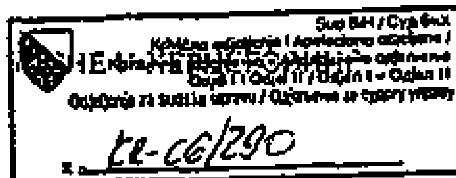
SUD BOSNE I HERCEGOVINE СУД 

Number: X-KRŽ-06/290
Sarajevo, 24 April 2008

PREVOD 402

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Appellate Division of Section I for War Crimes, in the Panel of Judges presided by Judge Dragomir Vukoje, and the Panel members, Judges Robert Carolan and Azra Miletić, with legal advisor Željka Marenić participating as the record-taker, in the criminal case against the accused Jadranko Palija for the criminal offense of Crimes against Humanity in violation of Article 172 (1) h) in conjunction with subparagraphs a), e), g) and k) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the BiH CC) and the criminal offense of War Crimes against Civilians in violation of Article 173 (1) a), c) and f) in conjunction with Article 180 1) of the BiH CC, deciding on appeals by the attorneys Ranko Dakić and Dragoslav Perić, defence counsels for the Accused, filed from the Verdict of the Court of Bosnia and Herzegovina Number: X-KR-06/290 of 28 November 2007, in the session held in the presence of the Accused, his Defence Counsels and the Prosecutor of the Prosecutor's Office of BiH, Džemila Begović, on 24 April 2008, rendered the following

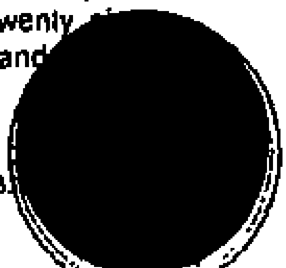
VERDICT

The appeals by attorneys Ranko Dakić and Dragoslav Perić, defence counsel for the accused Jadranko Palija are dismissed as unfounded, and the Verdict of the Court of Bosnia and Herzegovina Number: X-KR-06/290 of 28 November 2007 is hereby upheld.

REASONING

By the Verdict of the Court of Bosnia and Herzegovina Number X-KR-06/290 of 28 November 2007, the accused Jadranko Palija was found guilty of the following: by the acts described in Sections 1 and 2 of the operative part of the Verdict he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) h) as read with subparagraphs a), e), g) and k) of the BiH CC, whereas by the acts described in Section 3 of the operative part of the Verdict he committed the criminal offence of War Crimes against Civilians in violation of Article 173 (1) a), c) and f) in conjunction with Article 180 (1) of the BiH CC.

Based on the referenced legal provisions and in application of Articles 39, 42 and 48 of the BiH CC, for the criminal offence referred to in Article 172 (1) h), as read with subparagraphs a), e), g) and k) of the BiH CC, the first-instance Panel imposed on him the sentence of long-term imprisonment for a term of 28 (twenty [illegible] years, and for the criminal offence referred to in Article 173 (1) a), c) and



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BiH CC the sentence of imprisonment for a term of 10 (ten) years, and in application of Article 53 (2) a) of the BiH CC it sentenced him to the compound sentence of long-term imprisonment for a term of 28 (twenty eight) years and pursuant to Article 56 of the BiH CC, the time spent in custody pending trial, from 26 October 2006 until 2 November 2006, was credited towards the sentence.

Pursuant to Article 188 (4) of the Criminal Procedure Code of BiH, the Accused is partly relieved of the obligation to reimburse the costs of the criminal proceedings on which the Court will issue a separate decision, whereas pursuant to Article 198 (2) of the BiH CPC, the injured parties are referred to take civil action with regard to their claims under property law.

Attorneys Ranko Dakić and Dragoslav Perić, defence counsel for the Accused, filed in a timely manner the appeals from the referenced Verdict due to essential violation of the provisions of the criminal procedure, erroneously and incompletely established state of facts, violation of the Criminal Code and the decision as to the criminal sanction, with the proposal that the appeals be granted, the first-instance Verdict revised and the Accused be acquitted of the charge, or that it be revoked and holding of a trial be ordered for the purpose of remedying the violations stated in the appeals and at which the accused would be heard as witness, with mandatory exclusion of the public pursuant to Article 235, as read with Article 317 of the BiH CPC.

The Prosecutor of the Prosecutor's of BiH submitted responses to the appeals moving that they be dismissed as unfounded and that the first-instance Verdict be upheld.

In the session of the Appellate Panel held on 24 April 2008, pursuant to Article 304 of the BiH CPC, the Defence Counsels briefly presented the appeals, whereas the Prosecutor of the Prosecutor's of BiH responded to them, in which process they fully maintained the respective arguments and proposals presented in writing.

Having reviewed the contested Verdict within the limits of the appellate arguments, the Appellate Panel rendered the decision as stated in the operative part for the following reasons:

1. Essential violations of the provisions of criminal proceedings

Within these appellate grounds the Defence for the Accused maintains that the contested Verdict is based on evidence on which a verdict cannot be based according to the provisions of the CPC (Article 297 (1) i) of the BiH CPC), and that the right of the Accused to defence has been violated (Article 297 (1) d) of the BiH CPC).

In the elaboration of those assertions, the appeal by the defence counsel Dakić claims that the Trial Panel, contrary to Article 273 (2) of the BiH CPC, allowed the reading of the statements of witnesses Anđa Krljić and Rufija Šabić as evidence.

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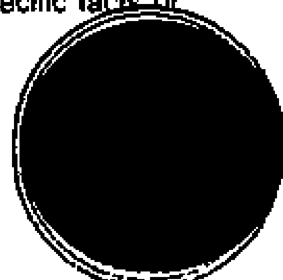
In support of this assertion the Appeal states the argument that both of the referenced witnesses as elderly persons have the usual health difficulties, such as high blood pressure, difficulty in moving, etc., which cannot be subsumed under the situation defined by the cited provision according to which their presence at the Court would be very difficult due to important reasons; the impression is, at least, that it does not ensue from the submitted medical findings. It is especially evident that it was necessary to directly hear the witness Rufija Šabić in order that the statements of the other witnesses could be verified.
The appeal claims that the right to defence was violated by such action of the Court, due to which the Defence was not provided with the possibility of cross-examination of the witnesses.

In the response to the appeal by the Prosecutor in respect of that appellate assertion it is stated that it is on the Court to assess whether there exists or not sufficient evidence to allow exception from the direct presentation of evidence, and that in the particular case, the Court based its decision on the Finding and Opinion by the medical expert witness for both witnesses (Exhibit Number 147, main trial of 27 August 2007).

Unlike the appeal which builds up its assertions on the impression, the first-instance Court deliberating, in the first place, about this factual issue – whether the arrival of the witnesses and their appearance before the Court is difficult, starts from the position taken on the basis of results of psychiatric expert evaluation supported by the finding of the clinical psychologist in respect of the witness Krijić, that is, the exactness of the medical finding regarding the witness Šabić who was found to have been a serious heart patient who, in addition, has a spine disease due to which she is unable to move, not even to go out of the house, which certainly falls within important reasons, as the first-instance Court reasonably concludes, for the exception to the principle of direct hearing of the witnesses. Additionally, that Court provides the reasons why it considers that this does not concern decisive evidence (e.g. when it was stated that witness Šabić was not an eye-witness of the event pertaining to the rape of the Witness "A"), prior to drawing a final conclusion, in the correctness of which this Panel has no doubt, that this by no means violates the right of the Accused to defence.

However, this Panel wishes to indicate to the incorrect action by the first-instance Panel in respect of issuing orders to the Prosecutor's Office at the main trial, in the particular case, for the conduct of the forensic psychiatric evaluation of the witness Anđa Krijić. More specifically, if the first-instance Court had considered that forensic psychiatric evaluation of the witness was necessary in order that a decision be rendered on whether the witness would be heard directly or not, it could not have referred the Prosecutor's Office to conduct of the referenced expert evaluation, but it itself should have conducted it, given that the proceedings are not in the phase of the investigation and that, at the main trial, the proceedings are governed by the Trial Panel which, consequently, and under its assessment, decides *inter alia* on whether it will conduct expert evaluation for the sake of clarifying specific facts or not.



