisoners, other members of the Hamza Battalion, including the Accused, were immediately present during the scene. However, since the camera was focused on Tewfik, it was impossible to identify the person who made that statement. The Panel is somewhat puzzled by the Prosecutor's attribution of the statement to Pero Boromisa, which is as inconsistent as the Prosecutor argued with respect to the Accused. Throughout the entire case and during his closing argument, the Prosecutor tried to convince this Panel how helpless, tormented, and terrified the prisoners must have felt during their capture. The Prosecutor specifically referred to Pero Boromisa stating that while in capture he was like a puppet, numb with fear, powerless, in an utterly hopeless situation, completely compliant and submissive, too scared to assert his rights or to protest. Yet, given the dire circumstances of the situation, the Prosecutor chose to attribute this courageous intervention to Pero Boromisa.

Since neither the Prosecutor nor the Defense introduced any corroborating evidence to support their claims pertaining to this intervention, the Panel, based on the evidence presented, refuses to draw any unfounded inferences regarding this issue. In accordance with the principle of *in dubio pro reo*, the Panel, however, gave the benefit of the doubt to the Accused.

After a painstaking review of all evidence pertaining to the alleged intimidation and physical abuse of the prisoners, the Trial Panel finds that the Accused physically restrained Pero Boromisa, holding him by the back of his shirt while marching him through the woods, made a statement to the cameraman about Pero Boromisa being his *kum*, was present at the time when Tewfik slapped and

pinched the prisoners. In addition, the Panel finds that the Accused slapped Branko Bašić once while questioning the prisoner shortly after his capture.

Prisoners' presence in the column of soldiers

The Trial Panel has also heard testimonies from a number of witnesses pertaining to the movement of the POW1 in the column upon his capture. According to the witness Šerif Kekić, the POW1 was captured during the military operation, he was disarmed and was moving freely with the group and not at the head of the column.

Witness Hasan Ćatić testified that POW1 continued marching with the platoon upon his capture because he was supposed to lead the 1st company to the Serb command. This statement was supported by the testimony of Refik Duraković, who stated that the 1st company used captives as guides when they marched towards the Serb battalion command.

In addition, the Trial Panel examined the video footage, which depicts POW1 walking in the column of soldiers, being surrounded by the soldiers of the Hamza Battalion. Although the Court noted, in a number of instances, that the prisoners were clearly holding or casually carrying the rifles, which is in contradiction with the witness testimonies, there was no evidence to support the Prosecution's contention that the POW1 marched at the head of the column as a bait to flush out additional Serb soldiers.

The Prosecutor argues that the POW1 was mentally tormented when he was led into the danger zone, i.e. towards the Serb command post, citing in support of his argument two ICTY cases. Although those cases deserve a more substantive discussion, the Panel will limit itself to espousing the essence of the holdings, i.e. exposing the prisoners to unnecessary danger by using them to dig trenches under constant enemy fire and using prisoners as human shields to protect the command post from shelling constitutes inhuman treatment. The Panel agrees with those findings yet factually distinguishes the case at issue. First, the Prosecutor has never alleged that the prisoner was used as a human shield. Second, evidence in this case indicates that the prisoner marched in the column of the Hamza Battalion after the defense lines were penetrated and after the enemy fire ceased, clearly indicating that the prisoner was not exposed to unnecessary danger. Therefore, the prisoner was moving together with the Hamza Battalion members. In addition, many witnesses testified that the prisoner volunteered to show the location of the Serb command post. Although the Panel has its doubts pertaining to this aspect of the testimony, it notes that the video footage does not depict any indicia of force: the prisoner walked freely with the soldiers, his hands were untied and there were no guns pointing at the prisoner.

Findings

While evaluating the evidence and assessing whether the treatment imposed on the prisoners as it is depicted on the video footage, amounts to inhuman treatment, the Trial Panel has taken into account all the legal elements of inhuman treatment as discussed above and applied the standard of ″an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity″. The Trial Panel finds that the treatment imposed upon the prisoners, and as depicted on the video footage from time frames referenced above, do not rise to the level of severity to constitute inhuman treatment.

As this Trial Panel has already stated, there is no clear definition of what constitutes inhuman treatment, since the ideas on the question differ significantly not only with reference to particular

acts, but as to the very factors on which an assessment should be based. According to this Court's understanding of the concept of inhuman treatment, to call the treatment alleged in the Indictment ″inhuman″ is excessive and distorting, unless the Prosecutor meant to use the term loosely and merely figuratively. Article 3 of the Geneva Convention is not intended to be applied in a light-hearted sense. The treatment of the Serb soldiers was perhaps a harsh treatment, maltreatment or any other similar description that could be found; but the ″inhuman″ involves a totally different category of the concept. The described events, even when used in combination, do not properly belong and do not describe instances of truly inhuman treatment. If the extreme term is to be used for any infliction of physical or mental harm or stress, without attaching the necessary weight to the genuine case, it would simply lose its meaning and significance.

The Prosecutor concedes that in a peace time context, a few slaps or threats to kill might be dismissed as mere puff or silly behavior and that perhaps the depicted strikes or slaps in themselves were not delivered with brutal physical force. The Prosecutor argues, however, that it is not the severity of blows but the harrowing context in which they were inflicted determines whether the Accused's conduct rises to the level of inhuman treatment.

The Panel respectfully disagrees with the Prosecutor's argument. The Panel notes that the law does not distinguish between the time of peace and the time of war. The elements of the crime of inhuman treatment remain stringent regardless of a context, which provides for a possibility that the prisoners might be physically restrained, mistreated and intimidated during their capture.

