Number: **X-KRŽ-05/24**

Date: **9 September 2009**

Before: **Judge Tihomir Lukes, Presiding**
Judge Azra Miletić, Reporting Judge
Judge John Fields, Member of the Panel

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MILOŠ STUPAR, MILENKO TRIFUNOVIĆ, BRANO DŽINIĆ, ALEKSANDAR RADOVANOVIĆ, SLOBODAN JAKOVLJEVIĆ, BRANISLAV MEDAN AND MILOVAN MATIĆ

APPELLATE VERDICT

Counsel for the Prosecutor's Office of Bosnia and Herzegovina: **Ibro Bulić**

Defense Counsels for the Appellant Miloš Stupar: **Ozrenka Jakšić and Radivoje Lazarević**

Defense Counsels for the Appellant Milenko Trifunović: **Rade Golić and Petko Pavlović**

Defense Counsels for the Appellant Brano Džinić: **Suzana Tomanović and Boriša Ilić**

Defense Counsels for the Appellant Aleksandar Radovanović: **Dragan Gotovac and Nada Mandić**

Defense Counsels for the Appellant Slobodan Jakovljević: **Boško Čegar and Slavko Ašćerić**

Defense Counsels for the Appellant Branislav Medan: **Borislav Jamina and Zorna Kisin**

Defense Counsles for the Appellant Milovan Matića: **Miloš Perić and Ratko Jovičić**

CONTENTS

Number: X-KRŽ-05/24
Sarajevo, 9 September 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Appellate Panel comprising Judge Tihomir Lukes as the Presiding Judge, and Judges Azra Miletić and John Fields, as members of the Panel, with the participation of Legal Officer Vahida-Ramić Sanida as minutes-taker, in the criminal case against the Accused Miloš Stupar, for the criminal offence of Genocide in violation of Article 171(a) in conjunction with Article 29 and 180(2) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), and Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan and Milovan Matić, for the criminal offence of Genocide in violation of Article 171(a) in conjunction with Article 29 and 180(1) of the CC of BiH, deciding upon the appeal of the Prosecutor's Office of BiH, and the appeals by the Defense Counsels for the Accused Miloš Stupar, lawyer Ozrenka Jakšić and lawyer Radivoje Lazarević, Accused Milenko Trifunović, lawyer Rade Golić, Accused Brano Džinić, lawyer Suzana Tomanović, Accused Aleksandar Radovanović, lawyer Dragan Gotovac, Accused Slobodan Jakovljević, lawyer Boško Čegar, appeal by the Accused Branislav Medan, and the appeal by his Defense Counsel, lawyer Borislav Jamina, filed from the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24 of 29 July 2008, at the Panel session held on 9 September 2009, in the presence of the Prosecutor of the Prosecutor's Office of BiH, Ibro Bulić, the Accused and their Defense Counsels, rendered the following:

V E R D I C T

The appeal of the Prosecutor with the Prosecutor's Office of Bosnia and Herzegovina is refused as ungrounded and the Verdict of the Court of Bosnia and Herzegovina, number X-KR-05/24 of 29 July 2008, with regard to the Accused Milovan Matić, is **upheld.**

The appeal of the Defense Counsel for the Accused Miloš Stupar is granted, therefore, the Verdict of the Court of Bosnia and Herzegovina, number X-KR-05/24 of 29 July 2008, with regard to this Accused is **revoked** and a retrial before the Appellate Panel of Section I of the Court of Bosnia and Herzegovina is ordered.

The appeals of the Defence Counsels for the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan and the Accused Branislav Medan in person, are granted in part, therefore, with regard to the referenced Accused persons, the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/24 of 29 July 2008, is **revised and it is hereby ruled as follows:**

ACCUSED:

Milenko Trifunović, a.k.a. Čop, son of Ivan and Milojka nee Obradović, born on 7 January 1967 in the village of Kostolomci, Srebrenica Municipality, residing in Skelani bb, of Serb ethnicity, citizen of BiH, completed Secondary Vocational Trade School, unemployed, married, father of three minors, served the Army in 1987 in Peć and Prizren, with no military rank or medal, registered in military records of Srebrenica, indigent, no other criminal proceedings are being conducted against him, with no previous conviction,

Brano Džinić a.k.a. Čupo, son of Ratomir and Dragica nee Erkić, born on 28 June 1974 in the village of Jelačići, Kladanj Municipality, residing in Vlasenica, Srpskih ranjenika 14, of Serb ethnicity, citizen of BiH, police officer by profession, single, no children, with no previous conviction, no other criminal proceedings are being conducted against him,

Aleksandar Radovanović, a.k.a. Aca, son of Ljubiša and Jela, nee Dragišević, born on 20 June 1973 in Bujakovići-Skelani, Srebrenica Municipality where he is holding permanent residence, of Serb ethnicity, citizen of BiH, police officer by profession, completed secondary education, married, father of one child, with no previous conviction, no other criminal proceedings are being conducted against him,

Slobodan Jakovljević, a.k.a. Boban, son of Dobrislav and Kosa, born on 9 January 1964 in the village of Kušići, Srebrenica Municipality, residing in Žabokvica-Skelani, of Serb ethnicity, citizen of BiH, unemployed, married, father of three, indigent, with no previous conviction, no other criminal proceedings are being conducted against him,

Branislav Medan, a.k.a. Bane, son of Risto and Marta, nee Milić, born on 24 March 1965 in Dubrovnik, residing in Mostar, Maršala Tita 23, of Serb ethnicity, citizen of BiH, worker by profession, completed elementary education, unemployed, widower, no children, indigent, served the Army service, with no previous conviction, no other criminal proceedings are being conducted against him,

ARE FOUND GUILTY

Inasmuch as:

Milenko Trifunović, in his capacity as Commander of the 3rd Skelani Platoon as a constituent element of the 2nd Šekovići Special Police Detachment, which he commanded, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan, as special police officers within the same Platoon, Brano Džinić as a special police officer in the 2nd Šekovići Special Police Detachment, together with other members of the Army of Republika Srpska (VRS) and the Ministry of the Interior of Republika Srpska, having participated in capturing of a large number of Bosniak men who, after the fall of the Safe Area of Srebrenica and its complete occupation by the forces of the Army of Republika Srpska, endeavored to leave the protected zone of Srebrenica on which occasion Trifunović previously encouraged and invited them to surrender, which many of them did as they were promised that they would be interrogated and exchanged, yet their personal papers and other personal belongings were seized, they were left without food, water and medical aid although many of them were seriously

wounded, at the same time witnessing that the remaining Bosniak civilian population, about 25,000 mainly women and children were transported by trucks outside the Safe Zone of Srebrenica, on 13 July 1995, escorted a column of the captured Bosniak men to the warehouse of the Farming Cooperative Kravica and, together with other captured Bosniak men who had been bused to the warehouse, more than one thousand of them, and imprisoned them in the warehouse of the farming cooperative and killed them in early evening hours in a way that Milenko Trifunović and Aleksandar Radovanović fired their automatic rifles at the captives, Brano Džinić threw hand grenades at them, and Slobodan Jakovljević and Branislav Medan took positions at the rear of the warehouse standing guard and preventing any escape of the captives through the windows.

T h e r e f o r e, by killing members of a group of Bosniaks, they aided in their extermination in part as a national, ethnic and religious group.

W h e r e b y:

They committed the criminal offense of – **Genocide in violation of Article 171(a) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 31 of the same Code,**

Therefore, pursuant to the referenced legislation, Articles 39, 42 and 48 of the Criminal Code of BiH, and Article 285 of the Criminal Procedure Code of BiH, the Court

S E N T E N C E S

THE ACCUSED MILENKO TRIFUNOVIĆ TO A LONG-TERM IMPRISONMENT OF 33 (THIRTY-THREE) YEARS

THE ACCUSED ALEKSANDAR RADOVANOVIĆ TO A LONG-TERM IMPRISONMENT OF 32 (THIRTY-TWO) YEARS

THE ACCUSED BRANO DŽINIĆ TO A LONG-TERM IMPRISONMENT OF 32 (THIRTY-TWO) YEARS

THE ACCUSED SLOBODAN JAKOVLJEVIĆ TO A LONG-TERM IMPRISONMENT OF 28 (TWENTY-EIGHT) YEARS

THE ACCUSED BRANISLAV MEDAN TO A LONG-TERM IMPRISONMENT OF 28 (TWENTY-EIGHT) YEARS

Pursuant to Article 56 of the CC of BiH, the time that the Accused spent in custody pursuant to respective Decisions of the Court until their committal to serve the sentences shall be credited towards the sentence of imprisonment as follows:

Milenko Trifunović, from 22 June 2005;
Aleksandar Radovanović, from 22 June 2005;
Brano Džinić, from 22 June 2005;

Slobodan Jakovljević, from 21 June 2005;
Branislav Medan, from 23 August 2005;

As to the claims under property law and costs of the criminal proceedings, the first instance Verdict shall remain unmodified with regard to all of the Accused.

R E A S O N I N G

I. PROCEDURAL HISTORY

FIRST INSTANCE VERDICT

1. By the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24 of 29 July 2008, the Accused Miloš Stupar, Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Medan Branislav, were found guilty of having committed criminal offences as described under sections 1 and 2 of the operative part of the Verdict, as follows: the Accused Milenko Trifunović, Aleksandar Radovanović, Brano Džinić, Slobodan Jakovljević and Branislav Medan as co-perpetrators by their actions committed the criminal offence of Genocide in violation of Article 171(a) in conjunction with Articles 29 and 180(1) of the CC of BiH, and the Accused Miloš Stupar committed the criminal offence of Genocide in violation of Article 171(a) in conjunction with Article 180 (2) of the CC of BiH.

2. The same Verdict acquitted Milovan Matić, Velibor Maksimović and Dragiša Živanović of charges that they committed the criminal offence of Genocide in violation of Article 171 of the CC of BiH in conjunction with Articles 29 and 180(1) of the CC of BiH.

3. Pursuant to Article 285 of the CPC of BiH, with the application of Articles 39, 42, 48 of the CC of BiH, the Court sentenced the Accused to a long-term imprisonment as follows: the Accused Miloš Stupar to 40 years, the Accused Milenko Trifunović to 42 years, the Accused Brano Džinić to 42 years, the Accused Aleksandar Radovanović to 42 years, the Accused Slobodan Jakovljević to 40 years and the Accused Branislav Medan to 40 years.

4. Pursuant to Article 56 of the CC of BiH, the time that the Accused spent in custody pursuant to respective Decisions of the Court until their committal to serve the sentences shall be credited towards the sentence of imprisonment, as follows: the Accused Miloš Stupar from 22 June 2005, the Accused Milenko Trifunović from 22 June 2005, the Accused Aleksandar Radovanović, from 22 June 2005, the Accused Brano Džinić, from 22 June 2005, the Accused Slobodan Jakovljević from 21 June 2005, the Accused Branislav Medan, from 23 August 2005;

5. Pursuant to Article 188(4) of the CPC of BiH, the Accused are relieved of the duty to reimburse the costs of the criminal proceedings, which will be paid from the Court budget.

6. Pursuant to Article 198(2) of the CPC of BiH, aggrieved parties, witness S1 and witness S2, and members of the Association – Movement of the Mothers of the Enclaves of

Srebrenica and Žepa are referred to take civil action to pursue their claims under property law.

APPEAL

7. The Prosecutor of the Prosecutor's Office of BiH filed an appeal from the first-instance Verdict in the part acquitting the Accused Milovan Matić of charges, on the grounds of erroneously and incompletely established state of facts and essential violation of the provisions of criminal procedure, moving the Appellate Panel to grant the appeal as grounded, to revoke the contested Verdict in the part pertaining to Milovan Matić and to order his retrial, to have evidence re-adduced, and thereupon to find the Accused guilty of the criminal offence with which he has been charged and sentence him to a long-term imprisonment.

8. The referenced Verdict was appealed by:

- the Defense Counsels for the Accused Miloš Stupar, lawyers Ozrenka Jakšić and Radivoje Lazarević. Lawyer Ozrenka Jakšić filed an appeal due to essential violations of the criminal procedure provisions, violation of the Criminal Code, erroneously and incompletely established state of facts, and due to the decision on the criminal sanction, moving the Appellate Panel to grant the appeal, revise the contested Verdict and acquit the Accused Stupar of charges, or to revoke the contested Verdict and order a retrial before the Appellate Panel. The Defense Counsel for the Accused, lawyer Lazarević, also filed an appeal on the same grounds as above with the same proposal;

- the Defense Counsels for the Accused Milenko Trifunović, lawyer Rade Golić, filed an appeal due to essential violations of the provisions of criminal procedure, violations of the Criminal Code, and erroneously and incompletely established state of facts and, pursuant to Article 314(1) of the CPC of BiH, moved the Appellate Panel to revise the first-instance Verdict and acquit the Accused of charges, or to revoke the Verdict and order a retrial;

- the Defense Counsel for the Accused Brano Džinić, lawyer Suzana Tomanović, filed an appeal due to essential violations of the provisions of criminal procedure, violation of the Criminal Code, and due to erroneously and incompletely established state of facts, and moved the Appellate Panel to order that all transcripts from the main trial and evidence presented in these proceedings be translated into English so that the members of the Panel who do not speak the BiH official languages be able to discuss this appeal at the Panel session on equal footing or, alternatively, the Appellate Panel to order the translation of all transcripts and evidence to which this appeal refers, the contested Verdict to be revoked in its entirety and the Appellate Panel to schedule and hold a retrial where all evidence will be adduced again and new evidence presented as proposed in this appeal;

- the Defense Counsel for the Accused Aleksandar Radovanović, lawyer Dragan Gotovac, filed an appeal due to essential violations of the provisions of criminal procedure, violation of the Criminal Code, erroneously and incompletely established state of facts and the decision on criminal sanction, and moved the Appellate Panel to revoke the contested Verdict or to revise it and, by virtue of proper application of law, upon the presentation of new evidence and repeated presentation of evidence already presented, to render a Verdict acquitting the Accused Radovanović of charges;

- the Defense Counsel for the Accused Slobodan Jakovljević, lawyer Boško Čegar, filed an appeal due to essential violations of the provisions of criminal procedure, violation of the Criminal Code, and erroneously and incompletely established state of facts, and moved the Appellate Panel, pursuant to Article 314(1) of the CPC of BiH, to revise the first-instance Verdict and acquit the Accused Slobodan Jakovljević of responsibility for the criminal offense of Genocide or any other criminal offense.

- the Accused Branislav Medan himself filed an appeal from the first-instance Verdict, and so did his Defense Counsel, lawyer Borislav Jamina, due to essential violations of the provisions of criminal procedure, violations of the Criminal Code, erroneously and incompletely established state of facts and the decision on sanction, and moved the Appellate Panel to grant the appeal, revoke the first-instance Verdict and schedule a new hearing.

9. The Prosecutor's Office responded to all of the foregoing appeals and moved the Court to refuse them as ungrounded and to uphold the first instance Verdict.

10. The Defense Counsel for the Accused Milovan Matić, lawyer Miloš Perić, responded to the appeal by the Prosecutor's Office and moved the Court to refuse it as ungrounded and to uphold the first-instance Verdict with regard to the Accused Milovan Matić

11. At the session held on September 8 and 9 2009, pursuant to Article 304 of the CPC of BiH, the parties and defense counsels briefly presented their respective appeals and responses thereof, fully adhering to the assertions and motions which had been stated in writing.

12. Having reviewed the first-instance Verdict insofar as contested in the appeals, the Appellate Panel rendered a decision as stated in the operative part of the Verdict, as follows.

II. GENERAL CONSIDERATIONS

13. Prior to providing its explanation on each particular ground of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC BiH, the Appellant shall state in the appeal both the grounds for contesting the Verdict and the reasoning behind the appeal.

14. Since the Appellate Panel will review the Verdict only insofar as it is contested by the Appeal pursuant to Article 306 of the CPC BiH, the Appellant shall draft the appeal in such a manner that it can serve as the grounds for review of the Verdict.

15. To this end, the Appellant must specify each appellate ground for contesting the Verdict, exactly which part of the Verdict, evidence or action of the Court is challenged, and provide a clear explanation supported with arguments.

16. Mere general recitation of appellate grounds as well as pointing to alleged errors during the first instance proceedings without specifying the ground of appeal raised by the Appellant, does not constitute a valid basis to review the Trial Verdict. Therefore, the Appellate Panel will *prima facie* refuse unsubstantiated or vague appellate allegations as unfounded.

III. APPEAL OF THE BIH PROSECUTOR'S OFFICE

17. Milovan Matić was acquitted of charges by the Verdict of the Court of BiH number X-KR-05/24 dated 29 July 2008. The Indictment charged him with the criminal offence of Genocide under Article 171 CC BiH, in conjunction with Articles 29 and 180 (1) CC BiH. The Indictment alleged that he seized wrist watches, money, and gold from the Bosniaks captured in the Kravica warehouse and filled ammunition clips used for the execution of the detainees, thus participating in the killings on that location.

18. The Verdict further stipulated that the Accused was relieved of the duty to reimburse the costs of the criminal proceedings, so the costs shall therefore be paid from the Court of BiH's budget appropriations, while pursuant to Article 198(2) of the CPC of BiH, the injured parties S1 and S2, and members of the Association – Movement of the Mothers of the Enclaves of Srebrenica and Žepa were instructed to take civil action to pursue their claims under property law.

19. The Prosecutor's Office of BiH lodged an appeal due to erroneously and incompletely established state of facts, pursuant to Article 299 (1) CPC BiH and the essential violation of the criminal procedure under Article 297 (2) CPC BiH. The Prosecutor's Office moved the Appellate Panel to uphold the appeal as well-founded, revoke the contested Verdict in the part pertaining to Milovan Matić and order a retrial of his case where evidence would be presented again. Thereupon, the Accused should be found guilty of the criminal offence as charged and sentenced to a long-term imprisonment.

20. Defense Counsel for the Accused Milovan Matić, Attorney Miloš Perić, submitted to the Court a response to the Appeal. He moved that the Appeal be refused as unfounded and the First Instance Verdict upheld in the part pertaining to Milovan Matić.

A. Essential violations of the criminal procedure

21. The Appeal of the Prosecutor's Office submits that the Trial Panel erred when it refused to admit into evidence the statements of the Accused Milovan Matić made at the Prosecutor's Office on 23 and 24 June 2005 and the statement the Accused made during the reconstruction of events. The Prosecutor's Office submits that the Accused was duly informed of his rights as a suspect and grounds for suspicion against him. The Prosecutor's Office further submits that it was completely clear that the Accused made his statement during the reconstruction as a suspect, rather than as a witness.

22. Opposing the Prosecution's submissions, the Defense notes that in the Records of Examination there is no mention of Matić's acts that constitute elements of the criminal offence with which he was charged.

23. The Appellate Panel finds that the Trial Panel provided a clear, thorough and sound explanation of the reasons why it did not admit the statements into evidence in Annex B of the Verdict, on pages 361 through 384.

24. The Prosecutor offers no new circumstances regarding this issue in his Appeal. The Appellate Panel therefore concludes that it is unnecessary to repeat the reasons for the decision of the Trial Panel on this matter. The Appellate Panel notes that the reasons for the decision are valid and sound, considering all the circumstances of the case.

25. The Trial Panel concluded correctly that all three statements were taken unlawfully, which constituted a violation of the rights of the Accused under Article 6 of the European Convention on Human Rights (ECHR), as well as a violation of the statutory procedures intended to protect the rights prescribed in Article 78 CPC BiH.

26. The Trial Panel correctly concluded that the Accused Matić was not properly informed of the grounds for suspicion against him, prior to giving a statement at the Prosecutor's Office, contrary to the procedure set forth in the law. The statement made during the reconstruction is a follow-up to the two unlawful statements. Pursuant to Article 10 (3) CPC BiH, the Court was not able to base its decision on such a statement.