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Further, the appeal claims that the first-instance Court grossly violated the provisions of the criminal procedure code by not allowing Tatjana Palija, wife of the Accused, whereby the right of the Accused to defence was violated.

More specifically, the appeal warns that the privilege of not testifying established in favour of the spouse of the accused, which is stipulated in Article 83 of the BiH CPC, does not mean that she is prohibited from testifying, as is incorrectly regarded by the first-instance Court.

Also, bearing in mind Article 265 (3) of the BiH CPC which stipulates that, until the hearing, the witnesses should be placed out of the court-room, the appeal claims that the first-instance Court violated that provision having failed to warn the audience in the court-room about those circumstances. The appeal underlines that it is not true that Tatjana Palija was present in the courtroom during the hearing of all the witnesses, but was present at the hearing of the witnesses under the first Count of the Indictment, but not under the second Count, in respect of which she was only able to provide useful information.

The appeal claims that Tatjana's testimony on the events in Šabića Sokak /alley/ in the summer months and the role of the Accused would be important, contrary to the position of the first-instance court which was presented in the Indictment, by which she would testify about family life of the Accused at the time that came considerably after that covered by the Indictment. More specifically, as this appeal stresses, Senad Šabić and Dika Ališić confirmed that Tatjana Palija came to that alley every day bringing help to them and spent days with them. Furthermore, the Defence did not state the name of this witness in the announcement, given that the Prosecutor's Office, in the course of the proceedings, initially withdrew evidence by Dika Ališić, and it was only after her testifying that the need arose for hearing Tatjana Palija. After all, the Defence has the right to propose witnesses until the completion of the main trial.

The Prosecutor notes in his response that it is incorrect that the Prosecutor's Office withdrew the evidence of witness Dika Ališić; that the Court rendered its decision on the hearing of Tatjana Palija primarily for the reason that she attended the hearing of the witnesses (Exhibit 147, main trial of 27 August 2007), but not for the reason, as the Defence wishes to show; that none of the witnesses mentioned that at the relevant time Tatjana knew the Accused, that her marriage came as a surprise (for the witnesses of the Prosecutor's Office) whereupon she did not come to the alley any more (main trial of 5 September and 10 July 2007).

The first-instance court took its stand on this issue which was also raised during the trial within Chapter – Non-admittance of Some Pieces of Evidence, on pages 16 and 17 of the reasons for the Verdict.

First and foremost, because the first-instance Panel refused a motion by some of the parties in the proceedings, the complaint about the violation of the procedural law is unfounded as such violation exists only if the Court does not present any reasons for its decision, which is not applicable in this case, given that the first-

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instance Panel actually did so. If, on the other hand, the first-instance Panel presents reasons which are claimed by the appeal as not being justified and sufficient, which essentially arises from the contents of the complaint, in that event the complaint refers to the incompletely and incorrectly established state of facts because of the non-presentation of that piece evidence.

As for the appellate complaint referring to the application of Article 83 of the BiH CPC, the first-instance court correctly interprets the contents of that Article; it does not state that a spouse is <u>prohibited</u> from testifying as the appeal imputes to it, but only states on page 17, the 5th paragraph from the top of the page of the contested Verdict that the Court had in mind the cited Article which allows the spouse of the accused <u>to refuse</u> to testify, which are completely different concepts. Besides, the appeal intentionally disregards the provision set forth in Article 81 (1) of the BiH CPC which is cited[1] by the first-instance court and afterwards the first-instance court, starting from the contents of that provision, applied it correctly on the situation which refers to the assessment of relevance of the evidentiary proposal of the Defence that Tatjana Palija be heard as a witness.

As for the appellate argument on the alleged failure of the Court to warn the audience in the court-room about the circumstance that the witnesses be placed outside the courtroom until the hearing, as stipulated by Article 258 (3) of the BiH CPC, the appeal incorrectly interprets this provision given that it refers to the obligation of the presiding judge to direct the witnesses and expert witnesses to the assigned to them outside the courtroom where they shall wait until called for questioning. Therefore, the Court does not warn the audience in the court-room but the witnesses, whereas the information about who the witnesses are it obtains from Article 260 (2) of the BiH CPC, which states that the Prosecutor, after reading of the indictment, shall briefly state the evidence on which he based the indictment, that is to say, from the announcement by the Defence of evidence which the Defence will offer in its defence, as stipulated in Article 260 (3) of the BiH CPC. As the Defence did not announce that it would hear Tatjana Palija as a witness, which was the purpose of the cited Article, the Court did not have any information about that possibility so that it could remove her from the court-room, nor did it, with respect to the principle of holding a public main trial, have any need to do so.

On that occasion, the first-instance court presented all the necessary and, according to this Panel, convincing reasons, which were affirmed by the Prosecutor's Office in its response when it logically notes that, if Tatjana had known the Accused at that time, her friends such as Dika Aličić's daughter-in-law, would not have feared when the accused Palija appeared in the street – for which reason it considers the presentation of this evidence as irrelevant, so that the opposite positions of the appeal, including the one maintaining that the right of the Accused to defence was violated, cannot be accepted as correct.

Actually, the appellate argument on the alleged violation of the right to defence in the referenced context indirectly implies that the first-instance court turned a deaf

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[1] Article 81 (1) of the BiH CPC reads: "Witnesses shall be heard when there is likelihood that their [illegible] may provide information concerning the offense, perpetrator or any other important circumstance[illegible]

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ear to the "Equality of Arms" principle referred to in Article 14 of the BiH CPC, which also cannot be accepted bearing in mind that the same court dismissed a motion by the Prosecutor's Office that, pursuant to Article 273 (2) of the BiH CPC, the statement of the injured Hilmo Suljanović be read out.

Besides, the evidence presented at the main trial to which the Court refers in the Reasoning of the contested Verdict confirms beyond doubt the established state of facts and the conclusion of the first-instance court that the Accused committed the criminal offences in the manner as described in the operative part of the Verdict, so that, even in the case that Tatjana Palija had been heard as a witness, her testimony, according to this Panel, would not have substantially changed the conclusion of the contested Verdict on the criminal responsibility of the Accused, which is also the reason for refusing this appellate complaint.

The appeal further claims that the first-instance court should not have accepted the facts referred to items 7, 11, 13 and 18 as established, given that under the Rule 94 (B) of the Rules of Procedure and Evidence, a fact cannot be accepted as established if, *inter alia*, it contains legal characterization, it addresses the criminal responsibility of the Accused and affects the right of the Accused to a fair trial. In this regard, the appeal claims that the established fact referred to in the above items are unacceptable because they contain the elements or qualifications of the criminal offence of persecution, murder, rape, pillaging, torture, beating and destruction of property.

The Prosecutor notes in his response to the appeal that the appeal of the Defence on this plane does not present any arguments and that, in respect of this issue, the Court stated its position in detail in its written Decision of 14 November 2007.

The Verdict took a clear stand about this issue in Section: a) "Established Facts", on pages 12 (in respect of Item 7) and 13 (in respect of Items 11, 13 and 18) providing clear and acceptable reasons which this Panel completely accepted, due to which the facts established by the final decision of the International Criminal Tribunal for the Former Yugoslavia in the Judgment in the case of *Prosecutor v. Radoslav Brđanin* (IT-99-36) of 28 November 2003 were accepted as proved. The first-instance court rendered the referenced decision bearing in mind the obligation of observing the right to a fair trial guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the BiH CPC, being guided by the ICTY case law referring to the Rule 94 (B) of the Rules of Procedure and Evidence of the ICTY (which stipulates that judicial notice may be taken of adjudicated fact if such fact is distinct, concrete and identifiable if it is restricted to factual findings and does not include legal characterizations, it was contested at trial and forms part of a judgement which has either not been appealed or has been finally settled on appeal or it was contested at trial and now forms part of a judgement which is under appeal, but falls within issues which are not in dispute during the appeal. Furthermore, it must not atest to the criminal responsibility of the Accused or be a subject of a (reasonable) dispute between the parties in the present case, and it cannot be based on the plea agreements in previous cases and impact on the right of the accused to a fair trial).

