Number: X-KRŽ-05/96-1
Sarajevo, 29 September 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, the Appellate Division of Section I for War Crimes, in the Panel of judges presided by Judge Vukoje Dragomir and the panel members, judges Hilmo Vučinić and Marie Tuma, with Legal Officer Medina Hababeh participating as the record-taker, in the criminal case against the accused Mirko Pekez, son of Špiro, Mirko Pekez, son of Mile, and Milorad Savić, son of Ljupko, for the criminal offence of War Crimes against Civilians in violation of Article 173(1) c) and f) as read with Article 29 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina (hereinafter referred to as the BiH CC), deciding on appeals of defence counsels for the accused, filed from the Verdict of the Court of Bosnia and Herzegovina Number X-KR-05/96-1 of 15 April 2008, in the session attended by the Prosecutor of the Prosecutor's Office BiH, Mirko Lečić, the accused personally and their defence counsels: Attorney Slavica Čvoro, defence counsel for the first-accused, Attorney Duško Panić, defence counsel for the second-accused, and Attorney Nebojša Pantić, defence counsel for the third-accused, on 29 September 2008 rendered the following

V E R D I C T

I The Appeal of the Attorneys Duško Panić and Predrag Radulović, defence counsels for the accused Mirko Pekez, son of Mile, is hereby **dismissed as unfounded**, and the part of Verdict of the Court of BiH, Number X-KR-05/96-1 of 15 April 2008, referring to this Accused, is **upheld**.

II The Appeals of the Attorney Slavica Čvoro, defence counsel for the accused Mirko Pekez, son of Špiro, and the Attorney Nebojša Pantić, defence counsel for the accused Milorad Savić, **are hereby granted**, and the part of Verdict of the Court of BiH, Number X-KR-05/96-1 of 15 April 2008, referring to these accused persons, is **revoked**, and in connection with that part the holding of a trial before the Panel of the Appellate Division of Section I for War Crimes of the Court of BiH is hereby ordered.

R e a s o n i n g

By the Verdict of the Court of Bosnia and Herzegovina (hereinafter referred to as the Court of BiH) Number X-KR-05/96-1 of 15 April 2008, the accused Mirko Pekez, son of Špiro, Mirko Pekez, son of Mile, and Milorad Savić, son of Ljupko, were found guilty because, by the actions described in the operative part of the referenced Verdict, they committed the criminal offence of War Crimes against Civilians in violation of Article 173(1) c) and f) as read with Article 29 of the BiH CC and Article 180(1) of the BiH CC.

For the referenced criminal offence the first-instance Court sentenced the accused Mirko Pekez, son of Mile, to the long-term imprisonment of twenty-nine (29) years, and the accused Mirko Pekez, son of Špiro, and Milorad Savić, son of Ljupko, to the long-term

imprisonment of twenty-one (21) years each, and pursuant to Article 56 of the BiH CC, the time spent in custody pending trial, starting on 1 November 2007 until committal to serve the sentence, was credited towards the sentence of imprisonment of the accused.

By the application of Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter referred to as the BiH CPC), the accused were exempt from the duty to reimburse the expenses of the proceedings, whereas by the application of Article 198(2) of the BiH CPC, the injured parties Nurija Zobić, Zejna Bajramović, Omer Karahodžić, Fahrija Mutić and Subhudin Zobić were instructed to take a civil action with their claims under the property law, as were the injured parties Mustafa Bajramović and relatives of the murdered civilians.

The Defence Counsels for all of the three accused persons filed the appeals from the referenced Verdict within the statutory time frame.

In the Appeal submitted to the Court on 6 June 2008, the Attorney Slavica Čvoro, defence counsel for the first-accused Mirko Pekez, son of Špiro, indicates the essential violations of the criminal procedure provisions, the incorrectly and incompletely established state of facts and the violation of the Criminal Code, moving that the appealed Verdict be revised and the Accused be acquitted of the charge, or that the Verdict be revoked and the holding of a trial be ordered.

By the Appeal filed on 9 June 2008, the Attorneys Duško Panić and Predrag Radulović, defence counsels for the second-accused Mirko Pekez, son of Mile, contest the Verdict because of the incorrectly and incompletely established state of facts, the incorrect application of substantive law and decision on the criminal sanction, moving that the Appeal, together with the whole of the case-file, be submitted for review and consideration to the Panel of the Appellate Division, which is proposed to grant the Appeal and revoke the first-instance Verdict by a decision and order the holding of a trial, or to revise the first-instance Verdict and impose a more lenient sentence on the Accused.

The Attorney Nebojša Pantić, defence counsel for the third-accused Milorad Savić, also filed the Appeal from the Verdict on 9 June 2008 because of the essential violation of the criminal procedure provisions referred to in Article 297(1)k), the violation of the Criminal Code referred to in Article 298 d) and the incorrectly or incompletely established state of facts referred to in Article 299(1), all the BiH CPC, proposing that the Appeal, together with the whole of the case-file, be submitted to the Appellate Division of Section I of the Court of BiH which was proposed to grant the Appeal, revoke the Verdict and order the holding of a trial.