27. The Appellate Panel reviewed the lawfulness and validity of the Trial Verdict in light of the appellate claim of essential violations of the criminal procedure, and concluded that this ground of appeal of the Prosecution is unfounded and it is refused as such.

B. Erroneously and incompletely established state of facts

28. The Appellate Panel further reviewed the appellate claims of erroneously and incompletely established state of facts under Article 299 (1) CPC BiH. The Panel concluded that they are unfounded.

29. The Prosecutor's Office claims erroneously and incompletely established state of facts because the Trial Panel did not conclude that the Accused Matić had been present at the crime scene, participated in the looting of the prisoners and filled ammunition clips for the special policemen; that he had been aware of the fact that the prisoners in the warehouse were imprisoned for execution purposes and had known that they would be executed. The Trial Panel did not reach the above conclusion, despite the body of evidence before it, in particular the statements of witnesses Miladin Nikolić, S2, Luka Marković, Ilija Nikolić, Miloš Đukanović and Momir Nikolić.

30. With reference to witness Miladin Nikolić, whose investigation statement contradicted his testimony at the main trial, the Prosecutor's Office submits that the Trial Panel should have given credence to the witness's statement taken during the investigation, because this witness probably changed his testimony due to influence and fear of self-incrimination.

31. The Defense submits that the Prosecutor's Office offered no proof for their submissions that this witness was influenced. The Defense adds that testimony under oath is a guarantee of a truthful testimony of a witness.

32. The Appellate Panel notes that the Trial Panel, when reviewing the testimony of the witness Miladin Nikolić, put that testimony in the context of evidence of all other witnesses who testified about the presence of the Accused Matić on the relevant place at the relevant time. The Trial Panel assumed its position on this particular piece of evidence pursuant to Article 290 (7) CPC BiH.

33. The Trial Panel did not base its decision on the testimony of this witness only. It also considered other witnesses testifying about the same circumstance. The Trial Panel correctly observes that this witness denied his statement from the investigation, to the effect that he saw the Accused Matić at the Cooperative on 13 July 1995.[1] However, other witnesses, namely Erić Zoran and Miloš Đukanović, also gave evidence about this circumstance. They stated that they had not seen the Accused Matić at the Cooperative that day, which is consistent with the testimony of witness Nikolić at the main trial.

34. The fact that these witnesses confirmed the testimony of this witness at the main trial, rather than his statement from the investigation, led the Trial Panel to give credence to those mutually corroborating testimonies given at the main trial. Accordingly, the Appellate Panel concludes that the Trial Panel's factual findings on this matter are valid and founded. The Appellate Panel concurs with those findings.

35. Based on the above, Prosecution's appellate claims are refused as unfounded.

[1] First-Instance Verdict, BHS, p. 212.

36. With reference to witness S2, the Prosecutor's Office notes that the Trial Panel applied too strict criteria to evaluate the description that S2 provided regarding the individual who entered the warehouse and demanded that the prisoners should hand in their money, gold and watches to him. The Prosecutor's Office alleges that this individual was exactly the Accused Matić.

37. The Defense submits that this claim of the Prosecutor's Office pertaining to witness S2 is unacceptable. It is impossible that the witness would omit to mention, in his description of the individual taking money from the prisoners, a beard that the Accused Matić had at the time. This shows that it was somebody else that entered the warehouse, rather than the Accused.

38. The Trial Panel notes in the Verdict that Witness S2 who was imprisoned in the Kravica warehouse described the individual who had entered the warehouse and taken money from the prisoners in detail. However, the Trial Panel correctly observes that S2's description of this individual's physical appearance does not correspond to the physical appearance of the Accused Matić, because at the time relevant to the Indictment the Accused was not losing hair and had a beard, which S2 did not mention.

39. Considering that Witness S2 described this individual in great detail, without mentioning the most conspicuous facial feature of the Accused (a beard), the position of the Trial Panel appears correct, since there was no sufficient and trustworthy evidence that it was exactly the Accused Matić whom Witness S2 described as taking valuables from the prisoners.

40. It has to be acknowledged that Witness S2, fearing for his own life, could not remember all details of the physical appearance of this individual. Nevertheless, the Trial Panel observed correctly that the beard the Accused had at the time was a particularly conspicuous detail, as opposed to the height of that individual. Witness S2 did not mention that detail. Therefore, it is impossible to conclude beyond any reasonable doubt that the individual described by the witness was the Accused Matić.

41. Witness Luka Marković in his testimony stated that a man had offered him to buy five or six watches. The witness added that the name of the man was Milovan Matić. The Prosecutor's Office submits that this testimony removes any doubt about the decisive fact that this man was the Accused Matić, who had taken the watches from the prisoners in the warehouse.

42. The Defense points out that witness Luka Marković's evidence about the Accused Matić's entering the warehouse was not corroborated by any other witness. The averment that this witness had known the Accused before the event charged is unconvincing.

43. The Trial Verdict notes witness Marković's evidence that the man by the name of Milovan Matić offered him to buy five or six wrist watches about 11 a.m. on 13 July. He assumed that Matić had taken the watches from the prisoners. Witness Marković stated that he had not seen Matić taking the watches from the prisoners, but assumed that he had indeed taken them from the prisoners, because he saw the Accused (Milovan Matić) entering the

warehouse with two other persons, namely Ilija Nikolić and Mile Obradović, in order to look among the prisoners for certain people who had previously taken part in an ambush.

44. No other witness or material evidence corroborated the evidence of the witness Marković. He could only confirm with certainty that he saw the Accused Matić enter the warehouse with two other people, namely Ilija Nikolić and Mile Obradović. He could not confirm that Matić took the watches from the prisoners. Therefore, the Trial Panel could not infer that it was indeed the Accused Matić who did that. He only *assumed* that the watches had been taken from the prisoners but did not deny that this might not have been so.

45. Witness Marković had not known the Accused Matić before. The identification he made is contrary to the evidence of many other prosecution witnesses, Ilija Nikolić, Zoran Erić, Miladin Nikolić and Miloš Đukanović, as well as witness S2 who also testified about these circumstances. Accordingly, the Trial Panel reasonably concluded that there is ample reason for doubt about the charges pertaining to the Accused Matić.

46. There is no other evidence which would lead to a positive conclusion that the Accused Matić seized watches, money and gold from the prisoners in the Kravica warehouse, apart from the testimony of witness Marković who provided contradictory accounts of the incident in his statements given during the investigation and at the main trial. The discrepancies pertain to a decisive fact – the identity of the Accused. The Trial Panel therefore reasonably concluded that the Prosecutor's Office failed to prove this allegation beyond a reasonable doubt. Accordingly this ground of appeal is refused as unfounded.

47. With reference to the participation in the killings in the Kravica warehouse, the Prosecutor's Office alleges that the Accused Matić filled the clips for the special policemen, as the Accused himself confessed to have done in several of his statements. This is corroborated by the evidence of witnesses Luka Marković, S4 and Momir Nikolić.

48. Defense Counsel for the Accused Milovan Matić, in his response to the Appeal, states that the Prosecutor's Office did not submit a single piece of evidence at the main trial which would corroborate their allegations from the Indictment. The defense further submits that the statements that the Accused made in the preliminary proceedings cannot be admitted as evidence.

49. With reference to this, the Trial Panel reasonably concluded that the Prosecutor had relied substantially on this unlawfully obtained and therefore not admitted evidence. Such evidence could not be used by the Panel when reaching its conclusions.

50. The Trial Panel also noted that Witness S4 had testified about this circumstance. This witness however provided decisive evidence only about the fact that there was an individual filling ammunition clips. The Trial Panel reasonably concluded that this evidence alone was inconclusive as to whether this individual had in fact been the Accused Matić.

51. Witness Momir Nikolić also testified about this circumstance. The Trial Panel reasonably found that this witness obviously gave hearsay evidence, due to his statement that he received information from a reliable informant, whose identity he did not reveal. The information was that the Accused Matić participated in the killings in the Kravica

warehouse. Witness Nikolić refused to disclose the identity of the informant, which prevented the Trial Panel to test the trustworthiness of that information.

52. The Trial Panel was therefore unable to rely upon this piece of evidence to a decisive extent. Rather, the Panel could use the evidence only if corroborated by other lawfully obtained evidence, which was not the case here.

53. Witness Nikolić also failed to clarify what he meant by saying that the Accused *had participated* in the killings in the Kravica warehouse.

54. On page 215, the Trial Panel makes the following finding on this matter:

> *Such a vague characterization of the Accused Matić's role highlights the underlying reasons for rejecting hearsay, and particularly double hearsay, evidence: the inability of the parties and the Panel to question what the witness knows and how he knows it. Participation is a legal characterization which must be independently determined by the Panel based on evidence of the actual activities witnessed. Without the factual predicate, the Court cannot conclude that there exists "participation" as defined by law, sufficient to support criminal liability for a crime.*

55. Accordingly, the Trial Panel reasonably found that there was no reliable evidence that the Accused Matić had filled the ammunition clips at the relevant time on the relevant place, which caused doubts as to the subjective identity of the Indictment in the part pertaining to the Accused Matić.

56. The *in dubio pro reo* principle implies that the Court, following the evaluation of evidence, may consider a fact to be established, if it was convinced at the main trial that the fact exists and has no remaining doubts about that. All inculpatory facts have to be established, i.e. proven, with certainty. Otherwise, they are considered to be nonexistent. All exculpatory facts are considered to be applicable even if they have been established only as probable (in other words, they were not proven with certainty). The Panel applied this rule in deciding on the charges against Milovan Matić.

57. Based on the above, the Prosecution's appeal is refused as unfounded and the Trial Verdict upheld in this part.

IV. APPEAL OF DEFENSE COUNSELS FOR THE ACCUSED MILOŠ STUPAR

58. Having examined the ground of appeal by the Defense Counsel for the Accused Miloš Stupar, stating that the Trial Panel committed an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC BiH (the Verdict's Operative Part is incomprehensible and contradicts the reasons of the Verdict), the Appellate Panel finds that this ground of appeal is well-founded.

59. It is argued in the Appeal that the Operative Part of the challenged Verdict is unclear on whether the Accused Stupar was found guilty of being an accomplice to the criminal

offense of Genocide or a co-perpetrator of the criminal offense of Genocide under Article 171(a) of the CC BiH, which is in contradiction to the concept of command responsibility of which the Accused Stupar was also found guilty under Section II of the Operative Part of the challenged Verdict (Article 171(a), in conjunction with Article 180(2) of the CC BiH).

60. Therefore, the Defense Counsels concluded that the Verdict's Operative Part is incomprehensible, internally contradictory and contradicts the reasons of the Verdict, not including reasons concerning the decisive facts, which amounted to an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC BiH.

61. The Defense Counsels' Appeal claim of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC BiH is well-founded.

62. Article 290 of the CPC BiH provides for the contents of a written Verdict, the operative part in particular, stating that the Court shall specifically and fully state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the Accused is criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act. Article 285 of the CPC BiH provides that a guilty Verdict must contain facts and circumstances that constitute elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends.

63. According to the Operative Part of the challenged Verdict, it indeed follows that the Accused Stupar, together with the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan, was found guilty of all the acts set out in the Verdict's Operative Part because the part of the Verdict indicating personal particulars of the Accused persons includes his name as well, followed by the factual account divided in portions I and II and a joint legal qualification of the offense the Accused were found guilty of. This manner of drafting of the Verdict is not stylistically or linguistically acceptable, although it is clear that the Accused Stupar was found guilty only of acts under Section II of the Operative Part (criminal offense under Article 171(a) in conjunction with Article 180(2) of the CC BiH) since his name was omitted from the factual account of Section I of the Operative Part.

64. However, upon the review of the challenged Verdict, the Appellate Panel has found that the Verdict's Operative Part does not contain a factual account of the offense (facts and circumstances that constitute elements of the offense). As a result, the Trial Verdict's Operative Part is incomprehensible and cannot be examined. It does not suffice to paraphrase the legal qualification of the offense of which the Accused is found guilty, as in the challenged Verdict. Instead, the Operative Part of a Verdict must contain factual grounds specifying the act of the Accused that constitutes a criminal offense and that ground must be clear, concrete and complete as well as encompass all elements of the offense. By acting to the contrary, the Trial Panel committed an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC BiH, as validly argued by the Defense Counsel in their respective Appeals.

65. Section II of the challenged Verdict's Operative Part lists the acts of the Accused Stupar as a commander as his omission to punish the perpetrators, but there are no factual details to support the conclusion regarding the knowledge of the Accused about the committed offense and perpetrators thereof or facts on the degree of effective control of Stupar upon which the Panel concluded that he failed to undertake necessary measures to punish the perpetrators. The Appellate Panel reiterates that the factual account cannot be replaced by mere paraphrasing of the legal qualification.

66. Furthermore, the reasons provided for the challenged Verdict contain factual conclusions that the Accused Stupar, at the time of commission of the criminal offense, was a *de iure* and *de facto* Commander of the 2nd Šekovići Special Police Detachment and at the time of perpetration of the offense he was at the location where the criminal offense was committed. These factual conclusions stand in contradiction to the challenged Verdict's Operative Part wherefrom it follows that the Accused is found guilty of failure to punish. This form of command responsibility implies that the Accused learned about the offense and perpetrators thereof after the offense had been committed, again in contradiction to the findings in the Trial Verdict. On the other hand, it follows from the reasons adduced for the challenged Verdict that the Accused Stupar, even if he was the commander, did not have the authority to punish but possibly to report an offense and perpetrators thereof to his superior commanders, rendering the challenged Verdict's Operative Part even more contradictory to the reasons adduced.

67. An essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC BiH has been committed by this kind of action. As a result, the Appellate Panel finds that there is doubt about the correctness of the established facts in relation to the Accused Stupar.

68. As the Trial Panel committed essential violations of the provisions of criminal procedure entailing mandatory revocation of the Trial Verdict, legitimately referred to by the Appellants in their Appeals, the Panel, having granted the Appeals, pursuant to Article 315(1)(a) of the CPC BiH, has revoked the Trial Verdict in relation to the Accused Miloš Stupar and ordered a retrial before the Appellate Division Panel of the Court of Bosnia and Herzegovina.

69. During the retrial, the essential violations of the criminal procedure will be corrected, the presented evidence will be presented again and, upon assessment of other grounds of appeal, new evidence will be adduced, if needed.

V. APPEALS OF THE ACCUSED MILENKO TRIFUNOVIĆ, BRANO DŽINIĆ, ALEKSANDAR RADOVANOVIĆ, SLOBODAN JAKOVLJEVIĆ AND BRANISLAV MEDAN

V.I ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE

Standards of review under Article 297 of the CPC of BiH

70. Having in mind that eight appeals were lodged in this case and that some appellate claims are repeated, the Appellate Panel decided to group them according to the grounds of appeal and then respond to each ground of appeal.

71. Before providing its reasoning, the Appellate Panel notes that under Article 295(1)(b)(c) CPC BiH the appellant is required to explain in the appeal the grounds for contesting the Verdict, as well as the reasoning behind the appeal.

72. As the Appellate Panel reviews the Verdict only in so far as it is contested in the appeal, pursuant to Article 306 CPC BiH, the appellant is required to draft the appeal so that it can serve as the ground for review of the Verdict.

73. In that regard, the appellant has to specify the grounds for contesting the Verdict, the section of the Verdict, piece of evidence or action of the Court that they challenge and provide a clear and substantiated explanation of the appeal.

74. Mere general recitation of appellate grounds or referring to purported errors during the first instance proceedings, without specifying grounds of appeal raised by the Appellant, does not constitute a valid basis to review the Trial Verdict. Accordingly, the Appellate Panel *prima facie* refused unsubstantiated or vague appellate claims as unfounded.

75. In terms of the gravity and significance of procedural violations, the CPC BiH distinguishes between the violations that, if established, create an irrefutable assumption that they adversely affected the validity of the Trial Verdict (absolute essential violations) and the violations concerning which, in each specific case, it is left for the Court to evaluate whether the established violation of the procedure had or might have had an adverse effect on the validity of the Verdict (relative essential violations)

76. Absolute essential violations of CPC BiH are specified under Article 297(1) subparagraphs a) through k) of the CPC BiH. They will be discussed below in Part A.

77. Should the Appellate Panel find any essential violations of criminal procedure provisions, it shall revoke the Trial Verdict pursuant to Article 315(1)(a) of the CPC BiH.

78. Unlike absolute violations, relative essential violations are not specified in the Code. They exist "*if the Court has not applied or has improperly applied some provisions of this Code or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict*." *(Article 297(2) CPC BiH).*

79. With respect to allegation of a relative essential violation of the criminal procedure it should be noted that the appeal is required not only to specify the act or the omission amounting to misapplication or non-application of a CPC BiH provision, but also to show how and in what sense that affected or might have affected the rendering of a lawful and proper Verdict.

80. The Panel will explain its position on relative violations of the criminal procedure in Part **B** below.

A. Essential violations of the criminal procedure, Article 297(1) CPC BiH

Essential violation of the criminal procedure, Article 297(1)(a)

81. With respect to this appellate ground, the appeals contend that the Trial Panel's composition was improper because two Panel judges were internationals, although the defense submits that

> a) individuals who are not BiH nationals cannot perform judicial functions in any court in BiH, including the Court of BiH (appeal of the defense for the Accused Slobodan Jakovljević, attorney Boško Čegar),
>
> b) there are no provisions allowing international judges to sit as Panel judges as Article 65 of the Law on the Court of BiH provides that an international judge can only perform the duties of a preliminary proceedings judge, preliminary hearing judge and individual judge, or a member of the Special 24(7) Panel, or the Panel foreseen in Article 16 of the Law on Protection of Witnesses (appeal of defense counsel for the Accused Milenko Trifunović, attorney Rade Golić).

82. However, the Appellate Panel considers the foregoing grounds of appeal to be unfounded.

83. More specifically, it is indisputable that two international judges, Judge Shireen Avis Fisher from the USA and Judge Paul Melchior Brilman from the Netherlands, were members of the Trial Panel.

84. However, contrary to the appellate claim of the defense counsel for the Accused Slobodan Jakovljević, the presence and work of international judges in the Court of BiH has its legal basis in accordance with Article 65 (2) of the Law on the Court of BiH which provides that the panels of Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Court of BiH are comprised of national and international judges whereas Paragraph 4 of that Article provides that international judges must not be nationals of Bosnia and Herzegovina or any neighboring country.

85. It clearly follows from the cited provisions that the appellate claims regarding the lack of legal basis for the presence and involvement of international judges in the Panels of Section I for War Crimes of the Court of BiH are absolutely ill-founded. Accordingly, the Appellate Panel refuses them.

86. The appellate claim implying that Article 65 of the Law on the Court of BiH does not provide for the participation of international judges in trial panels, is also unfounded.

87. Namely, the appellant refers to Article 65(5) and (6) of the Law on the Court of BiH. Those provisions indeed read as follows: *An International judge of Section I and Section II of the Criminal and Appellate Divisions may serve as a preliminary proceeding judge, a preliminary hearing judge or as a single trial judge in proceedings before Section I and Section II of the Criminal and Appellate Divisions and may serve as a judge in the panel as referred to in Article 24 (7) of the Criminal Procedure Code of Bosnia and Herzegovina,*

including the panel as referred to in Article 16 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Bosnia and Herzegovina.

88. However, the appellant disregards paragraph 2 of Article 65 that he invokes and which expressly reads that *the President of the Court, after consultation with the international Registrar shall be competent to assign judges of Section I and Section II of the Criminal and Appellate Divisions to any Panel,* which also includes trial panels. Accordingly, this ground of appeal is also unfounded and the Appellate Panel refuses it as such.