The allegation stated in the Indictment that the POWs were treated inhumanely is not justified by the evidence presented. The epithets to describe the conduct of the Accused and Tewfik would be unpleasant or harsh but to call it barbarous or brutal, which is necessary for the notion of the inhuman treatment, constitutes an abuse of language and devalues what is kept for much worse things. The Trial Panel concludes that the concept of ″inhuman″ treatment should be confined to the kind of treatment that amounts to atrocity, or at least barbarity, as it is intended by Article 175(a) CC of BiH and common Article 3 of the Geneva Conventions.

In light of the Trial Panel's finding that the alleged mistreatment of the POWs charged against the Accused does not constitute inhuman treatment under Article 175(a) CC of BiH and common Article 3 of the Geneva Conventions, the Trial Panel does not consider it necessary to discuss individual responsibility of the Accused pursuant to Article 180(1) CC of BiH.

cb) Murder

The Accused is charged with instigating, aiding and abetting the commission of murder of four prisoners of war. It is indisputable that the prisoners were killed. However, although the video recordings depict four dead soldiers, the Defense disputes the identity of those soldiers, the manner in which they were killed and who should be punished for this heinous crime. Many witnesses testified that Tewfik was the perpetrator of the crimes, which is supported by the video footage. Yet, the Prosecutor argues that the ultimate killings of the POWs resulted from the Accused's inciting and inflammatory language, which encouraged and approved further violence, and the Accused's failure to remove the danger when he had a duty to do so.

Instigation

The Prosecutor argues that the Accused instigated the murder of the prisoners by using inflammatory and inciting language. The Trial Panel will now consider whether those statements and inaction constitute substantial contribution required by law.

The Trial Panel has previously stated that the crime of instigation requires 1) influencing the principal perpetrator by way of inciting him to commit the crime, 2) intent to induce the commission of a crime or being aware of the substantial likelihood that a crime would be committed in the execution of that instigation, and 3) proof that the instigation of the accused was a substantially contributing factor in the commission of the crime. In light of these requirements, the Panel has carefully considered all Accused's statements to determine whether they were inciting and inflammatory as alleged by the Prosecutor. The language is inciting and inflammatory when the statements made by the Accused could only be understood by the physical perpetrators as a direct invitation and promptness to commit crimes.[172] Furthermore, actionable incitement requires both inciting words and the physical realization of their message. For example, the ICTY Trial Chamber found statements to be inflammatory when the Accused stated that children of mixed marriages should be thrown into the Vrbas River and that those who swam out would be Serbian children[173] or when he systematically suggested a campaign of retaliatory ethnicity-based murder, declaring that two Muslims would be killed in Banja Luka for every Serb killed in Sarajevo,[174] which incited Bosnian Serbs to commit systematic crimes against Bosnian Muslims and Bosnian Croats.

The evidence that the Trial Panel considered was a statement of one of the soldiers that Tewfik was the one who *only slits throats* and the statement in which he was calling someone his *kum*. With respect to the *kum* statement, the Trial Panel finds that such statement could not have been interpreted as a signal of the Accused's acquiescence to the murder of the prisoners. Considering the statement that Tewfik *only slits throats*, the Trial Panel concedes that this statement might (with additional evidence) be sufficient to show the Accused's awareness of Tewfik's past violent behavior, but it is insufficient to conclude that the Accused intended to provoke or induce the killings of the prisoners. The Trial Panel notes, however, that the Prosecutor did not introduce any evidence to demonstrate that Tewfik had a violent past or that the soldiers of the Hamza Battalion, including the Accused, knew that Tewfik was prone to violence. Most of the witnesses testified that they either knew Tewfik as a humanitarian worker or have never seen him before the Oluja operation. Accordingly, the Trial Panel concludes the Accused did not know about Tewfik's intention to commit the crime or that the perpetrator understood the Accused's statements as a direct invitation and a prompting to commit the crime.

In light of the foregoing discussion, this Panel holds that the Accused's statements were neither inflammatory nor inciting because they did not directly call for violence or signal the Accused's approval of violence given the context in which the statements were made. Furthermore, the Prosecutor failed to introduce any evidence to demonstrate that the Accused intended to assist or instigate Tewfik to kill the prisoners or that he was aware that there is a substantial likelihood that his statements would contribute to the crime.

Aiding and Abetting

[172] *Brđanin* Trial Judgment, para. 360.
[173] *Brđanin* Trial Judgment, para. 328
[174] *Brđanin* Trial Judgment, para. 329

It is not entirely clear to which mode of responsibility the Prosecutor refers when he argues the theory of aiding and abetting. There are two possible theories, the discussions of which follow.

First, the Prosecutor might have intended to apply in this case the theory of aiding and abetting by tacit approval and encouragement. An Accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[177] In the cases where this theory was applied, the accused held a position of authority, was physically present on the scene of the crime and his non-intervention was perceived as tacit approval and encouragement.[178] Under this form of aiding and abetting, individual responsibility (that is, individual responsibility under Article 180(1) CC of BiH) is not based on the duty to act, but stems from the encouragement and support that is afforded to the principal of the crime from such non-intervention. Accordingly, the combination of a position of authority and physical presence on the crime scene allowed the inference that the omission to intervene by the accused amounted to tacit approval and encouragement.[179] Such encouragement and support must, however, be substantial.[180]

The Trial Panel finds that there is no evidence whatsoever to demonstrate that the Accused was present or was in close proximity to the place where the killings took place. Even if the Accused were present or in the close proximity of the crime scene, the Trial Panel would still have to consider other factual circumstances before reaching its conclusion. An individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime. An individual's authority may be an important factor for establishing intentional participation. Nonetheless, responsibility is not automatic and merits consideration against other factual circumstances.

In addition, the evidence also does not permit to draw an inference that Tewfik and other soldiers of the Hamza Battalion believed that the Accused supported the murder of the prisoners. Accordingly, the Trial Panel refuses to make an inferential leap, so much encouraged by the Prosecutor, and conclude that there was sufficient evidence to prove beyond any reasonable doubt that the Accused's conduct (i.e. his statements and physical contact with the prisoners) constituted either an encouragement or moral support to Tewfik and other soldiers of the Hamza Battalion to commit crimes, which later substantially contributed to the commission of the killings.