The Prosecutor's Office did not file an appeal, but in response to the referenced appeals of the Defence it notes, *inter alia*, that all of the complaints of the accused persons are ill-founded, in other words, that the Court correctly applied the provisions of the 2003 BiH Criminal Code - substantive law, that the Verdict is comprehensible and is not contradictory to the reasons which are stated in the Verdict, and that it contains all the reasons referring to the established decisive facts, and moves that the referenced appeals filed from the Verdict of the Court of BiH Number: X-KR-05/96-1 of 15 April 2008, be dismissed by a verdict as unfounded and that the first-instance Verdict be upheld.

In the session of the Appellate Panel held on 29 September 2008, pursuant to Article 304 of the BiH CPC, the Defence presented the Appeals, and the Prosecutor's Office gave the response to those Appeals.

The Defence Counsel for the first-accused fully maintained her allegations from the appeal, making a detailed reference to the reasons indicating the essential violations of the criminal procedure provisions as well as the incorrectly and incompletely established state of facts, the allegations of which the Accused also maintained, asking the Court to take into account which Pekez was at what place at the relevant time, explaining that he and the second-accused have the same name.

Repeating the reasons from the Appeal, the Defence Counsel for the second-accused put the stress on the denial of the right to a defence to his client for the reason that the Accused Mirko Pekez, son of Mile, was not able mentally and physically to defend himself appropriately until the effective date of the Indictment, so that he missed certain advantages such as the admission of guilt, proposing that the proceedings be referred back to the initial stage in order that the Accused could try the avenues, because at the time he became aware of the situation he expressed his wish to cooperate with the Prosecutor’s Office and for his contribution towards the proceedings.

The Defence Counsel for the third-accused maintained the allegations from the Appeal, whereas the Prosecutor's Office maintained the allegations given in response to the referenced Appeals.

After it had examined the appealed Verdict with reference to the appellate arguments, pursuant to Article 306 of the BiH CPC, the Appellate Panel rendered decision as stated in the operative part for the following reasons:

I – This Panel found the appellate arguments of the Defence Counsels for the accused Mirko Pekez, son of Mile, which are subsumed under the incorrectly and incompletely established state of facts referred to in Article 299(1) of the BiH CPC, the violation of the Criminal Code referred to in Article 298d), and the incorrect decision on the criminal sanction referred to in Article 300, all the BiH CPC, to be ill-founded, and therefore it upheld this part of the appealed Verdict.

More specifically, by the appealed Verdict the accused Mirko Pekez, son of Mile, was found guilty of the commission of actions and offences he is charged with by the Indictment, specifically that he, together with the other two accused, and all of the three of them as a part of an organized group of armed people, violating the rules of international law during the war and armed conflict, committed murders and deliberate infliction of intense physical and mental pain on persons, violated their bodily integrity and plundered their property in the manner as described in the operative part of the Verdict. The first-instance Court rendered such decision after the conscientious and substantial assessment of each piece of evidence, taken individually and collectively, which were presented at the main trial, and having previously analysed the averments of the Prosecution and Defence, the assessment of which the Appellate Panel found to be correct and complete, which will be explained in detail in the further text.

I a) More specifically, following the appellate arguments, the essence of the part of the Appeal, which challenges the first-instance Verdict for the reason of the incorrectly and incompletely established state of facts, is reduced to the argument in respect of which the Court found on the basis of arbitrary hypotheses that the second-accused "participated in the joint criminal enterprise of killing and plundering the Muslim civilians from the villages of Ljoljići and Čerkazovići...", and that the participation of this Accused in all of the acts of commission of the referenced criminal offence was not fully clarified, especially in the act of killing the civilians, and that the Court, by unreasonable assessment of the admitted evidence of the Prosecutor's Office, made the omission to assess it in respect of the actual relation of the second-accused to the criminal offence of War Crimes against Civilians.

By a detailed analysis of the contents of the Verdict along with all pieces of evidence, individually and collectively, this Panel finds that it concerns unfounded assertions which, as assessed by the Panel, are not based on the correctly and completely established state of facts of the appealed Verdict which contains valid and acceptable reasons referring to all decisive facts based on which the decision on the Accused was rendered.

First of all, prior to arriving at the final conclusion that there exists the guilt of the accused Mirko Pekez, son of Mile, for the actions with which he is charged by the Indictment, the contested Verdict presented all relevant pieces of evidence. Thus, in the course of the first-instance proceedings, the following Prosecution witnesses were heard in respect of these circumstances: Nurija Zobić, Borka Oparnica, Dragan Nišić, Dragan Ždrnja, Fahrija Mutić, Nedeljko Jandrić, Pero Savić, Zejna Bajramović, Omer Karahodžić, Subhudin Zobić, Dr. Rajko Todorčević, Dr. Hamza Žujo, the expert witness and forensic pathology specialist from Sarajevo, and additional witness Miroljub Perlaš, as well as the Defence witnesses, including Nikola Nikolaš, Nedeljko Jandrić, Jovo Topić, Jovo Prole, Vlajko Radić, Bosiljka Rosić, and the first-accused and the second-accused as witnesses; the Trial Panel fully assessed their testimonies, as well as the presented objective documentation, pursuant to Article 281(2) of the BiH CPC.