Essential violation of the criminal procedure, Article 297(1)(b)

89. The Trial Verdict is contested also because, in the opinion of the defense, one of the judges who participated in the main trial should have recused himself. The defense justifies this claim by the fact that the Accused was found guilty of the criminal offence of Genocide perpetrated with the intention to destroy in part a national, ethnic and religious group of Bosniaks and further argues that the President of the Trial Panel, namely Judge Hilmo Vučinić, is a member of the same national and ethnic group of Bosniaks. During the war he lived and worked in the Goražde enclave where circumstances were similarly uncertain as in the Srebrenica enclave. Therefore, the defense argues, he is an aggrieved party in this criminal matter.

90. However, the case file and Annex B paragraph A of the First Instance Verdict reflect that the defense petitioned for the disqualification of the President of the Trial Panel, Judge Hilmo Vučinić, referring to the reasons under Article 29 (f) (circumstances raising reasonable suspicion as to his impartiality). In their petition the defense submitted the same facts and circumstances as in the appeal from the Verdict.

91. Article 30(2) CPC BiH provides that a petition for disqualification may be filed before the beginning of the main trial and if a reason for disqualification referred to in Article 29 subparagraphs a) through e) has been learned of subsequently, the petition shall be filed as soon as the reason has become known.

92. Article 31(1) CPC BiH provides that the Court in Plenary Session shall decide on the petition for disqualification. Paragraph 3 provides that no appeal shall be permissible against a decision upholding or rejecting the petition for disqualification.

93. Accordingly, the Court of BiH in Plenary Session rendered the decision number SU-373/06 of 8 May 2009, rejecting as inadmissible the petition of defense counsel for one of the co-Accused (the petition was filed prior to the decision on severance of the proceedings) seeking that all Serb and Bosniak judges be disqualified from the proceedings. The petition that sought the disqualification of the President of the Trial Panel because during the war he lived in the Goražde enclave where circumstances were similarly uncertain as they were in the Srebrenica enclave and because he is a member of the Bosniak people against whom the offence was committed was refused as unfounded.

94. The reasoning of the Decision of the Plenary Session states that the arguments raised do not place the impartiality of Judge Vučinić into question and that in addition to him the Trial Panel comprises two international judges who participate in the making of all important decisions. It was emphasized that all decisions rendered in the course of the proceedings are

subject to review on appeal before the Appellate Division (in cases when appeal is allowed pursuant to the law). That Division is comprised of judges of all ethnicities.

95. Article 318(1) CPC BiH provides that the parties, defense attorney and persons whose rights have been violated may file an appeal against the decision of the Court rendered in the first instance unless it is expressly prohibited to file an appeal under the Code.

96. Considering that Article 39(3) CPC BiH provides that no appeal shall be permissible against a decision upholding or rejecting the petition for disqualification, there is no legal ground for the defense to raise this objection again, because it has already been adjudicated by a final decision.

97. The appeal incorrectly refers to Article 297 (1) (b) CPC BiH which states that an essential violation of the criminal procedure occurred if a judge who should have been disqualified participated in the main trial. This provision pertains to the situation where there are reasons for the disqualification of a judge under Article 29 (a) through (f) CPC BiH but the disqualification was not considered at all in the course of the proceedings (either because no petition for disqualification was filed or because the judge did not request recusal) which is not the case here.

98. Regardless of the above, the Appellate Panel will highlight some matters for the purpose of interpretation of the notion of an aggrieved party in the proceedings and clarification of the provisions referred to in the appeal:

99. It is a matter of fact that a judge cannot perform judicial function if he is an aggrieved party in the criminal matter (as Article 29 (a) CPC BiH provides for). Article 20 (h) CPC BiH defines an aggrieved party as a person whose personal or property rights have been threatened or violated by a criminal offense.

100. In the case at hand, the Appellate Panel finds that the defense failed to prove that a single personal or property right of the President of the Trial Panel was violated or threatened by the criminal offence at issue. The defense makes this inference based on the general fact of the Judge's Bosniak ethnic background.

101. Provisions of the CPC BiH providing for the disqualification of judges, particularly Article 30(4) and (5) stipulate that disqualification may be sought with reference to only a particular judge and that such petition must be substantiated.

102. The purpose of this provision is to exclude a judge who has a personal or specific relationship with the parties, or the case which he/she should try.

103. In the case at hand the defense does not contest the professionalism and competence of the Panel President, but only his membership in a particular national, ethnic or religious group, a part of which was the target of the criminal offence.

104. However, Judge Vučinić could be considered an aggrieved party in this case, only if he himself, or a person close to him, was in the group of Bosniak civilians who were

imprisoned and then killed, or had some property right of his been violated by the instant criminal offence.

105. The interpretation of the notion of an aggrieved party used in the appeals is, in the opinion of this Panel, too broad. Its strict application would result in the situation that not a single individual could perform a judicial function in the cases of criminal offences against humanity in general, because the protected object in such matters are universal values common to the whole mankind. Similarly, in cases of involving Crimes against Humanity, an important element of the offence is an attack against any civilian population. Accordingly, if the standards submitted in the appeal were to be applied, all civilians would be disqualified from trials as aggrieved parties.

106. It follows that Judge Vučinić was not aggrieved by the instant criminal offence, as the defense inaccurately tries to imply. Therefore, the Appellate Panel determines that the claim that Judge Vučinić was an aggrieved party and should be disqualified to be unfounded.

Essential violation of the criminal procedure, Article 297(1)(c)

107. The appeals also contest the decision that the Trial Panel made during the hunger strike of the Accused and their refusal to come from the detention unit and attend the main trial hearings. The Panel decided not to have the Accused brought to the courtroom by the use of force. Rather the main trial hearings were held without the presence of the Accused who had been duly summoned to attend.

108. Explaining this ground of appeal, the appellants allege a violation of Article 247 CPC BiH according to which an accused cannot be tried in absentia. The appellants also invoke Article 246 CPC BiH which provides that if the accused was duly summoned but fails to appear and does not justify his absence, the judge or the presiding judge shall postpone the main trial and order that the accused be brought in at the next session.

109. Therefore the appellants contend that the Court should have had the Accused brought to the courtroom. The appellants add that the decision of the Court to continue the main trial without the presence of the Accused in the courtroom breached the rights of the Accused to a fair trial, while the main trial was held despite the lack of legal prerequisites to do so.

110. The appellants further contend that the Trial Panel erroneously concluded that none of the Accused were incapable to attend the trial since at the hearing held on 18 January 2007, expert witness Senad Pešto stated that Slobodan Jakovljević, Branislav Medan, Milovan Matić and Petar Mitrović experienced serious problems, while Milovan Matić was incapable to attend the trial. He was also not capable to attend the hearing on 17 January 2007.

111. The Appellate Panel concludes that the decision of the Trial Panel to hold the main trial without the presence of the Accused, in case they unjustifiably refuse to attend the scheduled hearings to which they had been duly summoned, was lawful and explained by sound arguments. The Appellate Panel finds that explanation to be reasonable.

112. It is not disputed that the Accused were in custody during the main trial, pursuant to the decision of the preliminary hearing judge of 19 December 2005. The Trial Panel reviewed the justification of custody on a bi-monthly basis pursuant to Article 137 (1) CPC BiH.

113. From the commencement of the main trial on 9 May 2006 until 10 January 2007, the Accused attended every main trial hearing. On 10 January 2007, they refused to attend the hearing because they went on a hunger strike or supported the hunger strike. The purpose of the strike was an urgent decision about their applications before the Constitutional Court of BiH.

114. The Court postponed the hearing scheduled for 10 January 2007 and summoned the Accused to explain verbally before the Court the reasons for their conduct on 11 January 2007. However, the Accused refused to attend that hearing as well.

115. The case file reflects that the Accused went on the hunger strike voluntarily, which was the reason for their refusal to attend the hearings to which they were duly and timely summoned. The Accused refused to attend the hearing on 11 January 2006, which the Court scheduled in order to hear them about the reasons for their conduct. Accordingly, the Appellate Panel concludes that the Accused completely ignored the work of the Court and thus actually attempted to frustrate criminal proceedings.

116. The Trial Panel, in resolving this procedural situation, correctly concluded that the CPC BiH did not prohibit the conduct of the proceedings without the presence of the Accused in the courtroom and that such action could not be defined as a trial in absentia.

117. The defense correctly states that Article 247 of the Criminal Procedure Code of BiH provides that: "An accused shall not be tried *in absentia*". Article 246 (1) CPC BiH reads as follows: *"If the accused was duly summoned but fails to appear and does not justify his absence, the judge or the presiding judge shall postpone the main trial and order that the accused be brought in at the next session."*

118. However, the defense uses only parts of the foregoing provisions and completely incorrectly interprets the notion of trial in absentia. Thus, the defense reaches an incorrect conclusion that the absence of the Accused from the courtroom in this case is a violation of the aforementioned provisions and the right of the Accused to a fair trial.

119. Article 246 (1) CPC BiH, to which the defense referred in their appeals, provides that the Court will order that the Accused be brought in, if he was duly summoned but fails to appear and does not justify his absence. However, in their reference to this Article, the defense fail to mention paragraph 2 providing for further consequences of the conduct of the Accused. Article 246 (2) CPC BiH provides that if forceful apprehension was not successful, the judge or the presiding judge may order that the Accused be placed in custody.

120. It is therefore clear that forceful apprehension referred to by the defense is used in situations when the Accused is not held in custody. In such situations, apprehension is ordered first, as a more lenient measure to secure his presence in the proceedings. The most

stringent measure of custody is ordered only if the more lenient measure does not achieve the desired purpose.

121. If the Accused is held in custody, then the most stringent measure to secure his presence has already been applied. Therefore, the Accused is considered to be under the court's custody. In other words, the Accused is not beyond reach or "in absentia".

122. The Appellate Panel does not accept the appellate claim implying that the First Instance Court should have had the Accused forcefully brought to the courtroom (defense counsel for the Accused Aleksandar Radovanović even suggested the use of "metal handcuffs" and "glass box" in the courtroom), in order to observe their rights to a fair trial. The Appellate Panel concludes that such course of action would have had an opposite effect. The use of physical force would transform the right of the Accused to be present and take part in the criminal proceedings into an obligation to do so. This is unacceptable, in terms of both CPC BiH and the relevant international standards of human rights and freedoms.

123. The use of coercion suggested by defense counsel would be inhumane and violate the mental and physical integrity of the Accused as well as undermine the authority and dignity of the Court. Other than their mere physical presence in the courtroom, it would not achieve active and willing participation of the Accused in their own proceedings.

124. Article 242 (2) CPC BiH reflects that every absence of the Accused from the courtroom is not necessarily considered his absence from the criminal proceedings in general. It allows the conduct of the proceedings without the presence of the Accused in the courtroom.

125. The foregoing article provides that

> *"the judge or the presiding judge may order that the accused be removed from the courtroom for a certain period if the accused persists in disruptive conduct after being warned that such conduct may result in his removal from the courtroom. The judge or the presiding judge may continue the proceedings during this period if the accused is represented by the defense attorney."*

126. The cited provision indicates that CPC BiH does foresee the possibility of continuing the hearing even if the Accused is not physically present in the courtroom. This reinforces the conclusion that such procedural situations are not trials in absentia.

127. Having reviewed the actions of the Trial Panel in terms of the standards prescribed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, the Appellate Panel concludes that the actions of the Trial Panel did not violate the rights of the Accused to a fair trial in any way.

128. The purpose of the procedural prohibition from trying the Accused in absentia is to enable the Accused to be informed of the proceedings conducted against him and to participate in those proceedings as much as he prefers, all in the context of his right guaranteed under Article 6 of the ECHR.

129. The Appellate Panel determines that these rights of the Accused have been observed, despite the fact that they were physically not present in the courtroom. In that regard, the Appellate Panel finds that the explanation of the Trial Panel is reasonable. The Accused were able to come to the trial at any point in time, their defense counsels were present at all hearings and after each hearing they received a recording of the hearing. This clearly shows that the Trial Panel respected all of the procedural requirements to ensure a fair trial.

130. The standards further require that the Accused should immediately be informed of the nature and reasons for the charges against him in a language he understands. That was done in the course of the hearing before the preliminary proceedings judge as well as upon the delivery of the Indictment, a plea hearing and opening of the main trial by the reading of the Indictment.

131. The Accused also have the right to examine witnesses or request the examination of the prosecution witnesses or approval of the presence and hearing of defense witnesses under the same conditions as prosecution witnesses. The Accused were able to do so at all times.

132. The Trial Panel paid particular attention to make sure that the Accused were informed of the course of the proceedings conducted without their presence in the courtroom. They were also allowed to come to the courtroom whenever they wanted.

133. The defense claims that the Accused were not able to attend and follow the hearings scheduled for 17 January and 18 January 2007, due to poor health condition. That ground of appeal is unfounded.

134. Defense counsel for the Accused Slobodan Jakovljević incorrectly quotes expert witness Senad Pešto. Since at the hearing held on 18 January 2007, following an examination of the Accused, the expert witness stated that the Accused was experiencing back pain, and added very clearly that that pain had nothing to do with his mental state and that he *"was fully capable to attend the proceedings"*. Defense counsel for the Accused Aleksandar Radovanović, attorney Dragan Gotovac, had a similar unfounded claim. The expert witness confirmed, at the same hearing, that Aleksandar Radovanović, as well as Miloš Stupar, Milenko Trifunović, Brane Džinić, Slobodan Jakovljević, Miladin Stevanović, Velibor Maksimović and Dragiša Živanović are *"completely capable to attend the proceedings and the court."*

135. The health condition of Milovan Matić on 17 and 18 January 2007 and his presence or absence on those dates had no bearing on the defense of the Accused Slobodan Jakovljević and Aleksandar Radovanović. Therefore, their defense counsel refer to that circumstance purposelessly, especially since the Accused Matić was acquitted of charges in these proceedings, and lodged no appeal accordingly.

136. Bearing in mind that the Accused were aware of the charges against them all along; they were timely informed of and summoned to the hearings scheduled; they were capable to attend the hearings; their defense counsel were always present at the main trial; the Accused every time clearly, willingly and explicitly waived their right to be present at the trial, the Appellate Panel concludes that they were not prevented from attending, following and

participating in the main trial in any way. The Accused obviously waived that right willingly and thus accepted that the main trial would continue without their presence.

137. Accordingly, the Appellate Panel finds these grounds of appeal to be unfounded and refuses them as such.

Essential violation of the criminal procedure, Article 297 (1) (d)

138. Appellate claims pertaining to the violation of the right to defense can be summarized as follows:

a) Co-counsel for the Accused Miloš Stupar submits in the appeal that the Trial Panel violated Article 286 (1) CPC BiH because they extended the deadline for the pronouncement of the Verdict after the completion of the main trial. He also submits that the Trial Panel violated Article 289 (1) CPC BiH, because it took the Trial Panel 150 days to finish the writing of the Verdict, thus they exceeded the statutory deadline of 30 days. Although when deciding on the appeal of the defense counsels for the Accused Stupar the Appellate Panel rendered a separate decision, it will refer to this ground of appeal because it is of interest to all Accused.

b) Defense counsel for the Accused Milenko Trifunović submits that in the course of the first instance proceedings, the prosecutor de facto supplemented the Indictment by his submission dated 24 June 2008. A new action and new legal definition was thus added and the defense was deprived of the opportunity to contest what were basically new charges in terms of both substantive and procedural law;

c) The appeals also contest the decision of the Trial Panel to refuse the defense motion that the Court order the Prosecutor's Office of BiH to disclose to the defense all documentary evidence from the case number KT-RZ-139/07 against Milorad Trbić, and allow the defense to conduct additional cross examination of witness Richard Butler;

d) The defense also contest the decision of the Court not to deliver to the defense the transcripts of cross examination of the witness S4 at main trials in severed proceedings;

e) Defense counsel for the Accused Milenko Trifunović alleges a violation of the right to defense because the costs of the preparation of defense were reimbursed to defense counsel only after the exhibits obtained were tendered into evidence.

139. Having reviewed these grounds of appeal, the Appellate Panel concludes that they are unfounded.

140. A violation of the right to defense occurs if the rules of criminal procedure were not applied or were misapplied to the detriment of the Accused. The appellant claiming this violation has to demonstrate that the Court put the defense in an unfavorable position, as compared to the Prosecutor's Office, by depriving the defense of some right guaranteed by the law or by preventing the defense in some other way to exercise its statutory rights.

141. The appellate claim is that the Trial Panel extended the deadline for the pronouncement of the Verdict without a legal basis and that the deadline of 30 days for the compiling of the written Verdict was exceeded. The Appellate Panel concludes that this did not violate the Accused's' right to defense.

142. Specifically, the First Instance Proceedings were completed on Thursday, 17 July 2008 and the Verdict was pronounced on Tuesday, 29 July 2008.

143. Article 286 (1) CPC BiH provides that if the Court is unable to pronounce the Verdict on the same day the main trial was completed, it shall postpone the announcement of the Verdict for a maximum of three (3) days and shall set the date and place when the Verdict shall be announced.

144. It follows from the aforementioned that the Verdict was pronounced on the twelfth day following the completion of the main trial (including two weekends).

145. However, this action of the Trial Panel had no bearing on the defense of the Accused nor did it put the defense in an unfavorable position as compared to the Prosecutor's Office. The Prosecutor's Office heard the pronouncement of the Verdict on the same day as the defense.

146. The statutory deadline for the pronouncement of the Verdict of three days following the completion of the main trial is a deadline for the court. The exceeding of that deadline has no detrimental consequences. This, naturally, does not mean that the Court may delay the pronouncement of the Verdict without justification. At the same time, the Court must ensure enough time after the completion of the main trial to carefully review the entire body of evidence and to decide on the criminal liability of the Accused.

147. The proceeding in this case involved 11 accused persons. They were later severed and continued as three separate cases before the same Panel, which conducted and completed the cases simultaneously. The main trial lasted for over two years. All three Verdicts were pronounced on the same day. Over a hundred witnesses were heard during the proceedings and over five hundred pieces of material evidence were adduced. Accordingly, this was obviously an extremely complex case.

148. Therefore, a three-day deadline was evidently insufficient for the Trial Panel to deliberate and vote on the decision after a proper review of the entire body of evidence. The Trial Panel extended the deadline for that reason.

149. The right of the Accused to defense was not violated by such action and the appellate claims in that regard are unfounded.

150. The Appellate Panel concludes that in the interest of fairness, and particularly in the interest of the Accused, the Court must take sufficient time to review the evidence from all aspects before making its decision, even if that involves a slight extension of the deadline for deciding. The Court is required to carefully review all evidence adduced. It is one of the most important statutory obligations of the Court in the course of the criminal procedure.

151. Accordingly, the Appellate Panel finds that the extension of the deadline for the pronouncement of the Verdict from three to twelve days did not affect the Accused's right to a defense in any way, nor did it amount to an unjustified delay in the decision-making, taking into account the specific circumstances of the case. Therefore, the Appellate Panel refuses this ground of appeal as unfounded.

152. The appellate claim that the Trial Panel failed to compile the written Verdict within thirty days is unfounded, for the same reasons. A thirty-day deadline is the maximum time provided for by the law. However, in such a complex and extensive case the Verdict could not reasonably be written within thirty days. The Verdict has 393 pages. The Trial Panel duly informed the Court President of the extension of this deadline, pursuant to Article 289 (1) CPC BiH.[2]

153. In addition, the defense again fails to explain how such actions of the Trial Panel violated the Accused's right to defense. Since the defense was on equal footing with the Prosecutor's Office of BiH and received the Verdict on the same day with the same deadline for appeal, the Appellate Panel concludes that this appellate claim is unfounded and refuses the claim as such.

154. The appeal claims that the Prosecutor's Office supplemented the Indictment with a new action and legal definition by its submission dated 24 June 2008 and that the defense was thus deprived of the right to refute new charges, as the defense calls them, in terms of substantive and procedural law.

