

**BOSNIA AND HERZEGOVINA**



**COURT OF BOSNIA AND HERZEGOVINA**

**Number: X-KR-05/42**  
**Sarajevo, 14 December 2006**

**IN THE NAME OF BOSNIA AND HERZEGOVINA**

The Court of Bosnia and Herzegovina, sitting as a Panel composed of Judges Dragomir Vukoje as the Presiding Judge, Richard Gebelein and Georges Reniers as the Panel members, with the participation of the legal officer Manuel Eising as the record-taker, in the criminal case against the Accused Nikola Andrun, for the criminal offense of War Crimes against Civilians in violation of Article 173 (1) c) and e) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC of BiH), deciding upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-28/05 dated 21 April 2006, confirmed on 27 April 2006 and amended on 11 December 2006, following the public main trial, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Vesna Tančica, the Accused Nikola Andrun personally and his Defense Attorneys Hamdo Kulenović and Nikica Gržić, lawyers from Sarajevo, on 14 December 2006 reached and publicly announced the following

**V E R D I C T**

The Accused: **ANDRUN NIKOLA**, son of Drago and mother Zora née Nikolić, born on 22 November 1957 in the place of ..., Municipality ..., where he is permanently residing, JMBG ..., merchant by occupation, unemployed, married, father of four, of ... ethnicity, citizen of ..., in custody since 30 November 2005.

**I**

**HAS BEEN FOUND GUILTY**

**In as much as he:**

In the second half of 1993, during the war in Bosnia and Herzegovina, and during the armed conflict between the HVO and the Army of R BiH, in the Gabela camp located in the place of Gabela, Municipality of Čapljina, as a member of the HVO Brigade *Knez Domagoj*, in his capacity as the Deputy Head of the Camp acted in violation of the provision of Article 3 (1) a) and c) of the Geneva Conventions on the Protection of Civilian Persons in Time of War of 12 August 1949, **because**

2. On an unidentified date, in late September or early October 1993, during the evening hours, together with the SIS-HVO investigator Marinko Marić, he took out from the Gabela camp the detainee Enes Bratić and brought him to the Police Station Čapljina, to a room in

which Vlado Rajić, investigator in this Station, waited for him and then kicked him several times with his feet wearing military boots, all over his body, whereupon Marinko Marić came into the room and twisted his right hand finger and broke it, put a pistol on his mouth and cocked it, hit and kicked him several times and when leaving the room Nikola Andrun kicked the detainee Enes Bratić with his feet wearing military boots in the part of the chest below the heart, that is, the ribs.

4. On an unidentified date in October 1993, in the evening hours, in the Gabela camp after the detainee Alija Šuta, who was in front of Hangar no. 3., refused to comply with his order to take out from the hangar the detainee Alija Čolaković, he entered the hangar together with the HVO member, and having called out Alija Čolaković, took him out from the hangar, whereupon several unknown members of the HVO, in the presence of Nikola Andrun, kicked him with their feet wearing military boots and beat him with rifle butts all over his body, because of which he fainted, whereupon they dragged the body of Alija Čolaković in the direction of Hangar no. 2.

5. At the beginning of September 1993, in the evening hours, in the Gabela camp, he took out from Hangar no. 2 the detainee Mirsad Omanović, brought him to a room in the Administration building where Marinko Marić, the SIS investigator, waited for him, and who, having asked the detainee where his money was, started kicking him with his feet in military boots and beating him using fists and baton all over different parts of his body, while Nikola Andrun during all that time was sitting on the table watching Marinko Marić abuse Mirsad Omanović, whereupon both of them took him to Hangar no. 2, threatening him that they would come again the next evening to pick him up and that they would kill him if by then he did not surrender the money to them, whereupon the following night, he came to Hangar no. 2 and took out Mirsad Omanović and brought him to a room in the Administration building in which Marinko Marić waited for them, whereupon they asked him whether he brought the money, and while Nikola Andrun was sitting and watching, Marinko Marić started punching him in his face and beating him with a baton all over different parts of his body, hitting him in his head with the baton, due to which Omanović fell and lost his consciousness, but at the moment of regaining consciousness, Omanović saw Marić above him kicking him in the face with his military boots on, and he ordered him to stand up and go to a corner of the room facing the wall, whereupon he started shooting over his head, and in one moment, hit him in the head with the pistol handle due to which blood gushed from his head, whereupon they took him back to Hangar no. 2 threatening him that the following night they would come to pick him up again.

9. In late July 1993, he took several detainees from the Gabela camp to the military barracks in Čapljina, including Topić Džemal, to collect pine-tree needles and acorns, whereupon he surrendered them to unknown members of the HVO, who beat him up on several occasions in a bathroom using the hose of the fire-prevention set, while Nikola Andrun was sitting on a bench watching them take him into the bathroom for the first time and take him out later all covered in blood, and when he was taken to the bathroom the next time and beaten up with the hose of the fire-prevention set, the detainee Džemal Topić lost his consciousness.

11. On an unidentified date in September 1993, in the Gabela camp, together with Boško Previšić, he took out from Hangar no. 1 several detainees, including the detainee Kemal Balavac, whereupon he surrendered him to the HVO soldiers Mato Brajković, Mile Nogulica

and others, telling them “Take them today, do with them whatever you want and tomorrow we’ll see”, whereupon the group of these soldiers, while he was pulling thorns from thorn-bush with his bare hands, hit him several times with the knife handle and kicked him with his feet wearing military boots.

12. On an unidentified date in August 1993, in the Gabela camp, he took out from Hangar no. 2, the detainee Selim Gagula, brought him to the gate next to the Administration building, where a group of HVO members stood, sat on a bench and watched this group of HVO members beat Selim Gagula with rifle butts, who lost his consciousness due to this beating and remained unconscious for several days.

13. On two occasions, in August and September 1993, he removed a group of Bosniaks whom they kept detained in the Investigation Section of the Administration building directly near the entrance gate from the Gabela camp, together with the Head of the Camp, Previšić Boško, intending to prevent the employees of the International Committee of the Red Cross to perform their humanitarian role and register all the detainees with a view to enabling them in that manner to be exchanged, to depart for third countries and to make contacts with their families. The detainees, among whom were Alaudin Veledar, Ramiz Leto, Enver Bojčić, Halil Turajlić, Bajro Pizović, Ahmet Cernica, Marić Huso, were transferred to the Silos camp near Čapljinina and thus prevented from being registered by the employees of the International Red Cross.

**Therefore,**

during the war in Bosnia and Herzegovina and during the armed conflict between the HVO and the Army of R BiH, violating the rules of international law, he tortured and participated in the torture of detained civilians, participated in the violation of their bodily integrity, inhumanely treated them and applied measures of intimidation and terror.

**Whereby,**

he has committed the criminal offense of War Crimes against Civilians under Article 173 (1) c) and e) in conjunction with Article 180 (1) and Article 29 of the CC of BiH, therefore, the Court, for the above mentioned criminal offense, applying Articles 39, 42, 48 and 56 of the CC of BiH hereby

**SENTENCES**

him to **13 /thirteen/ years** of imprisonment, while the time the Accused spent in custody, commencing on 30 November 2005, shall be credited towards the sentence of imprisonment.

Pursuant to Article 188 (4) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused shall be relieved of the duty to reimburse the costs of the criminal proceedings and the scheduled amount, which will be fully covered from the Budget of the Court.

Pursuant to Article 198 (1) and (2) of the CPC of BiH, the injured parties Mirzo Čolaković, Mirsad Omanović and Džemal Topić are hereby referred to take civil action with their claims under civil procedure law.

## II

Pursuant to Article 284 c) of the CPC of BiH, the Accused Nikola Andrun is hereby

### **ACQUITTED OF THE CHARGES**

#### **That**

1. On 30 September 1993, during the morning hours, in the Gabela camp, in the Camp Administration building, together with Marinko Marić, the SIS investigator and guard Almir Kudra a.k.a. “Hogar”, he questioned the detainee Mirza Čolaković, punching and kicking him with his military boots on all over his body, due to which he fell down, whereupon Nikola Andrun took out from a table drawer a 10 cm wide black belt, put it around his neck, pulled it through the buckle, having made in that manner a loop, climbed up on the table, lifting him up tied in such manner together with the others by dragging the belt which kept tightening around the neck, because of which Mirza Čolaković fainted due to the loss of air, and after he regained consciousness, Marinko Marić and Almir Kudra took him out to another room with a washstand and a tap, in which Nikola Andrun waited for them with a towel, placed him to the position with his head turned toward the tap, whereupon Nikola Andrun covered his face with the towel, and Marinko Marić and Almir Kudra opened the tap and directed water to fall on his nostrils, because of which, unable to breathe, Mirza Čolaković fainted, and when he regained consciousness, they took him to the solitary cell and told him that they would come again during the night to question and torture him.

3. On an unidentified date, in September 1993, in the afternoon hours, in the Gabela camp, after Pehar Nikica, the camp guard, informed him of having heard that the detainee Mirsad Žujo had said “This is the corridor for Neum”, he came to Hangar no. 3, called up the detainee Mirsad Žujo a.k.a. “Šile“, threatened him by the words “Come on, Žujo, come out, they will get to the other side once, but you never will”, and while the other detainees in the hangar watched all that in fear, took him out from the hangar to which he never came back again, whereupon the mortal remains of Mirsad Žujo were exhumed and identified in 1996, and the examination and autopsy showed that his skull was shot through with a clearly noticeable entrance hole behind the left ear caused by the dynamic action of a bullet fired from a hand fire weapon aimed at the back of the head, thus causing the violent death.

6. At the beginning of July 1993, in the Gabela camp, he took out several detainees from Hangar no. 1, including Ramiz Kurtović, drove them by car to the Police Station in Čitluk, where they were questioned by unknown policemen in his presence, whereupon their hands were tied on their backs, and tied in such a manner they were taken, escorted by Nikola Andrun, to the military barracks in Čitluk, while gathered citizens were throwing stones at them, kicking them and spitting on them, whereupon on the same day, after they returned to the Gabela camp from the barracks in Čitluk, together with the Gabela camp Head, Previšić Boško, ordered this group of detainees, including Ramiz Kurtović, to lie down on the hot

asphalt and let water running from the nearby tap without allowing them to drink it although they were thirsty.

7. On an unidentified date, in August 1993, in the Gabela camp, he came to the Hangar no. 1, and having called out the detainee Hivzija Dizdar a.k.a. "Učo", took him out from the hangar while the other detainees were watching all that in fear, and where he has not returned ever since, whereupon in 1996, the mortal remains of Hivzija Dizdar were exhumed and identified, and the examination of the body and autopsy revealed the spot where the skull was shot at, caused by the dynamic action of a bullet fired from a hand fire weapon to his head, thus having caused his violent death.

8. In the first half of July 1993, in the Gabela camp, from the cellar located in the Administration building, he took out the detainee Topić Džemal, brought him to his office in the same building, where together with Marinko Marić, the SIS investigator, he beat him up with a baton and a hose of the fire-prevention set.

10. On an unidentified date of August 1993, in the Camp Gabela, in the office located in the Administration building, having questioned the detainee Džemal Topić, he hit his head and bare back several times with a baton, due to which he suffered cuts on his back.

### **Whereby,**

by actions described under Count 1, 6, 8 and 10 of the Indictment he would commit the criminal offense of torture, under Count 3 and 7 of the Indictment the criminal offense of murder, which offenses constitute the grounds of the criminal offense of War Crimes against Civilians in violation of Article 173 (1) c) and e) and in conjunction with Article 180 (1) and Article 29 of the CC of BiH.

### **Reasoning**

1. By the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-28/05 dated 21 April 2006, which was confirmed on 27 April 2006, Nikola Andrun was charged, by actions specified in Counts 1 through 13, with the commission of the criminal offense of War Crimes against Civilians in violation of Article 173 (1) c) and e) and in conjunction with Article 180 (1) and Article 29 of the CC of BiH.

2. Following the completion of the evidentiary procedure, the Prosecutor partially amended the factual allegations of the Indictment in the introductory part of factual description and the factual description in Counts 2, 10 and 11, therefore, the Accused was finally charged with the criminal offense whose detailed description in terms of facts and law is given in the operative part of this Verdict.

3. The Accused Nikola Andrun pleaded not guilty of the criminal offense he was charged with in the Indictment.

4. During the evidentiary procedure the Court presented the evidence of the Prosecution, the defense as well as the evidence the presentation of which was ordered by the Court.

5. At the main trial, the Court heard the following prosecution witnesses: Mirza Čolaković, Enes Bratić, Eldin Vujinović, Senad Šetka, Hadžo Klarić, Kemal Balavac, Zlatan Zaklan, Hamza Penava, Alaudin Veledar, Ramiz Leto, Enver Bojčić, Halil Turajlić, Bajro Pizović, Ahmet Cernica, Huso Marić, Mirsad Omanović, Džemal Topić, Aziz Selimović, Hasan Tucaković, Ramiz Kurtović, Alija Šuta, Selim Gagula and Meho Zele. Also, at the main trial, the Court heard Dr. Ilijas Dobrača in his capacity as a forensic expert.