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Given that the facts from the ICTY final judgments, which were accepted by the first-instance court, completely satisfy the referenced criteria, the presumptive and unsubstantiated complaints of the Defence are hereby refused as ill-founded.

Nevertheless, this Panel notes that the accepted facts referred to in Section 11 (p. 13 of the contested Verdict) are to some extent awkwardly worded, stating that "the fact that there was a widespread or systematic attack against the Bosnian Muslim and Bosnian Croat civilian population in Bosanska Krajina". More specifically, it would seem in this way that the legal conclusion about the existence of a widespread or systematic attack, which actually constitutes the element of the offence, was adopted from the ICTY final judgment, although it is evident from the further wording of the referenced Section that the first-instance court accepted only the facts and on that basis, although using incorrect terminology from the correctly established facts, it rendered correctly the legal conclusion about the existence of the widespread or systematic attack.

For the above reasons, the appellate complaints are hereby refused as ill-founded.

The appeal further indicates to the unlawfulness of evidence when the Court allowed the admission of unsigned documents and documents whose author cannot be established into documentary evidence, which is in contravention of Article 274 (2) of the BiH CPC. It is also indicated to the non-compliance with Article 253 of the BiH CPC, which prescribes the compulsory keeping of the record, more specifically, the Defence was provided only with audio recording, but not with transcripts of the records.

As for the identification of the Accused in the court-room, the appeal builds up the argument about self-persuaded/self-suggestive witnesses[2], especially in respect of testifying by the witness Fikreta Kurbegović who was convinced to have seen in the court-room the man who was beating her husband on 25 May 1992, whereas *vice versa*, the key witnesses such as Raif Begić and the Witness "A" did not recognize the Accused in the court-room.

The Prosecutor notes in his response to the appeal that the appeal does not state what pieces of evidence are at issue; that the Defence evidently mixed the notions of "admission" and „evaluation" of evidence; the fact that a document is not signed and does not have a date or seal, does not necessarily mean that it is not authentic, because the authenticity of the document should observed in relation to its source, and consequently they should be regarded as having been made by the authorities that possessed them and where they had been found, which, in this case, is the Sanski Most Municipality and the Public Security Service upon the withdrawal of the Serb authorities. Those documents were received under the principle of subordination and in accordance with officiat operations, and thus they should be viewed from the aspect of official correspondence and keeping of archive materials, in other words, the distinction between the internal correspondence (uncertified copies) and the outgoing correspondence, sent outwards, which is signed and

[2] The Defence pleads for the self-suggestion method, called Kue after the French psychologist E[illegible] which implies the repeating of the same thing in order to convice yourself of it.

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certified with a seal, should be taken into account. Therefore, the uncertified documents that were found in the Archive do not (necessarily) mean that they are not authentic.

The Appellate Panel holds that these complaints as well as those in other parts of the appeal in essence repeat what the Defence claimed during the first-instance proceedings and about which the first-instance Verdict took its position. Namely, in respect of lawfulness of evidence the Verdict specified its position on page 22, paragraph four and on pages 23 and 24; whereas the issue of the identification of the Accused was addressed on pages 33 and 34. Generally speaking, as regards the describing of the scope of the review of the first-instance decision within the appellate proceedings, the Appellate Panel finds that the appellate proceedings are not the opportunity for the parties to repeatedly defend their arguments, because that is not the *de novo* trial. The general rule is that the Appellate Panel does not review the arguments which do not contain averments either about miscarriage of justice which makes the Verdict eligible for revocation, or about an error in the establishing of the state of facts with the same procedural effect.

As for the lawfulness of evidence, the first-instance Verdict does not make any errors which could call into question the propriety of its bases and the correctness of the conclusions ensuing from them.

In the first place, the Panel holds that the first-instance Verdict gave in its Reasoning a clear and reasoned position about the issue of lawfulness of the presented evidence, the position which is completely accepted by this Panel, given the fact that a document which was found in the Archive of the authorities that possessed it is not signed or does not have a seal does not necessarily mean that the document is not credible, in other words, that it is unlawful. In particular, the appeal presumptively calls into question the lawfulness of evidence, without specifically stating what specific evidence is concerned, and without contesting the correctness of the contents of that evidence (it cannot be expected in that case that the Appellate Panel makes the check of one piece of evidence after another). In the particular case, this does not concern unlawful evidence obtained through the violation of the basic human rights and freedoms and the essential violations of the procedural law, on which it is not possible to base a court decision. Besides, the first-instance Panel reviewed the evidentiary value and admissibility of each individual document, in the light of all of the presented evidence, both the documentation and statements by the witnesses, and only on the basis of such assessment it drew a conclusion as to whether some fact was proved, completely observing the principle of the lawfulness of evidence.

The appellate argument of the Defence Counsel which refers to the violation of the right to defence of the Accused because the record of the work at the main trial was not kept, the Appellate Panel finds ill-founded. To tell the truth, the Defence Counsel refers in the Appeal to Article 253 (1) of the BiH CPC reading: "*A verbatim record of the entire course of the main trial must be kept*". However, the legal provisions allow the keeping of the record in the form of a written record or by making an audio (sound) recording. Thus, Article 155 of the BiH CPC specifies: "*As*

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a rule, all undertaken actions during the criminal procedure shall be tape recorded..." During the first-instance proceedings in this case, the audio recording of the entire course of the proceedings was made, and the Defence Counsel and the Accused personally had the right and possibility to receive that recording. Ill-founded is the assertion of the Defence Counsel that the first-instance court did not act in compliance with the law, for the reason that the audio-recording, pursuant to the cited legal provision, constitutes a valid record. The Defence Counsel by no means contests the correctness, authenticity or completeness of that audio-recording (which is easily available, literal and contains the entire course of the proceedings), so that it is unclear how the right of the Accused could have been violated in this respect.

As for the allegations in both Appeals, especially the Appeal by the defence counsel Dragoslav Perić regarding the identification of the Accused in the court-room by the only surviving participant of the incident which is factually described in detail in Section 1 of the operative part of the first-instance Verdict, the witness Raif Begić, who says at one point that "by the present figure he does not resemble the man who was on the site at that time..." (Transcript of 29 March 2007, p. 83). The Appellate Panel does not find any contradiction with the categorical assertion by that witness-victim that he is confident that it was Palija (Transcript of 29 March 2007, p. 84). More specifically, at the main trial this witness gave a logical explanation why the Accused in the courtroom did not resemble that man who was the offender in the relevant event, bearing in mind exactly the key words which link the appearance of the Accused to the present shape, when he is fatter than he was at the time of the event, to which the Prosecutor rightfully indicates in her response to the Appeal. After all, even a crude comparison of wartime photographs of the Accused with his appearance at the time of the trial (Exhibits of the Prosecutor's Office: Number 23 – Photographs of Jadranko Palija scanned from the Refugee Identity Card and the excerpt from the CIPS Database, Number 24 – Wartime photographs of the Accused, Number 25 – Excerpt from the CIPS Database with a photograph of 19 February 2004 and Number 27 – Refugee Identity Card to the name of Jadranko Palija Number 1705/93 of 30 June 1993) almost makes one think that this concerns different persons and not exactly the same person.