Specifically, besides the incontestable existence of the three out of four general elements (*chapeau*) of the criminal offence of War Crimes against Civilians referred to in Article 173 of the BiH CPC (that the offence was perpetrated by the violation of international law provisions in such a way that the perpetration of the offence was directed against the civilian population, that is, the persons who do not participate in the armed conflict or who have laid down their arms or those placed hors de combat, and who are protected by the provisions of the Geneva Convention of 12 August 1949 relating to the protection of civilian persons at the time of war, that the same violation took place during the war, armed conflict or occupation and that the perpetrator's action has connection (nexus) with that war, armed conflict or occupation), the Panel found the fourth, challenged element (that the perpetrator must take the act of the commission of this offence which implies the commission or the ordering of some acts alternatively set in subparagraphs of this Article) to be well-founded and supported. By virtue of the evidence adduced, it was found beyond reasonable doubt that the accused Pekez Mirko, son of Mile, took the acts of commission of this offence, in other words, that he as a co-perpetrator took an active part in marching the Bosniak civilians away, in plundering and finally murdering them at the time, in the place and in the manner as described in the operative part of the first-instance Verdict.

It is necessary to start the analysis of the last element from the existence of the joint criminal plan, information and participation of the Accused in the implementation of that plan. In his testimony the witness Pero Savić described in detail the events that took place at the lunch served after a funeral service. It posed a scene at which a common plan was devised for the crimes subsequently committed. The plan was manifested in the Jovo Jandrić's appeal to all attendees to take revenge for the death of soldier Rade Savić and to the liquidation of the Muslims. According to this witness, everybody could have heard those words distinctly, since Jovo Jandrić said that in a loud voice. Not even the Accused contested his attendance at the lunch served after the funeral service in his testimony given before the Court.
Therefore, this Panel shares the opinion of the first-instance Court on the existence of the common plan and the intent of all participants in the referenced crime. This intent was shared also by the Accused as a member of the organized group of armed people whose action was directed towards the implementation of that plan. If, at the very beginning, he had not even been aware of Jovo Jandrić's clear intentions, he could have subsequently foreseen the actual aim in respect of all the circumstances that would follow, the aim being the killing of the remaining Muslim population from the villages of Ljoljići and Čerkazovići.

Moreover, the Panel finds that he did know about the final outcome and consequence of the plan, and that he knew about them even from the early phases of the implementation of the plan, and he shared the criminal intent of the other participants that the liquidation of the gathered civilian population be ultimately performed, which can be concluded from all actions taken by the Accused on the relevant night when he, together with other armed persons who shared the same idea, led the group of helpless civilians - men, women, children, his neighbours - to a certain and inevitable death. All circumstances indicated that night that the Accused could not have been unaware of the final outcome. More specifically, everything was happening in the evening, at between 21 and 22 hours, when a group of armed soldiers came to the houses of civilians and without any authorization expelled them and deprived them of their liberty. They did not take them to the Police Station for potential interrogation, but under an armed escort, beating them, insulting them and making it indirectly clear that they would be murdered, took them to an isolated place intrinsically symbolic of suffering, all of which compelled a logical conclusion about the fate awaiting those people.

In this regard, the subjective attitude of the Accused towards the committed criminal offence is very clear, and can by no means be taken as his dissent with regard to the committed offence and the consequences resulting therefrom, as the Defence tried to unsuccessfully present in their Appeal. Just the opposite, the point is that it was an active participation of the Accused and that he consciously and willfully caused the prohibited consequences.

The first-instance Verdict presents very strong and convincing facts which show the existence of both intellectual and voluntary elements on the part of the Accused in respect of his participation in an aspect of the implementation of the common plan, his *nexus* with it, as well as the occurrence of the consequences devised by that common plan.

More specifically, following their example, the conclusion unequivocally ensues from the testimonies of the witnesses Pero Savić and Miroljub Perlaš that it was possible to oppose and refuse to accept the criminal plan presented by Jovo Jandrić. In token of opposing the presented plan of liquidation of Bosniak civilians, those two persons stood up and left the lunch served that day after the funeral service, showing a positive example to all those who also opposed the criminal intent. Following this, a conclusion *per se* begs to be made that there was a way to avoid the participation in the implementation of the monstrous plan, and those were only some of the ways. Therefore, if the Accused had indeed wanted to distance himself from the implementation of the criminal project, he could have done that in any phase prior to achieving the final goal.

It was not impossible to oppose the orders the dangerous Jovo Jandrić, as he is described by the Defence, especially bearing in mind that the Accused was not under his direct command, given that Jovo Jandrić executed the duty of the commander of the Police Station department, reserve police forces, in that area, whereas the Accused was a member of the RS Army, which was incontestably found both from the documentary evidence and testimony of the Accused personally.
On the contrary, not only that the accused Mirko Pekez, son of Mile, indeed subjectively wanted the occurrence of the projected consequence, but all the time, side by side with Jovo Jandrić, he distinguished himself by cruelty among other participants, demonstrating his criminal intent. In connection with this, there is a very convincing factual corroboration of the first-instance Verdict, drawn from the testimonies of the witnesses who survived.