6. Further, at the main trial, the following documents submitted as evidence by the Prosecutor's Office of BiH were reviewed as follows: Records on Hearing of the forensic expert Dr. Ilijas Dobrača and a certified copy of the Findings and Opinion of the forensic expert of 12 and 13 November 1996; Original Autopsy Record (Reexhumatio) S. no. 27-196/2003, which was received by the Cantonal Prosecutor's Office of the Herzegovina-Neretva Canton Mostar; Certified copy of the Order of the Higher Court in Mostar, number: Kri.-41/96 of 11 November 1996 ordering the conduct of an expert evaluation by a forensic expert; Certified copy of the Record on the On-sight Investigation of the Higher Court in Mostar, number: 341/96 of 12 November 1996; Certified copy of the Information of the Ministry of Interior, Security Services Center Mostar on the course of the identification of 26 dead bodies which should have been delivered for identification on the basis of the agreement between the representatives of the IV Corps and the HVO; Certified copy of the Report and Opinion of the ballistic experts Borislav Stanković and Zijah Šalaga, number: 02/5-233-1058 of 12 April 1997; Certified copy of the Order of the Higher Court in Mostar, number 341/96 of 13 November 1996, ordering the conduct of an expert evaluation by a ballistic expert with regard to the type and caliber of the weapon from which a bullet was shot, and which was found in the skull pertaining to the body of Dizdar Hivzija; Certified copy of the Order of the Higher Court in Mostar, number: 341/96 of 23 April 1996, ordering an expert evaluation of the earth samples taken from the bodies delivered on 9 November 1996 by the Croat side; Certified copy of the Report on the research of soil samples taken from the corpses delivered by the Croat side, the Institute for Agropedology Sarajevo dated June 1997; Decision of the Presidency of the Republic of Bosnia and Herzegovina Proclaiming the State of War ("Official Gazette of BiH", no. 7/92); Decision of the Presidency of Republic of Bosnia and Herzegovina Terminating the State of War ("Official Gazette of BiH" no. 50/95); Original cover letter of the ICTY in The Hague, number: OUR REF: RU20051219-02 of 16 January 2006; Decision of the Government of the Croat Republic Herzeg-Bosnia number: 01-I-728/93 of 22 December 1993 annulling the Decision on Establishment of the District Military Prison and the District Prison in Gabela, number: 01-I-350/93 of 8 June 1993, which was registered in the ICTY in The Hague under number 00570909. The authenticity of this Decision is confirmed by the ICTY seal and signature in The Hague; Report on the Sanitary Inspection in the Center for Preventive Isolation and the Detention Center in the location of Gabela, made on 29 September 1993 by the Infectologic-Epidemiologic-Toxicologic Service of the Croat Republic of Herzeg-Bosnia, HVO Defense Department, Health Sector, which was received on 2 October 1993 in the HVO, Defense Department in Mostar, and registered under number: 02-1-/355/93. This Report was registered in the ICTY in The Hague under numbers: 01519982, 01519983 and 01519984. The authenticity of the three pages of this Report is confirmed with the seal and signature of the ICTY authorized person in The Hague; Information of the HVO, Defense Department, Security Sector, number: 02-4-1-1126/93 of 17 August 1993, which is registered in the ICTY in The Hague under numbers: 01505896 and 01505897. The authenticity of two pages of this Information is confirmed by the seal and signature of the ICTY authorized person in The Hague; Information marked with "A" drafted by the HVO, Defense Department, Security Sector under number: 02-4-1-1351/93 of 20

September 1993, concerning the security situation and the conditions of detainees accommodation in the Military Remand Prison "Gabela". This Information is registered in the ICTY in The Hague under numbers: 0150580 and 01505807. The authenticity of two pages of this Information is confirmed by the seal and signature of the ICTY authorized person in The Hague; Report of the Sector for SIS and Military Police concerning the work of the POW Accommodation Facilities "Gabela" and "Heliodrom", number: 02-4-2-93-10 of 18 November 1993, which is registered in the ICTY in The Hague under numbers: 01026832, 01026833, 01026834, 01026835, 01026836, 01026837. The authenticity of all six pages of this Report is confirmed by the seal and signature of the ICTY in The Hague; Information on Conditions in the Gabela Military Remand Prison drafted by the SIS Center Čapljina under number 02-4/2-3-089/93 on 7 December 1993. This Information is registered in the ICTY in The Hague under numbers: 01546110, 01546112 and 01546111. The authenticity of all three pages of this Information is confirmed by the seal and signature of the ICTY authorized person in The Hague; Order of the Croat Republic Herzeg-Bosnia, the Ministry of Defense, Security Sector number: 02-4-1/93-143 of 13 December 1993, which is registered in the ICTY in The Hague under number: 01550478. The ICTY in The Hague confirmed the authenticity of this Order by the seal and signature of a person authorized by it; HVO Report of the Čapljina Military Police Čapljina, the Crime Prevention Department Čapljina of 15 December 1993 which is registered in the ICTY in The Hague under number: 01550477. The authenticity of this Report is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; Activity report of the coordinator for inmates and prisoners of war in the territory of the Croat Republic Herzeg-Bosnia for the period from 22 July 1993 to 25 December 1993, which was received by the Croat Community Herzeg-Bosnia, Defense Department, Security Sector Mostar, on 6 January 1994. This Report was registered in the ICTY in The Hague under number: 01566990. The authenticity of two pages of this report is confirmed by the signature and seal of the authorized person of the ICTY in The Hague; Report of the Croat Community Herzeg-Bosnia, Service for Exchange of Prisoners and Other Persons of the Croat Community Herzeg-Bosnia number: 01-IP-2049/96 of 11 November 1996, which was registered in the ICTY in the Hague under numbers: 01543803 and 01543804. The authenticity of two pages of this Report is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; Information of the Ministry of Defense of BiH No. 08-04-65-3/06 of 13 April 2006 to the Prosecutor's office of BiH on a manner of elaboration of the Publication HVO Camps in Herzegovina and its authors and Publication "HVO Camps in Herzegovina" which is registered in the ICTY in The Hague under numbers: 02064768 through 02064790. The authenticity of twenty three pages of this Publication is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; Report on the Living Conditions in the Centers for Preventive Care, made by the Commander of the IET Service GSS CR H-B, Chief Physician Dr. Mr. Sci. Ivo Curić on 24 November 1993, which is registered in the ICTY in The Hague under number 01040293. The authenticity of this document is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; List made by the Service for Exchange of Prisoners and Other Persons of the Croat Republic of Herzeg-Bosnia under number: 01-IP-229/93 on 15 December 1993, which is registered in the ICTY in The Hague under numbers: 01538807, 01538808, 01538809, 01538810 and 01538811. The authenticity of this list is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; List made by the Municipality Jablanica, the Jablanica Reporting Center, number: Sl. of 20 October 1993, concerning 551 camp detainees, who came to Jablanica from the "Gabela" Camp. This list is registered in the ICTY in The Hague under numbers: 107895, 07896, 107897, 107898, 107899, 107900, 107901 and 107902. The authenticity of this list is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; Report of the Service for

Exchange of Prisoners and Other Persons of the Croat Republic of Herzeg-Bosnia number: 01-IP-2/94 of 3 January 1994, with the tabular survey of the detainees released from the prisons of the CR H-B, which is registered in the ICTY in The Hague under numbers: 01570126, 0157027 and 01570128. The authenticity of this Report is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; Photo-documentation of the mortal remains of Dizdar Hivzija a.k.a. "Učo", number: 226/98, identification number 331, which is registered in the ICTY in The Hague under numbers: 03619069, 03619070, 03619071, 03619072, 03619073 and 03619074. The authenticity of all six pages of this photo-documentation is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; CD with a map, photographs and video records of the Gabela camp, which the Prosecutor's Office of BiH submitted to the ICTY in The Hague under number: Ref: RU 20051219-02, Certified copy of the ICRC Certificate number: BAZ-316361 issued in Zagreb on 19 July 1994 to the name of Balavac (Osman) Kemal; Certified copy of the ICRC Certificate number: BAZ-373591 issued in Zagreb on 2 August 1994 to the name of Selimović (Munib) Aziz; Certified copy of the ICRC Certificate number: BAZ-371406 issued in Zagreb on 11 July 1994 to the name of Omanović (Ibro) Mirsad; Certified copy of the ICRC Certificate number: BAZ-370642 issued in Zagreb on 31 October 1994 to the name of Zaklan (Bećir) Zlatan; Certified copy of the ICRC Certificate number: BAZ-370539 issued in Zagreb on 6 October 1994 to the name of Penava (Ibro) Hamzo; Certified copy of the ICRC Certificate number: BAZ-316319112 to the name of Turajlić Osman; Certified copy of the ICRC ID number: ... to the name of Gagula Selim; Certified copy of the ICRC ID card number: ... to the name of Čolaković Mirza; Certified copy of the ICRC Certificate number: BAZ-370580 issued in Zagreb on 21 June 1994 to the name of Šuta (Ibro) Alija; Certified copy of the ICRC Certificate number: BAZ-369593 issued in Zagreb on 7 July 1994 to the name of Tucaković (Halil) Hasan; Certified copy of the Certificate of the Association of Camp Detainees of Bosnia and Herzegovina number: 1798/2001 of 11 May 2001 to the name of Alaudin Veledar; Certified copy of the ICRC Certificate number: BAZ-370339 issued in Zagreb on 22 July 1994 to the name of Šetka (Halil) Senad; Certified copy of the ICRC ID card number: ... to the name of Vujinović Eldin; Certified copy of the ICRC ID card number: ... to the name of Cernica Ahmet; Certified copy of the message of Cernica Miradeta sent to Cernica Ahmet to the address of Gabela Čapljina through the ICRC; Certified copy of the ICRC Certificate number: BAZ-368263 issued in Zagreb on 12 July 1994 to the name of Cernica (Huso) Ahmet; Certified copy of the Certificate of the State Commission for Exchange of Prisoners of War of the Republic of Bosnia and Herzegovina number: 05-107/94 of 7 April 1994, confirming that Pizović (Omer) Bajro was registered as the detainee from 23 April 1993 to 19 March 1994; Certified copy of the Association of Camp Detainees of the Municipality Čapljina-Hotanjan in which Kurtović (Velija) Ramiz is registered under an ordinal number; Certified copy of the Association of Camp Detainees of Bosnia and Herzegovina of the list of camp detainees of the Municipality Čapljina-Opličići; Certified copy of the List of Camp Detainees of the Municipality Stolac, made by the Association of Camp Detainees of Bosnia and Herzegovina, which includes Klarić (Salko) Hadžo registered as the detainee in the Camp Gabela; Certified copy of the ICRC ID number: ... to the name of Topić Džemal; Original excerpt from the Register of Deaths to the name of Čolaković Alija; Original excerpt from the Register of Deaths to the name of Dizdar Hivzija; Certified copy of the Notice of Death to the name of Dizdar Hivzija; Original excerpt from the Register of Deaths to the name of Žujo Mirsad; Certified copy of the Notice of Death to the name of Žujo Mirsad; Original Report of the Federation Ministry of Defense, Security and Intelligence Sector number: 06-01/6-4.4-816-5/05 of 19 December 2005 with a copy of the Report with the ZZFF document number: 27-10-02-I-09-I-12-253-5/05 of 14 December 2005 and a copy of the document of the Čapljina Defense Department number: 22-3-I-03-22-15/05 of 5 December

2005; Copy of the Scheme of the Location of the Gabela Warehouse in Čapljina, submitted by the Federation Ministry of Defense, the Security and Intelligence Sector to the Prosecutor's Office of BiH on 29 December 2005 under number: 06-01/6-4.4-816-4/05; Original excerpt from the criminal record of the Police Station Čapljina, number: 02-02/6-2768/05 of 12 December 2005; Document of the Office of the Prosecutor of the ICTY in The Hague, number: 015167/GB/RR/436 of 28 November 2001; Decision of the Court of BiH, number: X-KRN/05/42 of 26 August 2005 on the Take-over of the Criminal Case, Judgment of the ICTY in The Hague in the Jelisić case, number: IT-95-10 of 19 October 1999, which took legal effect on 5 July 2001- paragraph 54; Certified Copy of the Peace Agreement and Annex to the Peace Agreement of 23 February 1994; Order of the HVO Headquarters, no. 02-2/1-01-616/93 of 17 April 1993; Proclamation of the 4<sup>th</sup> Corps of the Army of RBiH; Report of the Glorious 41<sup>st</sup> Motorized Brigade of the Army of RBiH of 24 April 1993; Report of the HVO First Brigade "Knez Domagoj", no. 1100-11-17-93-92 of 18 July 1993; Report of the HVO First Brigade "Knez Domagoj", no. 1100-11-17-93-82 of 15 June 1993; Order of the HVO Headquarters, no. 02-1-438/93 of 25 April 1993; Daily Report of the Čapljina Military Police for the days of 4 and 5 December 1993, no. 02-4/3-13/3-217/93 of 5 December 1993; Daily Report of the Čapljina Military Police no. 02-4/3-13/3-188/93 of 21 November 1993; Order of the Commander, Nedeljko Obradović, of the HVO First Brigade "Knez Domagoj", no. 1100-01-01-93-521 of 28 July 1993; the HVO First Brigade "Knez Domagoj", Headquarters, document no. 1100-01-01-93-318 of 23 April 1883; Order of the Commander, Nedeljko Obradović, of the HVO First Brigade "Knez Domagoj", no. 1100-01-01-93-480 of 8 July 1993; Order of the Commander, Nedeljko Obradović, of the HVO First Brigade "Knez Domagoj", no. 1100-01-01-93-497 of 6 July 1993; Agreement on the Cessation of Hostilities in Bosnia and Herzegovina concluded between General Milivoj Petković and General Sefer Halilović on 12 May 1993; Joint Statement signed by Mr. Alija Izetbegović and Mr. Mate Boban on 27 January 1993; Foundation for Structuring Current Political Relations between the Croats and the Muslims drafted by the representatives of SDA, Islamic Religious Community, Cultural Society "Preporod", and "Merhamet"; Front-lines Status Report for the Previous 24 Hours, drafted by the Headquarters of the Armed Forces of the CC-HB, no. 02-2/1-02-3183/93 of 26 October 1993; Front-lines Status Report for the Previous 24 Hours, drafted by the Headquarters of the Armed Forces of the CC-HB no. 02-2/1-02-3168/93 of 25 October 1993; Front-lines Status Report for the Previous 24 Hours for 20/21 October 1993, drafted by the Headquarters of the Armed Forces of the CC-HB no. 02-2/1-02-3109/93 of 21 October 1993; Extraordinary Report of the HVO Headquarters, no. 03-485/93 of 11 June 1993; Order of the HVO Headquarters no. 02-2/1-01-646/93 of 17 April 1993; Front-lines Status Report for the Previous 24 Hours, no. 02-2/1-02-2227/93 of 30 August 1993; Front-lines Status Report for the day of 28/29 August 1993, no. 02-2/1-02-2224/93 of 29 August 1993; Front-lines Status Report of the HVO Headquarters for the Previous 24 Hours, no. 02-2/1-02-2194/93 of 28 August 1993; Front-lines Status Report for the Previous 24 Hours of the HVO Headquarters, no. 02-2/1-02-2034/93 of 19 August 1993; Front-lines Status Report for the Previous 24 Hours of the HVO Headquarters, no. 02-2/1-02-1998/93 of 17 August 1993; Front-lines Status Report for the Previous 24 Hours of the HVO Headquarters, no. 02-2/1-02-1930/93 of 16 August 1993; Front-lines Status Report for the Previous 24 Hours of the HVO Headquarters, no. 02-2-/1-02-1862/93 of 13 August 1993; Operative Report for the day of 5 August 1993 drafted by the HVO Headquarters, no. 01-279/93 of 5 August 1993; Front-lines Status Report for the Previous 24 Hours drafted by the HVO Headquarters, no. 02-2/1-01-15-23/93 of 24 July 1993; Situation Overview upon Reports, drafted by the HVO Headquarters, no. 02-2/1-02-1363/93 of 15 July 1993; Order of the Head of the Administration of Military Police Valentin Ćorić No. 02-4/3-02-321793 of 14 January 1993; Official Note of the Military Police Čapljina- Crime Prevention Department no. 02-4/3-06/2-104/93 of 19 October 1993.