155. By the submission dated 24 June 2008, the Prosecutor's Office specified the Indictment by adding the word "majority of" in count e) of the factual description of the offence, in order to convey the number of Bosniak prisoners who were killed at the relevant time. In the part of the Indictment pertaining to the Accused Milovan Matić, the Prosecutor's Office added that he *seized wrist watches, money, and gold from the captured Bosniaks* and was filling the ammunition clips used for the execution of prisoners. (emphasis added to the inserted part)

156. The remaining part of the factual description of the offence remained unchanged.

157. Article 275 CPC BiH reads as follows:

> *If the Prosecutor evaluates that the presented evidence indicates a change of the facts presented in the indictment, the Prosecutor may amend the indictment at the main trial. The main trial may be postponed in order to give adequate time for preparation of the defense. In this case, the indictment shall not be confirmed.*

158. The cited provision reflects that the amendment of the Indictment by the Prosecutor's Office was allowed. Taking into account that the Accused Milovan Matić was acquitted of

[2] An announced verdict must be prepared in writing within 15 days from its announcement, and in complex matters and as an exception, within 30 days. If the verdict has not been prepared by these deadlines, the judge or the presiding judge is obligated to inform the President of the Court as to why this has not been done. The President of the Court shall, if necessary, undertake the necessary measures to have the verdict written as soon as possible.

charges, the only amendment to the factual description that pertains to the Accused is the inserted phrase “majority of”.

159. The original Indictment charged the Accused with the killing of more than one thousand Bosniak male prisoners, while the amended Indictment charged them with the killing of the majority of prisoners. The amendment was clearly in favor of the Accused, rather than to their detriment. This only reinforces the conclusion that the appellate claims that the defense was put in an unfavorable procedural position are unfounded.

160. The appellate objections that the Trial Panel did not allow the Defense access to all evidence in the case No. KT-RZ-139/07 against Milorad Trbić is without merit. On 8 February 2008, deciding on the Motion for Disclosure of Evidence filed on 25 January 2008 by the Defense Counsel for the Accused Milenko Trifunović, attorney Rade Golić, with a view to protecting the right of the Accused to defense, the Trial Panel ordered the Prosecutor's Office of BiH to make available to the defense teams of all the Accused in the instant case, evidence based on which the Indictment against the Accused Trbić was issued, within seven days from the receipt of the Decision.

161. In addition to that, pursuant to the Law on Transfer of Cases from the International Criminal Tribunal for the former Yugoslavia to the Prosecutor’s Office of Bosnia and Herzegovina and the Use of Evidence Collected by ICTY in the Proceedings Before the Courts in BiH (LOTC) and the 12 April 2007 Decision of the Trial Panel, the Defense was given an opportunity in the first instance proceeding to cross-examine Richard Butler about the reports and his statements before the ICTY, and the Defense did so.

162. Subsequently, on 21 May 2008, the Trial Panel dismissed the Defense Motion for Additional Cross-Examination of Richard Butler.

163. In the reasoning of their Decision, the Trial Panel noted that the Indictment in this case was confirmed in December 2005, after which time the Defense was in possession of all the evidence on which the Indictment was based, including Richard Butler's Report. In the course of the proceedings, both parties had an opportunity to tender evidence related to the Report and to cross-examine Richard Butler about all circumstances they found relevant. The Trial Panel then concluded that the Defense actually sought to examine Richard Butler about certain circumstances which were not the subject of his analysis, or more precisely, about evidence that was not the subject of Richard Butler's observations and opinion in the making of his Report. Taking all of that into account, the Trial Panel dismissed the Defense Motion for Additional Cross-Examination.

164. In their Appeals, the Defense now submits that this action resulted in the violation of the right of the Accused to defense. However, they do not provide a single valid reason which would challenge the validity of the Decision of the Trial Panel.

165. Neither the Defense Motion for Additional Cross-Examination in the first instance proceeding, nor the appellate allegations indicate a single fact that was the subject of Butler's analysis and which the Defense had no opportunity to present to Butler during the immediate cross-examination. The Trial Panel was correct when they noted that the Defense was familiar with the Indictment and thus with this particular piece of evidence as well, since

December 2005. The Report was not supplemented with new evidence or changed in the course of the proceeding. Therefore, it follows that the Defense had sufficient time to study it and prepare all questions they deemed relevant for this witness. Based on the reasons described above, the Defense ground of appeal is refused as unfounded.

166. Finally, the Appellate Panel finds that the objection to the Court's decision not to deliver to the Defense transcripts from the cross-examination of witness S4 conducted at main trials in separate proceedings is also unfounded. More precisely, this decision did not result in the violation of the right of the Accused to a fair trial, as alleged in the Appeals.

167. This is because the Defense had the right (which they exercised) to cross-examine witness S4 about all the circumstances relevant to them at the session held on 11 June 2008. The Defense failed to state in their Appeals a single circumstance which would indicate the relevance of delivering transcripts of that same witness's cross-examination in another case and the Appellate Panel itself fails to see a realistic need for that taking into account that the Defense had already directly exercised their right to cross-examine this witness.

168. The objection of the Defense alleging violation of the right to defense due to the fact that the costs of preparation of the defense were reimbursed only after the obtained evidence was admitted is also without merit.

169. Due to the complexity of the case and gravity of the offense, the Court assigned two ex officio Defense Counsels to each Accused in the instant case with a view to ensuring adequate defense. In the course of the first instance proceeding, the Defense Counsels were regularly paid their representation fees, and all costs they actually incurred in the process of obtaining evidence were also reimbursed.

170. The Appellate Panel finds that the Trial Panel was correct when they decided to reimburse costs actually incurred in the process of obtaining only the evidence that was presented at the trial since any other practice would have resulted in a situation where the Court would not have any control over whether the costs of the Defense have indeed been incurred. In the manner described above, the Defense obtained all evidence they used in the main trial using the Court budget, and in addition to that, they were paid representation fees for the entire course of the proceedings, as well as fees for submissions filed with the Court. The Appellate Panel finds that the right of the Accused to defense was fully respected in this aspect as well.

171. Based on the foregoing, this ground of appeal is also refused as unfounded.

Essential Violation of the Criminal Procedure under Article 297(1)(h)

172. The Appeals further object that the First Instance Court did not entirely resolve the contents of the charge since it left out certain parts from the factual description and the Appeals further submit that the Court was supposed to decide on that part of the Indictment as well, and by doing so, adjudicate the matter in a manner as required by substantive law.

173. Contrary to the appellate claims, the Appellate Panel finds that the essential violation of the provision of the CPC, as alleged by the Defense, did not occur.

174. Namely, having considered all of the admitted evidence and having applied the principle of *in dubio pro reo,* the Trial Panel, as discussed in detail on page 169 of the First Instance Verdict, concluded that certain facts and acts alleged in the Indictment had not been proven. Therefore, the Trial Panel confirmed the Operative Part of the Verdict with their findings based on presented evidence.

175. Thus, the Trial Panel left out as unproven sub-paragraphs (a) and (b) of the Indictment, final clause of sub-paragraph (c), allegation in sub-paragraph (c) that the Accused "set[] up ambushes", and further conformed sub-paragraph (c) to reflect its factual findings, and left out certain clauses in sub-paragraph (d) as it was not described who committed the acts alleged.

176. All of the parts that were left out are discussed in detail by the Trial Panel on pages 169 – 170 of the First Instance Verdict.

177. Having examined the Verdict within the context of these grounds of appeal, the Appellate Panel finds that the submission made in the Appeals that the Trial Panel did not entirely resolve the contents of the charge in the manner as described above is without merit.

178. The Accused were charged with having committed the criminal offense of Genocide under Article 171 of the CC of BiH by acts described under sub-paragraphs (a), (b), (c), (d) and (e) of the Indictment. The acts described under the cited sub-paragraphs represent a whole and include a series of activities that, according to the Indictment, the Accused undertook on 12 and 13 July 1995, which were eventually qualified by the Court as the criminal offense of Genocide under Article 171(a) of the CC of BiH. In methodological terms, the Prosecutor could have described those acts under one or, as was done in this particular case, under several sub-paragraphs. However, it should be taken into account that those paragraphs individually do not represent a criminal offense but instead should be viewed together with a view to describing the criminal offense of Genocide as precisely as possible. For the reason described above, the appellate objections that by leaving out certain words, clauses and acts from the factual description of one criminal offense (Genocide), the Trial Panel actually did not entirely resolve the contents of the charge are unfounded because the parts that were left out do not constitute a separate criminal offense.

179. The Appellate Panel is allowed to intervene in the factual description if the intervention is aimed at a more precise specification of the offense. In doing so, it must be careful not to exceed the charge, or more precisely, make sure that the intervention does not result in a qualification more severe to the Accused. In the instant case, the factual description was only conformed with the established state of the facts in parts not related to the elements of the offense. The legal qualification in the Indictment was not changed and the fact that certain parts were left out from the description of the offense definitely did not put the Accused in a worse procedural position, but rather in a more favorable one.

180. The Defense for the Accused Milenko Trifunović is not correct when they claim that the Court should have rendered an acquittal for Forcible Transfer since the Accused were not

charged with that act as one that would individually meet the elements of the criminal offense. Rather, it represented an integral part of the description of the criminal offense of Genocide.

181. The factual description in the Indictment also included the allegation that the Accused "secured the road and kept it closed or open for traffic in line with the execution of the plan to forcibly transfer about 25,000 Bosniak women, children and elderly, who...were…forced out of the protected area."

182. The wording of Article 171 of the CC of BiH indicates:

> *Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:*
>
> *a) Killing members of the group;*
> *b) Causing serious bodily or mental harm to members of the group;*
> *c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *d) Imposing measures intended to prevent births within the group;*
> *e) Forcibly transferring children of the group to another group,*
>
> *shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.*

183. Forcible Transfer, **in the manner as described in the Indictment,** does not represent an act qualified as an act of perpetration of the criminal offense of Genocide under Article 171 of the CC of BiH nor does it in itself contain all elements of another criminal act. Therefore, there was no need for an acquitting Verdict for this part of the description only.

184. The appellate claim that the Trial Verdict does not indicate that the Accused has never been prosecuted or tried for the described act is also incorrect since the reasoning of the First Instance Verdict explicitly discusses this, thus, excluding the possibility of the Accused being tried twice for the same incident.

Essential Violation of the Criminal Procedure under Article 297(1)(i)

185. The Appeals further submit that the Trial Verdict is based on evidence which, according to the provisions of the CPC of BiH, it cannot be based. The appellate grievances related to this ground can be summed up as follows:

186. The Defense challenges the Court's Decision of 18 April 2007 which partially granted the Motion of the Prosecutor's Office of BiH No. KT-RZ-10/05 of 5 May 2006 and decided as follows:

- **Records of statements of the Accused are accepted as evidence and allowed to be read out at the main trial:**

- Petar Mitrović – the statement given to the Prosecutor's Office of BiH on 21 June 2005;

- Miladin Stevanović – the statements given to the Prosecutor's Office of BiH on 24 June and 1 July 2005;

- Brano Džinić – the statement given to the Prosecutor's Office of BiH on 22 June 2005;

- **Proposal of evidence from the Indictment is accepted:**

- exhibit No. 40 in the Indictment – Record of Crime Scene Reconstruction with Petar Mitrović of 4 October 2005, and
- exhibit No.122 in the Indictment – Kravica Crime Scene Sketch.

187. The Defense further challenges the lawfulness of the statements given in the investigation by the witnesses listed below which were admitted into evidence because, at the main trial those witnesses stated that they had been under pressure during their examination at the investigation stage, that they had been forced in various ways to sign the statements, that some of them had not even read their statements, and that generally there had been numerous irregularities during the taking of those statements. Those witnesses are as follows: Siniša Bećarević, Nedeljko Sekula, Slobodan Stjepanović, Nikola Milaković, Živojin Milošević, Ilija Nikolić, Obradin Balčaković, Danilo Zoljić, Stanislav Vukajlović, Mirko Sekulić, Predrag Čelić, Marko Aleksić, Ljubiša Bečarević, Tomislav Dukić, Nebojša Janković, Dragan Kurtum and Luka Marković.

188. It is further claimed that the Court should not have admitted into evidence reports by Richard Butler and Dean Manning because they were not expert witnesses and the matters that were the subject of their analysis did not fall within their field of work. They did not provide expert witness analyses but reports. With regard to Jean Rene Ruez, the Defense argues that it was not provided in accordance with the provisions of Article 5 of the LOTC.

189. The lawfulness of the admission of the statement by Miroslav Deronjić was also challenged.

190. The Defense also challenges the Decision of the Court accepting as proven facts established in proceedings before the ICTY in general and also because there was no right of appeal against this Decision in the first instance proceedings.

191. With respect to the appellate grievances related to the Court's Decision to admit into evidence Records of statements of the Accused Mitrović, Stevanović and Džinić, as described in detail above, the Appellate Panel considers those grievances to be unfounded and finds there were no violations of the provisions of the criminal procedure.

192. Specifically, in the course of the first instance proceedings, the Trial Panel decided to admit into evidence Records of statements of the Accused: Petar Mitrović – statement given to the Prosecutor's Office of BiH on 21 June 2005; Miladin Stevanović – statements given to the Prosecutor's Office of BiH on 24 June and 1 July 2005; and Brano Džinić – statement given to the Prosecutor's Office of BiH on 22 June 2005, and allow that they be read out at the main trial;

193. Pursuant to the Decision of 21 May 2008, the Court decided to sever the proceedings involving the Accused Miloš Stupar, Petar Mitrović, Milenko Trifunović, Miladin Stevanović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Velibor Maksimović, Dragiša Živanović, Branislav Medan and Milovan Matić, so as to have a separate case against the Accused Petar Mitrović (I), a separate case against Miladin Stevanović (II), and a third separate case against Miloš Stupar et. al.(III).

194. By the same Decision, the Accused Mitrović and Stevanović undertook to testify in each other's cases and also in the third case (Stupar et. al.). The Trial Panel guaranteed them that anything they might say as witnesses would not be used against them in their own cases.

195. The Trial Panel explained the need for the severance of the proceedings because the Court admitted and read out at the main trial the statements of Petar Mitrović and Miladin Stevanović given at the Prosecutor's Office of BiH during the investigation. The statements directly or indirectly incriminated the other Accused in this case.

196. Thus, following the severance of cases, Petar Mitrović and Miladin Stevanović became witnesses in this case.

197. Pursuant to one of the fundamental rights of the Accused in the proceedings, that is the right to question witnesses (Article 259(1) of the CPC of BiH) and the right to cross-examine witnesses (Article 262 of the CPC of BiH), the Court was required to provide the Accused with the opportunity to cross-examine the individuals whose statements incriminated them, directly or indirectly.

198. As regards Brano Džinić, the Trial Panel did not find it relevant to sever his case as well, because the statement of the Accused Džinić did not incriminate the other co-Accused in the case.

199. The defense teams in their Appeals now challenge the decision of the Court to admit those records of statements claiming that this represents a violation of the right of the Accused (witnesses in this case) to remain silent, or in other words to not incriminate themselves.

200. The Appellate Panel finds that this appellate claim is unfounded because Petar Mitrović and Miladin Stevanović are the Accused in different cases and they were tried in separate proceedings. Therefore, the Appeals filed on behalf of them in this case are not relevant for the ruling in this proceeding.

201. The decision on whether the right of the Accused Petar Mitrović and Miladin Stevanović to remain silent was violated by admission into evidence of their statements given in the investigation, will be made by the Appellate Panel in their cases (those in which they are the Accused), while in this proceeding they appear as witnesses and therefore are bound to testify.

202. The Defense further submits that their right to cross-examine witnesses Mitrović and Stevanović was merely fictitious and points out that they did not appear at trial in their

capacity as witnesses when they were supposed to be cross-examined, which also represented a serious violation of the provisions of the CPC of BiH.

203. These appellate claims are not correct given that the transcript of the main trial of 21 May 2008 clearly indicates that the decision to sever the proceedings was announced at this session and that, at the same time, it was decided that all the Accused would be given an opportunity to cross-examine the Accused about the statements given by Mitrović and Stevanović. For that reason, the Court scheduled a hearing on 28 May 2008. However, immediately upon the commencement of the hearing, all Defense Counsels stated they did not wish to cross-examine witnesses Petar Mitrović and Miladin Stevanović. This also includes explicit statements by attorneys Rade Golić and Boško Čergar who said they did not wish to use the possibility of cross-examination, which was noted for the record. Therefore the appellate grievances stating that they were not given this opportunity are simply not accurate.

204. With respect to the appellate grievances alleging formal deficiencies of the admitted statements, they can be summed up as follows:

- 1. grievance that the statements were taken without giving special warnings as prescribed by the CPC of BiH, the statement by Petar Mitrović being especially challenged;
- 2. grievance that the name Brane Džinić was added in handwriting next to the names of other members of the Skelani platoon without an explanation as to who added his name and why;

205. None of the appellate grievances mentioned above are well-founded and none challenge the validity of the statement given by Petar Mitrović to the Prosecutor's Office of BiH on 21 June 2005.

206. It is beyond dispute that the Accused Petar Mitrović gave two statements in the course of the investigation – one at the Bijeljina PSC on 20 June 2005 and the other one at the Prosecutor's Office of BiH on 21 June 2005.

207. The statement given at the Bijeljina PSC was taken in contravention of the provisions of the CPC of BiH since the suspect was examined as a witness (receiving the warnings given to witnesses pursuant to Article 86 of the CPC of BiH) rather than as a suspect (who is provided with different procedural guarantees under Article 78 of the CPC of BiH).

208. The Trial Panel did not allow the admission of this statement into evidence as a lawful piece of evidence. The Appellate Panel finds the explanation of the Trial Panel to be reasonable and the conclusion correct.

209. The Appeal, however, claims that Petar Mitrović's statement of 21 June 2005 was based on the statement given at the Bijeljina PSC on 20 June 2005 and is therefore unlawful as well.

210. Contrary to the appellate claims of the Accused, the statement that the Accused Petar Mitrović gave at the Prosecutor’s Office of BiH on 21 June 2005 was given in accordance

with the provisions of the CPC of BiH and as such meets all of the formal requirements for a lawfully obtained piece of evidence as was correctly determined in the First Instance Verdict.

211. In the contested Decision, the Trial Panel took into consideration that the Accused, when giving his statement to the Police (on 20 June 2005) was not exposed to any threat or use of force. It, therefore, reasonably follows that during his interview at the Prosecutor's Office of BiH on the following day, the Accused did not suffer from any trauma or fear from the day before.

212. Further, the second statement was taken the next day, by different persons, at another location, which interrupted the time and space continuum between the statements. Also, before the second interview, the suspect was appointed a defense attorney with whom the Accused conferred. Therefore, the Accused was informed of his rights and options.

213. Based on the established state of facts, the Appellate Panel concludes that the statement made at the Bijeljina PSC, or the formal deficiencies of its taking, did not affect the regularity of the procedure and the contents of the statement given at the Prosecutor's Office of BiH on 21 June 2005. Therefore, the decision of the Trial Panel to admit it into evidence was correct and in accordance with the law.

214. Also, the objection that the statements of Miladin Stevanović and Brano Džinić were not taken lawfully, more precisely, that they were not given warnings in accordance with Article 76 of the CPC of BiH (instruction to the Accused about his rights) is unfounded.

215. Having reviewed the respective Records, the Appellate Panel established that they contain all of the necessary warnings and that they were made entirely in accordance with the provisions of the criminal procedure code in effect at that time.

216. On 27 pages (from page 279 to page 306), the Trial Panel made a detailed analysis of every required element of the warnings given (at that time) to the Accused (Petar Mitrović, Miladin Stevanović and Brano Džinić) and found that the statements were valid in formal terms. This finding is confirmed by the Appellate Panel. The Trial Panel's reasoning regarding this procedural issue includes a comprehensive analysis of every aspect of the validity of statements and also even cites the relevant case law of the European Court of Human Rights. The Appeals do not include a single specific submission or any evidence which effectively challenge the findings of the Trial Panel.