In respect of the identification of the Accused in the courtroom, the Panel notes that this objection was often repeated in the filed appeals and that it was always repeated in the same manner, as a rule, the incorrect one. More specifically, the identification of the Accused in the courtroom by the witness does not constitute at all an act of proving in the manner as stipulated in Article 85 (3) of the BiH CPC. Whether the witness recognized the Accused in the courtroom or not, cannot be regarded as identification in terms of the cited legal provision, but can only be assessed in terms of the evaluation of validity and relevance of the witness himself/herself (evaluation of his testimony), whereas the situation that the witness does not recognize the Accused in the courtroom does not diminish the fact that the Accused is exactly the person who committed the criminal offences he is charged with. In the particular case, the first-instance court did not have any reason to separately assess the identification of the Accused in the courtroom, given that on the basis of the evidence presented, observed individually and collectively,

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been proven beyond any reasonable doubt established the identity of the Accused, his presence and role in the events in the area of the Sanski Most Municipality in the relevant period, for which reason this appellate argument is also refused as ill-founded.

Additionally, the ICTY case law goes in support of the referenced deliberation when the Trial Camber did not attach any positive probative weight[3] to the issue of identification in the courtroom in the *Kunarac et al.* Case.

Contrary to the appellate arguments concerning the essential violations of the criminal procedure provisions, following the review of the first-instance Verdict, the Appellate Panel finds that the Trial Panel adduced evidence by hearing both the Prosecution witnesses and the Defence witnesses, reviewed the adduced evidence of objective relevance and provided a comprehensive evaluation of that evidence, individually and collectively, including the assessment of inconsistency of witness testimonies and their credibility, and thus this Panel finds the conclusions of the Trial Panel entirely acceptable. For this reason, the Appellate Panel finds that the referenced complaints by the Defence remain without the necessary factual and logical grounds and are, as such, of no use for any further considerations, either on theoretical or practical level.

2. Regarding incorrect application of substantive law

Appeal

The Defence argues the incorrect use of the substantive law, given that the first-instance Court introduced case law, as a source of law, which is impermissible, given that the trial should have been conducted pursuant to the provisions of the Criminal Code and the Criminal Procedure Code which was applicable in 1992. By such action the Court most blatantly violated the principle of legality, and thus the Verdict appears to be unlawful and incorrect in that respect, as well.

The Defence further refers to Article 7 of the ECHR and Article 15 of the ICCPR, stating that the same principles have been developed by the provisions of Article 3 (Principle of Legality) and Article 4 (Time Constraints Regarding Applicability) of the BiH CC, and in this regard it reminds that crimes against humanity, as a separate category of criminal offences, were not provided as a separate criminal offence by the previous criminal legislation, although many basic criminal offences which may amount to crimes against humanity, were envisaged in different chapters of that law. Consequently, the application of the new Criminal Code in which the crimes against humanity are specified as a separate criminal offence, would bring about the violation of the *nullum crimen sine lege* principle in this case, whereby the inadmissible extension of the jurisdiction of the court *ratio materiae* would occur. The law which is more severe for the perpetrator cannot be applied only because the criminal offence was not stipulated as a separate form.

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[3] ICTY Case Number: IT-96-23&IT-96-23/1 in the Judgment before the Appellate Chamber of 12 June 2002, Section 562

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Finally, the appeal claims that it is evident that in this case the criminal code was incorrectly applied, given that the law has changed on a number of occasions since the commission of the criminal offence, whereas the Criminal Code of SFRY and the Criminal Code of FBiH are more lenient for the perpetrator of the criminal offence than the Criminal Code of BiH, and by the very application of the latter Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 15 of the International Covenant on Civil and Political Rights are violated.

The Appellate Panel notes that, during the proceedings, the Defence argued the incorrect application of substantive law in this case being of the view that the application of the Criminal Code of BiH constitutes a violation of the principle of legality, that the Trial Panel had in mind all the objections of the Defence in this regard and correctly based its decision regarding the application of substantive law on international and national legal norms.

The Trial Panel was of the opinion that it was important to pay attention to the principle of legality and the principle of time constraints regarding applicability of substantive criminal law, in respect of the time of the perpetration of the criminal offences (during the period from May 1992 to October 1995), and the Criminal Code which was effective then.

The Trial Panel stated the rule of the principle of legality pursuant to Article 3 and the applicability of the Criminal Code within time constraint, Article 4 of the BiH CC, and Article 7 (1) of the ECHR and Article 15 (1) of the International Covenant on Civil and Political Rights (ICCPR). However, the Panel also addressed the exception to the same principle pursuant to Article 4a of the BiH CC, Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR.

Article 4 a) of the BiH CC actually adopted the provisions of Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR, and thereby explicitly allowed the exceptional deviation from the principle referred to in Article 4 of the BiH CC and the deviation from the compulsory application of a more lenient law in the proceedings pertaining to the criminal offences under International Law and charges which include violations of the rules of international law. Such position has been taken in the jurisprudence of the Court of BiH hitherto in compliance with the international jurisprudence[4].

Bosnia and Herzegovina, as the successor state of the former Yugoslavia, ratified the ECHR and ICCPR which cover the relevant time of the perpetration of criminal offences. For this reason, these treaties are binding upon Bosnia and Herzegovina so that the state authorities of Bosnia and Herzegovina must apply them, and accordingly Article 4 a) of the BiH CC constitutes only a domestic legal reminder, given that it would not be necessary for the application of the referenced treaties

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[4] See Decision on admissibility and merits in the *Abduladhim Maktouf* Case of the Constitutional Court of Bosnia and Herzegovina of 30 March 2007, No. AP1785/06 to which the Court of BiH has already [illegible] its case law: See, e.g. Verdict in the *Radmilo Vuković* Case, No. X- KR/06/217 of 16 April 2007, [illegible] the ECHR in the *Karmo v. Bulgaria* Case, Decision on admissibility of 9 February 2006.

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which are binding upon all courts in BiH, whereas Article 4 a) of the BiH CC is not a compulsory requirement for its application. The same provisions as in Articles 3 and 4 of the BiH CC can be found in the CC of the Brčko District, Federation of BiH and Republika Srpska.

There is a rule and an exception to the principle of legality, which are equally relevant and important. The European Court regarded both the rule and the exception to the principle of legality as equally recognized and as being integral parts of the same principle. The European Court addressed this issue in at least two cases.[5]

On reviewing the appeals of the Defence, the Appellate Panel regards that the Defence develops some legal and theoretical considerations on the principle of legality without providing any argument which shows the kind of presumptive application of law in the Verdict. The appeal is presented as apparent violation of the principle of legality because the Verdict arbitrarily applied the substantive criminal law when those criminal offences were not regulated by the applicable laws of BiH and when the customary international law and general principles were not directly applicable.

The Verdict thoroughly explains why and how the actions with which Jadranko Palija is charged constitute the criminal offences under the BiH CC. The Defence invokes Articles 3 and 4 of the BiH CC and 7 (1) of the ECHR to substantiate its conclusion that the Trial Panel applied incorrect substantive criminal law in this case.

However, the Defence completely forgets and disregards Article 4 a) of the same BiH CC, Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR, which constitute, as has already been said, the basis for the Verdict. As the Trial Panel explains in detail in the Verdict, Article 4 a) is the provision which was also accepted by the Constitutional Court of BiH.[6] It is consistent with the ECHR, jurisprudence of the European Court and the ICCPR. Most importantly, crimes against humanity and crimes against civilians, which are addressed in this case, were a part of the international customary law at the time when the Accused was involved in the actions of which he was found guilty. Pursuant to Article 4 a) and international customary law, the conduct of the Accused constituted the criminal offence in 1992. The Trial Panel did not need to look for comparative provisions in the Criminal Code of the SFRY which was applicable at the relevant time in order to justify its Verdict. Indeed the Trial Panel only noted that such provisions existed. It is sufficient that international customary law covers the conduct prohibited by Articles 172 and 173 of the BiH CC, in order for it to be a basis for handing down the Verdict in this case.