Thus, the witness Nurija Zobić, who recognized the Accused in the court-room, said that on the relevant night, among the armed persons who were taking them out of the houses, he clearly saw the Accused with a weapon pointed at the witness. Later on, while they were being escorted in a column, this witness recalled that the Accused held a rifle barrel pointed all the time at his head.
The witness Fahrija Mutić, who also survived the execution by firing squad, testified about the taking him away from the house, when in front of the door he saw Jovo Jandrić and the Accused armed with automatic rifles, and after they had been taken out of the houses and after the column had started moving, the Accused ordered the witness to call his father who ran away, threatening him with murder. Those averments were also substantiated by the testimony of the witness Omer Karahodžić. The witness also noted that the armed persons were beating Omer and Šećo along the way, and as far as he was able to see, they were beaten by the accused Mirko Pekez, son of Mile, and Jovo Jandrić. This factual circumstance clearly indicates the persistence of the accused Mirko Pekez, son of Mile, in the implementation of his criminal project, in other words, it indicates perfectly clear the subjective contents of the objective act he undertook together with the other co-perpetrators.

Therefore, in addition to the demonstrated cruelty, it ensues beyond doubt from the aforementioned that the Accused participated in removing civilians from their houses and in marching them away to the scene of the crime. The Accused personally did not contest it, as he did not contest the participation in the plundering. At this point, it is necessary to comment on the conduct of the Accused during the plundering when he, after he had asked the prisoners civilians: “Who's got a cigarette?“, cursed their “Balija's mother“.

What appeared to be questionable in the Appeal is the participation of the Accused in the execution of civilians by firing squad. The Appellate Panel found those arguments to be entirely ill-founded assessing that the issue of degree of the act being proven - the commission of the crimes of murdering the civilians by the Accused - was satisfactorily resolved by the first-instance Court, as was the issue of his criminal responsibility, by an in-depth analysis as it is imperatively prescribed by Article 290(7) of the BiH CPC.
More specifically, the contested Verdict presents a valid and exhaustive argumentation by virtue of which it was found beyond doubt that the accused Mirko Pekez, son of Mile, did directly take the action of murdering the civilians at the time and in the manner as it is established in the operative part of the Verdict.

The survived witnesses Nurija Zobić, Fahrija Mutić, Zejna Bajramović and Omer Karahodžić testified about this circumstance. Their testimonies are completely consistent and they provide an overall picture of the horrible event of the execution of civilians by a firing squad. That event was found incontestable, as was the participation of the Accused in the act of commission of the referenced crime, whereby the argument from the Defence about his mere presence at the scene of the horrible event should be overturned.

The witness Nurija Zobić, whose testimony has the power of direct evidence, described the lining up of civilians along the edge of a ditch at the place where they would be executed, by the order of Jovo Jandrić, with their backs turned to the armed persons. At his command the shooting followed. The witness fell into the ditch and when he regained his consciousness a half an hour later, he realised that he was wounded and, together with the survivor Mustafa Bajramović, made their way to the woods.
This Panel and the first-instance Panel find the testimony of the witness Fahrija Mutić to be very important and relevant for establishing the participation of the Accused in the execution of the civilians. That witness described the execution clearly and unequivocally, as he did the coming of the accused Mirko Pekez, son of Mile, on the edge of the ditch, when he cocked the weapon and fired one more bullet into Mustafa Bajramović (son of Alija) who still was not dead after the execution by the firing squad. That witness also stated at the main trial that he recognized the Accused and that he was a person in charge. All of that, in conjunction with other pieces of evidence, is found also by this Panel to be incontestable evidence about the participation of the Accused.

Hence, the averments are not fully applicable when they indicate that in the proceedings there is no statement other than that by Fahrija Mutić which could identify the Accused as a perpetrator of the referenced murders. More specifically, the testimony of the previous witness is substantiated by the statement of the witness Omer Karahodžić who stated that, after the shooting which he survived pretending to be dead, he heard someone saying: ”Mirko, open a burst, the strong one“, which as the witness supposed he exactly did, and then the sound of the burst of fire could have been heard, whereupon the witness was shot, and then the Accused was striking at his head with a rifle butt checking if he was still alive; all of this indicates that the referenced averments of the Defence are ill-founded and incorrect.

The Appellate Panel finds that all of the adduced pieces of evidence were correctly assessed, both individually and collectively, in respect of their contents and quality and that,

by virtue of such assessment, the conclusions were drawn about the degree of the facts being proven about the charge of the Accused.

In the first place, the Panel finds the testimonies of the referenced witnesses to be very convincing and consistent, especially if one takes into account that those people endured the ordeal and suffering which can hardly be erased from their memory and each detail of which remains deeply imprinted in the survivors' minds. The indelible event for each of them is certainly a severe psychological trauma and a human misfortune which those persons experienced, and which exceeded normal and usual human experiences and perceptions, in the state of an enormous fear, at the time they were expecting a certain death which they were unable to prevent by no means.
Particularly if one has in mind that both of the mentioned witnesses, certainly not by chance but on the ground of what they saw and what was left as a deep imprint on their memory, described the referenced details related to the Accused (as well as to Jovo Jandrić), which corresponds to the aforementioned conclusion that the Accused, besides Jovo Jandrić, distinguished himself by his cruelty in the implementation of the referenced criminal plan, in other words, that he most actively contributed towards the implementation of that plan.
According to the Panel, the aforementioned is substantiated by the fact that the survived witnesses did not identify the specific actions of other persons related to the murdering of civilians, not even the other two accused persons, because as they said they were not positive or they remembered vaguely, which very clearly raises the inference that they testified about something they had indeed seen and experienced, not about the event they subsequently learnt about or an attempt to have the Accused criminalized without grounds, only to have someone prosecuted.