217. Almost all of the Appeals stress the subsequent amendments to the provisions of the CPC of BiH which added an additional warning to the previously required warnings. That is, the suspect, during his examination, must also be warned that his statement is admissible as evidence at the main trial and that it may, without his consent, be read and used at the main trial.

218. This ground of appeal is unfounded as well.

219. It is not disputed that on 17 June 2008, the Law on Amendments to the Criminal Procedure Code of BiH (Official Gazette 58/08) was enacted and entered into force on 29

July 2008. The Law amended, inter alia, Articles 6, Article 78(2)(c) and Article 273 CPC BiH and also a new paragraph (3) was inserted.

220. Article 6 of the amended CPC BiH provides that a suspect, at his first questioning, must be informed about the offense that he is charged with and the grounds for suspicion against him and also *that his statement may be used as evidence in further proceedings*.

221. Amended Article 78(2)(c) of the CPC of BiH states that, at the beginning of the interview, the suspect must be instructed that he has the right to comment on the charges against him and to present all facts and evidence in his favor *and that if he does so in the presence of the defense attorney, the statement made shall be admissible as evidence at the main trial and may, without his consent, be read and used at the main trial.*

222. Paragraph 3 of Article 273 CPC BiH, which was added, reads as follows:

> *"If the accused during the main trial exercises his right not to present his defense or not to answer the questions asked, records of testimonies given during the investigation may, upon decision of the judge or the presiding judge, be read out and used as evidence in the main trial, but only if during his questioning in the investigation, the accused was instructed pursuant to Article 78(2)(c) of this Code".*

223. The Appeals of the Defense refer to the provisions of the Law on Amendments to the CPC BiH (with the amended provisions cited above). However, the Appeals do not mention that this Law actually took effect on the very same day that when the Trial Panel pronounced the Verdict.

224. It, therefore, follows that the Prosecutor in this case and the Trial Panel could not act in accordance with provisions of a legal requirement that, at the time the procedural action was taken (namely the suspect's interview or admission into evidence), did not exist. According to the then applicable provisions of the CPC of BiH, the Prosecutor was not obligated to caution the suspect that his statement, should he make one, would be admissible as evidence at the main trial and may be read out and used as evidence in the main trial without his consent.

225. The Appellate Panel accepts the interpretation of the Trial Panel that the notice that was given was lawful and proper pursuant to the Criminal Procedure Code which was in effect at the time of the Panel's Decision on admission of the Accused's statement into evidence. Later amendments to Article 273 of the CPC of BiH, which added new and specific language to the Article, confirm the position of the Trial Panel.

226. The Appellate Panel also reviewed Article 125 of the Law on Amendments to the Criminal Procedure Code (Official Gazette number 58/08) which reads as follows:

> *In cases where the indictment had been confirmed before this Law entered into force, the proceedings shall continue in accordance with the provisions the Criminal Procedure Code of Bosnia and Herzegovina ("Official Gazette of BiH" number 36/03, 26/04, 63/04, 13/05, 48/05, 45/06, 76/06, 29/07, 32/07, 53/07, 76/07 and*

15/08), unless the provisions of this Law are more favorable to the suspect, or the accused.

227. This provision introduces a principle that is unusual in procedural laws. The principle of a ban on retroactive application of the law is inherent in substantive criminal law. This is reinforced by Article 4 of the CC of BiH, namely paragraph 1 thereof, which establishes one of the general principles of the criminal code. That is, the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence – *the principle of ban on retroactive effect of the criminal code –**a ban on retroactive legislation.***

228. This protects the principles of legality and the rule of law because no one can be sanctioned for an action that occurred before it was prohibited or illegal. This is also an established principle of international law as provided by Article 7 of the ECHR and Article 15 of the ICCPR.

229. Paragraph 2 provides for an exception, namely the possibility to apply a new, more lenient criminal code (retroactive application allowed if the new law is more lenient – retroactivity *in mitius*). The circumstances of a more lenient law (*lex mitior)* occur if the criminal offence was committed when one law was in effect, but was then amended once or several times, prior to the final verdict. There is a mandatory retroactive application of the new law, if it is more lenient to the perpetrator of the criminal offence.

230. The existence of this doctrine in the substantive criminal law is natural and logical, especially taking into account that the Court, when deciding whether to apply a more lenient law on a body of facts before it, reviews both (or several) laws and then determines which law to apply, following the aforementioned principle. This, however, is not possible with procedural laws. The Court conducting the proceedings applies the procedural law which is in force at the time of the procedural action and cannot assume that there may be any future amendments to particular provisions of the procedural law, and if so, what they may be.

231. This is supported by the Commentary to the CPC of BiH (Council of Europe/European Commission (2005), Commentaries to the Criminal Laws in BiH, Sarajevo, page 65) which states:

> *"In the criminal procedure law, unlike the substantive law, this issue is treated in accordance with the provisions of the law which is in force at the time of the action (tempus regit actum rule), which means that the fact that the criminal offence was committed before the Criminal Procedure Code entered into force is irrelevant. Rather, the pre-requisites for the undertaking and validity of a procedural action are governed by the law which was in force at the time of the action. The problem occurs in relation to such criminal proceedings that are ongoing at the time of the entering of the new law into force, because unlimited application of the new law may prevent the harmonization of the results of procedural actions undertaken pursuant to the old law with the ones undertaken pursuant to the new law. In such situations old regulations would be applied in the given cases until the conclusion of the stages or parts that commenced under the old law, and new ones would be applied in the stages following the entry into force of the new law. This is a compromise intended to*

protect the rights of the parties to the criminal proceedings. There are two rules in that regard. One, that the ***old procedural actions do not have to be repeated, because their results are valid under the new law too,*** *and the other, that the deadlines that are ongoing on the day of entry of the new law into force must be counted according to the rules that are more lenient to the party.*

232. Therefore, the more lenient or stringent nature of the procedural law should be evaluated in terms of the application of the provisions pertaining to legal deadlines for a certain procedural action. In other words, the more lenient law is the one allowing a longer deadline to the party to undertake the procedural action in question.

233. This is also the only logical interpretation, as it does not prejudice the lawfulness of the actions that were in full compliance with the law at the time they were undertaken.

234. An objection was made with respect to the fact that Brano Džinić's name was added in handwriting next to the names of other members of the Skelani Platoon in Petar Mitrović's statement of 21 June 2005, without any indication explaining who added his name and why and it is claimed that this rendered the statement unlawful. The Appellate Panel notes the following:

235. Having reviewed the relevant statement, the Appellate Panel notes that on page 4, after paragraph 2, after a list of the Skelani platoon members, the name "Đinić Branko" was added in handwriting in brackets.

236. This issue was also the subject of review by the Trial Panel, and the First Instance Verdict states on page 296:

"The Defense finally objects to the authenticity of the record, pointing to the presence of a handwritten comment in the margin of the record made after it was signed by the accused and his attorney. The Panel accepts the explanation provided by the Prosecutor that he wrote the notation as a personal reminder, believing that he was writing on a copy and not the original. The notation includes a name which is similar but not identical to the name of a co-accused. The Panel concludes that the added name is not an integral part of the Record. The objection that it corrupts the original document is unfounded and the Panel therefore accepts this Record, excluding the handwritten addition."

237. It is clear that the Trial Panel did not take into consideration the name that had been subsequently added. In that way, the Trial Panel eliminated any possible doubt about the formal regularity of the Record.

238. The Appeals entirely fail to take into account this decision of the Trial Panel without giving a single reason why the above cited decision of the Trial Panel is improper, and without any arguments to support the allegation that the Record, regardless of the fact that the added name was not taken into consideration, is invalid.

239. Accordingly, the Appellate Panel finds the appellate objections to be unfounded and finds that the admitted evidence was obtained in accordance with the CPC of BiH.

240. The Appellate Panel finds that Exhibit No. 40 in the Indictment – Record of Crime Scene Reconstruction with Petar Mitrović of 4 October 2005, and Exhibit No. 122 in the Indictment – Kravica Crime Scene Sketch, which according to the Defense were "fruits of a poisonous tree", or in other words, they followed from the unlawfully obtained statement of Petar Mitrović, were not unlawfully obtained pieces of evidence.

241. The objections of the Defense about the lawfulness of statements given in the investigation by witnesses Siniša Bećarević, Nedeljko Sekula, Slobodan Stjepanović, Nikola Milaković, Živoin Milošević, Ilija Nikolić, Obradin Balčaković, Danilo Zoljić, Stanislav Vukajlović, Mirko Sekulić, Predrag Čelić, Marko Aleksić, Ljubiša Bečarević, Tomislav Dukić, Nebojša Janković, Dragan Kurtum and Luka Marković, are without merit.

242. Namely, it follows from the case file that these witnesses were examined in the course of the investigation and that records of those examinations were made. Those records were made in accordance with the provisions of the CPC of BiH. In other words, they contain all of the elements and all of the necessary warnings as prescribed by the relevant provisions of the CPC of BiH (Chapter VIII, Section 5 of the CPC of BIH). The Appeals claim that the witnesses stated at the main trial that they were under various pressures during the examinations, that they did not know why and what they were signing, that they did not say the things that were written or that they said them in a different way. However, none of the examined witnesses had any objections to the Records. Instead, they duly signed them below a written statement stating they had no objections to the Record and that they were examined in accordance with ethical and professional principles. The statements of the eleven witnesses are especially unconvincing (Siniša Bećarević, Nedeljko Sekula, Slobodan Stjepanović, Nikola Milaković, Danilo Zoljić, Stanislav Vukajlović, Predrag Čelić, Marko Aleksić, Ljubiša Bečarević, Tomislav Dukić, Dragan Kurtum), taking into account the fact that they are police officers, employees of the RS Ministry of Internal Affairs, and at the main trial they stated that during their examinations there were pressures they did not know how to deal with, that they got confused or that they did not even read their statements.

243. The Appellate Panel finds that such conduct of the people who encounter such situations on a daily basis in their line of work and who are familiar with basic principles of the functioning of authorities such as the Ministry of Internal Affairs, is without merit and obviously aimed at modifying their previously given statements in accordance with and for the benefit of the defense of the Accused.

244. An obvious example of such conduct is witness Slobodan Stjepanović who was employed as a police officer at the RS Ministry of Internal Affairs. When asked by the Prosecutor at the main trial about the circumstances under which he had made his statement in the investigation, he said the following:

> ***Prosecutor:*** *Well, were you given an opportunity to, to say it is not correct what you are saying?*
> ***Witness Stjepanović****: "Well you know I did stay there for a while and, and well, whether I read it through, let's just get this over with, done, although."*

245. The same is true about the witness Danilo Zoljić, who at the main trial gave a very unconvincing explanation when asked by the Prosecutor about the circumstances surrounding his giving of a statement in the investigation:

> ***Prosecutor Bulić:*** *Did inspector Goran Gajić, did he request that, that you agree with what he, what he asked you to say? Did you in any way have to confirm that, what he asked from you?*
> ***Witness Zoljić****: In some paraphrased form yes.*
> ***Prosecutor Bulić****: Were you aware why that Record was being made?*
> ***Witness Zoljić****: No.*
> ***Prosecutor Bulić****: You work at the Police, is that correct?*
> ***Witness Zoljić****: I do, I was not aware of the purpose this statement was being taken for. Only when they, when the Prosecutor's Office started an investigation against Stupar, in case number 10/05, only then did I realize that this statement, er, was included in that investigation, that I lightly, er, and not putting certain things together, at that moment I could not remember things and events correctly, made the way I did. I am aware, even without your leading and without your explanation, that there are a couple of things that are not the way I said them. At that moment.*
> ***Prosecutor Bulić****: You signed this statement, is that correct?*
> ***Witness Zoljić****: OK, I did.*
> ***Prosecutor Bulić****: Why did you agree to sign something that, that you did not say?*
> ***Witness Zoljić****: I will explain it like this, we are all human, right, and we all have a certain capacity and a certain threshold of tolerance. And when someone upsets you to a maximum degree, then you either accept everything, or you hit them and leave, something happens, so nothing can happen to…those are rare cases that, when something happens, that something happens and is done on a conciliatory note.*

246. The above citation from the transcript clearly shows that the witness is not telling the truth about this matter, since he himself says that, allegedly, only when he learned which suspect his statement was going to be used against, did he realize that he had been unable to correctly remember things and incidents. This explanation is absolutely illogical and is aimed at changing the statement in favor of the Defense.

247. The Trial Verdict noted and recognized this conduct on the part of the witness when, on page 147 (English version, page 147), the Trial Panel analyzed the discrepancies in the statement of witness Siniša Bećarević.

248. In order to clarify his mental condition, the Trial Panel hired an expert witness in neuropsychiatry, Marija Kaučić-Komšić, who established that the witness suffered from acute reaction to stress, that there were no indications of any mental illness or incapability to memorize things and that he was fit to testify. The Trial Panel then determined that this witness's statement was given prior to the onset of the "acute reaction to stress" that the neuropsychiatrist described, and reasonably concluded that the statement from the investigation was a more reliable piece of evidence.

249. It is also important to note that the Trial Panel established decisive facts on the basis of statements of several different witnesses or documentary evidence that supported one another and not only and exclusively on the testimonies of the witnesses mentioned above.

250. For the reasons stated above, the Appellate Panel finds that the statements of the above witnesses are lawful and that, by admitting them into evidence and weighing them in the process of rendering a decision, the Trial Panel did not violate the provisions of the CPC of BiH, as the Appeals allege without merit.

251. Regarding the objections related to the decision of the Trial Panel to admit into evidence reports by Richard Butler and Dean Manning, the Appellate Panel finds that these objections are without merit.

252. On 4 December 2006, the Trial Panel rendered a Decision that it would, inter alia, admit at trial the following evidence obtained by the ICTY:

> A. Reports of Richard Butler (Indictment Part 6, Numbers 1 and 2) and Dean Manning (Indictment Part 6, Numbers 11, 14 and 16) - under Article 4 taken in conjunction with Article 8 of the LOTC;
> C. Testimony of Dean Manning (Indictment Part 2, Number 2) and Jean Rene Ruez (Indictment Part 2, Number 1) – under Article 5 of the LOTC;

253. The cited Decision represents an integral part of the reasoning of the First Instance Verdict and the Trial Panel stated their reasoning about these matters on pages 263 and 264 of the Verdict.

254. In their Appeals, the Defense points out that these persons are not expert witnesses and that they have not produced expert witness findings but reports which is why the Defense claims that they should not have been admitted into evidence in the instant criminal proceeding.

255. However, the cited Decision of the Court shows that the reports of Richard Butler and Dean Manning were not accepted under Article 6 of the LOTC (Statements by Expert Witnesses Made before ICTY) but instead under Article 4 in conjunction with Article 8 of the LOTC.

256. Article 4 of the LOTC reads:

> *After request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.*

257. Explaining their decision, the Trial Panel clearly stated that:

> *"The reports contain three types of information: argument, first hand information and compilation of the list of other evidence. The first hand information and the lists of other evidence are accepted by the Court under Article 4 of the LOTC. However, the arguments, in the form of opinion, are not.*

258. The Trial Panel further makes a clear distinction between the opinions contained in the proffered reports (that it did not accept) and the first hand information (that it did accept) contained in a document admitted before the ICTY to which it gave the same probative value as to any other piece of evidence in the proceeding.

> *"First hand information contained in the reports, will be accepted as evidence under Article 4 of the LOTC because it is contained in a document admitted before the ICTY proceedings. It will be subject to the same limitations and analysis as all LOTC evidence, including Article 3(2).*[3] *"*

259. The same is the case with testimonies of Dean Manning (Indictment Part 2, Number 2) and Jean Rene Ruez (Indictment Part 2, Number 1) accepted under Article 5 of the LOTC.

260. Article 5 of the LOTC prescribes that "transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RoPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue."

261. The Appeals claim that the Report of Jean Rene Ruez was not given in accordance with Article 5 of the LOTC, providing no substantiation for this allegation. Therefore, the Appellate Panel concludes that this unsubstantiated objection does not invalidate the Trial Panel's decision.

262. Based on the reasons given above, these grounds of appeal are also dismissed as unfounded.

263. The Appeals also dispute the lawfulness of the decision to admit into evidence the statement of Miroslav Deronjić because the Defense did not have an opportunity to cross examine this witness.

264. Having considered these appellate claims, the Appellate Panel determines that the statement Miroslav Deronjić gave on 25 November 2003 to the Office of the Prosecutor of the ICTY was admitted into evidence in the first instance proceeding (Exhibit O 326).

265. However, as correctly stated in the Appeal filed by Defense Counsel for Miloš Stupar, at the time when he was summoned to testify, Miroslav Deronjić had already been seriously ill and he subsequently passed away.

266. Article 273 of the CPC prescribes exceptions from direct presentation of evidence and it reads:

> *(1) Prior statements given during the investigative phase are admissible as evidence at the main trial and may be used in direct or cross-examination or in rebuttal or in rejoinder and subsequently presented as evidence. The person must be given the opportunity to explain or deny a prior statement.*

[3] The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.

(2) Notwithstanding Paragraph 1 of this Article, records on testimony given during the investigative phase, and if judge or Panel of judges so decides, may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in the Court is impossible or very difficult due to important reasons.

267. Taking into account that paragraph 2 of Article 273 of the CPC of BiH cited above allows the reading of testimonies given during the investigative phase and their use at the main trial when a person who gave the statement has died (which here was the case), the Appellate Panel concludes that the Court's decision to admit the testimony of Miroslav Deronjić into evidence pursuant to Article 273(2) of the CPC of BiH is lawful and that no procedural violations occurred in that respect.

268. The Appellate Panel will review the probative value of this testimony along with other pieces of evidence admitted as well as of the credibility of the witness himself in the section dealing with objections related to the established state of facts.

269. With respect to the appellate objections related to the facts established in the ICTY judgments, specified in the Decision of the Trial Panel which represents an integral part of the challenged Verdict (Section F, page 244 onward), the Appellate Panel notes that some of the Appeals claim that this is a violation of the right to a fair trial and right to defense and others claim it is an essential violation of the provisions of the CPC of BiH under Article 297(1)(i). Therefore, the Appellate Panel will here discuss both of these objections.

270. As indicated in the Trial Verdict, certain facts established in the proceedings before the ICTY were accepted as proven in the course of the proceeding pursuant to Article 4 of the LOTC.

271. The facts accepted as proven by the Court, as well as those that were not accepted, are listed in Section F of the challenged Trial Verdict, starting at page 244.

272. The Appeals primarily challenge the fact that an immediate appeal was not allowed from the Decision on Accepted Facts in the course of the proceeding which is alleged by all Defense Counsel to be a violation of the provisions of CPC of BiH and the right to a fair trial.

273. In addition, the Appeals also challenge the utilization of established facts in general explaining that the application of accepted facts violates the presumption of innocence and shifts the burden of proof from the Prosecution to the Defense.

274. Defense Counsel for the Accused Milenko Trifunović also states that "some of the facts […] are irrelevant for this case taking into account the original Indictment" and that "certain facts are vague in nature and the analysis shows they were taken out of the context and thus unsuitable", and finally that "some incriminate the accused, whereby the Trial Panel violates their principles set for accepting established facts".

275. The Appellate Panel finds the presented appellate reasons unfounded.

276. The appeals claim that the denial of the right to immediately appeal the Decision Regarding Facts Established in the Proceedings before the ICTY violated the principle of fairness and that, therefore, the Verdict is based on evidence it cannot be based on, is without merit.

277. The Defense submits that the legal basis for this conclusion is the LOTC, in particular Article 1(2), and Article 318(1) of the CPC of BiH.

278. Article 4 of the LOTC prescribes that, at the request or *proprio motu,* the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY (accepted facts) or to accept documentary evidence from the proceedings of the ICTY relating to matters at issue in the current proceedings.