The authenticity of this Note is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; Official Note on Verification of the Data of person from the Ministry of Defense, Security and Intelligence Service ref. no. 02-08-3-344/95 of 30 May 1995. The authenticity of this Note is confirmed by the seal and signature of the authorized person of the ICTY in The Hague; criminal records of Dževad Paja (witness for the defense) issued by the Čapljina Police Administration - Stolac Police Station; Criminal records of Mirsad Šuta, Ramiz Torla, Emir Šabanović and Osman Turajlić (witnesses for the defense) issued by the Čapljina Police Administration.

7. The Court heard the following witnesses for the defense: Lizde Rezalija, Ćamil Klepo, Ramiz Torlo, Omer Torlo, Emir Šabanović, Safet Peco, Osman Turajlić, Dževad Pajo, Jasminka Šunjić, Boško Buntić, Mirsad Šuta, Pero Putica, Vlatko Vego, Nikola Pehar, Milo Ćemeraš, Darko Križanović, Đikov Ljubo, Jusuf Elezović, Pavo Prce, Nikola Vuletić, Zvonko Jurković, Božo Buntić, Ivica Bačić, Zlatko Bošnjak, Ivan Raguz, Kupusija Salih, Kemal Balavac, Sabljčić Smail and the Accused Nikola Andrun as a witness.

8. At the main trial, by reading and presentation, the content of the following documentation of the defense was presented: military ID card of Herzeg-Bosnia to the name of Nikola Andrun; military ID card of Herzeg-Bosnia, Croat Defense Council no. 14733 to the name of Nikola Andrun; military ID card of Herzeg-Bosnia, Croat Defense Council no. AA2088 to the name of Nikola Andrun; Certificate of the Police Administration Čapljina no. 02-02/6-102706 of 20 April 2006 that Nikola Andrun, son of Drago has no previous convictions; Certificate of the company "Bregava" d.d. Čapljina no. 363/06 of 26 September 2006 that Nikola Andrun, son of Drago, was employed in that company in the period 1 January 1993 to 15 July 1993; four electricity bills to the name of Nikola Andrun, utility bills to the name of Srećko Marić (Andrun) and water bill to the name of Srećko Marić (Andrun); Death Certificate to the name of Lutko Pavlović; Certificate of Mostar Defense Administration, Čapljina Defense Department no. 22-3-1-49-1-419/05-01 of 12 December 2005 that Nikola Andrun, son of Drago, was a member of the HVO in the period 20 September 1991 to 31 March 1996 as a soldier; Letter of Munevera Knežević from Germany; amateur photographs of the hangar in the "Gabela" prison; Indictment of the Higher Court in Mostar no. KT-9/95 of 7 August 1995 against Jackije Banny, Verdict of the Higher Court in Mostar no. K9/95 of 8 September 1995 and Verdict of the Supreme Court of FBiH no. KŽ 259/95 of 23 February 1996 against Jackije Aklof Banny; *Slobodna Dalmacija* daily newspaper of 20 August 1993.

9. The Court has also used its legal possibility and pursuant to Article 261 (2) e) of the CPC of BiH, on 5 December 2006, carried out the identification of the crime scene in the territory of the Municipality of Čapljina, former „Gabela” camp, on which records were made while the State and the Investigation and Protection Agency (SIPA) made a video footage, a photo documentation and a sketch of the crime scene under number 17-02/8-04-1-1459/06.

10. Following the completion of the evidentiary procedure, within her closing arguments, the Prosecutor stated that the prosecution deems established the existence of an armed conflict between the HVO and Army of R BiH in the critical period. Further, as stated by the Prosecutor, the violation of the Geneva Conventions resulting in the fulfillment of the objective requirement within the criminal offense of War Crimes against Civilians is indisputable. In reference to this blanket norm the status of the detainees in the Gabela camp is also indisputable. Referring to the ICTY jurisprudence the prosecution stated that if the detainees at the moment of their arrest were wearing weapons and uniforms then at the latest by their detention in the camp they ceased to participate in combat operations so they should

be considered civilians at the period when the criminal offenses were committed. Prior to analyzing the reasoning of the prosecution related to individual counts of the Indictment (see the respective paragraphs of the Verdict) the Prosecutor in her closing argument considered the position of the Accused within the Gabela camp system. She stated that in the evidentiary procedure it was established beyond doubt that the Accused performed the function of a Deputy to the Head of the Camp, Boko Previšić. This fact, in the opinion of the Prosecutor's Office, primarily arises from material evidence presented during the main trial, and the Prosecutor emphasized in particular the 1995 Report of the Security Service of Herzeg-Bosnia made on the occasion of a security check of the Accused's brother.

11. The lead counsel for the Accused, lawyer Hamdija Kulenović, in his closing arguments, drew attention to the principle of the application of a more lenient law, stating, that based on this principle, set forth by the European Convention on Human Rights and the CPC of BiH, the Accused should be tried pursuant to the CC of SFRY. The Defense Attorney further disputes the allegation of the prosecution that the Accused was the Deputy Head of the Gabela camp, indicating that all the witnesses only passed indirect information and subjective opinions and not facts that the Court could rely on. Also, the Defense Attorney, qualifies the material evidence as invalid since they originate from people who are not competent or persons who did not have a real insight into the situation in the camp. In reference to this issue the Defense Attorney described the Head of the Camp Boko Previšić as an unstable personality, not allowing anyone to get close to him and as one pulling all the strings himself. The Defense Attorney concluded that his client was an ordinary guard with no formal or actual possibility to prevent the crimes committed in the camp or to stand up against his superiors.

12. The other Defense Attorney for the Accused, lawyer Nikica Gržić, in his closing arguments, in the first place also referred to the issue of his client's capacity within the Gabela camp, indicating that different names were used in the prosecution evidence, such as "assistant head" and "deputy". Defense Attorney Gržić is then drawing attention to the period up to mid July 1993 when the Accused, as he claims, was employed in the "Bregava" company in Domanovići, therefore, the critical timeframe given in the Indictment is too broad. In respect to the status of Mirsad Muminović a.k.a. "Tadija", lawyer Gržić notes that the prosecution failed to give the final answer to the question of the time period during which he carried out the function that his client is now charged with. Analyzing the counts of the Indictment from the aspect of the defense, Defense Attorney Gržić indicates in particular Count 13 stating that the International Red Cross was not announcing its arrival to the Gabela camp but to the higher command of the HVO which then would approve the visits, therefore, the Defense Attorney concludes that the order to transfer special detainees to the silos in Čapljina had to be issued at a higher level, thus the Accused cannot be charged with this criminal offense.

13. Following the consideration of some counts of the Indictment, the Accused, in his argument, supported the closing arguments of his Defense Attorneys.

14. After the Court, with due diligence and in terms of contents, evaluated each evidence individually and in relation to other evidence, with prior analysis of the allegations of the prosecution, that is, of the defense, the Court established the state of facts as in the operative part under I and II.

## **Established State of the Facts**

### **I- Facts of General Importance**

#### *Existence of Armed Conflict*

15. Reviewing the evidence of the Prosecutor's Office – the Decision of the Presidency of the Republic of Bosnia and Herzegovina (R BiH) Proclaiming the State of War of 20 June 1992 and the Decision of the Presidency of the Republic of Bosnia and Herzegovina Terminating the State of War of 20 June 1995, the Court established the existence of an armed conflict in the territory of R BiH, which fact, in any case, was not disputable during the proceedings in the case.

16. Also, the parties to the proceedings as well as the Court, did not consider disputable the fact that, during the war in Bosnia and Herzegovina, in the second half of 1993, there was an armed conflict between the HVO and the Army of the R BiH (for which period, also by the Indictment of the Prosecutor's Office, Nikola Andrun was charged with the commission of criminal offenses) in the territory of the municipalities of Čapljina and Stolac and that the conflict was terminated by the signing of the Peace Agreement and an Annex to the Peace Agreement in Zagreb on 23 February 1994. The Prosecutor's Office presented sufficient material evidence on that fact (33 in total) listed in the introductory part of this Verdict, and also the witnesses for the prosecution testified in detail about that conflict and in particular within the context of the circumstances of their arrest by members of the HVO and their detention in, in this case, the Gabela camp.

17. Establishment of these facts proved to be significant because the War Crimes against Civilians can only be committed during war, armed conflict or occupation.

#### *The Gabela Camp -- Physical Appearance and Conditions in the Camp*

18. Based on the evidence of the Prosecutor's Office - the Decision of the HVO Croat Community of Herzeg-Bosnia of 8 June 1993, it can be seen that the "Gabela" District Military Prison was established in the buildings of military barracks of the former JNA, in Gabela, Čapljina Municipality. Also, based on the material evidence, CD with a map, photographs and video footages of the Gabela camp, that is, exhibit no. 52 of the Prosecutor's Office, forwarded by the ICTY in The Hague, reference number RU 20051219-02; Records on the Crime Scene Identification with supporting photo-study, crime scene sketch and CD and mutually consistent statements of the witnesses for the prosecution but also of many witnesses for the defense including the statement of the Accused during his testimony, the Court established the fact according to which the said military prison was enclosed with barbed-wire, there were several observation posts, there was a guard post at the entrance gate, and behind it there was the Administration building, as the detainees called it, where upstairs there were administration offices and one room where arrested HVO members were detained. In this room there were also some other persons suspected of the commission of criminal offenses, while on the ground floor there was a room in which prominent Bosniaks and members of the Army of BiH were detained, as well as solitaries in which detained Bosniaks were tortured. Within the complex of the former military barracks, in addition to other buildings, there were four identical hangars in which detained Bosniaks were placed. The

surface of each hangar was approximately 400-500 m<sup>2</sup> and about 500-600 Bosniaks were detained in each of them.

19. As regards the detention conditions, they are best illustrated by the testimonies of persons who were detainees at that time and who had experienced the conditions themselves. Their fully consistent testimonies as well as all the testimonies of the witnesses for the prosecution and the ones for the defense demonstrate the fact that the conditions of their detention were cruel and unhealthy due to over-population, lack of air, the fact that there were no beds so they were lying on the concrete floor, which in some cases was covered with a blanket, and due to the lack of toilet facilities inside the hangars. They used to get one or two meals per day in a form of liquid food which could hardly be called food, and even that in small quantities with a thin slice of bread given that a loaf of bread was cut in 14 to 20 slices. They would get insufficient quantities of water, which was a special problem considering the high temperatures in Herzegovina during summer and the lack of sufficient fresh air in the hangars. For a certain period of time the detainees were using tin pails for their physiological necessities. In mid July 1993, during the fights between the Army of R BiH and HVO on the Dubravka plateau, the detained Bosniaks were kept without air, water and food for several days, which caused many of them to faint. The convincing testimonies of Enver Bojčić, Ahmet Cernica, Ramiz Kurtović and Ramiz Leto illustrate the fact that the situation on the frontline reflected significantly on the living conditions as well as on the torturing of the detainees. The witnesses Eldin Vujinović, Senad Šetka, Kemal Balavac and Džemal Topić point out that members of the HVO special units, “Ludvig Pavlović” and “Božen Šimović”, were frequently coming to the Gabela camp where they were beating up the detainees, standing out in cruel treatment against the detained Bosniaks.

20. Based on the evidence of the Prosecutor’s Office, the Decision of the Government of the Croat Republic of Herzeg-Bosnia of 22 December 1993, it could be seen that the Decision on the Establishment of the District Military Prison in Gabela of 8 June 1993 was annulled. Based on the foregoing, a certain number of detainees was transferred to the Military Investigation Prison in Ljubuški and Military Prison “Heliodrom”, a certain number was transferred to the territory controlled by the Army of R BiH while the remaining detainees left for third countries. Numerous witnesses for the prosecution have also spoken about these circumstances, including the testimony of the Accused.

21. Based on the evaluation of the presented evidence, the Court found established the fact that “Gabela”, regardless of the fact that it was established as a district military prison and the fact that in different documents of the authorities and institutions of provenance of Herzeg-Bosnia used the names such as “war prisoners lodgings” and “detention center“, was actually a camp in the real sense of the word, as “Gabela” absolutely justifiably was called by its previous detainees in their testimonies and in which the Accused has committed or at least commenced the majority of the criminal offenses as indicated in the factual description of the sentencing part of the Verdict.

22. Having said that, the Court is aware of the fact that the Accused is not charged with anything that would be connected to the establishment of the “Gabela” camp and the conditions in the camp at the time, but it deems important to consider the facts referring to this matter given that they constitute the contextual grounds extending throughout the factual description of the operative part of the Verdict.

### *Status of the Detainees*

23. During the presentation of evidence, the Prosecutor's Office proved beyond reasonable doubt that all the detainees in the Gabela camp, that is, injured parties from the factual description of the Verdict were persons protected by the Geneva Conventions on the Protection of Civilian Persons in Time of War of 12 August 1949. In other words, all the witnesses for the prosecution who were also detainees in that camp stated that they were arrested as civilians, except for Ahmet Cernica, Bajro Pizović and Kemal Balavac who were members of the "Bregava" unit of the Army of R BiH, but who, as interpreted by this Court, are also considered civilians given that at the moment of arrest they were not involved in any military activities and who, by the very act of deprivation of liberty, were incapacitated for fight and *tempore criminis* they were *hors de combat* as they were detained in the Gabela camp. Based on the above mentioned facts they could not have had the status of war prisoners but they had the status of civilians, thus they acquired the capacity of a passive subject in terms of this criminal offense. The detainees in the hangars, unlike prominent Bosniaks detained in the cells of the Administrative building, were registered and had documents issued by the International Committee of the Red Cross (ICRC) as can be seen from the evidence specified in the introduction of the reasoning.

24. In any case, paragraph 54 of the final ICTY judgment in The Hague, in the Jelisić case, number IT-95/10 it was established, *inter alia* "[...] that reference to a civilian population would seek to place the emphasis more on the collective aspect of the crime than on the status of the victims, that the civilian population must include all those persons bearing or having borne arms who had not, strictly speaking, been involved in military activities. The Trial Chamber therefore adjudges that the notion of civilian population as used in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed hors de combat when the crime is perpetrated."