Therefore, if one takes into account that the presence of the Accused at the scene of the execution of civilians was found to be incontestable as were his expressed criminal intent and his most active part in putting that intent into practice, and assessing the testimonies of the referenced witnesses as credible and wholly truthful, the conclusion is incontestably reached that all of those circumstances, observed in their mutual connection, create a convincing image of a direct participation of the Accused in the action of murdering 23 Bosniak civilians and injuring 4 persons out of 5 survivors, at the time, in the place and in the manner as established in the operative part of the Verdict.

In this regard, the first-instance Verdict differentiated very clearly and satisfactorily between both the relation of the Accused to what was done and his acts of commission in relation to other participants, including the act of murdering, which constituted the ground for the application of Article 29 of the BiH CC. The provision of that Article requires that, if several persons were found guilty of having committed a criminal offence as co-perpetrators, therefore as perpetrators of their own act, the acts of commission must be previously stated in the operative part of a verdict in respect of each co-perpetrator individually, because the existence of the co-perpetration and the application of this Article depend on the description of those acts. By clear differentiation of the acts of this Accused, which are based on the completely and correctly established factual substratum, his guilt was, according to this Panel, correctly found pursuant to Article 32 of the BiH CC, as finally was his criminal responsibility for the criminal offence committed.

I b) Next ground to which the Appeal points is an incorrect application of substantive law, given that the Court, imposing the sentence on the Accused for the criminal offence prescribed in BiH law, acted contrary to the principle of legality. As assessed by this Panel, it is incontestable that, while applying substantive law and legal qualification of the offence, the first-instance Court correctly applied the provisions of the applicable BiH Criminal Code which became effective on 1 March 2003, in other words, that contrary to the appellate arguments, the principles of legality and time constraints regarding applicability of laws prescribed in Articles 3 and 4 of the same law were not violated.

More specifically, the principle of legality is prescribed both by our Criminal Code (Article 3, BiH CC) and by Article 7(1) of the European Convention on Human Rights (ECHR) which has priority over all other laws in BiH (Article 2.2, BiH Constitution), and by Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR).

Article 7(1) of the ECHR prescribes: "No one shall be held guilty of any criminal offence on account of any ac or omission which did not constitute a criminal offence 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 offence was committed".

On the other hand, Article 15(1) of the ICCPR prescribes: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, 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 offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".

As it can be seen from the aforementioned, the referenced provisions prescribe the prohibition against the imposing of a more severe punishment, without establishing the compulsory application of the (most)lenient law (if it was amended several times) to a perpetrator, in respect of the punishment which was applicable at the time of the commission of the criminal offence.

However, Article 7(2) of the ECHR prescribes: " 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 recognised by civilized nations". Likewise, Article 15(2) of the ICCPR prescribes: "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".

The cited provisions, therefore, constitute exceptions to the rule defined in Article 7(1) of the ECHR and Article 15(1) of the ICCPR. This is the provision to which the Defence refers, without analysing the provision of the next (aforementioned) paragraph of the same Article, and hence, the Panel finds this appellate complaint to be unsubstantiated and founded on a superficial analysis of the referenced provisions.

The same exception is stipulated Article 4a) of the BiH CC which prescribes that Articles 3 and 4 of the BiH CC 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. In this way, the provisions of Article 7(2) of the ECHR and Article 15(2) of the ICCPR were in fact adopted, which enabled the extraordinary deviation from the principle referred to in Article 4 of the BiH CC, as well as

deviation from compulsory application of a more lenient law in the proceedings for criminal offences under international law. It is exactly the case in these proceedings, because, as it is reasoned in the first-instance Verdict, the actions of the Accused at the relevant time constituted a crime contrary to the provisions of international law, as well as the violation of the utmost values protected in each existing legal system.

It is essential to mention in the context of the aforementioned that the state of BiH, as a successor (legal successor) of the former Yugoslavia, ratified the ECHR and ICCPR, so that these agreements are binding upon the country, and courts of Bosnia and Herzegovina must apply them. Hence, Article 4a) is only a domestic legal reminder, because it is not necessary for those agreements to be applied, and it must be applied while trying all the criminal offences related to war crimes, which are prescribed in Chapter XVII of the BiH Criminal Code under title "Crimes against Humanity and Values Protected by International Law".

The customary status of punishability of war crimes and the prescribing of individual criminal responsibility for their perpetration in the period of the year 1992 were confirmed by the UN Secretary General[1], because of which it is incontestable that in the year 1992 crimes against civilian population were a part of international customary law.

Given all the aforementioned, this criminal offence can, in any case, be subsumed under "the general principles of international law" referred to in Article 4a) of the BiH CC. Therefore, irrespective of whether they are viewed from the standpoint of the international customary law or the standpoint of "the principles of international law", it is beyond doubt that the war crime against civilian population constituted the criminal offence at the relevant time, in other words, that the principle of legality was satisfied. Finally, in connection with Article 7(1) of the ECHR, this Panel notes that the application of Article 4a) is additionally justified by the fact that the imposed sentence is in any case more lenient than the capital punishment which was effective at the time of the commission of the offence, whereby the application of the principle of the time constraints regarding applicability of the Criminal Code is satisfied, contrary to unfounded assertions in the Appeal that it concerns the violation of this principle.