279. Article 1(1) of the LOTC prescribes that the provisions set forth in that Law shall regulate the transfer of cases by the ICTY to the Prosecutor's Office of BiH and the admissibility of evidence collected by the ICTY in proceedings before the courts in BiH. Paragraph 2 of the same article prescribes that when the provisions set forth in that Law do not provide for special provisions for the matters referred to in paragraph 1 of this Article, other relevant provisions of the BiH Criminal Procedure Code shall apply.

280. Article 318 of the CPC of BiH prescribes that the parties, the defense attorneys and persons whose rights have been violated may always file an appeal against the decision of the Court rendered in the first instance unless when it is explicitly prohibited to file an appeal under this Code. Paragraph 2 of the same Article prescribes that a decision rendered in order to prepare for the main trial and the Verdict may be contested only in an appeal against the Verdict.

281. It is indisputable that the LOTC neither prescribes nor prohibits the right of appeal from the decision accepting facts pursuant to Article 4 of the cited Law. However, it also does not prescribe any special form of that decision or the criteria to be taken into consideration in the process of deciding.

282. Taking into account that for matters not regulated by that Law, the LOTC refers to the application of the CPC of BiH, the Appellate Panel finds that it is proper for this matter to be decided upon by a decision. A decision on such matters is rendered upon hearing of the parties, also usually following their motion and it must contain the reasoning on whether the proposed facts meet the specific acceptance criteria that the Trial Panel utilized from the ICTY jurisprudence, which this Appellate Panel fully supports.

283. What remains in dispute is whether this type of decision represents a decision on the merits from which an immediate appeal would be allowed, or a procedural decision which can be contested only in an appeal from the verdict.

284. Contrary to the appellate claims which imply that some of the facts accepted as proven at the same time represent elements of the criminal offense of which the Accused has been found guilty and that therefore those decisions are on the merits, the Appellate Panel is

of the opinion that these are procedural decisions which do not allow for interlocutory appeals but which may be challenged on appeal from the Verdict.

285. The Trial Verdict, and in particular, the separate Decision rendered on this matter, clearly indicated that only those facts that were distinct, concrete and identifiable and that were not conclusions, opinions or verbal testimonies, and most importantly, were not a characterization of legal nature, were accepted as proven. In addition to this, the accepted facts also meet other criteria – they contain essential findings of the ICTY and were not significantly changed; they do not directly or indirectly confirm the criminal liability of the Accused; they were either affirmed or established on appeal or were not contested on appeal; and, no further opportunity to appeal is possible. They are not subject of a plea agreement or voluntary admission and derive from the proceeding in which the Accused had legal representation and the opportunity to defend themselves.

286. Taking into account everything mentioned above, the Appellate Panel also shares the conclusion of the Trial Panel that the established facts accepted by the cited Decision entirely meet the acceptance criteria and in no way violate the right of the Accused to a fair trial and their presumption of innocence. This is especially true because in the course of the proceeding these established facts were treated as a piece of evidence that the Defense had an opportunity to challenge and to question by counterarguments, and by their own submitted evidence.

287. This conclusion is also supported by the fact that the same Decision denied a Prosecution Motion of 4 May 2006 to accept as proven facts established in Judgments IT-02-60/1-A of 8 March 2006 and IT-02-60/1-S of 2 December 2003, and IT-02-60/2-S of 10 December 2003. The Trial Panel concluded that some of the proposed facts represented legal conclusions or directly or indirectly incriminated the Accused. This indicates that the Trial Panel made a clear and correct distinction between the facts that can be established and those whose acceptance would jeopardize the right of the Accused to a fair trial.

288. Also, some of the facts established in the proceedings before the ICTY and proposed by the Defense were also established in the instant proceeding. The Motion filed by attorney Dragan Gotovac, Defense Counsel for the Accused Aleksandar Radovanović, on 11 February 2008 seeking to accept facts established in the ICTY cases Prosecutor vs. Radislav Krstić and Prosecutor vs. Vidoje Blagojević and Dragan Jokić was partially granted. Additionally, on 2 April 2008, a Motion filed by attorney Rade Golić, Defense Counsel for the Accused Milenko Trifunović, on 26 March 2008 and seeking to accept facts established in the final Judgment in the ICTY case Prosecutor vs. Radislav Krstić, was also partially granted.

289. These circumstances reflect that the Defense was in an equal position to the Prosecutor's Office of BiH with respect to availability and use of the established facts.

290. Furthermore, the purpose of a decision to accept established facts is to contribute to the judicial economy, to promote the Accused's right to a speedy trial and to establish a balance between the right of the Accused to a fair trial and the need to minimize the number of appearances of witnesses who must repeat their testimony in several cases. Decision regarding established facts comes down to a purely procedural action of admitting evidence

in the proceedings, naturally under the condition that the evidence (in this case established facts) meet the acceptance criteria.

291. Based on the foregoing, the Appellate Panel finds that the Decision regarding the acceptance of established facts basically represents a decision to admit exhibits into evidence as stated in the reasoning of the Trial Verdict that, *in the proceedings the adjudicated facts constitute a special evidentiary action and the Panel will treat them as a piece of evidence.*

292. Taking all of the above into consideration, it is entirely proper to admit evidence in the course of the proceedings by procedural decisions. The contents and the probative value of that evidence are weighed following the end of the main trial when the Trial Panel has received all of the presented evidence and, pursuant to Article 15 and Article 281(1) and (2), the Panel is able to freely evaluate every piece of evidence and its correspondence with the rest of the evidence.

293. If the position of the Defense regarding the admissibility of an immediate appeal of a Decision on established facts in the proceedings is accepted, that same principle would have to be applied to the admission of every other piece of evidence, which would mean that proceedings would be delayed until each such decision becomes final.

294. In addition to the fact that this is not prescribed by the Criminal Procedure Code, this method of appeal would also be absolutely unacceptable from the aspect of procedural efficiency and the Accused's right to a speedy trial.

295. Additionally, the Appellate Panel notes that, in their appeals from the Trial Verdict, all but one of the defense teams do not contest the contents of the accepted facts at all which they could have done in their appeals from the Trial Verdict nor do they point to any evidence indicating a possibly of a different state of facts. They only challenge the principle of not allowing an immediate appeal from this type of decision.

296. Only the Appeal filed by the Accused Milenko Trifunović points out three facts, specifically one claimed as being irrelevant to the case and the others as indistinct and useless (which then render the appellate objection unnecessary). It should be noted that the mentioned facts were not used in the Trial Verdict for the ruling.

297. Finally, regarding the fact: *"In some places, ambushes were set up and in the others, the Bosnian Serbs shouted into the forest (...)" (T85),* the Defense Counsel submits that it incriminates the Accused, without giving any further explanation. However, the Appellate Panel fails to see how the cited fact incriminates any of the Accused in this case.

298. Based on the foregoing, the Appellate Panel concludes that the admission of the above established facts did not result in a violation of the provisions of the CPC of BiH or in a violation of the right of the Accused to a fair trial, as the Appeals claim without merit.

<u>Essential Violation of the Criminal Procedure under Article 297(1)(j)</u>

299. In his Appeal, Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čergar, submits that "the Accused are charged only with the actions in Kravica, whereas the Reasoning of the challenged Verdict goes much beyond that and imputes to the Accused everything that took place in a wide area in Srebrenica and in other locations in which they were not present at all. In that way, the Reasoning of the Verdict represents an extended, unallowed accusatory role, because it moves *ultra petitum* the limits of the Indictment, which represents a significant violation within decisive facts in a form of considerable and decisive contradiction on one hand and entirely erroneous factual basis on the other."

300. On the basis of the above objection, although it is not entirely clear, both with respect to the type of violation it alleges and with respect to the facts it deems erroneous and contradictory, it can be concluded that the Defense Counsel submits that the First Instance Verdict exceeded the charges because the reasoning also includes incidents not mentioned in the Operative Part of the Trial Verdict.

301. This ground of appeal, however, is unfounded.

302. Article 280 of the CPC of BiH prescribes that the verdict shall refer only to the accused person (the so called subjective identity between the indictment and the verdict) and only to the criminal offense specified in the indictment that has been confirmed or amended at main trial the so called objective identity between the indictment and the verdict).

303. Basic elements of a verdict are as follows: the introductory part, the operative part and the reasoning (Article 290(1) of the CPC of BiH) and, in case of a guilty verdict, operative part must contain details as prescribed by Article 285 of the CPC of BiH.

304. Article 285(1)(a) of the CPC of BiH prescribes that, in a guilty verdict, the Court must cite facts and circumstances that constitute elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends.

305. These legal provisions clearly prescribe that a detailed factual description of the act is mandatory in the operative part of a guilty verdict and it is exactly the operative part with its elements prescribed by the law that is a binding part of the verdict which must set out the facts of which the accused has been found guilty. This is extremely important in order to establish the adjudicated matter and also for one of the basic rights of a suspect/convicted person, that is, to know the charges against him and to know what acts he has been found guilty of.

306. For the reasons mentioned above, the operative part of the verdict must be sufficiently detailed and must include a reflection of the facts established by the Court on the basis of the presented evidence. In that context, with a view to establishing the facts as precisely as possible, the Court may and should harmonize the description of the illegal act representing the crime the accused has been found guilty of with the results of the evidentiary proceedings. This authority of the Court must not be to the prejudice the Accused. The Court's determinations regarding the factual description must not result in a qualification that is more severe than as originally charged in the Indictment and the Court cannot find the Accused guilty of a crime that is entirely different from the one alleged in the

Indictment. Otherwise, this would result in exceeding of charges in violation of Article 297(1)(j) of the CPC of BiH.

307. However, as opposed to the Operative Part whose integral parts are strictly prescribed by the law and which represents the substance of the ruling on the Indictment, the reasoning of the Verdict represents an analysis in which the Court must precisely and fully present the facts the Court finds proven or not proven and the reasons thereof, especially elaborating on the credibility of contradictory evidence, providing the reasons for not granting certain motions of the parties, reasoning why a decision was made to not directly examine a witness or an expert witness whose testimony has been read out, stating the reasoning that the Court guided itself when ruling on legal issues, and especially, establishing the existence of the criminal offense and the criminal liability on the part of the Accused and applying certain provisions of the Criminal Code to the Accused and to the offense.

308. The "reasoning" cannot "exceed the charge". When stating reasons for its ruling, the Court is not bound by anything but the law, as contrasted with the Operative Part which, is bound by the factual description in the Indictment.

309. Based on the foregoing, this ground of appeal is unfounded and is therefore refused.

Essential Violation of the Criminal Procedure under Article 297(1)(k)

310. Before discussing the alleged essential violation of the provisions of the criminal procedure, the Appellate Panel notes that, when giving reasons to support their appellate objections related to this matter, most of the Appeals refer to the fact that the Court gave weight to certain evidence differently than the Defense believes it should have been done. More precisely, the defense claims that the Court did not attribute appropriate significance to the evidence they presented. Therefore, they conclude that the Verdict does not cite reasons concerning decisive facts.

311. However, having examined the above arguments of the Appellants, the Appellate Panel finds that they actually object to the established facts of the case. More precisely, they submit that the Trial Panel established the facts of the case erroneously.

312. Namely, essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH exists *„if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or* ***if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts****."*

313. Contrary to the appellate objections, the challenged Trial Verdict does cite the reasons concerning the decisive facts. Their findings are different from the thesis of the Defense. For these reasons, the Appellate Panel will examine these appellate objections when it examines the established facts of the case.

B. Essential Violation of the Provisions of the Criminal Procedure under Article 297(2) of the CPC of BiH

314. The Appeals also include certain objections that have not been classified under any of the provisions of Article 297(1) of the CPC of BiH. Therefore, the Appellate Panel examined them in accordance with the provision under Article 297(2) of the CPC of BiH.

315. These objections can be summed up as follows:

1. Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čergar, challenges the lawfulness of the Warrant to search the dwellings of the Accused because the Warrant did not contain the names of persons conducting the search, precise description of the property that was the subject of the search, and also because the Defense Counsel were not informed about the search;

2. Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čergar, also challenges the decision of the Court to refer the aggrieved party *Mothers of Srebrenica and Žepa Enclaves Association* to take civil action to pursue their property law claims.

316. This Panel finds that the appellate objections alleging that the Court of BiH Warrant of 9 July 2005 authorizing the search of family houses, yards and ancillary buildings owned or possessed by the Accused was not produced in accordance with the law, are unfounded.

317. The primary reason for this finding is the fact that the Defense already made those identical objections (that the Warrant did not contain the names of persons conducting the search, that it did not contain the description of the property that was the subject of the search, and that the Defense Counsel were not informed about the search, and finally also that the signatures of witnesses did not guarantee the lawfulness of the search) in the course of the first instance proceedings, and the Trial Panel ruled on those objections in a separate Decision of 30 October 2006, adequately responding to each of the allegations made by the Defense. The Appellate Panel finds that reasoning to be reasonable and correct, and especially notes that the Defense failed to provide in their Appeal a single reason as to why they considered that the Trial Panel had affected or at least might have affected the lawful and proper Verdict.

318. Based on the foregoing, the objection of the Defense is dismissed as unfounded.

319. The Appellate Panel further finds that the appellate objection related to the decision of the Court to refer the aggrieved parties, *Mothers of Srebrenica and Žepa Enclave Association,* to take civil action to pursue their property law claims is also unfounded.

320. The Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čergar, essentially challenges the standing of the Association as such to take civil action pointing out that "it has not been established whether any of the killed persons were related to that Association".

321. However, pursuant to Article 198(2) of the CPC of BiH,

> *in a verdict pronouncing the accused guilty, the Court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder. If the data of criminal proceedings do not provide a reliable basis for either a complete or partial award, the Court shall instruct the injured party that he may take civil action to pursue his entire claim under property law.*

322. The provision cited above indicates that, in a criminal proceeding, the court can either award the aggrieved party the claim or refer him/her to a civil action. The claim of the aggrieved party in the criminal proceeding cannot be dismissed or denied. If it does not award the claim, the court can only refer the applicant to take civil action.

323. In that civil action, the court of relevant jurisdiction will review the issue of the aggrieved party's standing to sue and the amount and the basis of the claim under property law.

324. Based on the foregoing, the objection of the attorney Čergar is not founded because he moves the Court to render a decision which is not allowed by the law.

V. II ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

Standards of Review pursuant to Article 299 of the CPC of BiH

325. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. In reviewing the allegedly erroneously established state of facts, the Appellate Panel will substitute the findings of the Trial Panel with its own findings only if a reasonable trier of fact could not have established the contested state of facts.

326. In determining whether or not a Trial Panel's conclusion was such that a reasonable trier of facts could not have reached it, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at the main trial is left primarily to the discretion of the Trial Panel and that findings of fact reached by the Trial Panel must be given a margin of deference.

327. The Appellate Panel shall only revoke the first instance Verdict if the factual error has resulted a miscarriage of justice which has been defined as a grossly unfair outcome in the court proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the criminal offence.

328. In order to prove that a miscarriage of justice has occurred, an appellant must demonstrate that the alleged errors of fact made by the Trial Panel raise a reasonable doubt about the guilt of the Accused. In order for the Prosecutor to prove a miscarriage of justice,

s/he must demonstrate that, considering the errors of fact made by the Trial Panel, any reasonable doubt of the Accused's guilt is eliminated.

329. Therefore, only where the Appellate Panel finds, first, that no reasonable trier of fact could have reached the contested findings and, second, that the error of fact caused a miscarriage of justice shall the Appellate Panel grant an appeal which is filed pursuant to Article 299(1) of the CPC of BiH and which claims that facts have been established erroneously and incompletely.

330. The claims in the appeal by the defense, which pertain to the allegedly erroneously and incompletely established state of facts, may be summarized as follows:

Erroneously or Incompletely Established State of Facts

331. All of the appeals referred to the state of facts being erroneously and incompletely established. Considering that some of grounds of appeal recur, the Panel decided to firstly address joint grounds of the appeals pertaining to all of the Accused and then those individual, so as to respond to all grievances falling within the framework of erroneously and incompletely established state of facts.

332. The Panel notes that it only referred to the averments indicating the erroneously and incompletely established state of facts and the findings of the Trial Panel which pertain to the decisive facts when it comes to the guilt of the Accused, leaving aside the grievances which are irrelevant to adjudication in this criminal case.

Joint grounds of appeal

333. **The defense is of the view that the state of facts was erroneously and incompletely established with regard to giving credence to the testimony of witness S4, considering that witness S4 entered into a plea agreement with the Prosecutor's Office of BiH.**

334. However, this Panel finds the stated grounds of appeal unfounded.

335. The Appellate Panel primarily finds that the Trial Panel's arguments are valid with regard to the admissibility and reliability of the testimony of witness S4, the witness who entered into the plea agreement, and that the Trial Verdict provided good reasoning and valid grounds for such a decision. Specifically, from page 7 of the Trial Verdict onwards, the Panel provides a very detailed analysis of the credibility of the witness S4's testimony. In that context, apart from the provisions of Articles 15 and 281(1) of the CPC of BiH, the jurisprudence of the Constitutional Court of BiH (in *M.Š.*, AP-661/04, Decision on Admissibility and Merits of 22 April 2005, para. 38) was analyzed and it was eventually found that

"*that evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity is subject to the same standard, no stricter and no more lenient. Simply, with respect to evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity, there is neither a presumption of unreliability nor a presumption of truthfulness."*...Furthermore, the Trial Panel refers to the Court of BiH jurisprudence in *Maktouf* (KPŽ-32/05), second instance Verdict of 4 April 2006: "*The Panel must, of course, consider all facts bearing on the reliability of the witness when analyzing the witness's evidence and exercise caution. However, the Panel must do the same when considering any evidence*."

336. Therefore, the Trial Panel analyzed the testimony of the witness S4 carefully and conscientiously, in isolation and in connection with other presented evidence, without a priori attaching smaller or greater evidentiary value to this testimony, which is a proper procedure.

337. The Appellate Panel determines that this witness's testimony was evaluated in accordance with the law and the credence given to his testimony is entirely reasonable and corroborated by other presented evidence as well.

338. The defense's objection concerning this witness' credibility boils down to the claim that just because he entered into a plea agreement his testimony cannot be considered reliable. However, such discrediting of the witness's testimony for the sole reason of the referenced fact is not logical because no lawfully obtained evidence can a priori be rejected or given preference but it has to be evaluated individually and in connection with other evidence in order to verify its evidentiary value, which was done in this particular case.

339. In a separate paragraph, the Trial Panel analyzed the differences in this witness's statements. Therefore, this ground of appeal by the defense is entirely unfounded and arbitrary.

340. **In evaluating the credibility of witness S4, as argued by the appellants, apart from analyzing his two statements (of 18 April 2008 and 22 May 2008), the Panel also had to analyze his testimony of 29 May and of 11 June 2008 and correlate these three statements and the testimonies of other witnesses who testified on the same matters.**

341. Credibility of the witness S4 is stated in a separate section in the contested Verdict which addressed this issue from the aspect of the reliability of information provided by the witness S4 in the courtroom, the statements given in the Prosecutor's Office, and from the aspect of discrepancies in the statements he gave on two occasions; on 18 April in his capacity as a suspect and on 22 May in his capacity as a witness. Considering the reasons presented by the Trial Panel for its Decision, it is evident that the statement of witness S4, which he gave as a suspect, was used with certain caution in the contested Verdict. Being a person for whom there existed grounds for suspicion that he had committed the criminal offence, he was not obliged to tell the truth, which witness S4 himself confirmed. On the other hand, the statement which he gave as a witness was taken based on the previously stated procedural guarantees under the procedural law and after being cautioned of his obligation to tell the truth, which the witness S4 confirmed by stating at the trial, that his statement of 22nd was *more accurate*.