25. The established fact according to which the detainees who were first arrested and then detained in the Gabela camp had the status of civilians proved to be important considering the content of Article 3 of the Geneva Conventions on the Protection of Civilian Persons in Time of War of 12 August 1949 prohibiting, among other things, acts against civilians, that is, persons protected by the Convention, such as the violation of life and bodily integrity, in particular murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity, in particular humiliating and degrading treatment. So, the said Convention regulates the position of civilians during war, that is, armed conflict, as does the Protocol I Additional to the 1977 Geneva Conventions Relating to the Protection Of Victims of International Armed Conflicts ratified in 1978 (Official Gazette of the SFRY, International Treaties, no. 16/78). The term armed conflict covers not only the international conflict but also the internal armed conflict if the requirements referred to in the Protocol II Additional to the 1949 Geneva Conventions are met.

26. The violation of a rule of international law in terms of this blanket criminal offense represents an objective condition for punishability. During the proceedings it was proved, subject to further elaboration, that the Accused through torture, participation in torture, participation in the violation of life and bodily integrity, inhumane treatment, intimidation and terror acted in violation of the said provision of the Geneva Convention and thus violated rules of international humanitarian law.

*Consideration of the Status of the Accused Nikola Andrun in the Gabela Camp*

27. The Prosecution claims that the role of the Accused as Deputy Head of the Gabela camp should be taken as an aggravating factor in respect to the criminal offense of War Crimes against Civilians that he committed.

28. The Prosecution, in that sense, in addition to a large number of the witnesses also presented material evidence in which the Accused is mentioned as the Deputy Head of the Gabela camp, as follows: Information of the HVO, Defense Department, Security Sector of the Croat Community of Herzeg-Bosnia, number: 02-4-1-1351/93 of 20 September 1993; Report of the Sector for SIS and Military Police concerning the work of the POW Accommodation Facility "Gabela" and "Heliodrom", number: 02-1-II-03/93 of 18 November 1993; Report of the Military Police Čapljina, Crime Prevention Department, of 15 December 1993; Activity Report by the coordinator for inmates and prisoners of war in the territory of the Croat Republic Herzeg-Bosnia for the period from 22 July 1993 to 25 December 1993, made on 26 December 1993; Official Note of the Military Police Čapljina - Crime Prevention Department/Dretelj no. 02-4/3-06/2-104/93 of 19 October 1993; Official Note on Data Verification of Person, Security Intelligence Service of the Ministry of Defense, SIS Center Čapljina, no. 02-08-3-344/95 of 30 May 1995.

29. In their closing arguments the defense disputed the validity of the material evidence and the competence of the authors of this evidence, stating that these authors did not know what duties the Accused actually did carry out, but that they made reports based on rumors. The defense reiterated the claim that the Accused Nikola Andrun was an ordinary guard and that he had no influence on the events in the camp at all.

30. Opposite to the view expressed by the defense, the Court reached a different conclusion, being of the opinion that the material evidence presented by the prosecution originates from different sources, that they were made on different occasions and that they are verified by different authorities of Herzeg-Bosnia, which at that time did not have any reason to indicate the Accused as the Deputy Head of the camp together with the name of the Head of the Gabela camp if he was just an ordinary guard. Although none of the documents officially appoints the Accused to the position of Deputy Head, the mere fact that even without such formal appointment or order and even without visible ranks or insignia on the uniform of the Accused, the authors of these documents, based on his conduct or fact that they knew him, perceived him as the Deputy Head, which only indicates his real position within the camp. So, the signatories of these documents recognize Nikola Andrun as the Deputy Head of the camp. Thus, for example, witness for the defense Boško Buntić who, as an *insider*, submitted the report verified by the stamp of the Croat Community Herzeg-Bosnia as the Head of the Crime Prevention Department of the Military Police in Čapljina, in which he states the name of the Accused as the Deputy Head of the camp, during his testimony confirmed the accuracy of the data given in the content of that document. If, in addition to the above mentioned, we consider the official note referring to a full check-up of security data of Ivica Andrun, brother of the Accused, made by the SIS of the Ministry of Defense of the Croat Republic of Herzeg-Bosnia, indicating the position of the Accused as the Assistant Head of the prison in Gabela, it is more than clear that these data are correct given the authority and character of the activities of the drafter of that document.

31. The Court also evaluated testimonies of the witnesses given at the main trial indicating that the Accused introduced himself in the above mentioned capacity (Hadžo Klarić, Meho

Zelević) and that he was introduced as the Deputy Head (Senad Šetka, Ahmed Cernica), that he acted as the Deputy Head of the “Gabela” camp (Mirza Čolaković, Senad Šetka, Kemal Balavac, Zlatan Zaklan, Hamza Penava, Alaudin Veledar, Enver Bojić, Ahmed Cernica, Huso Marić, Džemal Topić, Aziz Selimović, Hasan Tucaković, Ramiz Kurtović, Alija Šuta, Selim Gagula, Meho Zelević), and that he had real power over his subordinates (Zlatan Zaklan, Alaudin Veledar, Kemal Balavac, Eldin Vujinović, Senad Šetka, Džemal Topić).

32. For example, the testimony of the witness Zlatan Zaklan indicates the fact that the Accused had authorities similar to the Head of the camp, stating that the guards were not allowed to let the detainees out and that the Accused could do that. The witness further points out that in the evening hours it happened that the Accused would come to the hangar, issue orders and take out some detainees. The same witness describes the Accused as a man wiser than Boko Previšić as is also confirmed by a large number of other witnesses who, essentially, described the Head of the camp as a person who had been retired early due to mental problems.

33. Thus, the witness Senad Šetka said about Boko Previšić that he would come to the hangar every 2 to 3 days, that he would give lectures to the detainees, stating that they were no longer Muslims but that as of now they were Bosniaks, that he discussed how the Muslims originated from Catholics. In respect to the Accused, the witness, on the same occasion, says that he would come to the hangar frequently, that he did not give lectures, but when he would come “something concrete would happen”. This statement is also confirmed by the testimony of Hasan Tucaković stating that the Accused “did not talk much, he was quiet. It was not clear to me why Boko was the commander because Andrun looked more collected.”

34. Based on the foregoing, the Court founded its conclusion that the Accused carried out the duty of the Deputy Head of the Gabela camp on the statements of the said witnesses (see paragraph 31) who, given their existential situation as detainees in this camp, had a preserved perception based on which they stated that the Accused had occupied this position.

35. Additionally, the evidence of the witnesses for the prosecution were considerably corroborated by some witnesses for the defense as regards the type of weapons that the Accused was carrying in the camp, that is, that he did not carry weapons as ordinary guards (Ćamil Klepo, Ramiz Torlo, Omer Torlo, Osman Turajlić, Dževad Pajo, Boško Buntić, Pero Putica, Đikov Ljubo, Jusuf Elezović), the position of the Accused in the camp at the spot near the gate wherefrom he could monitor what was coming in and out of the camp (Mirsad Šuta, Pavo Prce, Zvonko Jurković, Božo Buntić, Ivica Bačić) and the type of his regular duties that were significantly different from the duties of a guard (Ćamil Klepo, Dževad Pajo). Also, the statement of the Accused himself in the capacity as a witness implicitly indicates his eminent position within the camp. In other words, he himself, before the Court at the main trial held on 1 December 2006, says: “Many times he would send me up there, Head Boko to see how the guards were working.” Also, the Accused in his testimony indicates that he would pass on to Boko what was happening in the camp; in addition, on several occasions, out of simple curiosity, he asked the detainees returning from interrogation to the hangar or cell, what they were asked by the SIS interrogators, which question, as stated by Andrun himself, the detainees answered in 90% of the cases. The important fact was established based on statements of the witnesses for the prosecution, which fact is not disputed even by Andrun himself, but on the contrary he recognizes it, that he was seen in the zone of the entrance gate of the camp, meaning at the place which by the nature of the things enabled him to have an insight in and effective control over all the events in the camp, which is certainly a higher

position than the one of an ordinary guard as, absolutely ungrounded, the defense wants to present. Further, the Accused describes very precisely the position of the buildings in the camp (which in addition to the exceptional memory he also showed during the identification of the crime scene), details on changing of the guards and, in general, everything that kept the camp in operation.

36. On the other hand, the witnesses for the defense: Lizda Rezalija, Ramiz Torlo, Omer Torlo, Safet Peco, Dževad Pajo, Boško Buntić, Mirsad Šuta, Pero Putica, Mile Čemeraš, Jusuf Elezović and Ivica Bočić in their statements claimed that the Accused carried out the duty of a guard. Evaluating their statements, the Court found it indicative that the witnesses for the defense during testimony felt the need to express reservations using the words such as “what I saw” or “as far as I know” or “what I heard”; so, for example the witness for the defense Zvonko Jurković, indicates that he did not hear that Andrun mistreated anyone or similar, which as deemed by the Court indicates that such residual approach to testimony makes it deficient and as such unconvincing. In other words, the said witnesses only remember those things to the advantage of the Accused, and not against him, all this regarded within the context of a psychological evaluation of their statements. It is really very difficult to give credence to the witness for the defense Milo Čemeraš when he claims that Andrun was an ordinary guard and that he was not taking out (from the hangars) some detainees given that this witness himself was a guard in the “Gabela” camp at the critical time period, thus taking chances to be a suspect himself.

37. Correlating the evidence of the Prosecutor’s Office, both the material evidence of the same organization to which the Accused belonged during the war, and the statements of the witnesses, which corroborate each other, the Court, beyond reasonable doubt, established the fact according to which the Accused Nikola Andrun in the indicated time period, apart from his membership in the HVO “Knez Domagoj”, was also the Deputy Head of the Gabela camp.

38. The reference of the Defense Attorney Gržić made to the fact that the prosecution disposes with different names of duties which the Accused carried out at the relevant time, in the opinion of the Court is more a question of terminology than a question of essence.

39. The Court evaluated such an important established fact referring to the position of the Accused in the camp, among other things by consulting jurisprudence of the ICTY<sup>1</sup>, although from the aspect of criminal responsibility in a somewhat different context, as an aggravating circumstance for the Accused.

## **Sentencing Part of the Verdict**

### **II- Facts Established through Evaluation of Evidence in Respect to the Commission of Acts which are at the Core of the Crimes of the Accused according to the Counts of the Indictment**

*With respect to the act referred to in Paragraph 2 of the Operative part of the Verdict*

40. By the amended Indictment in respect to this Count, the following was indicated:

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<sup>1</sup> *Sikirica case, ICTY, trial chamber judgment number IT-95-8 dated 13 November 2001, paragraph 140*

On an unidentified date, in late September or early October 1993, during the evening hours, together with the SIS-HVO investigator Marinko Marić, he took out from the Gabela camp the detainee Enes Bratić and brought him to the Police Station Čapljina, to a room in which Vlado Rajić, investigator in this Station, waited for him and then kicked him several times with his feet wearing military boots, all over his body, whereupon Marinko Marić came into the room and twisted his right hand finger and broke it, put a pistol on his mouth and cocked it, strongly hit him on the head with a chair handle several times, after which Nikola Andrun entered the room and kicked the detainee Enes Bratić in the part of the chest below the heart.

41. The Court heard the witness Enes Bratić in reference to these circumstances of torture in the Police Station Čapljina. In his testimony given at the main trial the witness Enes Bratić stated that one night a police vehicle came from Čapljina and that Mario Marić entered the hangar in the “Gabela” camp while Nikola Andrun was standing at the door. After the witness was called out, he went out and entered the vehicle. The driver was in the vehicle. Andrun also entered the vehicle and sat next to him in the back seat, Mario Marić also entered and sat in the front seat. They took him to the Police Station in Čapljina. In the meantime, the witness asked Andrun what was happening, where they were taking him, and he answered that he would “riddle him with bullets” if he continued asking. When he entered the Police Station in Čapljina there were many police officers inside. He was told to put hands against the wall and he did that. Some started to beat him and when they stopped beating he was taken to the office of Vlado Rajić, where Rajić and Mario beat him. They were beating him throughout the night with feet wearing military boots, hands, putting a pistol barrel in his mouth. Marić broke his finger. Nikola was in the same room sitting in the corner and when he was on his way out he kicked him - “scissor-kick” in the ribs and then Andrun left the room and did not come back any more. The factual description from this paragraph of the operative part of the Verdict is not completely identical to the factual description of the amended Indictment but it is harmonized with the results of the evidentiary procedure, statement of the witness Bratić who in his testimony did not confirm that he was beaten with a chair handle. The same witness also stated that Andrun was present in the room all the time (the Indictment alleges that the Accused entered the room later) and that he kicked the witness with scissor-kick in the ribs and, when asked by the Court, he said that it was possible that it was in the chest below his heart.

42. Answering additional questions in reference to the identity of Mario, that is Mario Marić, Bratić said that he did not know his full name but that it was the same person. The witness specified that Andrun kicked him in the ribs but he could not remember whether Andrun was wearing his military boots on that occasion.

43. During his cross-examination by the Accused, the witness stood by his previous allegations, answering to the questions of the Accused that when arriving to the “Gabela” camp he greeted the Accused who was his acquaintance and whom he saw again only when he was being taken out from the “Gabela” camp to the Police Station Čapljina. As regards the event itself, in cross-examination, the witness confirmed that on the critical occasion he was taken by the Accused and Marinko Marić to the Police Station in Čapljina where Vlado Rajić waited for him and that in the morning hours he was returned to the “Gabela” camp.

44. Heard in the capacity as a witness, the Accused does not contest that Enes Bratić was a detainee in the “Gabela” camp, but he claims that Enes Bratić was not taken to interrogation from the “Gabela” camp as stated in the Indictment, but that as late as 2 October 1993 when, following his temporary release from the camp during the visit of Mate Granić on 23

September 1993, he was taken back from the police station to the “Gabela” camp where he was previously beaten.

45. Evaluating the statement of the witness Enes Bratić, the Court decided to give full credence to it. In other words, the statement of this witness, who is at the same time the victim of the said events, is detailed, logical and non-contradictory so it does not leave any room for a doubt that this event did happen and developed exactly as the witness presented it at the main trial. Also, the defense itself, in cross-examination, in the opinion of this panel, did not manage to contest the testimony of this witness or to bring into question his credibility. In other words, the Accused does not contest that Enes Bratić was a detainee in the camp, that he was beaten in the police station, but he denies his participation in the concrete act as well as the fact that this detainee was taken to the said interrogation from the compound of the Gabela camp. However, the Court did not accept this part of statement of the Accused because it was obviously directed to deny his personal responsibility, while on the other hand the statement of Enes Bratić was convincing and fully detailed. Particularly important is the fact that the witness had known the Accused personally, that he recognized him on that occasion, therefore, the Court accepted his statement as a whole. The Court finds additional grounds for such conclusion in the fact according to which the witness Bratić, explicitly asked by the Prosecutor, stated that he was not aware of the status of the Accused in the camp, which certainly he would not have said if he had intended to charge the Accused.