Finally, in support of all the aforementioned, the Court refers to the Decision of the Constitutional Court of Bosnia and Herzegovina in the Abdulhadim Maktouf Case[2] which concludes that in the particular case the issue of the application of the BiH CC in the proceedings before the Court of BiH does not constitute the violation of Article 7(1) of the ECHR.

I c) Next appellate complaint of the Defence is subsumed under the violation of the right to a defence of the Accused in terms of the essential violation of the criminal procedure provisions referred to in Article 297(1)d) of the BiH CPC. The Panel found this complaint to be also ill-founded and it assessed that in the particular case there is no violation of Article 6 of the BiH CPC.

The foothold for such position the Panel finds in the particular and reasoned argumentation of the first-instance Court as well as in the fact that it is clear that the Accused was aware of all the rights during the investigation when he even referred to his

[1] Report of the UN General Assembly in conjunction with paragraph 2 of the Security Council Resolution No. 808, 3 May 1993, paragraphs 34-35 and 47-48
[2] Decision rendered on 30 March 2007

right not to answer the questions and not to give the statement to the Prosecutor pursuant to Article 6(3) of the BiH CPC, and that from the very beginning he had *ex officio* defence counsel whom he personally chose, so it seems illogical that, in the course of the entire proceedings, he was not able to get acquainted with the actions he is charged with, as he could have done it, at least from written submissions and from all documents he was signing from the time of his first questioning at the Prosecutor's Office on, or finally from the Indictment.

The Appellate Panel goes a step forward concluding that even if the Defence assertions were accepted that the Accused participated only formally in the proceedings and that, until the beginning of the main trial, he did not know what offences he was charged with, his disinterest in the referenced circumstance would seem very unlikely, given that until then he stayed a long period of time in custody and was taken before the Court on a couple of occasions, so it is logical that he must have been very much interested in everything concerning his life and freedom, as well as the need to respond, indicating that he did not understand what he was told.

The Defence notes that the Accused was unaware of his right because of the hearing impairment, so that he failed to exercise his right referred to in Article 229 and Article 231 of the BiH CPC, that is, the potential admission of guilt or negotiation about the guilt. The Panel finds this argumentation to be unrealistic for the reason that the Accused could have exercised his rights prescribed by the provisions laid down in the referenced Article at any time during the course of the proceedings before the first-instance Court, therefore, until the completion of the main trial.

Further, during the course of evidence, the Accused was examined both by the Defence and the Prosecutor's Office without any greater difficulties. And, in addition to everything, the Court provided him with a hearing aid complying with the medical diagnosis. The Accused had complaints even about the hearing aid provided, stating that he again did not understand anything and that the use of the hearing aid only intensified tonal quality of sounds that reached him. Viewed from the standpoint of this Panel, all of that raises the inference that it was but the tactic of defence which attempted to misuse the incontestable hearing impairment of the Accused for the wrong purposes, and all of this for the reason that the Accused, especially after the confirmation of the Indictment and the imposition of the first-instance Verdict, became aware of the gravity of the crime he is charged with, that is, sentenced by the appealable Verdict. By this tactic the Defence attempted to disown the Court by illogical and unconvincing assertions about the violation of the right of the Accused to a defence. Also, in the open session of the Appellate Panel which was attended by the Accused, the Panel members were able to see for themselves that the hearing impairment to which the Accused referred was not of the kind as to frustrate the Accused to normally follow and participate in the proceedings.

I d) Finally, the last thing the Appeal pointed at is a decision on criminal penalty, with an alternative proposal that a more lenient sentence be imposed on the Accused, without providing any reasoning to its credit. In particular, the Appeal does not specify for which reasons the decision on criminal penalty is contested, nor does it state what it is in which the violation of some provision is reflected and for which reasons the imposed sentence is regarded as being too severe, in other words, nor does it present any argumentation to the credit of the motion for commutation of sentence for the Accused.

Hence, bearing in mind that this Panel has found that the first-instance Verdict established the state of facts correctly and completely in respect of the actions of the Accused, as well as his criminal responsibility, the Panel concludes that the imposed sentence for a term of 29 years was correctly meted out.

The Appellate Panel finds that the first-instance Court correctly assessed all circumstances relevant for meting the sentence pursuant to Article 48(1) of the BiH CC, bearing in mind the length of sentence prescribed for the referenced criminal offence, the purpose of punishment and the existence of extenuating and aggravating circumstances. These circumstances became sufficiently apparent in meting out the punishment for the Accused and this Panel also shares the position of the first-instance Court that the purpose of punishment stipulated in Article 39 of the BiH CC will entirely be achieved by the imposed sentence.

Given all the aforementioned, the Appeal of the Defence Counsels for the accused Mirko Pekez, son of Mile, had to be dismissed as unfounded pursuant to Article 313 of the BiH CPC and the part of the first-instance Verdict referring to this Accused had to be upheld.

II In respect of the part of the Verdict referring to the accused Mirko Pekez, son of Špiro, and the accused Milorad Savić, upholding the Appeals of their Defence Counsels, given that the essential violations of the criminal procedure provisions were established, pursuant to Article 315(1)a) and paragraph (2) of the BiH CPC, the Appellate Panel revoked the part of the first-instance Verdict referring to these accused persons, because it found that this part of the Verdict can be separated with no harm to a correct adjudication, and it ordered the holding of a trial before the Panel of the Appellate Division of the Court of BiH.