Alternatively, the Prosecutor might have intended to apply the theory of aiding and abetting by omission. Although the jurisprudence of the ICTY recognizes that omission may constitute *actus reus* of aiding and abetting where there is a legal duty to act,[184] the Tribunal never set out the requirements for a conviction for omission in detail, and so far has declined to analyze whether omission may lead to individual criminal responsibility for aiding and abetting. For example, the *Blaškić* Appeal Chamber held that the *actus reus* of aiding and abetting may be perpetrated through an omission, provided that this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*.[185] The most comprehensive requirements, however, have been formulated by the *Ntagerura* Trial Chamber (cited by *Ntagerura et al*. Appeal

[177] *Aleksovski* Trial Judgment, para. 87
[178] *Aleksovski* Trial Judgment, para. 87.
[179] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Judgment dated 10 December 1998 (*Furundžija* Trial Judgment), para. 207. *Kayishema and Ruzindana* Trial Judgment, para. 200 (ICTR), upheld by *the Kayishema and Ruzindana* Appeal Judgment paras. 201-202.
[180] *Aleksovski* Appeal Judgment, para. 162
[184] *Galić* Appeal Judgment, para. 175, referring to *Blaškic* Appeal Judgment, para. 663 and *Tadić* Appeal Judgment, para. 334;
[185] *Blaškić* Appeal Judgment, para. 47.

Judgment, para. 333). [186] Thus, in order to hold an accused criminally responsible for an omission as a principal perpetrator, the following elements must be established: 1) the accused must have had a duty to act mandated by a rule of criminal law; 2) the accused must have had the ability to act; 3) the accused failed to act *intending* the criminally sanctioned consequences or with the awareness and consent that the consequences would occur; and 4) the failure to act resulted in the commission of a crime.

The Prosecutor argues that the Accused encouraged and supported the commission of the crime through his inaction. He urges this Trial Panel to look at the facts, beyond hierarchical charts or parallel chain of command, surrounding the Accused's own actions in exposing the prisoners to harm and his omissions to alleviate danger irrespective of what others did or did not do. He supports his arguments citing the lack of evidence for any decisive action on the part of the Accused (albeit his duty to act as an Assistant Commander for Security), i.e. the Accused failed to report Tewfik's threats to his superior Zijad Nanić; he failed to confront Asim Bajraktarević and demand a decisive action; he failed to report Asim Bajraktarević's misbehavior; he failed to influence Asim Bajraktarević and others by threatening to report them, etc. Despite the Prosecutor's illustrative examples of what the Accused could have done to avoid criminal liability, the Prosecutor addressed only one of the possible requirements for commission by omission, i.e. the duty to act. The Prosecutor did not attempt to show and no evidence was adduced with respect to the Accused's intent to cause death of the prisoners or that he was aware that his omission would substantively contribute to the killings of four prisoners and nevertheless consented to such consequence. Furthermore, the Trial Panel concludes that it has not been proved beyond reasonable doubt that the Accused's omission to restrain Tewfik is causally linked to the resulting deaths of the prisoners (which will be addressed in more detail later in the Verdict).

In view of the above discussion, the Trial Panel considers that there is scant evidence to support the conclusion or even to draw the inference that the Accused's failure to intervene, coupled with his position of authority, encouraged the perpetrators and substantially contributed to the commission of the crime. The Trial Panel also concludes that it has not been proven beyond reasonable doubt that the Accused intended the killings or that he was aware that the death of the prisoners would be a probable consequence of his omission.

[186] *Prosecutor v. Andre Ntagerura*, MKSR Case No. ICTR-99-46-T, para. 659

cc) The Accused's responsibility pursuant to Article 180(2) of the CC of BiH

Inhumane Treatment

The Trial Panel recalls its earlier finding that the alleged acts committed by the Accused Šefik Alić and the perpetrator Al Harbi Tewfik, which the Accused is charged with, do not rise to the crime of inhumane treatment envisioned by Article 175(a) CC of BiH and common Article 3 of the Geneva Conventions. Hence, the Trial Panel deems it unnecessary to discuss the responsibility of the accused for inhuman treatment under the doctrine of command responsibility. Accordingly, the Trial Panel will proceed directly to the evaluation of evidence and determination of the accused's command responsibility for the murder of four POWs.

Murder

Before determining criminal responsibility in relation to the command position that the Accused is charged with, the Court must first determine whether the Accused had the superior authority at all.

Requirements of superior-subordinate relationship

In making its assessment concerning the Accused's command position held during the *Oluja* operation and the period covered by the Indictment, the Court has relied on witness statements given before both SIPA and the BiH Prosecutor's Office as well as their testimony during the main trial. The Trial Panel has also considered relevant items of material evidence, including the video footage.

The Trial Panel notes that witness Zijad Nanić, Assistant Commander for Security of the 505th Brigade, testified that the Accused was appointed by Izet Nanić, the Brigade Commander, as an assistant officer for security the day before the *Oluja* operation. This testimony is supported by the statement of Witness W1 who stated during the trial that the Accused was appointed as the security officer of the battalion by the Brigade Commander on the day that the Battalion was established. This was in line with the statement he gave to SIPA in which he said: "I believe Alić was one of the security officers".

Furthermore, the Trial Panel particularly notes the evidence given by witness Zijad Nanić, the Assistant Commander for Security in the Brigade. In his statement given before SIPA officials, he said that the Accused was the security officer-assistant. He further confirmed this in his interview with the BiH Prosecutor's Office where he stated that the Accused was the security officer of the battalion. During his testimony at trial he stated that the Accused was the assistant commander for security. On cross-examination he maintained that the Accused was definitely in that position from the 4th until the 20th of August 1995.