46. The differences between the statement given in the Prosecutor’s Office of BiH a year before giving the statement at the main trial, which the defense pointed out, this Court finds absolutely understandable due to the lapse of a longer period of time from the day when these statements were given and also due to a longer period of time which elapsed from the moment of commission of the criminal offense itself, therefore, the credibility of the entirety of the statement of this witness is not challenged. The differences in the statements referring to the names and to the presence of some perpetrators, to specific parts of the body where the Accused kicked him or the means used for torture by several persons are also understandable as well as irrelevant considering the mental condition of the witness during the physical mistreatment.

47. Due to the above mentioned reasons, the Court deems proved that the Accused, in the manner and time as indicated in the Indictment, together with Marinko Marić, took out the detainee Enes Bratić from the hangar in the Gabela camp, took him to the Police Station in Čapljina, surrendered him to the police officers who were there to physically mistreat him, that he remained present during his torture, eventually kicking him in the ribs. Based on the entire context of the said acts, the Court reached the conclusion that the Accused undoubtedly knew what would happen to the witness at the place where he was taken to, and that as the Deputy Head of the camp used his powers to take out the witness from the hangar, that he attended and took part in the physical mistreatment of the witness, which indisputably results in his intent in respect to the actions committed in co-perpetration.

*With respect to the act referred to in Paragraph 4 of the Operative part of the Verdict*

48. This act refers to the event related to Alija Čolaković. Based on the testimony of Eldin Vujinović and Alija Šuta the Court established the fact according to which the Accused, together with other persons, took out the detainee Alija Čolaković from Hangar no. 3 who was then beaten by unknown HVO members until he fainted and whereupon they dragged him to

an unknown place. In reference to this event the witness Eldin Vujinović in his testimony stated: "Alija Čolaković was also detained with me. He was lying at 1.5 meters distance from me. Upon the order of Nikola Andrun he was taken to forced labor somewhere around Popovo polje. He tried to escape but he was arrested by the HVO unit, returned to the camp and stayed for 5 to 6 days in the hangar. He was taken out for work every day and every time he was beaten. One day he was taken out from the Hangar no. 3 and he never returned. Nikola Andrun took him away." Witness Alija Šuta testified about the same event from a different perspective: "I was outside the hangar with Nikica when Andrun and the guards came. I stayed in the guard-house when they left and took out Čolaković. The guard-house was at 10 to 15 meters distance from the hangar. I saw that they were beating him, several of them. Nikola Andrun and Nikica Pehar headed in my direction and the others were beating Alija. Nikola left and Nikica proceeded in my direction. Alija Čolaković never returned." During the cross-examination, the same witness further stated that the Accused was standing and watching the torture of Alija Čolaković for some 10 to 15 minutes before he left that spot, but that personally he did not participate in the beating. The same witness added that the Accused did not do anything to prevent further beating of Čolaković and that two HVO soldiers unknown to him dragged the more dead than alive body of Alija Čolaković in the direction of Hangar no. 2. Witness Senad Šetka has confirmed the fact that when Alija Čolaković was being taken out of the hangar Eldin Vujinović was present in the hangar, so he was 6-7 meters away from him, except that Šetka stated that Čolaković was taken out by Marinko Marić, whereas he claimed when the Prosecutor examined him in redirect that Čolaković was taken out by Mile Čemeraš. The Court could not regard Šetka's testimony as convincing because he changed his statement with respect to this important fact. The Court drew a similar conclusion with respect to the testimony of Hamza Penava, who introduced a new person into this event when he claimed that Nikica Soldo had taken Čolaković out of the hangar, but he is the only witness who claims this. As a contrast, the Court judged the respective statements of Vujinović and Alija Šuta as direct witnesses to be convincing as it found them to be detailed and non-contradictory.

49. The respective testimonies of Eldin Vujinović, who was able to watch the event from inside the hangar, and Alija Šuta, who was in front of the hangar on that occasion, complement each other with respect to the sequence in which the event concerned developed. Therefore, on the basis of their testimonies the Court gained a comprehensive picture of the events related to this Count of the Indictment, conclusive with the moment of torture of Alija Čolaković by the HVO soldiers.

50. Although the defense tried in its closing argument to discredit witness Alija Šuta, his statement that on 17 July 1993 he arrived in the Gabela camp as a detainee, where he had been placed into Hangar no. 3, and that he got out of that hangar for the first time only after 40 days, corresponds with respect to the time period to his testimony concerning this Count of the Indictment, according to which the criminal offense happened on an undetermined day in October that year.

51. With respect to this Count of the Indictment, the Accused himself stresses, generally contesting it, that victim Alija Čolaković's brother was also detained in the same hangar and he wonders why the Prosecutor's Office proposed witnesses Eldin Vujinović and Alija Šuta to testify about this instead of examining the victim's brother. The Court judged this argument to be irrelevant, since it is up to the Prosecutor's Office to choose witnesses who could corroborate the allegations in the Indictment in the best way and it is up to the Court only to evaluate the credibility of statements of the heard witnesses.

52. The Court rendered a legal evaluation of this act and found the Accused guilty of the commission of criminal act (in violation of Article 173 c) of CC BiH - violation of bodily integrity and torture) as a co-perpetrator, since the Prosecution did not provide sufficient evidence for establishing beyond reasonable doubt the commission of the criminal act of killing referred to in the same provision of the law, as the Indictment asserts. It was not disputable for the Court that having been taken out by the Accused, Alija Čolaković never returned to the hangar and that his mortal remains were exhumed on 25 April 1998 from the mass grave in Tasovčići and thereafter re-exhumed on 10 December 2002 and buried following the identification on 27 October 2003, as it follows from the presented evidence. However, for the Court to be able to make a firm and reliable conclusion that the Accused committed the murder of Alija Čolaković as a co-perpetrator, when reviewing the causal link between the taking out of the victim by the Accused as the first and the death of the victim as the final fact, in the light of the presented evidence, it has remained unproven whose act caused the fatal consequence, even whether it was a death caused by violence at all. In particular, it has not been proven whether Čolaković's death was a direct consequence of the torture by the HVO soldiers. There is neither material nor other evidence about this decisive fact, therefore, it was not possible to draw the conclusion beyond reasonable doubt that the Accused committed the murder of the victim as a co-perpetrator.

53. On the one hand, this is so because the Court could not establish beyond reasonable doubt from the presented evidence that the death of this victim was a direct consequence of mistreatment by the HVO soldiers during which the Accused was present. Moreover, it cannot be concluded from the testimony of Alija Šuta, the eyewitness of the event, that the HVO soldiers beat Čolaković to death. This witness only states that two soldiers dragged the victim away more dead than alive. In addition to this, the results of the forensic expertise by the heard medical forensic expert Dr Ilijas Dobrača as to the cause of death are insufficient, as he could not be explicit about that circumstance. Instead, based on the fact that the Accused took this detainee out of the hangar, and, according to the convincing testimony of witness Eldin Vujinović, the detainee had regularly been tortured after being taken out of the hangar and then returned to the hangar on previous days, the Accused could objectively hope that things would end in the same way again. The Prosecutor's Office did not present a single piece of evidence that would lead to the conclusion that the Accused was aware that the victim Čolaković would be taken away and/or liquidated and that he wanted such consequence to happen. The general criminal law principle *in dubio pro reo* was taken into account in all this.

54. Starting from all these circumstances of fact a reasonable evaluator would draw the conclusion that the Accused's general relation to the committed criminal offense, and the Court finds his responsibility for the said offense to be proven, would be obvious from his conduct. Therefore, on the basis of the said witness testimonies the Court established as an indisputable fact that the Accused undertook a real action -- taking the victim out of the hangar knowing that HVO soldiers were waiting for him in front with the intention of beating the victim Čolaković. The torture and violation of Čolaković's bodily integrity had happened before, so, based on it, the Court finds as proven a direct intent on the part of the Accused, who acted on the concrete occasion as a co-perpetrator only with respect to the violation of bodily integrity and torture of victim Alija Čolaković, not beyond it, as the Prosecution believes.

55. The Accused was beyond reasonable doubt aware of the actions of the other participants and his role in that act, without which minimal connection there is no complicity. The fact

that the Accused Andrun in the said capacity, if not the official, then a de facto deputy head of the camp, after having delivered the victim to the soldiers was present for a certain period of time during the torture of the victim and in that way gave significant support to the soldiers, tells in itself that his act represents a part of direct perpetration of criminal offense and constitutes a unity with the acts of the other co-perpetrators. From the fact that the Accused was present during the torture of the victim the Court draws the conclusion that the Accused thus demonstrated his functional control over the act, given that the act of a co-perpetrator cannot be restricted to the act of perpetration only. In addition to compliance with the objective element in terms of this criminal act, the subjective element of the act was also complied with. Taking into consideration the entirety of the factual circumstances established with the presented evidence, including the circumstance that he represented a person who could take the detainees out of the hangars whenever he wanted, which ordinary guards could not do, the Accused possessed a specific awareness and volition for joint action, which fits into the will of each of the co-perpetrators to commit the act of torture and violation of bodily integrity of victim Čolaković as their own (*animus auctoris*). Since the death of victim Čolaković cannot be brought in correlation with the acts of the Accused, the Court omitted from the description of facts the wording from the Indictment concerning the exhumation and re-exhumation of Alija Čolaković's mortal remains.

56. The Court hereby notes that the issue here is not command responsibility, but a direct personal responsibility of the Accused for taking out and delivering the victim and his presence during the torture of the victim, which acts must be viewed, as has already been said, as a significant support to the direct perpetrators of the torture. Therefore, it is an active act that the Accused is charged with, as this Court finds, in the sense of torture and violation of bodily integrity committed in co-perpetration, not an omission – a passive conduct of the Accused related to the moment when his position would have him actively prevent a prohibited action, in which hypothetical case it would be possible to speak about command responsibility.

*With respect to the act referred to in Paragraph 5 of the operative part of the Verdict*

57. That the Accused committed the criminal offense of War Crimes against Civilians in violation of Article 173 (1), in this case of Item c) (torture and violation of bodily integrity), in conjunction with Article 180 (1) and Article 29 of CC BiH, in the manner described in Paragraph 5 of the sentencing part of the Verdict, follows beyond doubt from the statement of witness Mirsad Omanović, direct victim of the criminal acts of the Accused, and the statement of witness Aziz Selimović, who testified about taking Omanović out of and his return to Hangar no. 2, in which both were detained.

58. To wit, without doubts about the identity of the Accused and stressing that he had known the Accused since before the war and at the same time pointing at the Accused in the courtroom, witness Mirsad Omanović completely confirmed the allegations in the Indictment, explaining in detail how upon the return from labor outside the camp the Accused would take him out of the hangar, drove him by car to another building where, without doing anything, the Accused watched the torture that the witness was subjected to by Marinko Marić. The witness particularly stressed the following in his statement: “They told me that I had brought 5,000 marks. I said that I had not and that I did not have money. Marinko hit me. Nikola watched it. They accused me of stealing ammunition and arms from the HVO for the Army. They took me back to the hangar by car. They told me to bring money in the evening,

otherwise I would be liquidated. In the evening, Andrun and Marinko called out my name. They took me to the same room again. Marinko beat me, ordered me to undress and when he saw that I did not have the money, he hit me with a baton, kicked with his boot, fired shots above my head and said he left a bullet in. He put a pistol into my mouth and pulled the trigger. I swore that I did not have it, I begged him to kill me. All that time Nikola was present, he was sitting on a desk. At the door of the hangar Nikola and Marinko told me: If you do not bring money, you will be killed tomorrow evening. I told them: Don't wait, kill me right now." The witness states that after this second torture the Accused and Marinko Marić no longer came to take him.

59. Aziz Selimović, who was also a detainee in Hangar no. 2, also testifies about these acts of the Accused, clearly recalling that the Accused entered the Hangar no. 2 several times and took some detainees out, including Mirsad Omanović whose identity he does not doubt since they were in-laws. The witness stresses that Omanović was being returned half-conscious, injured and bloody and that he used to tell him that Marić and Andrun had stripped him naked and beat him. Witness Selimović states that during his stay in the Gabela camp the Accused would enter the hangar and take out some detainees, including Mirsad Omanović, whose name he remembers as he knew him. He stresses that on several occasions Omanović was taken out during the night and returned injured, bloody and half-conscious. Witness Selimović helped this victim then and thus learned from Omanović who had tortured him.

60. With respect to this Count of the Indictment the Accused himself stated that he saw witness Omanović for the first time with full awareness during his hearing as a witness and that he did not understand how he could be charged with extortion of money from a detainee, since, in general, the detainees did not have such means at disposal given the fact that they were in a camp. However, if this comment of the Accused is brought in correlation with his testimony and the testimonies of the defense witnesses who testified in favor of the Accused, from which the very opposite is obvious, that is, that it did happen that the detainees in the camp possessed money (see, for example, defense witnesses Rezalija Lizde, Ćamil Klepo and Ramiz Trolo), then this comment of the Accused cannot be accepted. Moreover, as it follows from Mirsad Omanović's testimony that on the day concerned the witness worked at a place close to his house, policemen took him home where he collected some belongings and when he returned to the Gabela camp he was taken out and requested money. Therefore, it can be concluded from the said facts that the Accused and Marinko Marić obviously believed that this witness brought the money from home on the particular day.