More specifically, by the contested Verdict the accused Mirko Pekez, son of Špiro, and Milorad Savić were found guilty of the commission of acts and actions with which they were charged by the Indictment, that is to say, they, together with the accused Mirko Pekez, son of Mile, and all three of them as a part of the organized group of armed people, violating the rules of international law during the war and armed conflict, committed murders and deliberate infliction of intense physical and mental pain on persons, violated their bodily integrity and plundered their property in the manner as described in the operative part of the Verdict.

The Defence Counsels for both of the Accused filed the Appeals because of the essential violation of the criminal procedure provisions referred to in Article 297(1)k), whereas the Defence Counsel for the first-accused referred, in addition, to sub-paragraph d) of the same paragraph and to paragraph 2 of the same Article, the violation of the Criminal Code referred to in Article 298d) and the incorrectly or incompletely established state of facts referred to in Article 299(1), each of the Articles contained in the BiH CPC.

Reviewing all the grounds for appeal to which the referenced Appeals pointed, the Appellate Panel proceeded from the essential violations of the criminal procedure provisions (*error iuris)*, given that they have primacy over all other grounds for appeal, and hence, bearing in mind that their existence implies nullity of the procedural actions performed in the criminal proceedings and the Verdict handed down and the compulsory

revocation of the Verdict in the appealed part, the grounds of appellate complaints indicating this violation under Article 297 of the BiH CPC had to be examined.

As for the appellate complaints which indicate the essential violation of the criminal procedure provisions referred to in Article 297(1)k) of the BiH CPC, the Defence Counsel for the accused Mirko Pekez, son of Špiro, stated that: "The Verdict does not include the reasons for decisive facts, because it can be seen from the Verdict that it is confusing and illogical and contradictory." This is corroborated by argumentation that the Reasoning does not include the reasons which would indicate that this Accused is responsible for all that was happening, which the Court tried to demonstrate, and also it is pointed at the part of the Reasoning referring to the plundering of civilians, where not a single piece of the referenced evidence raises the inference that the Accused participated in it, whereas, on the other hand, the overall contents of the Prosecutor's Indictment is accepted as the operative part of the Verdict.

The Defence Counsel for the accused Milorad Savić reasons the complaints referred to in the same legal provision by the fact that the operative part of the Verdict states that his client acted in such manner that he, together with other perpetrators, agreed a common plan, was armed with a long-barrelled weapon, insulted non-Serb civilian population which he marched to the execution site and, on that occasion, kicked them and beat them with a rifle butt, ordered that they put at a particular place all valuable items they had on them, and appropriated those items, and then he ordered that they line up next to each other and fired the long-barrelled weapon at them, whereas it is stated in the Reasoning of the Verdict that it is beyond doubt found for the accused Mirko Pekez, son of Mile, that he directly took part in the commission of the act of plundering and murdering the civilians, whereas the other two accused decisively contributed towards the accomplishment of the acts.

According to the Defence Counsel, the aforementioned raises the inference that it is evident from the Reasoning of the Verdict that the accused Milorad Savić did not participate in the referenced actions, whereas by the operative part of the Verdict he was found guilty of the commission of those acts.

In line with the aforementioned, this Panel found the referenced complaints which can be subsumed under the complaint that the first-instance Verdict committed the essential violation of the provisions of the Criminal Procedure Code referred to in Article 297(1)k) of the BiH CPC to be entirely well-founded, given that the operative part of the appealed Verdict is contradictory to the reasons of the Verdict, and is *per se* inconclusive and that the Verdict does not contain the reasons at all and that the reasons referring to the decisive facts in respect of these two accused are not stated therein, which *ipso facto* requires a compulsory revocation of the appealed part of the Verdict, since we have here an absolutely essential violation in respect of which there is an incontrovertible assumption that it adversely affected the legality and correctness of the Verdict handed down.

Only one of the violations to which the Appeals pointed is sufficient to entail the consequences of a compulsory revocation of the Verdict. It refers to the contradiction of its operative part with its reasons when it states in the factual description of the operative part that these two accused, together with other perpetrators: "…*armed with automatic and semi-automatic rifles, under the threat of using the arms, unlawfully arrested and forcibly*

removed the Bosniak civilians from their houses (...), and thereupon took them all together to the place called Draganovac (...), threatening that they would kill whoever tried to escape, and while they were taking them away they insulted them, and physically harassed them, (...), and when they reached the place called Draganovac, they stopped them there and ***ordered*** *them to put at a specifically designated place all valuable items (...), and when they did so, they* ***appropriated*** *those items (...), where they* ***ordered*** *them to line up against the edge of an abyss, (...), they all* ***opened*** *fire (...)"*, on which occasion they **murdered** 23 persons and 5 persons survived, out of which 4 were suffered bodily injuries, whereas, particularly, the Reasoning of the Verdict (page 31) states: "*It was indisputably established for the accused Mirko Pekez son of Mile that he had directly taken the action of plundering and killing the civilians, together with Jovo Jandrić, while the other two Accused (*referred to the accused Mirko Pekez, son of Špiro, and Milorad Savić*), contributed in a decisive manner to the commission of the crime by their participation in rounding up the civilians and at least ensuring their escort to the execution site,* ***if not actively participating in the execution."***

This is only one of the examples which, according to the Panel, most clearly establishes what the referenced violation constitutes. More specifically, it ensues very clearly from the operative part of the appealed Verdict that all of the three accused, as co-perpetrators, acting with direct intention, committed the referenced criminal offence in the place, at the time and in the manner as described in the operative part of the Verdict.