Finally Article 4 a) of the BiH CC, which the first-instance Verdict rightly invokes, provides that Articles 3 and 4 of the law do not prejudice the trial and punishing of a

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[5] *Karmo v. Bulgaria* Case. Decision on admissibility of 9 February 2006. Also, see Decision on admissibility of 5 January 2006 in the *Ivanov v. Bulgaria* Case.
[6] A. Maktouf (AP 1785/06), 30 March 2007.

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person for an offence or omission which, at the time of commission, constituted the criminal offence under the general principles of international law. Thus, Articles 7 (2) of the ECHR and Article 15 (2) of the ICCPR were practically adopted again. The substantial basis of the Verdict is completely omitted from the arguments of the Defence which, in addition, do not contain any explanation, nor do they provide any argument why customary international law and general principles were not directly applicable in the case at hand, and therefore, no grounds for appeal exist in this respect either.

3. Regarding incorrectly and incompletely established state of facts

General considerations with regard to the assessment of the probative power of testifying

As for the complaint regarding the credibility of testimonies on which the first-instance decision is based, the Appellate Panel notes that a reliable and detailed testimony is necessary for rendering a fair decision by the Trial Panel which is based on law. In addition, the Appellate Panel was aware, as regards the approach to testimony and a well-intended one, that it is generally inextricably connected to the issue of the volatility of human perception and different cognitive capacities of each witness. Besides, in the war crime cases, testimonies have their specificities related to the circumstances under which the original statements were given immediately after the end of the conflict to police, prosecutor's office or courts whose members, with the exception of the ICTY investigators, were as a rule of the same ethnic background, that the witnesses then could not even anticipate that the time would come when unrestricted freedom of movement would be in place, that members of different groups, until recently opposed in the war, would become neighbours again. Besides, witnesses were often compelled to change their place of residence[7]. All of that contributed to the interpolation of numerous other events into the memorizing process between the time when the information about the relevant event was coded in the mind of the witness and the time of testifying, resulting necessarily in the loss or distortion of information. Also, under the provisions of the new CPC, witnesses are questioned by police or prosecutor's office during the investigation, whereas at a main trial all of their statements are the subject of direct and often detailed cross-examination during the proceedings which is adversarial by its nature. Due to this reason it is logical to expect that, at a main trial their statements would differ in details in respect to what they stated previously or what they did not state and what they recall at the main trial. For these reasons, the Appellate Panel had in mind the approach by the ICTY Trial Chamber to this issue when it is stated:

„ In evaluating the evidence given by witnesses, the Chamber has taken into account that the alleged events took place almost ten years before the witnesses presented their testimonies in court. The Chamber accepts that due to the long period elapsed between the alleged commission of the crimes and the trial, witnesses cannot reasonably be expected to recall the precise minutiae, such as exact dates or times, of events. The Chamber further notes that many Prosecution witnesses were transferred through a number of different detention facilities, in a sequence that

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[7] See: Group of authors: Protection of witnesses in serious criminal offences – procedural measures [illegible] protection. Manual for the training of police, state attorneys and courts, Council of Europe, Septe[illegible]

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may, for some, have amounted to traumatic experiences. The Chamber finds that such witnesses cannot be expected to recall each and every detail regarding the sequence or details of the events. The Chamber further shares the view of Trial Chamber II that in most instances the oral evidence of a witness will not be identical with the evidence given in a prior statement. It lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court... The Chamber has not attached particular significance to minor inconsistencies in the testimony of a witness or irrelevant discrepancies in peripheral matters in the testimonies of different witnesses who testified to the same events. The Chamber has, however, only attached probative weight to evidence submitted by witnesses who were, as a minimum, able to recount the essence of the incident charged in sufficient detail."[4]

Complaints about credibility of testimonies of Prosecution witnesses:

Defence Counsels for the Accused, each on his part, object to the regularity of the state of facts established by the first-instance Verdict which in the first place, was based on the testimony by the Prosecution witnesses, as follows:

<u>As for Section 1 of Verdict</u>

This Section of the state of facts established in the first-instance Verdict refers to the participation of the Accused Jadranko Palija, together with other soldiers of the Army of the Republika Srpska, in the attack on the civilian population of the hamlet of Begići – the village of Kljevci, at the relevant time, to the separation of women and children from men whom they took across the fields called *Vinogradine*, to the arrival at a slaughterhouse next to the bridge on the Sanica River where the Accused killed Miralem Cerić and Enver Cerić, and then on the intersection in Vrhpolje, he killed Ismet Kurbegović, whereas on the main road towards Sanski Most he killed Irfan Begić and then he also killed Enes Dizdarević on the Vrhpolje bridge, and together with other soldiers he took part in the killing of other civilians whose names are stated in the operative part of the Verdict.

The appeal by the defence counsel Perić Dragoslav analyses the testimony of the only survivor from those events, the witness-victim Raif Begić, against the statements he gave for record on different occasions, noticing inconsistencies in his testimony.

The appeal by the defence counsel Ranko Dakić also indicates to the illogical point in the testimony by the witness Raif Begić, and particularly notes that, unless substantiated by other evidence, the statement of a witness should be taken with great caution, that is to say, such statement cannot be accepted for a still stronger reason that much time has elapsed since 1992 and, therefore, the statements of witnesses, generally speaking, have restricted value.

As the confirmation of the doubt in the credibility of the testimony by the witness Begić, both appeals state a part of his statement describing the way in which Ismet Kurbegović was killed. More specifically, under the testimony this witness gave to

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[4] *Office of the Prosecutor v. Mladen Naletilić, aka Tuta and Vinko Martinović, aka Štela,* "2003" Hague Court 3 (31.03.2003) Case No. IT-98-34-T para 10.

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the court in Sanski Most, Ismet Kurbegović was killed in such a way that Jadranko Palija shot one bullet in his forehead in cold blood, whereas at the main trial he said that Jadranko shot "him" providing no details as to which part of the body. In connection with that, the incontestable medical documentation indicates to the fact that Ismet Kurbegović had entry and exit wounds in the area of ribs but not in his skull which, according to the appeal by the defense counsel Perić, would be more *logical, because the deadly bullet was fired in his forehead*, as stated by the witness Begić.

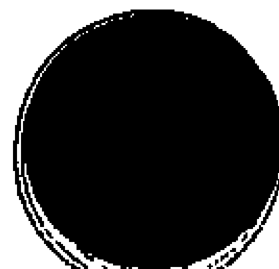
In his response to the appeal the Prosecutor notes that there is no reason for the Court not to give credence to Raif Begić if it takes into consideration the entire statement of his, particularly his deeply moving testimony given at the main trial. Besides, his testimony has been confirmed by the statements of other witnesses (main trial of 19 April, 9 May, 10 May 2007) and by the record on exhumation of mass graves from which bodies of those taken from Begići were exhumed (Exhibits Numbers 93, 94, 95), and accordingly the testimony that the death of civilians from Begići was the consequence of Jadranko Palija's activities, also, within the wide-spread and systematic attack against the civilian population is not called into doubt by anything.

As for Section 2 of the operative part of Verdict

This Section of the operative part of the contested Verdict refers to the fact that in the summer of 1992, the Accused came to a house where he found two women with two children, who had come to get food, and having asked for their identity documents, he intimidated them, telling them that their life in Sanski Most was worthless, and under the pretext that he wanted to search the other part of the house which was locked, he took female *A* to the entrance door to that part of the house, broke down the door and, having come inside, he raped her threatening her with a pistol, and then threatened to kill her if she spoke about what had happened.

The appeal by the defence counsel Ranko Dakić points out the contradictions between the statements that the witness "A" gave during the investigation and at the main trial, and he objects the same to the witness Senad Šabić saying that his statement is *contradictory in its entirety*, as is the *statement by the witness* Dika Ališić, which in addition is illogical and factually impossible, as well as inconsistent with the statement of the witness "A", about which the first-instance Court does not state a single word in the Reasoning of the Verdict, although it could not have rendered a convicting sentence unless the guilt had been proved beyond reasonable doubt.