342. With regard to the reliability of information provided by the witness S4, the first instance Verdict took into account all the circumstances – the lapse of time, the fact that he was talking about the facts he witnessed or heard himself, rather than about those which he learned through hearsay, and it focuses on the details in his testimony which the witness, considering the circumstances of the event, was reasonably able to observe and memorize.

343. Finding that the testimonies of this witness are mutually consistent with regard to all essential facts and that they are also consistent with the testimonies of witnesses S1 and S2 who were the only survivors of the killings in Kravica on 13th, as well as with ample documentary evidence, that they are objective and persuasive, the Appellate Panel too, had no reason not to give credence to these testimonies, as it considered them a reliable basis for the finding of the Accused's criminal actions as stated in the operative part of this Verdict.

344. **Furthermore, three appeals claim that the event in the warehouse of the Kravica Farming Cooperative was a spontaneous incident and that, if Krsto Dragičević had not been killed, the captives would not have been killed either. They also claim that the Trial Panel erred when it found that the killings on the 13th were planned and systematic.**

345. The Appellate Panel is of the view that such logic does not result from the referenced case file. More specifically, it is true that the shooting was preceded by the incident-murder of Krsto Dragičević by a prisoner after the prisoner snatched Krsto's rifle, which the parties (including the defense) did not contest during the first instance procedure, either. On that occasion Rade Čuturić was also injured. However, the perpetrator of Krsto's murder was immediately revealed and killed even before the mass killings of the captives started which the contested decision properly states on page 145 (English version, page 122). While the captives were escorted to the warehouse and later on, during the execution, verbal exchanges containing ethnic and religious slurs and curses were heard at both sides of the entrance to the warehouse, of which the survivors-S1 and S2 and witness S4 testified.

346. Furthermore, witness S4 and Mitrović[4] testified about clearly defined roles of the Accused Trifunović, Radovanović, Jakovljević, Medan, Džinić (and Mitrović) on the relevant day. S4 and Mitrović were armed with automatic rifles. S4 did not shoot. Mitrović fired two bullets towards the doors. At that moment he received an order to go, together with Branislav Medan, Slobodan Jakovljević and one Željko Ivanović, toward the rear of the building and secure the openings to prevent the Bosniaks from jumping through the openings. While guarding the rear of the building, fire in rapid succession continued in the inside of the building. He also heard the explosions of hand grenades, which were thrown in by the police officers nicknamed Vojvoda and Čupo.

347. In his statement given during the investigation, Stevanović stated that, upon arrival in front of the warehouse building, at about 16:00 hrs. on the 13th of July 1995, he could see on the left side of the room about 150-200 persons; some were standing, some were sitting and right behind them, Mirko Milanović was standing and positioning the machinegun on a

[4] In the investigation statement, number KT-RZ-10/05 of 21 June 2005

table[5], pointing at a group of prisoners. He saw the body of Krsto Dragičević lying on the road. In the other room which could receive about 400 persons and which was larger, he saw dead people and a young man throwing hand grenades into the room. Screams, shrieks, and moaning were heard from that room.

348. Witness S4 stated that, on the 13th, among others, Radovanović and Trifunović were shooting at the group of captives in the hangars, while three members of the Detachment were ordered to go behind the building to secure the window thus preventing any escape, and those were Branislav Medan a.k.a. Mostarac, Slobodan Jakovljević and Petar Mitrović a.k.a. Mali Petar. Furthermore, he mentioned a person who refilled the clips during the relevant event, and about two boxes of hand grenades which were subsequently thrown in by Vojvoda and Čupo.

349. Furthermore, it follows from the Dispatch Note[6] of the PSC Zvornik that, apart from evacuation of about 15,000 civilians from Srebrenica, the execution of about 8,000 Muslim soldiers who were blocked in the woods around Konjević Polje was also arranged.

350. All of this indicates that the killings of the captives were not incidental but they constituted the implementation of a systemic and organized event within which there was a clear division of roles of its participants. Among whom, the Accused also had their own roles as stated in the operative part of the Verdict.

351. In the context of the further developments, it was only the death of Krsto Dragičević that could be deemed to be an incident, considering that that was the only isolated an unplanned event which, according to the presented evidence, resulted from the chaotic situation in the hangar – on one hand, the fear of the captives that they would be executed and, on the other, the executors' resoluteness to fully accomplish the task which, due to the fact that some of the prisoners recognized their neighbors and acquaintances, made it even more difficult.

352. The Appellate Panel also finds it reasonable that the killing of Krsto could not have accounted for the killing of all of the other captives as the appeals claim, but rather, in view of the overall circumstances, it only could have accelerated the already planned sequence of events.

353. By acting in the manner as described by the witnesses and as the Trial Verdict reasonably established, the Accused Radovanović, Medan and Džinić, Jakovljević and Trifunović contributed to a decisive extent to the killings of the prisoners on the relevant day. Thus, they participated in the killings of the detainees as co-perpetrators.

354. For the foregoing reasons, the claims in the appeals are refused as ungrounded.

355. **Three appeals refer to erroneously established facts arguing that the time of perpetration and the overall duration of the killings of the detainees were not properly determined.**

[5] Witness Luka Marković stated that they had taken a desk and two chairs from his office and brought them into the hangar, tr. of 7 June 2006, page 50
[6] PSC Zvornik Dispatch Note , 283/95 of 13 July 1995

356. With regard to the time of perpetration and the duration of the killings in the warehouse, the witnesses commented on that circumstance[7] spontaneously and of their own initiative within their respective testimonies or in response to a question by any party in the proceedings.

357. On the grounds of these testimonies, the Trial Panel inferred that the killings of the captives lasted for about 1.5 hours and that they took place between 16:00 and 19:00 hrs. (13 July 1995).

358. However, the time frame context of the perpetration and the duration of the killings do not reach the degree of decisive facts which need to be established beyond a reasonable doubt which, in the end, follows from the factual description pertaining to section I e) of the operative part of the Trial Verdict elaborating on the killings *in the early evening hours*, with no indication of the duration of the act of killings itself.

359. Therefore, as these circumstances do not constitute the elements of the criminal offence of genocide, they are irrelevant to rendering a decision in this case.

360. Pursuant to the foregoing, the Appellate Panel refuses this ground of appeal as unfounded.

361. **The Defense (in the three appeals) argue that the Trial Panel did not properly establish the number of victims in Kravica, claiming that the Trial Panel erroneously established that there were more than 1,000 persons killed there.**

362. The witness statements about the number of captives ranged from 100, 150 captives (Đorđe Vukanović and Slobodan Mijatović) to 2,000 according to S1. The Panel also reviewed the documentary evidence about this circumstance (Petrović's footage showing a soldier on the road who was talking about 3,000 to 4,000 captives, Dispatch Note of Ljubomir Borovčanin number 284/95 of 13 July 1995). With regard to this circumstance, expert witnesses Vlado Radović (in the field of civil engineering) and Dragan Obradović (land surveyor) were also examined. According to the testimonies of the survivors, the captives in the warehouse were so crammed that there was no space between them at all. Correlating this with the statement by the expert witness Radović about the warehouse area in the Farming Cooperative Kravica (630 m²) and the fact stated in the findings of the expert witness Obradović according to whom two adults occupy 1 m², the Trial Panel concluded that more than one thousand persons had been captured and then killed in the warehouse of the Kravica Farming Cooperative.

[7] **Witness S1** (5 October 2006, page 26) stated that the shooting began at about 4:00-5:00 p.m. and that it lasted until dusk; Witness **Luka Marković** – "the fight commenced at about 6, 7 hrs. (page 29, of 7 July 2006) and lasted 20-30 minutes, not at all for one hour"; **Witness S2** (page 46, 12 December 2006) – about the circumstance surrounding the shooting inside the warehouse and stated "it was getting dark, there was still some daylight left". "Firing in rapid succession lasted for half an hour, they would take a break, then threw hand grenades, then continued with automatic weapons". **Witness Zoran Erić** (8 June 2006, page 77) – "It was about five, six hours or so when a guard got killed, then the shooting began. The shooting lasted longtime and was also heard the whole night". **Stevanović** (statement from the investigation) – after talking about the dead bodies in the larger part of the warehouse which could receive about 400 people, he left Kravica about 16:30 hrs., taking the body of Krsto Dragičević with him.

363. Finally, with regard to the number of those killed in the warehouse, the Trial Panel found the following on page 36 (English version, page 38):

> *"[...]Nevertheless, it is not necessary to establish either the exact number of prisoners on the meadow, or that the prisoners killed in the warehouse came exclusively from the meadow, or even the precise number of prisoners killed in the warehouse."*

364. The Appellate Panel finds this conclusion of the Trial Panel to be reasonable. This is supported by the fact that the captives initially gathered on the meadow in Sandići, to which location they kept arriving. Therefore, it is reasonable that the number of those previously brought to the Sandići meadow and then to the warehouse of the FC Kravica varied depending on the time of the day and the inflow of captives who were reaching the warehouse either in column or by buses, which was also stated in the testimonies of the survivors (S1 and S2).

365. However, considering that many of those killed in Kravica on 13 July 1995 are still unaccounted for and that many bodies which have been found have not yet been identified, it is clear that the number of those identified thus far cannot be considered the total number of those killed, but rather as the minimum number of those killed. Therefore, the Appellate Panel is satisfied that the Trial Panel reasonably found that it was not necessary to establish the exact number of those killed. The reason for this is that the exact number of persons killed does not constitute an element of the act of genocide. Therefore, there is no need for any further finding on that matter. The grounds of appeal by the Defense Counsel claiming the opposite are refused as unfounded.

366. **In further course, the Appellate Panel will address individual claims by the defense teams for the Accused within the same ground of appeal**.

TRIFUNOVIĆ MILENKO

367. **The Defense Counsel for the Accused submits that due to erroneously established facts, the Trial Panel groundlessly inferred that there had been a widespread and systematic attack on the enclave and that the Trial Verdict is based on the testimony of witness Butler only.**

368. The conclusion on the existence of a widespread and systematic attack is stated in the contested Verdict on pages 22-31 (English version, pages 32-34), while the nature of the attack is elaborated in its reference to individual witness testimonies and documentary evidence.

369. Therefore, for instance, the witnesses S1, S2, Hajra Ćatić and Šuhra Sinanović were among those who talked about the nature of the attack. They talked about the details of the event after the "fall of Srebrenica" which they experienced – departure of women, children and old persons carrying their luggage on their backs or on horses heading towards Potočari and about the departure of the Bosniak men into the woods.

370. The Trial Verdict also grounded its finding about this on the testimonies of witnesses – members of the Skelani Platoon who testified in this case. For instance, witness Obradin Balčaković talked about the VRS offensive which was launched against the town of Srebrenica as early as in March 1993. After the offensive, the frontlines were established.

371. Major Franken stated that Srebrenica had been heavily shelled for more than 200 times in July 1995, while there was no military target in the town at all to justify such an attack.

372. The inference on the existence of the attack also follows from the established facts T31-T33, 736 and T39[8].

373. Therefore, the conclusion of the Defence Counsel stating that the contested Verdict is solely grounded on the testimony of witness Butler is erroneous.

374. However, considering that the existence of a widespread and systematic attack does not constitute an element of the criminal offence of Genocide, the Appellate Panel will not address this issue any further. It is for this reason that the Appellate Panel intervened in the operative part of the Trial Verdict concerning the section which included the facts on the circumstances of a widespread and systematic attack.

375. **The Defence Counsel for the Accused states that the group of Muslims in Kravica does not constitute a substantial or essential part of the overall group of 40,000 men, women and children which was the total number of the Muslim population in the territory of the Municipality of Srebrenica, according to the 1991 Census**.

376. The Appellate Panel notes that the element of *substantiality* does not necessarily refer to the quantitative aspect, as claimed by the defense, which is properly observed and reasoned by the contested Verdict on page 61 (English version, page 62) where it corroborated its arguments and findings by the relevant jurisprudence of the ICTY and ICTR. One of the aspects pointed out in the Trial Verdict is that the element of *substantiality* implies: ***a substantial part of a protected group***. The Trial Panel found that, in the circumstances surrounding the relevant time, given the roles of men and women in the community, the destruction of the male population would have a greater impact on the ultimate destruction of the group than the killing of the female population. The Appellate Panel finds these arguments to be reasonable. Therefore, the grounds of appeal claiming the opposite are refused as unfounded.

377. The Defense Counsel further argues that it has not been proven that the Accused knew what was happening in the wider area and that the mass killings, in which they did not participate, would be committed at a later point in time.

[8] "Faced with the fact that Srebrenica fell under the control of the Bosnian Serb forces, thousands of Bosnian Muslims – inhabitants of Srebrenica fled to Potočari seeking protection in the UN base." (T31); "By the evening of 11 July 1995, about 20,000 to 25,000 refugees, Bosnian Muslims, gathered in Potočari." (T32); "Several thousands of them fled to the UN compound, while others placed themselves in the nearby plants and fields."(T33): "There was little food or water available, and the July heat was stifling."(T36); "The refugees in the compound could see Bosnian Serb soldiers setting houses and haystacks on fire." (T39)

378. The participation of the Accused persons in the events as charged primarily follows from the testimonies of witness S4 and the statements of the suspects Mitrović and Stevanović given in the investigation phase. It follows from these statements that, during the relevant period of time, there was a clear division of roles of the Accused, including their contribution to the commission of the criminal offence.

379. On the grounds of the presented evidence, the Trial Panel reasonably found that the Accused were aware of their Detachment being involved in the second phase of the task of "liberation of Srebrenica", which did not imply the military attack on the safe zone, and that they, as early as on 12 July 1995, could get a clear picture of what their task would be on the 13th, given that, in sight of all those present, some of the members of the Detachment "cleansed the terrain", that is, transferred and took the remaining people to Potočari. Therefore, the Accused could clearly see numerous buses and trucks on which women, children and elderly persons of Bosniak ethnicity (but not men) were boarded, while the Accused Trifunović had certainly had far better knowledge of the details concerning the continuation of the event (related to the killings in Kravica), considering his position as the Platoon Commander.

380. **Further, the defense argues that the total number of the captives on the Sandići meadow is questionable, and adds that the Defense expert witness, Dragan Orbadović, stated that there had been 450 captives there.**

381. The Prosecutor's Office proved the number of those captured in Sandići on 13 July 1995 by the documentary evidence (aerial photographs) which shows a group of people on the meadow on the relevant day at 14:00 hrs.[9] With regard to that circumstance, the defense presented evidence- finding and opinion of the expert witness Dragan Obradović, land surveyor (Exhibit O-X-2), who concluded that, based on the aerial photograph, there were about 450 captives on the meadow at about 14:00 hrs. During the evidentiary proceedings, some witnesses also testified about the same circumstance – Hajra Čatić, Luka Marković, witnesses S1, S2, E.H. and others. According to the testimony of Hajra Čatić, there were 250 to 300 captives on the meadow on the relevant day, while Luka Marković stated that there had been 1,000 to 1,200 of them.

382. With regard to the number of captives on the Sandići meadow, the Trial Panel stated the following on page 36:

> *Everything described above indicates that, based on the presented evidence, it was impossible to establish the exact number of captives, but it also shows beyond doubt that the witnesses made general comments on the number mentioning the highest number they could remember. It should not be forgotten that the number of captives was not constant and that it varied all the time depending on the time of the day and the inflow of captives who surrendered themselves that day. However, it is clear that the number of captives on the Sandići meadow that day was well over 1,000. Nevertheless, it is not necessary to establish either the exact number of prisoners on the meadow, or that the prisoners killed in the warehouse came exclusively from the meadow, or even the precise number of prisoners killed in the warehouse."*

[9] Exhibits: O-219 a, O-219b and O-219c

383. The Appellate Panel determines these findings to be reasonable. This is because it is evident that those persons who surrendered on the 13th of July in Sandići, except for witness E.H., were detained in the FC Kravica warehouse where, after the last group was brought in, they were executed.

384. **The Defense Counsel further states that the Panel erroneously found that the prisoners had been executed by the members of the Skelani Platoon.**

385. However, this argument is inconsistent with to the evidence in the referenced case file.

386. Witness S4, and Mitrović and Stevanović in theirs statements, testified about the identity of persons who executed those imprisoned in the warehouse. Witnesses S4 and Mitrović were present at the time of the commission of the killings, while witness Mitrović did some shooting himself. Among those who formed a semi-circle in front of the building and who were shooting, Witness S4 identified the Accused Trifunović and Radovanović, while Jakovljević, Medan (and Mitrović) went behind the building in order to secure the windows, thus preventing anyone from getting out through them. In his statement given to the Prosecutor's Office, Mitrović stated that he himself fired two bullets at the direction of the door and that he did not know whether he had hit anyone and that he was then tasked, together with Branislav Medan, Slobodan Jakovljević and one Željko Ivanović, with securing the openings thus preventing the escape of the captives. Many witnesses, members of the Skelani Platoon, testified that they knew the Accused from the Platoon, and the Accused themselves commented on this circumstance. Also, many witnesses stated that they indirectly, through others, had learned that those from Skelani (orig. *Skelanci*) were responsible for the crime in Kravica. The material documents[10] also proved that the Accused had been members of the Third Platoon Skelani.

387. Therefore, the finding of the Trial Panel on this circumstance is the only reasonable inference which could be reached by any reasonable trier of fact based on the case record.

388. The Defense Counsel further submits that, since that the capture of the enclave was not planned in terms of operations, it is absolutely wrong to claim that the transfer of civilians from Srebrenica was a foreseeable, foreseen and planned action.

389. This argument is irrelevant to rendering a decision on the criminal responsibility of the Accused. Therefore, the Appellate Panel will not further elaborate this matter.

390. The claim in the appeal stating that there is no evidence that the Special Police Brigade had authority and assignments in the territory of Sandići and Kravica before July 1995 is irrelevant to deciding on the criminal responsibility of the Accused. Therefore, the Appellate Panel will not further elaborate this matter.

[10] Payroll for July 1995 (Exhibit O-176) and a list of members of the Second Detachment Šekovići, Skelani Platoon (Exhibit O-176)

391. **The defense also contests the finding of the Trial Panel that Milenko Trifunović was the person on the video footage who was encouraging Bosniaks hiding in the woods.**

392. Witnesses S4, Nebojša Janković and Milojko Milovanović testified about this circumstance at the main trial. During their testimony, they were shown footage made by a journalist from Belgrade, on which they recognized the Accused Trifunović. Trifunović was S4's platoon commander, witness Milovanović knows him from the early '90-ies, while witness Janković was the Accused's best-man.

393. Therefore, there was specific evidence about the circumstance that the Accused Trifunović was present in Sandići on the 13th and that he encouraged Bosniak men who were hiding in the woods to surrender. Therefore, this ground of appeal is refused as unfounded.

394. At the session of the Appellate Panel, lawyer Rade Golić, Defense Counsel for the Accused Milenko Trifunović, provided the Appellate Panel with the electronic version of the testimony of Richard Butler, an audio-recording pertaining to the witness S4 of 3 February, 11 February, 11 March, 13 March, 20 March 2009 (or the referenced witness to be summoned as the witness for the defense), photographs from another case tried before this Court at which witness S4 shows the entries through which the column of men entered and he noted that the referenced evidence had not been known or available to him during the Trial proceedings.

395. By the referenced evidence, the defense attempted to challenge the validity of the Trial Panel's findings and stated that the facts remained incompletely established. The Appellate Panel notes that the evidence presented actually was not new evidence since the testimony of Richard Butler had already been the subject of evaluation by the Trial Panel. The testimony of witness S4, who was a protected witness in another case, cannot be used in this case, nor is the content of the information of such nature and gravity to imply a possible different finding about the decisive facts which would make an essential difference between the findings of the Appellate Panel and those of the Trial Panel, nor did the Defense Counsel clearly point to such a possibility.

396. Specifically, the Appellate Panel finds that the proposed evidence does not question the reasonableness of the Trial Panel's view, either from the aspect of thoroughness or correctness of the factual findings of the Trial Panel.