Witness Sead Jusić stated in his interview with the Prosecutor's Office that: "When the battalion was formed, Commander Nanić appointed the Accused as an assistant commander for security, and that was his position throughout the *Oluja* operation". He confirmed his statement during the main trial, stating that he thought that the Accused was a commander based on his personal observation, but he did not have actual knowledge of the Accused's position.

The Prosecution's witness W-1 testified that, as much as he could recall, the Accused was appointed as a security officer, that he was appointed on the day the battalion was established by the

order of the Brigade Commander, and that it was a verbal order issued on the very day. This is in line with his statement to SIPA investigators in which he said that the Accused was a member of the battalion command and that he was in charge of security affairs of the Hamza Battalion. In his interview to the Prosecutor's Office he stated further that the role and responsibility of the security officer was, among others, the responsibility for the prisoners of war. This witness especially emphasized that all assistants to the Battalion Commander were appointed by the Commander's verbal order, the day before the operation.

Witness W-3 testified that the Accused was in charge of the security in the Battalion. In his interview with SIPA investigators, he stated that the Accused was one of the commanding officers and the security officer in the Hamza Battalion in the course of the *Oluja* operation.

Furthermore, witness W-4 testified that he learned that the Accused was on the battalion command and that he was the most senior officer when they captured the POWs. Later on, perhaps in the same month, he learned that the Accused was assigned as a battalion security officer the day before the *Oluja* operation.

According to witness Mevlid Mustafić in his SIPA interview, the Battalion Commander Asim Bajraktarević told him the Accused was his deputy for security. During his testimony at the trial he claimed he could not remember if Bajraktarević had told him that, but maintained his conviction that the Accused had held this position during the relevant operation.

The witness who was the Assistant Commander for Logistics in the Battalion testified at the trial that the Accused was the assistant commander for security. In his SIPA interview, he named all assistants to the Battalion Commander and included the Accused as the assistant commander for security.

Furthermore, witness Agan Elkasović, who was the Deputy Commander of the Battalion, stated in his SIPA interview that he thought either Safet Isaković or the Accused was the assistant commander for security. During his testimony at the trial he confirmed that the Accused supposedly was the assistant commander for security.

The witness Hasan Ćatić testified that he participated in the *Oluja* operation and that the Accused was the company commander. In his interview with SIPA investigators he stated further that he thought that the Accused was the person responsible for taking one of the POWs forward, towards the lines.

It is clear, therefore, that the Accused was holding this position on an *ad hoc* basis.

The Court has taken into special consideration the documentary evidence on different positions which the Accused Šefik Alić held in the period between 1992 and 1995, according to the then rules of appointment.
It follows from the personal file of the Accused No. 492011000216 that the Accused, from his engagement with the Territorial Defense and later with the RBiH Army, was a detachment commander, a platoon commander, even a military police officer. However, in the period between 1 January 1995 and 5 October 1995, he held the position of the *Bofors* Battery Commander pursuant to the order of the 505th Brigade Commander of 31 December 1994 and that in the period between 5 October 1995 and 20 February 1996, he was the Deputy Battalion Commander, upon the order of the RBiH Army 5th Corps Commander of 26 November 1995.

Defense exhibit No. 38, temporary wartime establishment No. 05/53-1813 of 26 November 1995, appointing the Accused Deputy Battalion Commander and revoking the Order of the 5th Corps Commander No. 05/53-1178 of 4 June 1995 by which the Accused was appointed Acting Assistant to the Battalion Commander for Security of the 3rd Mountain Battalion of the 505th Brigade, required special attention and evaluation. The Accused was supposed to take up his new duties on 5 October 1995. It should be noted here that the Court had in mind the testimony of the defense witness, military analyst Dževad Jusić, when evaluating this exhibit, who, in his explanation of the manner in which one could be appointed to the position of the assistant commander for security and his competence, said that the command staff in the Army does not recognize the concept of the acting assistant commander for security.

Further on, starting from the date of issuance of this temporary wartime establishment, 26 November 1995, and the taking up of new duties on 5 October 1995, the Court particularly notes that the Hamza Battalion was not even formed when the alleged order of the Commander of the RBiH Army 5th Corps was issued, that is, on 4 June 1995, namely that the Hamza Battalion was established the day before the critical operation on 4 August 1995.
On the other hand, the Accused was discharging the duties of the commander of the Bofors Company at the time when the Order on the acting security officer was allegedly issued, which follows from the personal file of the Accused, the content of which was certified by the Ministry of Defense of the BiH.
Finally, bearing in mind that the Prosecutor was in a position to inspect the overall archives of the RBiH Army, that is, to obtain all evidence necessary for the prosecution, including the disputable Order of 4 June 1995, it is logical to have suspicion about the existence of this Order.
It is the fact, however, that the Hamza Battalion did not exist on 4 June 1995 and that the Prosecutor did not offer any evidence to corroborate the allegations pertaining to the temporary wartime establishment. Up until the forming of the Hamza Battalion, there was only the Special Purposes Company Hamza.

Having in mind all illogicalities and the resulting ambiguity, the Court decided not to accept this evidence.

The Court has also evaluated the Prosecution Exhibit No. 37 - Recommendation for promotion of the Accused Šefik Alić, stating that the Accused held the position of the Assistant Commander for Security. This Recommendation was signed by Sead Jusić, a witness in these proceedings. However, the Recommendation did not provide any information as to the period or the basis of the Accused's alleged performance of this function.