61. It follows clearly from the statements of the witnesses who testify unambiguously about the role of the Accused in the crimes, that the Accused committed the criminal act concerned in the described manner. By taking out witness Omanović and by participating in his interrogation the Accused was also a co-perpetrator of the torture, as they both acted jointly, irrespective of the fact that only Marić beat the witness while the Accused was present and asked questions. First, with his very presence he provided security to his co-perpetrator Marić in his actions and thus encouraged him to continue the torture of victim Omanović. Second, the existence of intent on the part of the Accused with respect to torture clearly follows from the joint manner of interrogating Mirsad Omanović – it was undertaken by a convergent conduct of both co-perpetrators, the Accused and Marinko Marić, with the aim of extorting money from victim Omanović. The Court finds it necessary here to touch on the comment by Defense Attorney Kulenović in his closing argument when he said that under the tenor of the Indictment the Accused is charged with the execution of torture under nine counts. Referring to the definitions of torture contained in the UN Convention against Torture (1984), as well as

in Article 190 of CC BiH, the Defense Attorney states that torture, given its description in the aforementioned definitions, differs from the other, less severe forms of mistreatment by a high degree of suffering arising from it, for which, in the opinion of the Defense Attorney, the Accused can in no way be blamed given that the aforementioned criminal acts, as they are described, do not reach such a degree of suffering as to correspond to torture. Additionally, by referring to the ICTY Judgment number II-95-17/1 in the *Ante Furundžija* case, the Defense Attorney implies that even if the Accused had sometimes been present at the act of torture, he did not participate in the purpose of torture or helped its perpetration in any way, hence, he cannot be considered criminally responsible for it. Such an assertion of the Defense Attorney and his reference to the quoted judgment of the ICTY is simply groundless, as it is not based on the presented evidence from which it can be seen clearly that the presence of the Accused during the instances of torture of the injured parties, even in the cases when the Accused did not undertake a direct act of perpetration, was of decisive importance for and in close relation to the acts undertaken by other persons, making a unity with them. Additionally, having in mind the testimony of Andrun himself (concerning his curiosity, and not only it, but also the informing of the camp commander), as well as the other witnesses who testified about his role in the Gabela camp, it is obvious that he possessed full awareness of the events in the camp. The Court notes that in the *Kunarac, Kovač and Vuković* case (Appeals Chamber), 12 June 2002, para. 142, the ICTY based its definition of torture on the following constitutive elements: (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person." See also *Krnjelac* (Trial Chamber), 15 March 2002, para. 179 (identical). Similarly, Article 190 of CC BiH gives a definition of torture whereby an official or another person who inflicts on a person physical or mental pain or severe physical or mental suffering, with the alternatively set goal, when, *inter alia*, that person is intimidated or coerced for any other reason based on discrimination of any kind. With respect to the goal of perpetration of the criminal act under this Count of the Indictment, it is set by requesting money from the injured party of Bosniak ethnicity. The argument of Defense Attorney Kulenović with which he tries to call into question the degree of suffering of the injured party/parties, thus also make relative and call into question the criminal responsibility of the Accused for his participation in the act of torture, either as a direct perpetrator or co-perpetrator, does not apply, for the simple reason that the law sets forth alternatives in terms of prohibited consequence, that is, inflicting physical pain or severe physical pain, whereby a sufficient requirement for the existence of torture has been met with the very established fact that physical pain was inflicted upon the injured party Mirsad Omanović as well as the other injured parties under the Paragraphs of the sentencing part of the operative part of the Verdict. Anyhow, several injured parties still feel the consequences of the torture manifested as pain, as they explicitly stated in their testimonies.

*With respect to the act referred to in Paragraph 9 of the operative part of the Verdict*

62. With respect to the proving of the acts described in Count 9 of the Indictment, on the basis of Džemal Topić's testimony the Court established the facts according to which in July 1993 the Accused took several detainees, including Topić, to the Grabovina barracks in Čapljina and surrendered them to unknown HVO members.

63. Witness Topić further convincingly testified that on that occasion the same HVO soldiers took him and a group of other detainees one by one into a bathroom of a building within the barracks and that they beat them, among others, with the hose of the fire prevention set, while all that time the Accused was sitting on a bench in front of the building, watching Topić being taken into the building and then out of it, covered in blood. Witness Topić confirmed several times during his testimony that the position of the Accused while the detainees were being taken in and out of the building with the bathroom was such that he could see well the condition in which the witness and the other tortured detainees were leaving the building.

64. His testimony was in this part supported by the statement of Kemal Balavac, who was taken by the Accused to the barracks in Čapljina on another occasion and who described the behavior of the Accused that exactly corresponds to the description from this Count of the Indictment, which is a circumstance of fact that leads to the same model of Andrun's behavior. To wit, Kemal Balavac's testimony indicates that mid-July he was taken to Čapljina for labor in a truck together with Džemal Topić and others and that they were beaten up there. Balavac does not continue testifying about the events concerning the day when Topić was with him, but he nevertheless confirms that Topić was being taken to labor in Čapljina and that on such occasions they would all be beaten up. Furthermore, Balavac states that on one occasion when he was in a group during the work in the canteen he was approached by a young soldier who extinguished a cigarette against his hand. Andrun saw it clearly while sitting on a bench but he did not prevent it, which again fits into the identical model of his behavior on other occasions as well. This witness states that on another occasion a group of detainees was being beaten in the bathroom by the hoses of fire prevention set and that they were totally weak and bloody after the beating, but, he adds, as far as he could notice, Andrun was not in the barracks at the time. Therefore, the witness testifies about the event identical to the one in this Count of the Indictment, which indicates that it was a customary manner of torture that the Accused Andrun could quite certainly be present at on some other occasion when injured party Džemal Topić was subjected to it.

65. The conclusion of the Court that witness Džemal Topić can be trusted about the manner of torturing detainees which is also described in Count 9 of the Indictment is additionally supported in the results of the evidentiary proceedings in the case number K.9/95, conducted in 1995 before the High Court in Mostar against the Swede Jackie Banny Arklof in which it was confirmed that the torture of detainees, including Džemal Topić, brought from the Gabela camp, did happen in the manner described in the Indictment and that this *modus operandi* also included the use of the hose of the fire prevention set.

66. With its arguments the defense tried to discredit witness Topić with respect to the other two Counts of the Indictment, while in his statement the Accused denied having had any contact with this witness in the Gabela camp, which this Court has not accepted as it is opposed to the testimony of witness Topić, who described in a convincing way the participation of the Accused in the acts referred to in the Indictment. With respect to this Count of the Indictment, whose contents, unlike the contents of two other Counts (see Counts 8 and 10) that concern this witness, were sufficiently clearly investigated and explained by the Prosecutor, the Court was convinced beyond reasonable doubt that this event did happen in the manner described in the Indictment. The Court based such belief on, among other, the fact that basically the same model of behavior of the Accused referred to in this Paragraph of the operative part of the Indictment/Verdict repeats in all the situations of torture of the detainees that Andrun was present at contributing with active participation, as has already been emphasized.

67. By surrendering Džemal Topić to the HVO soldiers the Accused made his torture possible to the decisive extent. The established fact, which concerns the continuation of the event according to which the Accused saw the taking of Džemal Topić and other detainees one by one into the bathroom by the HVO soldiers, and that on that occasion there was no reaction to this event on his part whatsoever, indicates the intent of the Accused concerning the torture of Džemal Topić in this room, as does the fact that after Topić had been taken out with visible signs of mistreatment the Accused did not show in any way sympathy with the tortured, or anything that would have disassociated him from the actions undertaken by the soldiers. Moreover, the Accused showed indifference, which in total results in his acquiescence with respect to the emerging of a prohibited consequence.

*With respect to the act referred to in Paragraph 11 of the operative part of the Verdict*

68. Criminal responsibility of the Accused concerning this Count of the Indictment stems from the statement of witness Kemal Balavac, who is a direct victim of this incrimination. This witness first testified as a witness for the Prosecution on 14 September 2006 and then as a witness for the defense on 1 December 2006.

69. As a matter of fact, this witness states that on several occasions within a period of 15 days he was taken by the *Ludvig Pavlović* anti-terrorist group to forced labor to pluck thorns and blackberries with his bare hands, during which he was not allowed to squat down but had to be bent, that he did not get water, that members of the group kicked him and hit him with knife handle, hands and with whatever they could. Witness Balavac states that on the specific occasion they came to take him to labor again, that a conflict broke out between Andrun and Perišić on the one side and Mirso Muminagić on the other, as the latter did not allow that the witness be taken away. Previšić and Andrun surrendered those 15 detainees to that anti-terrorist group, telling the group to take them that day and do with them whatever they could and that they would see on the following day what to do with them. When examined directly by the Prosecutor this witness unclearly confirmed her allegations that on the occasion concerned it was said: "Here they are, do with them whatever you want". However, when directly questioned by Defense Attorney Kulenović, he said: "Take them today, and we shall see tomorrow what to do." Yet, during the cross-examination by the Prosecutor, he said: "Take them today and do today whatever you can and we shall see tomorrow what to do," which he explicitly confirmed to a repeated question of the Prosecutor, so this last version is quoted in the operative part of the Verdict, although it is essentially one and the same thing. The witness added that he suffered the following consequences from the blows he received: four broken ribs, six broken teeth, broken molar bone and eight lacerations on his head. Balavac does not say that the Accused beat him, but stresses that the Accused stood aside while he was being beaten. Having examined this witness, the Panel based its decision on both testimonies that he gave, once as a witness for the Prosecution and the other time as a witness for the defense. Evaluating his complete testimony the Court finds that his statements are mutually consistent to a decisive degree and reliable, as such, so the Court gave credence to his testimony and accepted it.

70. The statement of witness Kemal Balavac is also confirmed by witness Hasan Tucaković, who was detained in Hangar no. 1 together with Balavac, and who recalled in his statement the incident when Balavac returned to that hangar with bloody hands after plucking thorns. Defense witness Safet Peco, who was also detained in Hangar no. 1, also confirmed in his

testimony before the Court of BiH on 6 November 2006 that Kemal Balavac had often been taken out of the hangar and that he thinks that Balavac had been mistreated outside. These two testimonies are corroborated by the testimony of Kemal Balavac with respect to the special manner of torture that he was subjected to after the Accused had handed him over to the said military unit.

71. In the capacity as a witness the Accused denied the statement of Kemal Balavac with the argument that nobody is capable of plucking thorns with bare hands for 15 days and that for this reason alone this witness' statement was discredited. The Court did not accept this argument since, first, it follows clearly from the said pieces of evidence that match one another that Kemal Balavac was indeed tortured in this special way. Also, with respect to the physical capacity of doing this job with bare hands, the Court hereby emphasizes that at issue here is one of the allegedly 15 days for which witness Balavac was taken to forced labor and that it can be concluded with respect to the whole period that the jobs that the witness had to do under surveillance of HVO soldiers could vary.

72. Likewise, due to the aforementioned testimonies of the other detainees of the Hangar no. 1, the Court could not give credence to the argument of the Accused that witness Kemal Balavac was never a detainee in Hangar no. 1, but was detained together with other respectable Bosniaks in a separate cell in the Administration building left from the entrance gate to the camp for the entire period that he had to spend in the Gabela camp.

73. In this Count of the Indictment the Accused is charged with a concrete act of commission, that is, surrendering Kemal Balavac to the anti-terrorist group with the following words: "Here they are, do with them whatever you want", which indicate at least a potential intent on the part of the Accused and his acquiescence to all possible consequences that could arise from his act. Therefore, his personal criminal responsibility stems from the active act of surrendering witness Kemal Balavac to members of the *Ludvig Pavlović* anti-terrorist group.

*With respect to the act referred to in Paragraph 12 of the operative part of the Verdict*

74. This Count of the Indictment has been proved by the testimonies before the Court of BiH of witnesses Bajro Pizović, Ahmet Cernica, injured party Selim Gagula, as well as by the Accused's own confession.

75. The Accused said in the capacity as a witness that on an undetermined day in August 1993 he took Selim Gagula out of Hangar no. 2. He drove him by car to the range in front of the interrogation premises and there surrendered him to a group of 3-4 soldiers from Konjic, who afterward mistreated Selim Gagula so severely that he was unconscious for several days, due to which, according to the statements of Bajro Pizović and Ahmet Cernica, his burial was being planned. The Accused admitted further that he saw that torture because he was on a bench just a few meters away from the torture site. Witness Gagula stated about his mistreatment: "Branko Nikota kicked me with his boot in my stomach, then twice with a rifle butt against my head and what happened next with me, I don't know." The witness is clear that prior to losing consciousness he saw the Accused sitting so that he could observe everything that was taking place.

76. Witness Bajro Pizović said the following about this circumstance: “One day guard Nikolić asked me if I would take a bottle of water to the neighboring room. It was a 2.5 x 1.5-meter room. There was a man who wore only shorts there, he was almost black, his head, chest, hands, legs and eyes were so swollen that only the eyelashes could be seen. He was sitting on a mattress and that was splashed with some 15 cm of water. I asked what his name was and he said Selim Gagula. A truck came in the morning. It parked in front of that room. Four men took a sack out and put it onto the truck. Someone said: This one is alive, bring that sack back. So they turned him back. Afterward, when I got out of the camp, I learned that he survived.”

77. The very fact that the Accused took witness Selim Gagula to the range where the HVO soldiers celebrated, not to the building in the camp in which the interrogation of the detainees by SIS usually took place, indicates the intent with respect to further developments. With his behavior after the surrender of Selim Gagula to the soldiers who immediately started mistreating him, the Accused showed a lack of any sense of humanity for this victim. The statement of the Accused in the capacity as a witness that he opposed such treatment of the detainees by having announced to the Camp Head Boko Previšić that he would no longer take the detainees out, even if it were true, would represent a post facto conduct that is irrelevant for the existence of this criminal act.

78. The Court here notes that the admission of the Accused concerning this Count of the Indictment points at one model of his behavior that was encountered in previous Paragraphs of the sentencing part of the Verdict. Only in rare cases did the Accused directly undertake acts of torture in narrower terms, as is direct beating of the detainees, but he always undertook acts of taking the detainees out, bringing them to the site of direct execution of torture, surrendering them to other persons and, as a rule, was present during the torture, which represents a kind of division of roles in the joint perpetration of the criminal act. Therefore, in the aforementioned Paragraphs the Accused did not undertake acts of aiding and abetting but acts of joint perpetration of the criminal act, given that the acts undertaken by the Accused, in the opinion of this Court, represent a decisive contribution to the act of perpetration of this criminal offense without which the actions of the other co-perpetrators would not be possible (see also Paragraph 55).

*With respect to the act referred to in Paragraph 13 of the operative part of the Verdict*

79. The Court is of the opinion that visits of persons deprived of liberty due to war conflict constitutes a key element of the protection provided by the International Committee of the Red Cross (ICRC), which is an internationally recognized legal entity whose operation is made possible by its impartiality and neutrality and to which the international community gave a clear mandate to secure the implementation of detailed rules of the Geneva Conventions. The essence of these visits is that, given that the persons who were detained or arrested in the course of a conflict or as a consequence of a conflict were considered enemies by their captors, these persons need the mediation of a neutral independent body that will secure that they are treated in a human way, that detainees are held in decent conditions and that they are enabled to exchange news with their families, that is, secure that detainees are treated in accordance with the humanitarian principles set forth by the Geneva Conventions. The Court stresses the fact that, pursuant to the Geneva Conventions, the goal of ICRC visits is not the release of detainees but the implementation of standard ICRC procedures that are

clearly presented to the authorities holding the detainees prior to a visit and that also include the registration of the detainees.