The appeal by the defence counsel Dragoslav Perić also calls into doubt the statements of the witnesses which are, as stated, confusing and even contradictory as to the essential facts, especially pointing out the statement by the witness "A" when she describes the Accused and his hairstyle which is completely contrary to *the description referred* to in Section 1 of the operative part of the Verdict.



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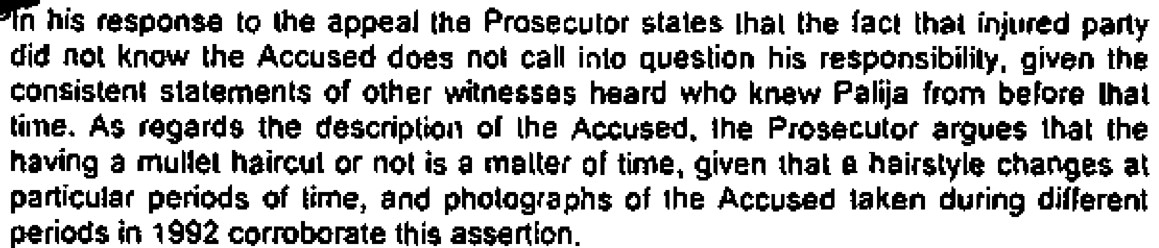

In his response to the appeal the Prosecutor states that the fact that injured party did not know the Accused does not call into question his responsibility, given the consistent statements of other witnesses heard who knew Palija from before that time. As regards the description of the Accused, the Prosecutor argues that the having a mullet haircut or not is a matter of time, given that a hairstyle changes at particular periods of time, and photographs of the Accused taken during different periods in 1992 corroborate this assertion.

As for Section 3 of the operative part of Verdict

This Section of the state of fact established by the first-instance Verdict refers to the period from 1993 to October 1995 when the Accused, as a military police officer, in the area of Sanski Most, stopped Muslim civilians, intimidated and beat them, and participated in their arrest and taking them to a military police prison.

The appeal by the defence counsel Ranko Dakić claims in relation to this Section of the Verdict that the responsibility of the Accused is based on the statements of self-persuaded witnesses whose statements are illogical, contradictory and most often they concern indirect testimony, even on the third hand.

The defence counsel Dakić concludes in his appeal that the first-instance Court ascribed all contradictions in the statements of the Prosecution witnesses and in documentary evidence as a consequence of the lapse of time and human subjectivity, whereas, by the contrast, he assessed the statements of the Defence witnesses, without any explanation, as implausible, illogical and untrue, being guided in the evaluation of evidence by the case law, but not by the Criminal Procedure Code, and hence rendered the Verdict based on a body of evidence, but not beyond every reasonable doubt.

As opposed to the position stated in the Appeals this Panel believes that the First-Instance Court, on the basis of the evidence presented at the main trial and facts established on the basis thereof, in a reliable manner concluded that the accused Jadranko Palija committed criminal acts as described under counts 1 through 3 of the operative part of the Verdict and correctly found that the described acts include all elements of the criminal offence of *Crimes against Humanity* in violation of Article 172 (1) h), in conjunction with items a), e), g) and k) of the CC of BiH (counts 1 and 2 of the operative part) and the criminal offence of *War Crimes against Civilians* in violation of Article 173 (1) a), c) and f) of the CC of BiH (count 3 of the operative part), which conclusion is fully endorsed by this Panel.

Indeed, with regard to the evaluation of evidence on which the decision on responsibility of the accused is based, in the opinion of this Panel the First-instance Verdict provided valid and detailed reasons as to why certain facts were taken as proven and in a satisfactory manner explained and reasoned in which manner they evaluated statements provided by witnesses, as well as other pieces of presented evidence. The fact that the First-instance Panel did not evaluate evidence in the manner favorable for the Defense and that they did not analyze every sentence of statements given by the witnesses, either when they were examined during the

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course of the investigation or at the main trial, does not make the First-instance Verdict deficient and incomplete, but on the contrary, it is clear and focused on important elements of the criminal offence at hand.

The evaluation of evidence which is an important part of the Verdict, should contain an explanation as to the basis on which the Court concluded (or did not conclude) the existence of important elements of criminal offence and in which manner contradictory pieces of evidence were evaluated. However, it does not mean that the Court is bound to explain absolutely every difference in witnesses' statements.

Bearing in mind the foregoing, the First-instance Panel thoroughly dealt with the state of facts in the case always applying the standard approach when stating evidence they referred to, analyzing evidence individually and as a whole and presenting evidence on the state of facts. For these reasons the contested Verdict contains valid analysis of all decisive facts, and therefore, the Appellate Panel believes that the objection stated in the Appeal that the evidence was not evaluated in the manner as prescribed under the CPC, is not valid.

The averments stated in the Appeal pertain to different interpretation of the contents of the examined witnesses' statements than the one rendered by the First-instance Panel, as well as their alleged contradictions. Nevertheless, if the statements are analyzed in their entirety and in relation to other evidence and not in fragments and out of the context as was done in the Appeals, then it is quite clear that the presented evidence – primarily the witnesses' statements concurrently confirm the state of facts described in the operative part of the Verdict, as the First-Instance Panel correctly concluded.

Moreover, pursuant to Article 15 of the CPC of BiH the right of the Court to evaluate the existence or non-existence of facts is not bound or limited by special formal evidentiary rules. It is the position of this Panel that if certain piece of evidence is lawful and valid and if it is authentic and credible then such evidence, as opposed to the averment stated in the Appeal, can be sufficient for finding the commission of the criminal offence even if such piece of evidence follows from the statement of a single witness.

Thus, the statement of the witness Raif Begić, a direct eyewitness to the event described under count 1 of the operative part of the Verdict and the sole survivor of the execution, is likewise accepted in its entirety by this Panel as truthful and credible because it is complete and convincing and does not leave any doubt that the event took place exactly in the manner as described by the witness.

When evaluating this witness statement and upon the claim stated in the Appeal pertaining to the inconsistency of his testimony, the Appellate Panel took a different approach when considering this issue compared to that of the appellant. There is nothing in Begić's statement which would render it unrealistic, such as lack of factual details, lack of nuances or personal attitude, that is, that which would make his statement bare, with a linear tendency, by always following the same line. For example, Raif Begić testified about the killing of Irfan Begić at the bridge, saying

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that the Accused called out, "You in the green jacket....." before shooting him. The record on the exhumation conducted before Raif Begić gave his statement on these circumstances confirmed that Irfan Begić had worn a green jacket when he was shot and killed, thereby corroborating Raif Begić's testimony. Therefore, some imperfections and inconsistencies in the statement of this witness, of which the Appeal speaks, give it convincing character and life-like appearance, because otherwise, small imperfections and inconsistencies are usually not present in made-up stories when the statement giver directly and dogmatically tries to conceal the truth by avoiding any change of the focus, at the same time leaving out all that contributes to general impression. When evaluating Raif's statement from the psychological aspect, the Appellate Panel listened to the audio recording and was satisfied that his pronunciation of words[9], tempo and rhythm of speech show tranquility which is characteristic for persons who like him suffered such traumatic experiences, dictated only by the motivation to tell the truth about what he had experienced and the witness – victim Raif was explicit about this. The detail witness Raif referred to pertaining to his encounter with the snake on the bank of the Sana River, which actually helped him regain his strength and continue with his salvation, in addition to its psychological and symbolic meaning only confirm this Panel in its belief that his testimony is convincing. Finally, why would this witness falsely accuse Palija for his personal drama which he survived by chance and thus contribute to concealing the role of other culprits for this crime. Other, subjective pieces of evidence, serving as control evidence in this case, also point to the veracity and credibility of his testimony, including the statements given by Fikreta Kurbegović, Sadika Begić and Mirzeta Cerić pertaining to the separation of men and women in the village before the column of men was marched to the execution site and Anđa Krljić's testimony related to the event when Raif returned to the village and when they tended to his wound on the head which he got when he jumped from the bridge into the water, as well as objective evidence like the exhumation records.