Also, the Trial Panel has considered that witnesses for both Prosecution and Defense have stated that the Accused was a great fighter and admired by all of his fellow soldiers. Similarly, witnesses for both parties have testified that the Accused was the commander of the special purpose company Hamza before the creation of the battalion Hamza. Taking into account the testimony of witness Sead Jusić and Defense witnesses Besim Abdić, the Court accepts that a company in the Army of BiH would have consisted of anywhere between 50 to 100 soldiers. Taking this into consideration, the Court sees no logic in the suggestion, as put forth by Defense witnesses, of a highly respected soldier and company commander being demoted to an ordinary private upon the establishment of the Hamza Battalion. The Court therefore declines to accept the statements of the Defense witnesses regarding the position of the Accused.

The Trial Panel is aware of a number of discrepancies in some of the witness statements and even in official military documents concerning the position of the Accused. For example, in his SIPA

interview, witness Safet Isaković identified the Accused from a video footage as being the Assistant Commander for Security. However, when asked during the main trial, the witness stated that he does not remember stating to the Prosecution that the Accused held that position during the Indictment period. In resolving such discrepancies, the Trial Panel took into account the different testimonies regarding the pressure that the Army of BiH operated under and the resulting manner in which it conducted its administration. The Court heard the testimony of the witness Hamdija Emrić who said that people changed on posts on a daily basis. Witness Šerif Kekić stated it was usual for appointments to be made orally, and Zijad Nanić testified that oral appointments were sometimes not confirmed in writing because there would be no time to do so. He also said that regardless of written orders, everyone obeyed Commander Nanić. Witness Sead Jusić said that the procedure for appointments was very informal so that Commander Nanić could appoint someone and then change his mind the next day.

For these reasons, having reviewed the aforementioned evidence, especially the documentary evidence, the Court finds that the Accused was appointed to the position of the Assistant Battalion Commander for Security, but only for the Oluja Operation, and that he was not officially deployed to that position subsequently in accordance with the strict legal procedures which prescribed the consent of the RBiH Army General Staff.

The conviction of the Court about the ad hoc discharge of these duties is especially contributed by the testimony of Dževad Jusić, Defense witness, whose testimony was evaluated as clear, professional and convincing, in particular because the witness was a career military officer with the Military Security at the relevant time and is currently retired with the rank of a Brigadier.
Having underlined how Military Security plays a special role in all armies, the witness explained the strict procedure of appointment of a certain soldier to a position in the Military Security Service, which started with the recommendation of a unit to which a soldier belongs, which is then followed by numerous inquiries on all levels, up to the level of the Commander of the Army General Staff or the Minister of Defense, and concluded with the consent to admit the recommended soldier into the Military Security Service, after which an order is issued defining his specific duties within the Military Security Service. Membership in the Military Security Service is confirmed by the military identity card which, the Court notes, the Accused Šefik Alić did not have.

According to this witness, it was not possible to appoint an acting officer in this service within the Army but only temporary assign someone to carry out assignments from the domain of the Military Security Service who is already a member thereof. This fully justifies the conclusion of the Court not to accept the Prosecution Exhibit No. 37, considering that the Accused was appointed Acting Assistant Commander for Security by the mentioned Order of 4 June 1995.

Likewise, the allegations of this witness about the mandatory recording of changes in the military engagements in one's personal file goes in favor of accepting the data in the personal file of the Accused, as the only authentic data on his engagement. The personal file of the Accused does not contain information on his engagement with the Military Security Service.

On the other hand, although this witness insisted that the described procedures had to be abided by at all times, even in combat, attributing it to the very nature of the security officer's role and contesting at the same time the possibility of a brigade commander appointing someone to the position of a security officer, by verbal order on top of that, the Court has no doubt that the Accused played the role of an *ad hoc* security officer during the relevant operation.
It follows from the testimony of both the prosecution and the defense witnesses that the Commander of the 505th Bužim Brigade, Izet Nanić, enjoyed unquestionable authority and genuine

respect and that he was a commander whom all soldiers blindly followed. It is exactly this authority and proven leadership skills that created the possibility for him to choose his assistants for security, operations, etc., in the operation planned for 5 August 1995. This also follows from the testimony of Zijad Nanić, the Assistant Brigade Commander for Security, who, aware of the strict rules of the Military Security Service, objected to the Commander's decision to appoint the Accused to the position of the security officer in the Battalion. His remonstration was unsuccessful. The Court is certain that the role of the security officer was awarded to the Accused Šefik Alić, a soldier known to be a highly capable and courageous fighter, as pointed out by all witnesses. The Accused had fulfilled this role during the relevant operation, having escorted the prisoners to the Battalion Commander, Asim Bajraktarević, his superior officer.

The legalization of this appointment, that is, its extension pursuant to the rules described by the witness Dževad Jusić, could be done even after the relevant operation, the Court is convinced, however, as it undoubtedly follows from all evidence, that never happened. This is especially so based on the testimony of the witness Zijad Nanić who emphasized that the Accused was a security officer only for around twenty days, during which time only one operation was carried out, that being the relevant operation. The Accused, according to this witness, did not posses the qualities required for the Military Security Service.
The Accused Šefik Alić was a security officer only during the operation carried out on 5 August 1995, the operation which was suspended due to the killing of the Brigade Commander, Izet Nanić, which brought about many changes in the structure of the 505th Bužim Brigade, especially in its chain of command.

However, a mere fact that someone held a certain position does not automatically trigger his/her command responsibility. This is determined based on the type of one's position, whether it is a command position or a position of an assistant for certain affairs.
The Court is convinced that the Accused was the Assistant Battalion Commander for Security during the relevant days of the *Oluja* operation. Therefore, his role was not that of the ordering authority, but an advisory one.

The absolute order-issuing role, especially in the critical action, was played by the battalion commander, who took part in the action.
Other participants in the action also had the order-issuing role, specifically platoon and company commanders, but the Accused Šefik Alić was not among them.