However, while defining specific participation of those accused in the acts of commission, the Reasoning does not state, either through the factual argumentation or through the conclusions reached on them, as the Appeals correctly note, that they directly participated in the acts of commission of plundering and murdering the civilians. Just the opposite, the Verdict is restricted to the wording that they in a decisive manner made a contribution, without precisely stating even then what their decisive contribution constitutes of, in other words, that they forced civilians to act under the Jovo Jandrić's order and hand over the valuables they had on them at that time, in other words, that they contributed in a decisive manner to the execution of civilians, which clearly indicates that they did not directly participate in those actions, so that, according to this Panel, the Verdict failed to present the reasons referring to decisive facts and to reason the decision from the operative part in respect of these two accused persons.

Therefore, the conclusion *per se* begs to be made that, by the presented Reasoning, the first-instance Court did not incontestably find the direct participation of all of the accused in all the acts of commission of which they were found guilty by the operative part of the Verdict, which is inadmissible from the aspect of a formal and material correctness of the Verdict. To be more precise, by the operative part of the Verdict, the first-instance Court found all of the three accused persons guilty of the perpetration of all the acts of commission of the referenced criminal offence, whereas by the Reasoning it found the participation of the accused Mirko Pekez, son of Špiro, and Milorad Savić in the action of gathering civilians and marching them away to the execution site to be the only incontestable fact.
One gets the impression, according to this Panel, that the Prosecution filed and the first-instance Court accepted the factual description of the offence, and then assessing all the pieces of evidence in the Reasoning of the Verdict it drew different conclusions on the

participation of the accused persons in the acts of commission and their criminal responsibility.

The aforementioned also ensues particularly from the part of the Reasoning referring to the decision on the criminal sanction. As the circumstance which guided the Court to mete out the sentence for those two accused persons, this part of the Reasoning states the fact that they acted with potential intent, whereas the accused Mirko Pekez, son of Mile, acted with direct intent, which is yet another example in the sequence of examples showing that the Reasoning of the Verdict, in respect of both subjective element (*mens rea)* and the objective one (*actus reus)* pertaining to those two accused, does not constitute an equivalent to what is stated in the operative part of the Verdict, in other words, the operative part of the Verdict and the Reasoning of the Verdict are in contradiction, whereby the violation that the operative part of the Verdict is contradictory to the reasons of the Verdict was committed.

Finally, this Panel concludes, and the Appeals reasonably point at, that the first-instance Court did not draw a clear conclusion in the Reasoning of the Verdict that the accused persons directly participated in giving orders for the actions, appropriating the valuables and shooting at the victims, but that they in a decisive manner contributed towards the perpetration of those actions, which can be subsumed under the institute of co-perpetration as defined in Article 29 of the BiH CC, but only in the event that the acts of commission referring to each individual co-perpetrator are distinctly defined and differentiated in the operative part of the Verdict, because the existence of the co-perpetration and the application of the cited Article depend on the description of those acts, which was not made in the particular case.

More specifically, as it ensues from all the circumstances, the participation of the accused Mirko Pekez, son of Špiro, and Milorad Savić in the acts of commission of the referenced criminal offence and *ipso facto* the issue of their criminal responsibility are not entirely made clear by the appealed Verdict.

Hence, the Appellate Panel found that the essential violation of the criminal procedure provisions referred to in Article 297(1)k) of the BiH CPC was committed, as the Appeals reasonably indicated. That violation entails the compulsory revocation of the appealed part of the Verdict without valid examination of other grounds for appeal, because the assumption is that, due to imperfections in the procedure, the Verdict is not correct and is substantially not appropriate for examination, irrespective of the grounds for appeal.

Therefore, any violation referred to in Article 297a) through k) (except for f) and j)) of the BiH CPC whose existence is established by the Appellate Panel necessarily implies the impossibility of going in for assessment of any other ground for appeal, especially making a statement on the ground for appeal (whether positive or negative), the reason being that no assessment can be made on the decision rendered in the procedure, or upon the procedure, contrary to the law, without there being grounded suspicion in the very decision.

Given that the established violations constitute absolutely essential violations entailing the referenced consequences, the Appellate Panel granted the Appeals and, pursuant to Article 315(1)a) and (2) of the BiH CPC, revoked the part of first-instance Verdict referring to the accused Mirko Pekez, son of Špiro, and Milorad Savić, and in respect of that part it ordered the holding of a trial before the Appellate Panel of the Court of BiH.

In a renewed trial the essential violation of the criminal procedure provisions shall be removed, already presented evidence shall be presented again and, with the assessment of other appellate arguments, the other pieces of evidence shall be presented as needed.

Bearing in mind that this part of the first-instance Verdict was revoked, the Appellate Panel did not delve further into an in-depth analysis of the other appellate complaints of the Defence, but pursuant to Article 316 of the BiH CPC, it restricted itself only to the presentation of short reasons for the revocation.

Record-taker:

Medina Hababeh

PRESIDENT OF THE PANEL

J U D G E

Dragomir Vukoje

LEGAL REMEDY: This Verdict may not be appealed.

I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.
Sarajevo, 3 December 2008
Certified Court Interpreter for English