Inconsistencies in the statement of this witness to which the Appeals point – witness Begić's statement that Palija shot one of the victims in the head and that during the exhumation it was not found that the wounds had been inflicted to the skull but in the area of thorax (perforating wound of ribs – according to the Record of the Ministry of Interior – Public Security Center no. VM-II-22/96 dated 12 May 1996), are not of such nature to question the veracity and reliability of witness statement and therefore, the Appellate Panel shares the conclusion reached by the First-instance Court, namely that it is sufficiently precise in regard to all key points and important elements of the relevant criminal offence. Certain deviations in the statement only show that the witness is honest and, bearing in mind circumstances pertaining to the threat against his life, he repeated before this Court all facts and circumstances which he objectively was able to remember. Indeed, when it comes to such criminal offences, it is realistic to expect that the witness – victim focuses his undivided attention on the situation but it is also realistic to expect that a high level of stress would interfere with the ability to accurately notice details of the event. Due to fear for his life it is quite possible that the witness Raif directed his

[9] The area of his statement pertaining to the so-called paralinguistic communication (Court's note)

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attention upon the weapon which actually posed the threat[10] and due to this he incorrectly interpreted other sequences of the event, in this case, into which part of the body of one of his victims Palija fired.

Likewise, the averments made out in the Appeal contesting the finding of the First-instance Panel not to give credence to the Defense witnesses Rajko Mastikosa, Renko Kolar and Đuro Stojanović who tried to provide an alibi to the accused, are not founded. All arguments stated in the Appeal have already been pointed out during the First-instance proceedings and the First-instance Verdict took the correct position in relation to them and the reasoning provided in that regard is accepted in its entirely by this Panel as well.

In view of the foregoing, the Defense does not have to agree with the conclusion of the First-instance Panel but also they cannot reasonably claim that there was no evidence on which the Trial Panel could rely when reaching a factual and legal conclusion related to count 1 of the operative part of the First-instance Verdict.

With regard to the factual findings under count 2 of the operative part of the Verdict, the Appellate Panel believes that the First-instance Verdict provided detailed and comprehensive analysis of key evidence - witnesses' statements who testified about the circumstances pertaining to this count and in this regard reached the correct conclusion which is fully supported by this Panel, as well.

Indeed, statements of the witness under pseudonym "A" and witnesses Dika Ališić, Rufija Šabić and Senad Šabić mutually concur in relation to the actions of the accused and this Panel also finds them to be clear, reliable and credible and that they entirely confirm the factual findings under this count of the operative part of the Verdict.

It is the fact that witness "A" did not know the accused from before but when evaluating her statement this Panel, too, concludes that there are no inconsistencies in it with respect to what had actually happened to her. When this statement is related to the statements given by other witnesses who knew the accused Palija before and who consistently described his character and traits in their testimonies stating that he was arrogant, rough and overbearing, then such statements provide a full picture of the relevant actions of the accused precisely in the manner as evaluated by the Trial Panel.

Certain inconsistencies in the testimony of the witness "A" on which the Defense insists (whether she saw the accused when she left the house or not, who was among the gathered neighbors, whether somebody mentioned the name Jadranko or not), trying to discredit the witness, are not of such nature so as to call into question the factual findings or the truthfulness of the testimony which clearly shows that the witness speaks about what she had experienced. Additionally, the circumstances under which the event took place and the traumatic situation in which she found herself cannot be disregarded and for these reasons she found it difficult to remember all details and therefore, it cannot be reasonably expected that

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[10] In literature known as *gun effect* (Court's note)

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she would be a hundred per cent certain (as cannot be expected from other witnesses, either) when speaking about the events which took place then. It is therefore quite understandable that there are some deviations in the statements which however did not lead to a different factual conclusion than the one for which the accused was found guilty.

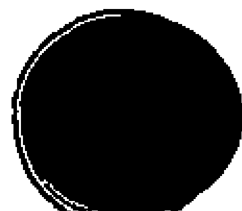
Furthermore, the Appeal is inconsistent when referring to the statement given by the witness Senad Šabić, pointing out that this witness claimed that he saw Palija riding a bicycle immediately before the incident and that he told him he was going to cut the grass for the municipality and confirmed that that was his sole encounter with the purported Palija and that he only heard about the rest.

Nevertheless, this witness was very clear and specific in his statement saying that he had met Palija on his way to cut grass and that he came back because a loud bang was heard and when he approached the house he heard noise and then he saw Jadranko Palija under the eaves standing above the witness "A" who was upset and he thought that the worst thing that could happen to a woman happened to her. The witness was certain that the person who stopped him when he went to cut grass and the person he saw on the veranda are one and the same person and without any second thoughts he confirmed that he could recognize Jadranko Palija.

Witness Dika Ališić also recognized him and explaining that at the time Palija had not been as fat as he was then, according to her words he was vigorous and she remembered him by an event she watched from her own yard when Palija took the injured-party "A" behind the house. When they returned the woman was all disheveled, she sat on a chair and buried her head in her hands facing the ground. The witness does not have any doubts that it was the accused as she knew him before. Additionally, she confirmed the presence of witness Senad Šabić and she stated that the latter told her that they should go around so that they could see everything through a window of some barn but she did not dare.

There is nothing illogical in the statement of this witness as claimed by the Appeal, nor are inconsistencies between her statement and statements of other witnesses, pointed out by the Defense, of crucial importance. These inconsistencies pertain to who left the house first, whether it was witness "A" or Palija, whether Palija took the other woman, who was with the witness "A", by the hand, and whether the accused had a pistol or not (the Defense even incorrectly interpreted the latter stating that the witness Ališić did not see the pistol but she saw a horrible knife which Palija carried. The truth is that she actually stated that the accused had had hand grenades and a pistol, but that she feared the knife the most).

The Appellate Panel notes that the testimonies witnesses provided before the Court are their subjective experience of the events there are testifying about, and that they, quite naturally, and due to a different intensity of concentration, perceptive ability, memory and the situation they found themselves in, paid attention to different details. What is important is that their statements concur in all important elements pertaining to the referenced event as was correctly concluded by the



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First-instance Panel, while certain discrepancies only corroborate the conclusion that they are testifying about what they experienced.

By logical reasoning and relating witnesses' statements given with reference to actions of the accused as described under count 3 of the operative part of the Verdict and after evaluating factual circumstances in their entirety the Appellate Panel finds that the First-instance Panel correctly concluded that in the period between 1993 and October 1995, as a military police officer he moved around the territory of Sanski Most, and at that time he stopped Muslim civilians, intimidated and beat them, including Faruk, Ljilja and Zlatko Maličević, Husein Aganović, Mehmed Zukanović and Vehid Zulić, as well as taking them to the military police prison which was located in the Mahala settlement; at a checkpoint in Pobriježje, he demanded that civilians who were passing through the checkpoint show their identity documents, insulted them in various ways, intimidated and beat them, including Velid Jakupović, Vehid Zulić, Eniz Cerić, a deaf and dumb person Idriz Alagić, a/k/a Iba, Agan Habibović, and very frequently he intimidated and beat Teufik Kamber, telling him to move out, until Teufik Kamber was killed in his house which was blown up in December 1994.

Attempts of the Appeal to point out contradictions and illogicalities in witnesses statements who testified in relation to this count of the operative part of the Verdict and their insistence that the Court took a selective approach when evaluating evidence, during which process, according to the Appeal, the Court always accepted that part of the statement which was the most detrimental to the accused, cannot be accepted. The fact that the appellants in their Appeals gave greater credence and importance to the Defense witnesses than to the Prosecution witnesses does not make their allegations sustainable because evaluation of evidence belongs always and only to the Court.

When arguing that the Court was biased when evaluating and accepting only those evidence which confirmed the responsibility of the accused, neglecting in the process those evidence which were in favor of the accused, the Appeal did exactly what they reproached the First-instance Court for. Only some parts of testimonies of certain witnesses are quoted in the Appeal and even those most often incorrectly, and by relating those parts they tried to call into question the veracity of those statements and the correctness of their evaluation by the First-instance Panel.