There is no doubt that the accused enjoyed sufficient influence among the soldiers. The testimonies of witnesses indicate that the accused was highly thought of among his fellow soldiers and was a brave soldier. However, substantial influence is not an element in constructing a person's superior responsibility.[212] The nature and concept of superior responsibility concern the relationship of the superior and his subordinates, and are marked by the hierarchy of command and control, and not influence. Accordingly, to justify holding a commander responsible, there must be a showing of authority and subordination.

Many witnesses testified that they thought, but did not know for sure, that the Accused was in charge of the security of the battalion, failing to specify what that meant in practical terms. Witness Šerif Kekić testified that the Accused, as a security officer, worked on intelligence and that his duties did not include the responsibility for the POWs. Yet, witness W1 stated that the Accused was in charge of the battalion security, prisoners of war and deserters. Despite the contradictory

[212] *Čelebići* Appeal Judgement, par. 265.

testimonies, both prosecution and the defense witnesses were consistent with respect to the Accused's duty to deliver POWs to Asim Bajraktarević, the Battalion Commander.

After careful examination and review of the witnesses' testimonies, the Trial Panel concludes that the accused was not the ordering authority, but an *ad hoc* assistant battalion commander for security-related issues. Neither the prosecution nor the defense witnesses testified that the accused was in a position to issue orders or that he indeed issued any orders to his fellow soldiers. On the contrary, the witnesses testified that the Accused did not have command responsibility and that they received orders directly from Asim Bajraktarević, the Battalion Commander, who was in complete control over his fellow soldiers and the prisoners of war.
The Prosecutor also failed to establish that there was a direct link, i.e. *vis-a-vis* the relationship between the Accused and the perpetrator Al Harbi Tewfik (Tewfik). Almost all prosecution and defense witnesses testified that the perpetrator was known as a humanitarian aid worker and that he was not a member of the brigade formation. They also testified that they did not see the perpetrator in the Hamza Battalion either before or after the events in Oluja. Accordingly, the Prosecution failed to prove beyond reasonable doubt that the Accused had any, let alone effective control over Tewfik.

In the absence of the ordering authority role, the Panel concludes that the Accused cannot be held responsible under the doctrine of command responsibility.
Having reached this conclusion, the general judicial decorum does not require from this Court to continue with the analysis of the Accused's command responsibility. However, having in mind the importance of the judicial efficiency in future appeal proceedings, as well the importance of establishing facts in this case, the Court will analyze the remaining elements and will provide additional grounds for acquitting the Accused of the criminal charges under the doctrine of command responsibility.

Requirements of Knowledge of Crime

The Court has carefully reviewed the testimonies of all witnesses pertaining to the knowledge, both actual and imputed, that the Accused might have had regarding the crimes at issue. None of the witnesses testified to the fact that the accused was informed or had personal knowledge that the heinous crimes were about to be committed by Tewfik. On the contrary, the testimonies of many witnesses indicate that they were aware of and followed the strict protocol with respect to the prisoners of war (POWs), by protecting them from Tewfik. The Trial Panel gave particular attention to the testimony of witness W5 who testified during his direct examination that the Accused, together with Tewfik and other soldiers of the Hamza Battalion, took the prisoners away and that he heard gun shots within minutes of their departure. He also testified that the group, including the Accused, returned shortly thereafter but without the prisoners. The witness W5, however, gave a contrary testimony during his cross-examination, stating that he did not remember whether Alić was present at the elevation Hleb, which is supported by his previous statement to the Prosecutor's Office. As a matter of fact, the witness stated that he did not remember seeing the Accused at all on the day at issue. The Panel considered this testimony in light of other evidence. Given that the testimony of witness W5 was not corroborated by any other witness, that the witness was confused and gave contradictory testimony depending on which party was examining him, and that there was no additional testimony to support that Alić was present at the elevation Hleb when the killings occurred, after careful examination the Trial Panel disregarded this testimony.

In addition, the Prosecution failed to prove that the Accused was at the elevation Hleb at the time the killings took place. The Trial Panel carefully reviewed the video footage and noted that there

was no indication whatsoever that the Accused was present at the elevation after the POWs were delivered to the Battalion Command post at the elevation and handed over to Battalion Commander Asim Bajraktarević. The record showed the POWs in the presence of Asim Bajraktarević, the Battalion Commander, and other soldiers of the Hamza Battalion but the footage did not depict the Accused at the elevation Hleb before, during or after the murder has been committed.

The Trial Panel also reviewed the evidence to determine whether the accused had reason to know that the perpetrator was about to commit a crime. The Accused was assigned as an assistant security commander on the eve of the *Oluja* events. The witness testimony indicates that Tewfik joined the Hamza Battalion the day before the *Oluja* operation. He enjoyed a reputation of being a humanitarian aid worker and did not display any violent propensities.

The Prosecution argues that a reasonable inference that the commander knew or had reason to know that the crimes were about to be committed may be drawn from the fact that the accused was present at the time when the perpetrator was slapping the POWs on their faces and hats. Naturally, the Prosecutor was referring to the Accused as an assistant for security who had a command role. This Court respectfully disagrees with that proposition. Even though the position that the assistant for security did not have this role was already explained, in order to better understand the overall event, the Court will next reflect upon the Prosecution's averments.

The right question is: what is the quantity and the knowledge a commander must posses in order to be held responsible only based on the fact that he was a commander.

It is not sufficient to simply demonstrate that the commander was aware that there was a risk that his subordinates would commit crimes because there is *always* a risk of commission of such crimes.[217] It must be shown that the commander had information that crimes of *similar* gravity and *similar* nature as those with which he is charged were about to be committed.[218] Even if the commander had some general information that the perpetrator was involved in criminal activities (such as slapping the prisoners on their faces and hats), this knowledge cannot be equated with knowledge that the perpetrator was about to commit killings.