80. Therefore, the transfer of a group of respectable Bosniaks who were held separated from the other detainees from the Gabela camp to the Silos in Čapljina on at least two occasions, in August and September 1993, with the intention to prevent the registration of these detainees by the ICRC, caused great fear with these detainees. Witnesses Mirza Čolaković, Ramiz Leto, Enver Bojić and Bajro Pizović, who were transferred at least two times together with the other detainees—witnesses Alaudin Veledar, Halil Turajlić and Meho Zele, confirmed with their statements that the detainees were aware of the reason of the transfer and that this fact caused a great fear with them.

81. With respect to the transfer of respectable Bosniaks from the part of the civil prison that was located in the Administration building leftward from the entrance gate to the camp to the Silos in Čapljina, witness Ahmet Cernica said that he was taken away with a group of 50 people before ICRC representatives were supposed to come and that on two occasions they were being hidden into the Silos in Čapljina, that guards and one intervention group took them out and that the guards could not do it without the decision of the camp administration. He also testified that he had heard from one guard that Andrun had visited the Silos and that he had once seen him there. Witness Huso Marić states that he was taken to the Silos on two occasions and that he saw Andrun one time but did not see him the other. Kemal Balavac testifies that on two occasions he was being hidden from the ICRC representatives together with others, that they were transferred to the Silos in Čapljina and that the order for hiding was issued by Boko Previšić and Andrun. Witness Alija Šuta testifies that he heard from a certain Penava that the detainees were being hidden from the Red Cross in order not to be registered and after that testifies that Andrun “once” took off Penava's glasses and told him not to talk. With respect to the same circumstance, witness Osman Penava states that he gave statements to the Red Cross concerning some detainees and that Andrun wanted to know what he had said, so Andrun hit him mildly due to which his glasses fell down. When these witnesses' statements are brought into correlation, the Court finds that the existence of direct intent of the Accused is proven with respect to the hiding of the detainees from the ICRC officials, thus also the concrete operations of transferring the detainees from Gabela to the Silos in Čapljina. Anyhow, the witnesses for the Prosecution stress that the camp administration is responsible for their transfers ahead of the ICRC representatives visits. For this Court that administration is personified in Head Previšić and his Deputy Andrun, which has been discussed earlier.

82. Despite the assertion of the Accused that he was not involved in these operations in any way, his behavior with one detainee during the ICRC visit to the Gabela camp leads to the opposite conclusion. It follows from the respective statements of Senad Šetka and Alija Šuta that after detainee Osman Penava in Hangar no. 3 had informed the ICRC staff about the hiding of the detainees in the Silos in Čapljina, the Accused approached this detainee and asked him what he had said and then hit him, breaking his glasses. Witnesses Hamza Penava and Eldin Vujinović confirm this incident with their statements. Witness Hamza Penava states that Osman Penava gave statements to the Red Cross about some detainees, that Andrun wanted to know what Osman had said and hit him mildly due to which Osman's glasses fell down and Andrun then told him: “You should know that it was an Ustasha who has just broken your glasses.” Enver Bojčić states that they were being hidden from the Red Cross representatives to the Silos in order not to be registered by them, which caused fear with the detainees because anyone who wanted could have killed them as they were not registered.

Admittedly, he states that Andrun never hit or tortured him, but adds that Andrun was the Deputy Head of the camp in which the witness was kept “under lock and key”, that is, was a detainee in the camp. To the question how he knows it, the witness states that he learned it from the other detainees when they would return to the hangar as well as by communicating with the guards who confirmed to him that Andrun had perhaps more “say” than Boko himself. The witness definitely stated that the transfer of the detainees, including him, could not have been done without the knowledge of the camp administration. The Court gave credence to this witness' statement as it found it to be detailed, and as this witness had been a court president, that is, a judge, at one time even in the period of the existence of Herzeg-Bosnia, hence for the said professional and educational skills, he had the capacity not just of accurate observation but also an astute and logical deduction. Additionally, the Court finds that this witness did not show any reasons why he might be considered a biased witness, as he is firm in his claim that Andrun had never made a physical contact with him. The fact that the witness did not see Andrun on one of the given occasions in front of the Silos does not mean that he was not there on another occasion. Even if he had not been there (although there is the previously mentioned testimony to the contrary), his physical presence in front of the Silos is not necessary, considering the fact that together with Boko Previšić he could issue orders to the guards to transfer the detainees. In the opinion of the Court, this evidence, both direct and indirect, indicates a conduct with intent on the part of the Accused concerning the hiding of the detainees from the ICRC representatives and also in relation to the specific operations of transfer from the camp to the Silos. Anyway, with respect to these events the Prosecution witnesses point at the camp administration as responsible for their transfer ahead of the ICRC delegation visit. For this Court, that administration was personified in the Head Boko Previšić and his Deputy Nikola Andrun, which has been discussed earlier.

83. By having intentionally participated in the hiding of the detainees from the ICRC representatives and thus prevented their registration, the Accused denied them the detainee status, thus also all the rights stemming from that status under the Geneva Conventions. This is for the already mentioned reason that their fate as detainees would be known to the outside world only owing to such registration and would in that way represent a degree of safety in the difficult position that they were in as camp inmates. The Court is of the opinion that the notion that they were being deliberately hidden from the ICRC representatives caused severe mental suffering to those detainees, who could fear for their lives justifiably, which constitutes an established fact and the basis for the Court to classify such treatment by the Accused as inhumane treatment referred to in Article 173 (1) c) of CC BiH.

### **Acquitting part of the Verdict**

*With respect to the act referred to in Paragraph 1 of the operative part of the Verdict*

84. The Court did not find the Accused guilty of this Count of the Indictment because the Prosecutor did not prove beyond reasonable doubt the facts relating to the event when detainee Mirza Čolaković was interrogated and tortured by the Accused who acted together with Marinko Marić and Almir Kudra a.k.a. “Hogar” on the described occasion.

85. This is because even after the Court's visit to the site, the former camp that is currently military barracks in Gabela, it was not possible to determine with certainty where the criminal offense described in this Count of the Indictment had taken place, since there were no stairs at the entrance to the building to the left from the camp gate, whose interior description is the

only one matching the witness' statements. The witness mentioned several times in the important parts of his testimony the fact that these stairs existed, that is, when entering the building, when exiting the building after the torture, when he was supposed to be brought by Marinko Marić and Almir Kudra since he could no longer master these stairs on his own, and when he noticed that the Accused was standing on the stairs giving instructions to Marinko Marić.

86. The only witness who confirms the testimony of Mirza Čolaković is Alaudin Veledar, who says in his statement that one day he heard a guy being beaten and that he recognized the voice of the Accused. The witness further stresses that he afterward learned from Mirza Čolaković that he [Čolaković] had been beaten by the Accused on that occasion. Since witness Alaudin Veledar in the critical period was placed in the basement prison of the aforementioned building, whose design does not match the testimony of victim Čolaković, the Court could not establish beyond reasonable doubt the criminal responsibility of the Accused for this Count of the Indictment.

87. Also, the testimony of Mirza Čolaković before the Court of BiH is partially inconsistent with the previous statement given before the Prosecutor's Office in the course of the investigation on 9 November 2005. This brought about the imprecision as to which of the co-perpetrators exactly took the witness out of Hangar no. 4. This inconsistency alone would not call into question the testimony of Mirza Čolaković, but regarded in the context of and together with the aforesaid it creates further ambiguity concerning this Count of the Indictment.

88. For these reasons the Court evaluated the presented evidence of the Prosecution regarding this Count of the Indictment to be insufficient for the Court to base a conviction beyond reasonable doubt that the facts of this Count of the Indictment have been proven (Article 173 (1) c) of CC BiH – violation of bodily integrity and torture).

*With respect to the act referred to in Paragraph 3 and 7 of the operative part of the Verdict*

89. Count 3 of the Indictment refers to the event from September 1993 in which detainee Mirsad Žujo a.k.a. "Šile" was called out and then threatened and taken out of Hangar no. 3 by the Accused, after which Žujo never returned to the hangar and his mortal remains were exhumed and identified in 1996.

90. Count 7 of the Indictment charges the Accused that in August 1993 he came to Hangar no. 1 and called out and took out of the hangar detainee Hivzija Dizdar a.k.a. "Učo" who never returned to the hangar. His mortal remains were exhumed and identified in 1996.

91. The facts that are not in dispute in both these separate incidents is that the violent death caused to the victims occurred by the dynamic action of a bullet fired from a handgun – in the case of victim Žujo to the back of the head, and in the case of victim Dizdar by a penetrating wound to his skull. Anyway, these facts were established beyond doubt on the basis of objective evidence related to the exhumation and identification of mortal remains of the two victims and on the basis of the testimony of forensic medicine expert Dr Ilijas Dobrača, which was acceptable as expertise in all its elements for this Court and which was not called into question by anybody in the course of the proceedings.

92. By evaluating the testimonies of the Prosecution witnesses who testified about these circumstances, the Court has found the facts and circumstances related to the taking of victim Žujo out of Hangar no. 3 and victim Dizdar out of Hangar no. 1 by the Accused to be established.

93. Thus, with respect to the event described in detail in Paragraph 3 of the operative part of the Verdict, the Court evaluated the statements of direct witnesses in this case, who described in a convincing way the taking of Mirsad Žujo out of Hangar no. 3, namely: Eldin Vujinović, Senad Šetka, Hadžo Klarić, Zlatan Zaklan, Kemal Balavac and Džemal Topić. Considering the fact that the said witnesses were themselves in the said hangar on the occasion concerned, in their statements they basically congruently confirm the fact that the Accused took the victim out of Hangar no. 3 to which the victim never returned. Thus, for example, witness Senad Šetka states that he knew Mirsad Žujo his whole life, that they sat next to each other in the hangar some 10 meters away from the entrance, that he saw the Accused Andrun entering the hangar in the evening hours, that at that time the detainees were making rows among themselves since they were expecting the arrival of ICRC representatives, that on that occasion Žujo said: “There, we have got the corridor for Neum”, that a guard heard it and that they requested that the one who had said it come out. One of the detainees said to it: “Mirsad, it was you”. So, Mirsad came out and after that he returned and said that the guard hit him twice. Nikica called him again to come out, he returned to the hangar all covered in blood after some 15 minutes, beaten by Nikica and some others, and on that occasion Mirsad said: “This thing with me will not end well.” When he was called out for the third time, Mirsad told the witness to pass on a message to his mother and when Andrun showed up he said: “Come on, Žujo, come out, they will get to your side once, but you never will.” He saw the taking out of Žujo because the moonlight was clear and the hangar door was opened. When Andrun took him out, witness Šetka thought Andrun would beat him again. Hamza Penava's testimony is unique with respect to the said witnesses' testimonies as he claims that Nikica took out Žujo who never returned. The Court finds that a possible clarification of this witness' statement may be that he simply left out from his perception the taking out of Žujo by Andrun and registered only the taking out of Žujo by Nikica that had taken place before.

94. With respect to the murder of Hivzija Dizdar, a.k.a. “Učo”, closely described in Paragraph 7 of the operative part of the Verdict, the Court has also established the fact that the Accused took detainee Dizdar out of Hangar no. 1, who never returned afterward, following the testimony of the Prosecution witnesses Džemal Topić and Kemal Balavac.

95. On the basis of the fact that the victims were taken out of the hangar and that their mortal remains were found after the war, the Prosecution builds a theory in both these cases that their murder was committed by nobody else but the Accused Nikola Andrun. However, the Court finds that such an automatic drawing of conclusions by establishing a simple correlation between the fact that the victims were taken out by the Accused and the fact that they died a violent death, which was established beyond doubt, shows serious shortcomings when it comes to the Prosecution's effort to prove beyond reasonable doubt the allegation that it was exactly the Accused who directly committed their murder. In other words, such theory of the Prosecutor is not corroborated by the presented evidence, moreover, the evidence that would corroborate it is absolutely lacking.

96. Generally speaking, it is indisputable that for establishing criminal responsibility all elements of the criminal offense should be viewed in their unity, but that when evaluating compliance with certain elements of the offense we must separate the elements and view them

individually. For the existence of a causal nexus (*nexus causalis*) as an objective link in both these incidents in terms of this particular criminal act, there lacks the factual description of the consequential act of the Accused which, in addition to it, would be additionally accompanied with his awareness and volition for the production of prohibited consequences – the death of the victims. The Prosecutor did not offer a single piece of direct evidence which would prove the fact that would enable the Court to draw beyond reasonable doubt the conclusion that the Accused indeed committed the criminal act of murder that lies in the root of the crime, which would be interpolated in that causal link. In the light of the presented evidence it has remained unknown to the Court what exactly the act of perpetration of murder would consist of in both these cases, that is, in which way (*modus operandi*), with which means and at what time it would have been committed.

97. None of the heard witnesses states that he saw the Accused murdering either of the two victims.

98. With respect to Mirsad Žujo, an additional concern of the Court with respect to the acceptance of the Prosecutor's allegation arises from the important differences in respective statements of the witnesses concerning the developments after the taking of detainee Žujo out of the hangar. Witness Senad Šetka remained inconsistent in his testimony about the circumstances following Žujo's taking out of the hangar and it concerns important facts, since he first stated before the Prosecutor's Office that after the taking out of Žujo he had heard a manual firearm shot in front of the hangar, but at the main trial he said the opposite, that is, that he had heard the sound of an automobile instead of a shot. Witnesses Hamza Penava and Zlatan Zaklan, who were inside the hangar just like witness Šetka, did not hear either. Zaklan states that he did not see who took Žujo away but he is sure he heard Andrun's voice. The other witnesses did not testify about these facts. For these reasons Šetka's testimony remains utterly questionable for the Court and, as such, unconvincing with respect to the developments following Žujo's taking out of the hangar.