For example, it is pointed out in the Appeal that the witness Mugbo Zukić claimed that Tufo (Teufik Kamber) told Severin Jolić that he was beaten by Palija and these averments were refuted by the witness Jolić himself who stated that the name Palija meant nothing to him although he and Tufo were put on labor detail every day. Nevertheless, the Appeal disregarded that witness Jolić also stated that Teufik himself complained that Palija had slapped him and that he had to clean the check-point. Likewise, the Appeal refers to the statement of witness Ismeta Kamber who claimed that her husband Teufik passed through the checkpoint in Podbriježje often and that Palija and other members of the military police did not stop him in most cases, which is consistent with the statements of witnesses - members of the

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military police who were on the checkpoint and who claimed that they had not stopped the persons whom they knew. However, the part of the statement by witness Ismeta Kamber when she described watching the accused Palija beating her husband at the check-point is not mentioned in the Appeal.

The Appeal incorrectly conveyed the statements given by witnesses Ismet Čehajić, Velid Jakupović and Mehmed Zukanović.

Thus, according to the allegations stated in the Appeal witness Čehajić confirmed that he had not seen Palija beating deaf-and-dumb Idriz because the structures were blocking his view although the witness actually clearly stated that he saw Iba (Idriz) and a military police officer, who, as he was told, was called Jadranko Palija who was kicking him with his boot and he also saw a woman approaching them and she was also hit by the police officer.

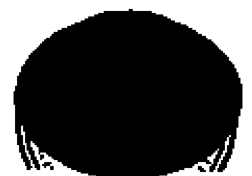
In relation to the witness Velid Jakupović it is stated in the Appeal that the witness claimed to have been brutally beaten by Palija on a daily basis. The Appeal uses this to support its theory on the incredibility of such testimony, firstly because it was illogical that somebody would come to the checkpoint every day knowing that they would be brutally beaten and also because there were 8-hour shifts at the check-point and therefore it was not possible for Palija to be constantly at the checkpoint.

Nevertheless, contrary to the allegations made in the Appeal witness Jakupović told how he avoided the check-point where the accused Palija was and that only on one occasion, when he was too tired to return home using roundabout roads, he went through that check-point when it was Jadranko Palija's shift. The witness particularly remembers him by the *cute way in which he pronounced letters s and š.*

Finally, the Appeal reasoned illogicalities in the statement given by the witness Mehmed Zukanović who claimed it was Jadranko Palija who beat him up with a shovel so that he was black and blue and that he remained on his feet throughout that time. What the witness actually stated is that the accused was hitting him with a shovel on his hands until they were almost black and blue. This witness has no doubts that it was the accused himself who both times took him to the Delalić's house where he beat him. The witness provided complete details and was consistent when describing the manner in which this happened so the averments made in the Appeal about his statement being absolutely illogical are entirely unacceptable.

Violation of the Criminal Code cannot be established by applying partial review of the state of facts as the Appeal attempts, nor can it throw into doubt the findings of the First-instance Court on the criminal responsibility of the accused, in the same manner as the evaluation of the credibility of the statements of the witnesses who testified in relation to this count of the operative part of the Verdict, cannot be questioned because they were entirely clear, logical and consistent.

The objection stated in the Appeal that none of the witnesses even closely remembered the day or the period when some incidents took place also cannot



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throw into doubt the established state of facts, primarily because the majority of witnesses did state the period and also, bearing in mind extremely stressful and traumatic period in which the witnesses found themselves and constant fear for their own and lives of their families, it cannot be expected of them to pinpoint exactly when the event took place. What is important is their concurrence and objectivity when speaking about the relevant actions and their logical explanations which leave no room for doubt that they were committed by the accused himself. For this reason, when evaluating statements given by the Defense witnesses Nedeljko Kondić, Željko Baljak and Drago Krunić, military police officers who at the time were also in the territory of Sanski Most municipality, the First-instance Court accepted the possibility that the maltreatment and beatings of civilians who passed the check-point in Pobriježje were not regular occurrences in all shifts of military police officers who were deployed at the check-point. However, the Court correctly concluded on the basis of witnesses and victims statements that the accused Palija, during his shifts at the check-point, insulted, abused and beat civilians of non-Serb ethnicity and this conclusion is accepted in its entirety by this Panel as well.

That the allegations stated in the Appeal are ungrounded is supported by the fact that the First-instance Court, lacking solid evidence, left out the part of the factual description under count 3 of the operative part of the Verdict pertaining to the accused intimidating and beating Hasib Hodžić and Hilmo Suljanović, as well as that the accused participated in the unlawful arrest and taking of Hilmo Suljanović to the military police camp. This is another evidence that the First-instance Court evaluated all presented evidence with equal attention not favoring evidence or parts of the witnesses' statements which, as *noted in* the Appeal, are to the detriment of the accused. Acting thus, the First-instance Verdict entirely complied with the principle of *equality of arms* since they equally inspected and established not only inculpatory but also exculpatory facts, not leaving out during the process any of the facts important for decision-making.

The Appellate Panel uses this opportunity to refer to the Judgment of the Appellate Panel of the ICTY in Kupreškić[11] case which states the position: *The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.*

Moreover and as was stated previously, the challenged Verdict resolved all these open issues according to the Appeal in a convincing and well-argumented manner and there can be no objections in that regard.

4. Regarding the decision as to the sanction:

Both Appeals filed by the Defense objected to the criminal sanction imposed although the Appeals did not specify in which part the First-instance Court

[11] Kupreškić and others case number IT-95-16, Judgment of the Appellate Panel dated 23 October 2001, paragraph 32

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incorrectly meted out the sentence or did not correctly apply provisions of the law pertaining to the sanction and accordingly, when the Appellate Panel dealt with the issue of the imposed punishment it started from the extended effect of the Appeal pursuant to Article 308 of the CPC of BiH.

Considering the First-instance Panel Decision as to the sanction, the Appellate Panel has concluded that the imposed punishment of imprisonment was properly meted out in terms of duration, that it adequately reflected the degree of criminal responsibility of the accused, motives to commit the offences, and particularly the gravity of the criminal offences and numerous criminal acts he was found guilty of and bearing in mind the fact that the protected object in relation to these criminal offences are universal human values, values which are the condition and the basis for joint and human existence and as such have been standardized in numerous international conventions and international documents and the fact that there is no statute of limitations for these criminal offences attests to their gravity. When meting out the sentence the First-instance Court had in mind all subjective and objective circumstances pertaining to the criminal offences and the perpetrator thereof and rendered the correct conclusion that the compound sentence of 28 (twenty-eight) years of long-term imprisonment is a necessary measure to achieve the purpose of punishment in terms of general and special prevention. This conclusion is fully supported by this Panel as well.

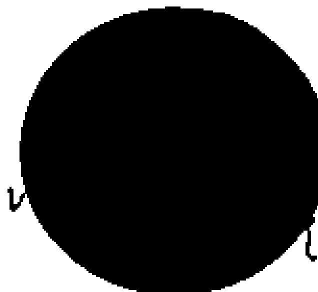
According to foregoing and pursuant to Article 310 (1), in conjunction with Article 313 of the CPC of BiH, it has been decided as stated in the operative part hereof.

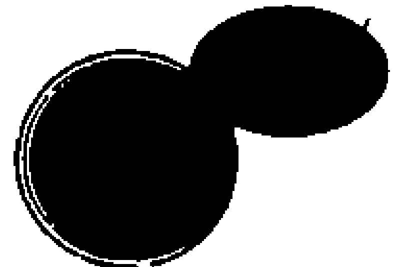
Record-taker	PRESIDING JUDGE
Željka Marenić	Dragomir Vukoje

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

Sarajevo, 25 July 2008

Certified Court Interpreters for English





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