The Court reviewed the testimony of protected witness W3, which is also relied upon by the Prosecutor's Office, who indicated that he took control of the situation and protected the POW1 because he recognized the threat posed by Tewfik during the knife scene and that he relinquished his control upon arrival of senior officers. The Court notes that despite the perceived threat, the witness failed to report this serious incident to his superiors, i.e. Tewfik's threats to slit the throat of POW1. The witness stated that there were many soldiers around the prisoner and he felt reporting was unnecessary. Also, W4, who was a Platoon Commander, testified that he reported the abuse to the Battalion Commander Asim Bajraktarević, but failed to intervene because he thought it was not necessary since other members of the Hamza Battalion were present. If the witnesses were so concerned about the wellbeing of the POWs because of the posed threat, the question arises as to why they did not file reports or undertake certain activities to request safe passage of the POW to the command post.

[217] *Blaškić* Appeal Judgment, par. 41.
[218] *Krnojelac* Appeal Judgment, pars. 155, 178-179. The commander could not be said to have known or have had a reason to know that a given crime had been or was about to be committed because he may have known or have had reason to know that a less serious offence or one which does not contain all of the elements of the first one had been or was about to be committed.

The Trial Panel has noted and carefully considered the part of the video footage where Tewfik told one of the POWs that he was a mujahedeen who came to kill, and where the Accused was present at the time the statement was made. The question before the Panel was whether this threat was serious enough to put the commander (Accused) on notice about the perpetrator's intentions. After thorough consideration of all evidence, the Trial Panel concluded that despite the threatening tone of the statement, it was not specific enough for the commander (Accused) to take any affirmative actions.

Even if the Accused, for the sake of the argument, perceived Tewfik's threat as serious, the Panel is satisfied that the Accused took all necessary steps to fulfill his duty as the Assistant Security to the Commander, i.e. to deliver and hand over the POWs safely with his Commander, Asim Bajraktarević, which is discussed in greater detail in the next section.

For these reasons, the Trial Panel concludes that the Accused, even if he had a command role, which was proven in the instant case, did not have the prerequisite knowledge or was on notice that the perpetrator was about to commit criminal acts as stated in the Indictment.

Requirements of Failure to Prevent or Punish

The duty to prevent commission of a crime rests on a superior at any stage before the commission of a crime by one of his subordinates if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect that such crime will be committed.[223] The Court will not address this variant of liability since it has been already established that the Accused did not have a command role or prior knowledge or reasonable grounds to suspect that the crime was being planned by his subordinates. Instead the Court has turned directly to the duty of a commander to punish his subordinates for the crimes committed.

The Prosecution argues that the Accused should be held responsible for the killings of four prisoners perpetrated by Tewfik on the basis of his failure to report the killings of the prisoners of war, having sufficient notice of the executions. The Prosecution supports this allegation relying on the testimony of Zijad Nanić who stated that the Accused failed to submit any reports regarding the crimes, and on the testimonies of witnesses Sead Jusić, Agan Elkasović, W3 and W4, who testified that no investigation was conducted at the time into the suspected executions of Serb soldiers.

The Trial Panel has already stated that a commander has a duty to punish the perpetrators of crimes when he knows or has reason to know that his subordinates have already committed them.
Emphasis on the commander.
The Accused, as already explained, was the Assistant Commander for Security and was not an order-issuing authority, and hence the superior position over the perpetrator, Tewfik Al Harbi in this case. The Court will, however, step away from its conclusion in order to portray the relevant situation in as much detail as possible through a comprehensive evaluation of evidence.

Even more so when bearing in mind the type of responsibility of the Accused as the assistant for security.
In determining whether the Accused knew or had reason to know about the killings, the Trial Panel carefully examined the evidence pertaining to this issue. Based on the testimony of witnesses, the Trial Panel concludes that the Accused was not present at the elevation Hleb at the time when the killings were perpetrated and that he was not informed about the killings after the *Oluja* operation. Witness Hasan Ćatić recalled during his testimony that the Accused was executing the order issued

[223] *Kordić and Čerkez* Trial Judgment, par. 445.

by Asim Bajraktarević to create a defense line around the elevation Hleb, which confirms the Accused's absence from the elevation. Finally, the video footage confirms the Accused's departure from the elevation after he surrendered the prisoners to the Battalion Commander.

The Prosecutor argues that the Accused must have known about the crimes because other witnesses learned about the killings that day or in the following days. The Trial Panel rejects this proposition and holds that knowledge of the killings cannot be presumed or indirectly attributed to the Accused, and that the Prosecutor must prove beyond reasonable doubt that the Accused knew or had reason to know that the prisoners were executed. The Prosecutor failed to introduce any evidence to prove that the Accused was informed about the killings. The Prosecutor also did not introduce any evidence which would help the Panel to determine when and if the Accused learned about the crimes. Accordingly, in absence of any evidence pertaining to the Accused's knowledge, the Trial Panel refuses to infer that the Accused knew or had reason to know about the killings or to further speculate on this issue.

The power to punish, which includes commander's ability to investigate alleged crimes and punish the perpetrator, also depends on the commander's ability to exercise effective control.[227] Hence, when a commander is replaced shortly after commission of a crime, and there is no evidence to indicate that he knew or was aware that a crime had been committed before his replacement, he no longer has effective control over his subordinates and no longer has authority to punish the subordinates in question. Accordingly, the law does not hold an Accused criminally responsible under the doctrine of command responsibility for failure to punish when he is no longer in a position of a commander.

Witness Sead Jusić and witness Safet Isaković testified that there were quick changes in the command structure, sometimes on a daily basis due to the combat operations. Witness Zijad Nanić testified that the Accused was appointed the Assistant Commander for Security, albeit against his will, the day before the *Oluja* operation. He also testified that he dismissed the Accused from this position shortly after the *Oluja* events.