99. The Court also reached such crucial conclusion in the case of murder of Hivzija Dizdar, a.k.a. "Učo" concerning the incident described in Paragraph 7 of the operative part of the Verdict. The Court evaluated the fact that the Prosecution witnesses confirmed that the Accused took detainee Dizdar out of Hangar no. 1, although it did have in mind the fact that there were considerable discrepancies in their respective statements, such as the time when the victim was taken out of the hangar to which he never returned. Thus witness Džemal Topić, who is the only one to directly link the Accused to Dizdar's murder, claims that those were the evening hours when the first dark falls, which does not match the respective statements of witnesses Kemal Balavac and Ramiz Kurtović, who testified that Dizdar was taken out of the hangar in the period between 0000 and 0200 hrs.

100. On the basis of Topić's testimony the Court could not establish beyond reasonable doubt the fact indicating that the Accused directly committed or at least participated in the act of commission that would cause Dizdar's death. First, it was because of the observed divergence regarding the time of Dizdar's taking out, and then because the witness drew a hypothetical conclusion, on the basis of his own logical inference and not of what he observed and heard, that only the Accused could have done it. It is not sufficient to say that he saw the Accused together with Dizdar in front of Hangar no. 1 and that two-three minutes later he heard a firearm shot, and that at the moment he was passing them by he did not see anyone else nearby, to draw a categorical conclusion that the Accused committed the murder of the victim. These facts may provide circumstantial evidence only, which is insufficient to

establish the guilt of the Accused on this Count, as indications cannot compensate for the lack of direct evidence of commission of the criminal act of murder by the Accused, as the Indictment alleges. Objectively, even if the assertion of witness Topić on the elapse of two-three minutes after which he heard the shot were accepted, some other event or protagonist that would have caused the murder of the victim could be interpolated in that passage of time, sufficient although so short.

101. The Court approached the evaluation of this issue with full caution, having also in mind the part of the testimony of witness Mirza Čolaković acceptable for the Court about the event when the Accused told the investigator Marinko Marić that he should not beat that witness in front of a building, that is, at the place where the others could see it. A logical conclusion is drawn from this that if the Accused did not allow the beating of that witness to be done in public, why would the Accused risk committing a much more severe act – Dizdar's liquidation in front of the hangar in public. Additionally, having in mind the testimonies of the Prosecution witnesses who discussed the role and the character of the Accused, especially his intellect, something like that would not fit his psychological profile. On the basis of the examination and autopsy of the mortal remains of Hivzija Dizdar, forensic medicine expert Dr Ilija Dobrača found an entry hole of firearm wound of 7 millimeters in diameter in the skull, and stated that an irrefutable proof of his violent death was the discovery of a small caliber – 6.35-mm bullet in the skull, which indicates that a 6.35-mm hand fire weapon was used. The Accused claims in his testimony that Dizdar was not killed in Gabela and that he possessed a 7.65-mm caliber pistol. Based on the facts that the aforementioned Prosecution witnesses confirmed that the Accused was armed by a pistol (which does not necessarily mean that he had a pistol on that particular occasion and nobody saw a pistol with the Accused on that critical occasion; comment of the Court) and that witness Topić heard a firearm shot a few minutes after he had seen the Accused together with Dizdar, the Prosecution tried to create a chain of indications in favor of its own theory that Andrun had murdered Dizdar. Disregarding the fact that, in addition to everything stated above, the Prosecution did not offer a single piece of material evidence to support that allegation. It can be seen from the wording of Article 284 c) of CPC BiH that the Court is **obliged** to render a verdict acquitting the accused when it has been established, that is, proven with certainty that the accused did not commit the criminal offense he is charged with, as well as when the Court has doubts whether or not the accused committed the criminal offense. Also, all the facts that are *in peius* of the accused must be established, that is, proven with certainty, and if that is not accomplished, it is regarded that they do not exist. The Court presented all the evidence of importance for such a decision at the main trial.

102. For these reasons the Court finds that the Prosecution did not prove beyond reasonable doubt that the Accused did indeed directly commit the murders of Mirsad Žujo and Hivzija Dizdar, that is, the acts referred to in Article 173 (1) c) of CC BiH that the Accused is charged with.

*With respect to the act referred to in Paragraph 6 of the operative part of the Verdict*

103. With respect to the description of facts in Count 6. of the Indictment that several detainees, including Ramiz Kurtović, were taken from Hangar no. 1 to the police station in Čitluk whereupon, escorted by the Accused, they were taken with their hands tied to the barracks in Čitluk, on which occasion they were subjected to beating and insults by citizens, while upon the return to the Gabela camp the Accused, together with the Head of the camp

Boško Previšić, tortured the detainees subjecting them to thirst, the Court could not establish criminal responsibility of the Accused on this Count of the Indictment.

104. This is because the Court could not rely beyond reasonable doubt on a single statement of a witness, who indisputably had a serious conflict with the Accused before the war. The reservation of the Court concerning the incriminating statements of this witness arises from the fact that the witness indicated in his testimony the existence of a dispute concerning the Accused's conduct toward the witness' family, due to which the witness, according to his own words, even wanted to fight with the Accused.

105. When viewing this Count of the Indictment, it can be noticed that the Prosecution does not mention the other injured parties to this incident at all, nor do they appear as witnesses, although the Prosecution uses plural in the factual description in the Indictment. Instead, everything is reduced to one injured party that is the only witness, although one of the acts that the Accused Andrun is charged with under this Count of the Indictment took place within the compound of the Gabela camp, that is, at a place where that event could have been noticed if not by all, than at least by a few detainees given their large number. In addition to this, witness Kurtović only charges the Accused with the participation in the murder of Mujo Obradović by stating that Andrun took a rifle from a guard's shoulder and handed it to Boko Previšić who fired. The result of all this is that this witness' statement concerning this Count of the Indictment cannot be taken as reliable, thus the incident referred to in Count 6 of the Indictment cannot be proven beyond reasonable doubt.

*With respect to the act referred to in Paragraph 8 of the operative part of the Verdict*

106. The Court could not accept as reliable the testimony of detainee Džemal Topić about his torture by Marinko Marić and the Accused in the Administration building of the prison. This is because his testimony about this Count of the Indictment is not convincing for the reason of discrepancy regarding the time period related to the presence of the Accused in the Gabela camp.

107. To wit, it follows from the testimony of Džemal Topić that he was brought to the Gabela camp on 13 June 1993 and that on that day the Accused took him to one room, where, together with the SIS investigator Marinko Marić, the Accused questioned him about the possession of arms and mistreated him by using a baton and the hose of a fire prevention set. On the one hand, this statement does not coincide with the allegations in the Indictment according to which the criminal act happened in the first half of July 1993. On the other hand, this witness' statement does not fit into the time period for which the Court was able to establish the presence of the Accused in the Gabela camp and which is included in the general framework of the Indictment.

108. For this reason the Court could not establish the criminal responsibility of the Accused under this Count of the Indictment.

*With respect to the act referred to in Paragraph 10 of the operative part of the Verdict*

109. Also, the Court could not use Topić's testimony as a basis for an indisputable conclusion about the allegation of the Prosecution that Nikola Andrun hit Džemal Topić with a baton against his head and bare back several times, since it deemed the testimony to be insufficient.

110. This is because Džemal Topić's testimony about this incident is not supported by the testimonies of other detainees from Hangar no. 2, among whom certainly some would have noticed the taking out or bringing in of this witness to that hangar considering their large number. This fact, together with the vagueness regarding the capacity that Mirsad Muminović a.k.a "Tadija" had in the Gabela camp in August, unlike his position during the previous incident described in Count 8 when, according to Džemal Topić's testimony, he was also a passive observer at the room door, was the reason why the Court was not able to establish beyond reasonable doubt the criminal responsibility of the Accused under this Count of the Indictment.

### **Evaluation of the other evidence**

111. Several witnesses testified in the course of the proceedings in favor of the Accused. Thus witness Rezalija Lizde states that he asked the Accused Nikola to have the documents confiscated from him returned, which he did indeed. Ćamil Klepo testifies that on one occasion Andrun asked him if he smoked, if he had money, if he needed anything and offered him money, but the witness took only a cigarette from Andrun. On some other occasion he gave the Accused money to buy him coffee and chocolate to bring it to the witness' wife and children, which Andrun did and gave him the change back, even more than he was supposed to with the following words: "That is yours and this is from me." Ramiz Torlo states that Andrun brought to him in the camp the money he was owed by another person, while witness Omer Torlo states that Andrun saved him on one occasion. Safet Peco also testified about his good treatment of the detainees stating that he heard from the others that Andrun had helped people. Mirsad Šuta adds that the Accused allowed his niece to bring him food. Jusuf Elezović states that Andrun gave him a cigarette once. The Court did not have any reason not to trust these witnesses about the stated circumstances. Analyzing the said evidence, the Court finds that it is important for meting out the punishment of the Accused. On the other hand, the Court notes that such acts of the Accused, favorable for the detainees in the said cases, actually indicate that the conclusions that the Court made when evaluating the issue of the status of the Accused were accurate. If the Accused was in a position to help the detainees as they testified, then it is logical that he thus demonstrated the true power that arises from his status of the deputy head whereby he, together with Head Previšić, personified the administration of the camp.

112. With respect to the other presented evidence, the Court evaluated it, but finds that it was not of decisive importance as to have effect on rendering a decision.

### **Application of substantive law**

113. With respect to the issue of substantive law that should be applied, considering the time of the perpetration of the criminal offense, the Court accepted the legal characterization of the Prosecution and sentenced the Accused for the criminal offense of War Crimes against Civilians in violation of Article 173 (1) c) and e) of CC BiH. The Accused committed the said criminal offense with intent, as it follows from the evidence presented in the proceedings that

at the moment of the perpetration of the criminal offense he was aware that he was violating the rules of international law with his acts and it is obvious that with his acts, that lie in the core of the crime, he wanted or at least acquiesced to the causing of a prohibited consequence, as specified in the respective Paragraphs of the sentencing part of the Verdict.

114. Considering the time of the perpetration of the criminal offense and the substantive law that was in effect at that time, the Court considers two legal principles to be relevant: the principle of legality and the principle of time constraints regarding the applicability of the criminal code.

115. Article 3 of CC BiH lays down the principle of legality under which no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law. Article 4 of CC BiH (time constraints regarding applicability) 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 and 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.

116. The principle of legality is stipulated by Article 7 (1) of the European Convention on Human Rights (hereinafter: the ECHR) that has priority over all the other laws in Bosnia and Herzegovina (Article 2.2 of the Constitution of Bosnia and Herzegovina). The said Article of the ECHR reads: “No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.” Therefore, the pronouncement of a heavier penalty than the one applicable at the time the criminal offense was committed is prohibited. This provision, therefore, prescribes the prohibition of a pronouncement of a heavier penalty than the penalty that was applicable at the time the criminal offense was committed, but it does not establish mandatory application of a more lenient law for the perpetrator. Paragraph 2 of Article 7 of ECHR reads as follows: “This 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.”

117. Article 15 (1) of the International Covenant on Civil and Political Rights (hereinafter: ICCPR) reads: “No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

118. Paragraph 2 of Article 15 of ICCPR sets forth that “nothing in this article shall 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 the community of nations.”

119. Finally, Article 4a) of CC BiH sets forth that Articles 3 and 4 of 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, whereby the provision of Article 7 (2) of ECHR was practically taken over and whereby an exceptional departing from the principle laid down in Article 4 of CC BiH, as well as from the mandatory application of a more lenient law in the proceedings for the acts that constitute criminal offenses according to international law are offered, as are the proceedings against the Accused as they involve an incrimination that includes the violation of rules of international law. Such position was taken in the Verdict of Section I of the Appellate Division of the Court of BiH pronounced against Abduladhim Maktouf No. KPŽ 32/05 on 4 April 2006.

### **Decision on sentence**

120. Considering the fact that the acts of the Accused referred to in Section I of the sentencing part of the Verdict fulfill all the important elements of the criminal offense of War Crimes against Civilians in violation of Article 173 (1) c) and e), pursuant to the said regulation this Court has pronounced him guilty of it in the operative part of the Verdict and sentenced him to imprisonment for a term of 13 years.

121. Deciding on the application of the type and duration of criminal sanction against the Accused, the Court, taking as the starting point the general purpose of criminal sanctions, purpose of punishment and the limits of punishment prescribed by the law for the criminal offense of which the Accused was found guilty, took into account all the circumstances referred to in Article 48 of CC BiH that influence the duration of sentence in a particular case. To wit, the Court took as extenuating circumstances for the Accused the facts that the Accused behaved appropriately before the Court, that he had no prior convictions, that he is a family man, father of four, that he admitted the commission of a criminal act on one Count of the Indictment for which he expressed remorse which the Court deemed to be sincere, and that in some cases he had helped Bosniak detainees. The Court finds the following circumstances to be aggravating: the capacity of the Accused as the Deputy Head of the Gabela camp (specifically explained with respect to the facts of general importance; see para. 27-39), the large number of criminal acts that the Accused committed, the gravity of the committed criminal offense, the existence of a high degree of criminal responsibility on the part of the Accused, and it also took into account the gravity of the consequences caused by the commission of the criminal offense that the injured parties, who requested damage compensation from the Accused, still feel. Therefore, the Court is of the opinion that the imprisonment sentence of such length appears to be necessary in order to achieve the purpose of punishment envisaged in Article 39 of CC BiH, that is, in addition to the reasons of general and individual prevention, in order to express the community's condemnation of a perpetrated criminal offense and to increase the consciousness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators. Therefore, not to punish Nikola Andrun's acts would mean to adopt low ethical criteria and avoid justice for the victims.

122. Pursuant to Article 56 of CC BiH, the time that the Accused has spent in custody since 30 November 2005 shall be credited toward the pronounced sentence of imprisonment, and, pursuant to Article 188 (4) of CPC BiH, the Accused is hereby relieved of the duty to reimburse the costs of criminal proceedings because he is unemployed, hence, in the opinion of the Court, the Accused has no funds from which to reimburse these costs.

123. Deciding on the claims under property law, pursuant to the provision of Article 198 (1) and (2) of CPC BiH, the Court has instructed the injured parties Mirzo Čolaković, Mirsad

Omanović and Džemal Topić, with claims under property law, to take civil action, since establishing facts on the amount of claims under property law would require a lot of time, which would prolong these proceedings.

**Record-taker  
Legal Officer  
Manuel Eising**

**Presiding Judge  
Judge  
Dragomir Vukoje**

**Legal remedy:**

An appeal against this Verdict shall be allowed with the Appellate Division, Section I of the Court of Bosnia and Herzegovina in Sarajevo, within 15 (fifteen) days upon the receipt of a written copy thereof. The appeal shall be submitted to this Court, the Appellate Division, in a sufficient number of copies directly or by registered mail.

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