Undoubtedly, the law favors holding a commander responsible for the acts of his subordinates when the commander's failure to punish *contributes* to the criminal activity of those under his command and when his failure to punish can be linked causally to the *subsequent* criminal activity of those he did not punish, or of others under his command. But to hold a commander responsible for the crimes of his soldiers on the ground that he failed to report the crimes, when he does not have an effective control over the perpetrators and/or has no knowledge of the crimes committed, is alien to the principles of the contemporary criminal law. In light of its earlier findings that the Accused did not have any knowledge about the killings and that he did not have a command role and/or the position of hierarchical superiority or effective control over Tewfik and other soldiers of the Hamza Battalion, the Trial Panel concludes that the totality of these circumstances effectively prevents triggering the Accused's command responsibility.

Finally, the Trial Panel is also of the opinion that the Accused had fulfilled his duty as an Assistant Commander for Security when he delivered the POWs to the command post and handed them over to the Battalion Commander. Witnesses Dževad Jusić and Sead Jusić testified that the responsibility of the Accused, if he were a security officer, would cease when he delivered the POWs to the command post, i.e. to Asim Bajraktarević, because the Battalion Commander exercised the absolute authority. Witnesses W4, W3, Hasan Ćatić, and many others testified that, in accordance with the

[227] *Hadžihasanović* Trial Judgment, para. 197, confirmed on appeal dated 22 April 2008.

clear instructions, the POWs were delivered and surrendered to Asim Bajraktarević. Finally, the video footage corroborates witness testimony and clearly depicts that the POWs were under the control of the Battalion Commander at the elevation Hleb.

The evidence also demonstrates that the Accused was not present at the elevation Hleb when Asim Bajraktarević ordered that the POWs be marched away. The Prosecutor argues that the actions of Asim Bajraktarević did not intervene in the chain of events and that the Accused remains criminally responsible for the killings of the prisoners because he was aware of Tewfik's animosity towards the prisoners and was responsible for the prisoners even after he had delivered them to the command post. The Trial Panel disagrees with the Prosecutor's argument. Indisputably, Tewfik displayed his enmity towards the prisoners but it was the duty and responsibility of the Battalion Commander to take the necessary measures to protect the prisoners when they were delivered to the elevation Hleb. The Battalion Commander had absolute authority in the area under his control, which included elevation Hleb and ultimate authority over the prisoners. The Trial Panel has no doubt that the death of Izet Nanić created an opportunity for Tewfik to murder four POWs but it was not the Accused but Asim Bajraktarević who provided Tewfik with that opportunity.

It is necessary to note here that the Court when evaluating evidence had in mind other evidence presented at the main trial but did not give special importance to those pieces of evidence nor did it find it necessary to conduct their detailed analysis, for they did not have a significant impact on the finally-established factual situation and conclusions reached by the court based on the evidence evaluated in the verdict.

In light of the foregoing discussion, the Trial Panel finds that the Accused fulfilled and discharged his duty with respect to the prisoners when he safely delivered and placed the prisoners with the Battalion Commander. The Accused did not know or had reason to know about the execution of the prisoners. Therefore, vertically, in line with the profession, he did not have anything to report to the superior officer-assistant commander for security of the 505th Bužim Brigade, Zijad Nanić. On the other hand, even if he knew about the execution and failed to inform Zijad Nanić about it, the Accused would have been responsible under the principles of disciplinary responsibility in the military service - due to his failure to report to his superior officer in the line of profession. Disciplinary responsibility, however, is not the subject of criminal proceedings.

Conclusion

The Prosecutor states that he does not seek to hold Accused criminally responsible purely for the actions of others in his absence, i.e. after the Accused parted from the prisoners at the elevation Hleb. The Prosecutor also asks this Trial Panel to acquit the Accused of the murder and inhuman treatment if the panel finds that the Accused, while having control over the prisoners, complied with his obligations by ensuring their proper treatment and protection and relinquished his control over the prisoners to senior officers such as Asim Bajraktarević and Hamdija Mustafić, because he had reasons to believe that they were safe.

Bearing in mind the finding that the alleged mistreatment of the prisoners does not constitute inhuman treatment to trigger the Accused's individual criminal responsibility, that the Accused was the Assistant Commander for Security during the *Oluja* Operation, that he did not have the order issuing authority and that he did not know or had reason to know about the execution of the prisoners, the Panel is satisfied that the Accused complied with his duties as the assistant commander for security when he safely delivered and placed the prisoners with his superior officer, Battalion Commander, at the elevation Hleb.

Accordingly, the Prosecutor's Office has failed to prove that the Accused Šefik Alić was responsible under individual and command responsibility for the crime committed on 5 August 1995 over the four prisoners - members of the Army of Srpska Krajina captured during the *Oluja* Operation in a wider area of the elevation Hleb.

Therefore, in this situation, based on the results of the evidentiary proceedings and since the decisive fact in relation to the participation of the Accused in the relevant event was not proven, by applying the principle *in dubio pro reo*, the Court finds that it does not exist, and in the absence of evidence acquitted the Accused Šefik Alić of the charges pursuant to Article 284 (c), in conjunction with Article 3 of the CPC of BiH.

7. Decision on costs and claims under the property law

Pursuant to Article 189 (1) of the Criminal Procedure Code of Bosnia and Herzegovina, the costs of the criminal proceedings defined in Article 185 (2) (a) through (f) of this Code, shall be paid from within the budget appropriations.

Pursuant to Article 198 (3) of the BiH Criminal Procedure Code, considering that there were no claims under property law filed by the injured parties at the main trial, the injured parties are instructed that they may pursue their claims under property law in a civil action.

Record-taker
Legal Advisor
Amela Skrobo

President of the Panel
Judge
Minka Kreho

LEGAL REMEDY: An appeal from this Verdict shall be allowed with the Appellate Panel of this Court within 15 days as of the day of the receipt of the written copy of the Verdict.