DŽINIĆ BRANO

397. Defense Counsel submitted in the appeal that the Trial Panel had incorrectly established the facts when it found that Brano Džinić had participated in the events in the FC /Farming Cooperative/ in Kravica in the afternoon of 13 July 1995 and thrown hand grenades into the warehouse. In that regard, it is claimed in the appeal that the Trial Panel incorrectly analyzed the testimony of witnesses Zoro Lukić and Zoran Tomić who testified about the whereabouts of the Accused Džinić on that day; moreover, the Panel failed to

provide any explanation for not using these pieces of evidence in the determination of the whereabouts of the Accused at the relevant time.

398. It is also argued in the appeal that witnesses Zoro Lukić and Zoran Tomić testified that the Accused Džinić was with them the entire time on 13 July on the pass, on the Sandići hill. Witness Lukić stated quite clearly that Brano Džinić and Zoran Tomić were with him throughout the afternoon of 13 July 1995 and that the two of them spent the night of 12/13 July 1995 at a location 100 meters away from him.

399. Page 153 (English version, page 129) of the first-instance Verdict provides the following explanation:

> *"If Zoran Tomić's testimony that Džinić was with him the entire time is compared with the testimony of S4, who stated that Zgembo and Čupo Brano also escorted the column of Bosniaks, and with Zoro Lukić's statement that Tomić's nickname was Zgembo, it is clear that Lukić's testimony that Brano Džinić was on the road and did not go towards Kravica cannot be accepted. Specifically, Lukić himself stated that Džinić and Tomić were with him the entire time, which was disputed by Tomić, who stated that he and Džinić left after being called up by Čuturić.*
>
> *Moreover, Zoran Tomić's statement that he was together with Džinić at the time Gen. Mladić was at Sandići at 14:00 is not inconsistent with Džinić escorting the column of Bosniaks, as it is clear from the evidence that the column was formed after Gen. Mladić left from Sandići.*
>
> *From the evidence mentioned above, the Panel concludes that Mitrović was an eyewitness in the respect that he saw the Accused Džinić, a.k.a. Čupo, together with someone else, "Vojvoda", throwing hand grenades into the Kravica warehouse."*

400. Contrary to the appellant's arguments, the Trial Panel took into consideration the referenced testimonies of the witnesses and commented on them in detail in the Verdict, assessing them individually and in their mutual connection and indicating the inconsistencies found. Thereafter, the Trial Panel made findings on the evidentiary value of those testimonies.

401. Based on the foregoing, the complaints raised in the appeal are refused as unfounded.

402. **The Defense pointed to the fact that the Trial Panel incorrectly alleged that the Accused Petar Mitrović was an eyewitness to the event that took place in front of the Kravica farming cooperative because he stated during the on-site visit and reconstruction[11] that he did not see the man nicknamed Čupo on the relevant day in Sandići and added that some soldiers told him that Čupo and Vojvoda had thrown hand grenades into the warehouse.**

403. The Appellate Panel notes that it follows from the record of the on-site visit and reconstruction with the Accused Mitrović (no. KT-RZ-10/05 dated 4 October 2005) that the

[11] Record of on-site visit and reconstruction with the accused Mitrović, no. KT-RZ-10/05 dated 4 October 2005.

Accused Mitrović stated that he saw the police officer nicknamed Čupo in Sandići on the relevant day but he did not see him in front of the warehouse. He heard from some soldiers who were present at the warehouse on the relevant day that Čupo and Vojvoda threw hand grenades on the prisoners in the warehouse.

404. On the other hand, Mitrović stated on record (suspect interview record, no. KT-RZ-10/05 dated 21 May 2006) that he heard detonations of hand grenades thrown by the police officers nicknamed Čupo and Vojvoda and added that Čupo had a ponytail, long black hair, that he was thin and about 165 cm tall.

405. Furthermore, witness S4 stated that he personally saw Vojvoda and Čupo using hand grenades from two boxes and throwing them into the warehouses.

406. The investigative statement by suspect Mitrović regarding the identity of the individual who was throwing hand grenades into the warehouse on the relevant day was confirmed by witness S4 who, too, was in front of the FC Kravica on the relevant day.

407. Based on the evidence cited above, the Trial Panel found that the Accused Džinić was throwing hand grenades into the warehouse of the FC Kravica on the relevant day.

408. Based on the foregoing, the conclusion drawn by the Trial Panel regarding this circumstance is the only reasonable conclusion to be drawn by any reasonable trier of fact. Therefore, the complaints raised in the appeal are refused as unfounded.

409. **The Defense pointed to the fact that the Trial Panel incorrectly analyzed the testimony of witness Jovan Nikolić and failed to put it in the same context with the other evidence, which resulted in erroneous findings**. The Defense pointed to the erroneousness of the allegations by witness Nikolić in his statement dated 10 October 2006 that Zoran Erić told him that the Special Skelani Unit committed the killings in the Kravica warehouse, thus challenging the credibility of this witness.

410. In his statement to the Prosecutor on 10 October 2006, witness Nikolić said that he learned from Erić that the Skelani Platoon had committed the killings and that this became a "generally known and public secret" on the following day.

411. While giving evidence at the trial of 16 May 2006, witness Jovan Nikolić said that Zoran Erić told him that the commander of the Skelani unit got killed, that members of that unit were there, that is, "*the Skelani platoon, whatever its name was, that a commander got killed and that shooting occurred later on. That, he said that*" referring to Zoran Erić. He also said that Erić told him "*that the man who got killed was from Skelani and that he was the commander of that, that unit that was there*".

412. The Trial Panel interpreted the testimony by witness Jovan Nikolić on page 49 of the Verdict: "*Erić told the witness (Nikolić) on that occasion that the Skelani Police Unit was also there*".

413. Witness Zoran Erić confirmed during the trial of 8 June 2006 (direct examination) that the portion of his investigative statement pertaining to the commencement of the

shooting in the hangar and the killing of a member of Ljubiša Borovčanin's special unit was correct but he could not remember it instantly. The relevant portion of his investigative statement reads as follows:

> *"At about 17.00 hrs a burst of fire was heard coming from the hangar. After that, shooting started and lasted for about one hour. I subsequently heard that a member of Ljubiša Borovčanin's special unit was killed in the hangar. That man was from Skelani and he escorted the buses transporting the Muslims to the hangars."*

414. When testifying at the trial on 4 July 2006 (cross-examination), witness Erić did indeed say that it was not true that Jovan Nikolić said that the killings in Kravica were committed by members of the Skelani Platoon.

415. Irrespective of the discrepancies, it follows from the Trial Verdict that the Trial Panel, having assessed the testimonies of witnesses Erić and Nikolić, gave decisive significance to their corroborating testimonies about this circumstance (that is, that the Skelani Platoon was also there, but not that the same platoon committed the killings). However, bearing in mind that the Trial Panel's conclusion on the name of the unit (platoon) to which the executioners of the prisoners in the warehouse on the 13th belonged was drawn on the basis of many other pieces of evidence (witness statements and documentary evidence), so that any further discussion of details of the testimonies of witnesses Erić and Nikolić about this fact is superfluous.

416. Based on the foregoing, the complaints raised by the Defense in this regard were refused as unfounded.

417. **The Defense also claimed that the Accused Brane Džinić never had the nickname "Čupo"**.

418. On the basis of the testimonies of witnesses Nebojša Janković, Dragomir Stupar, Đorđe Vuković, Stanislav Vukajlović and Slavoljub Gužvić, the Trial Panel found that the Accused Džinić's nickname at the relevant time was Čupo.

419. For instance, witness Dragomir Stupar, when giving evidence at the trial on 14 September 2006 said that some called Brane Džinić Mali /Shorty/ because of his height, but some also called him Čupo. Witness Nebojša Janković stated that the nickname of Džinić, whom he recognized in the courtroom and on the photograph[12], was Čupo. He further added that Džinić played soccer well.

420. Furthermore, witness Đorđe Vuković testified at the trial of 1 September 2006 that the Accused's nickname was Mali Džino, Džin and, sometimes, "Čupo" since he had a long hair. Aside from the referenced witnesses, witnesses Stanislav Vukajlović and Slavoljub Gužvić confirmed this in their respective investigative statements; Gužvić said that Čupo was Brano Džinić's nickname while witness Vukajlović added that he knew Džinić from before, from soccer matches. Witness Dalibor Džurđić stated that in 1994 and 1995 Brane Džinić had a long hair and he tied it in a ponytail. Witness S4, too, recognized Džinić in the

[12] Exhibit O-62.

courtroom, saying that Džinić's nickname was Čupo and that he threw hand grenades at the prisoners on the relevant day.

421. Based on the foregoing, the conclusion drawn by the Trial Panel regarding this circumstance is the only reasonable conclusion to be drawn by any reasonable trier of fact.

422. Additionally, the nickname *Čupo* in these areas is a frequent nickname of persons who have long hair and it is evident that the Accused Džinić (when compared to the other co-accused) according to witness statements, did in fact have long hair at the relevant time and he tied it in a ponytail.

423. On 27 May 2009, the Defence Counsel for the Accused Džinić, lawyer Suzana Tomanović, filed with the Court a supplement to the appeal from the Trial Verdict due to the existence of new evidence of which the defense had not been, nor could it have been, informed. The CPC of BiH does not recognize such a supplement to an appeal as a special legal remedy. A supplement to the appeal is only possible and allowed as an integral part of the already filed appeal while the legally set deadline for filing an appeal must be observed. Since the referenced supplement to the appeal was filed after the expiration of the deadline for filing an appeal, it could not be considered. Besides, the Defense Counsel took advantage of her oral address at the Panel session and also presented the arguments submitted in the supplement to the appeal and, although the Panel will not specially comment on them, it did consider these averments as well in responding to other grievances of the appeal.

RADOVANOVIĆ ALEKSANDAR

424. **The Defence Counsel submits that the Defendant was in his unit, executing his police assignment, the same as he did when he went on field missions on other occasions and that he did not have any information about the attack and its military goal because his military status was such that he was not entitled to know that information. He further argues that the facts surrounding the participation of the Accused Radovanović in the killing of the imprisoned people were erroneously established.**

425. The Appellate Panel finds the conclusion reached by the Defence Counsel to be in contravention of the evidence. The Trial Verdict expressly explained in several sections that the actions taken by the Accused were criminal in nature and that he knew of the attack. It also elaborated on his role in the relevant incident. The Trial Panel reached their conclusion as to these facts after having analysed the evidence admitted, primarily the testimonies given by Hajra Ćatić, Momir Nikolić, witnesses S1 and S2 and witness Mayor Franken, who testified about the atmosphere in Potočari at the time that suggested without any doubt what would be the outcome of the whole incident to which everyone referred to as *the liberation of Srebrenica*. The Trial Panel also found credible testimonies given by witness S4 and the Accused Mitrović and Stevanović themselves (statements given under investigation), who identified the Accused and spoke about his role in escorting the prisoners to the hangar, and also in the subsequent shooting through the large entrance to the hangar, where the prisoners were detained.

426. According to the Trial Panel, the state of disorder in Potočari increased the feelings of superiority, invincibility and impunity in the executioners, who felt like being above and beyond law, as was the case with the Accused Radovanović. The Accused was a member of the special police forces, an official person, whose professional ethics obligated him to be a guardian of law and order. Therefore, the conduct of the Accused was expected to have been more observant within the time period and geographical context in which he acted. However, not only did he fail to protect law and order but the Accused was actually one of those responsible for the ordeal of the prisoners. It follows from the testimony of witness S4, who abstained from the killings of the prisoners in the warehouse, that the Accused had a choice. Nevertheless, the Accused Radovanović did not approve his conduct. He rebuked witness S4 for not shooting, saying: "Shoot, you traitorous Serb fucker."

427. The Appellate Panel reached the same conclusion as the Trial Panel that this shows that the actions of the Accused during the relevant incident were taken intentionally with the purpose of achieving prohibited consequences, that he knew of the attack and that his actions were taken as part of the attack. To that end, the allegations of the Appeal that claim otherwise are refused as unfounded.

428. **The Defence Counsel further argues that it was the duty of the Panel to *ex officio* order the hearing of Borovčanin's driver who allegedly said who had been shooting since the Defence withdrew this witness due to his fear for his personal safety and the safety of his family.**

429. According to the case record[13], the Defence for the Accused Stupar proposed that General Borovčanin's driver be heard and be granted certain protection measures. The Panel summoned the witness and heard him with regard to his testimony before the Court under protection measures. The witness informed the Court about the measures he would be granted if he were to testify before the ICTY. Having heard the witness, the Trial Panel decided to allow the examination of this witness under the same protection measures that he would be granted if he were to appear before the ICTY. Regardless of the decision of the Trial Panel, the Defence withdrew the proposed witness. In addition, the Trial Panel gave an opportunity to the Defence Counsel for all of the other Accused to hear the proposed witness as their own witness but the Defence Counsel refrained from doing so, leaving the possibility to summons this witness on another occasion.

430. The Appellate Panel notes that the Defence Counsel argues in his Appeal that the Trial Panel was bound to *ex officio* obtain certain pieces of evidence, the same as in the previously described situation. Specifically, in addition to the already described situation involving the proposed witness, the Defence believes that it was the duty of the Trial Panel to *ex officio* order the presentation of certain expert evaluation reports. The Defence referred to an infantry expert and a traffic expert. As to the latter proposal, the Defence Counsel proposed to the Appellate Panel to allow the expert witnesses to testify.

431. The Appellate Panel recalls that the main trial is a procedural stage at which facts are established given that evidence is adduced at this stage. The parties (therefore the Defence as well) have full evidentiary initiative, while the court plays only a secondary role at this stage

[13] Transcript 22 August 2007, page 55

of the proceedings. With respect to the evidentiary procedure, the Court may at any time order the presentation of evidence or put questions to witnesses of the adverse parties. In so doing, the Court is guided by the need to establish decisive facts, and ultimately to be able to conclude whether such facts have been established or not. Thus, when the Court makes a discretionary decision and finds that presentation of some evidence would result in proving a decisive fact that was obtained on the proposal of either party or after an objection was raised, the court will order the presentation of such evidence. In contrast, should the court find that certain evidence need not be presented or that it is irrelevant since it does not lead to establishing decisive facts, such piece of evidence would not be presented.

432. The decisive fact in this specific case was the identity of the individuals who committed the killings in the warehouse. The Appealed Decision established this fact based on the testimony of witness S4, Mitrović and Stevanović, corroborating that finding by relevant legal conclusions. Thus, there was no need to further establish the facts in that respect. On the other hand, even if the Court did not proceed with the presentation of additional evidence, that still did not preclude the parties (the Defence as well) to do so, given the available procedural options.

433. In view of the foregoing, the Appellate Panel holds that the decisive facts concerning the identity of the individuals who fired were clarified and that it was unnecessary to present any additional evidence surrounding that fact.

434. Therefore, the allegations of the Appeal in that respect have been refused as unfounded.

JAKOVLJEVIĆ SLOBODAN

435. **The Defense Counsel for the Accused Jakovljević states in the Appeal that it is not clear on what basis the Trial Panel concluded that the Accused would execute the order had he been ordered by someone to kill the detainees when in fact he executed the order by going behind the warehouse to guard the detainees, which he claims was a legitimate and logical military task.**

436. The Appellate Panel opines that such conclusion of the Defense Counsel is contrary to the presented evidence.

437. Namely, the unlawfulness of the actions of the Accused was determinedly elaborated in several places, and also his knowledge about the attack, his awareness and the role in the incriminating incident.

438. The Trial Panel properly corroborated its findings that the Accused stood guard at the rear of the building, by the testimonies of witness S4, and the statements of Petar Mitrović and Miladin Stevanović given during the investigation, which indicate the role and the position held by the Accused Jakovljević at the relevant time.

439. The fact that the Accused Jakovljević was behind the warehouse, standing guard and thereby preventing the detainees from escaping during the mass execution that was going on at the front part of the warehouse, cannot be considered a legitimate military task. By his action, the Accused made a decisive contribution to the act of execution and to the realization of the planned intention – to have no survivors in the warehouse.

440. By standing guard under the window in order to prevent any escape of the captives while the mass killing was going on inside the warehouse, the Accused Jakovljević stepped into the punishable zone of crime commission, while his act became unlawful. Thus his actions pertaining to the killing of the captives were given the correct legal qualification of co-perpetration.

441. The Trial Panel rightfully made a distinction between the actions of this Accused and the actions of the other Accused for whom it was proved that they had been in front of the warehouse and that they had fired toward the inner space of the warehouse. However, the actions of this Accused contributed to the killings to a decisive extent.

442. **The Defense also states that the fact that the killed persons were Bosniaks was not established with certainty and that the names of the persons who were killed in the warehouse should have been specified.**

443. The finding of the Trial Verdict was that the Bosniaks from Srebrenica were victims of the killing in the FC Kravica warehouse. The Trial Panel drew this conclusion primarily based on Mitrović's and Stevanović's statements given in the investigation, the statements of the Accused Radovanović and witness S4. Further in the reasoning, the Trial Panel drew its conclusion that the killed persons were Bosniaks on the statements of witnesses – members of the Second Detachment Šekovići (Milojko Milanović, Milenko Pepić and others). The Trial Panel concluded from this evidence that the Accused were also aware of the fact that the detainees were Bosniaks.

444. On pages 63-64/(English version, page 59 of the Verdict, the Trial Panel analyzed the statements of certain witnesses and the Accused regarding this circumstance:

> *"Radovanović admitted knowing that the men surrendering at Sandići were from Srebrenica, and that only Bosniaks had been living in Srebrenica since 1993. S4 testified that Trifunović had told them on their way to their assignment on the road that they were expecting a large influx of Bosniaks fleeing Srebrenica, and this was confirmed to him when he saw those surrendering, some of whom he knew personally. He further confirmed that the men taken to the warehouse were from the group of Bosniak men who surrendered and that these were men fleeing Srebrenica.*
>
> *Their testimony is corroborated by the statements of Stevanović and Mitrović. Mitrović, in his statement to the Prosecutor, spoke of receiving the order to accept all Bosniaks who surrendered, as they were "hiding in the woods", explaining that he was guarding a group of 500 Bosniaks; he also stated then that captured Bosniaks were taken to the Kravica warehouse. Stevanović, in his statement to the Prosecutor, confirmed S4's recollection, stating that after deployment to the Budak hill: "Suddenly, we received the task, communicated to us through Commander*

Trifunović, to move in order to secure the communication between Bratunac and Konjević Polje, more specific to Kravica, because Muslims should pass there." Later in the statement he spoke of the Bosniaks surrendering."

445. The Trial Verdict includes the journalist's video recordings for Serb Television recorded that the soldiers who were by the road knew that the men who had surrendered themselves were Bosniaks from Srebrenica. [14]

446. Witnesses S1, S2 and Hajra Čatić also testified with regard to this fact.

447. The foregoing evidence indicates that all of the conclusions of the Trial Panel regarding this circumstance were reasonable. The Appellate Panel finds that any reasonable trier of fact would have drawn an identical conclusion. For the foregoing reasons, the objections stating the opposite are refused as unfounded.

448. The complaint that the Trial Panel failed to state the names of the victims, due to which the state of facts was allegedly incompletely established, is also unfounded. During their testimony, certain witnesses spontaneously stated the identity of the persons who were killed on 13 July. However, the Appellate Panel notes that this circumstance is not an element of the criminal offense of Genocide and it is irrelevant for the decision in this case.

449. Therefore, the referenced grounds of appeal are refused as unfounded.

450. **Defense Counsel for the Accused states that it remains unclear what evidence was the basis for the Trial Panel to establish that the detainees from the bus entered the first part of the facility and the ones who came on foot entered the other part.**

451. Witnesses S1 and S2 testified with regard to this circumstance. Witness S1 testified that he was taken to the warehouse in the column and described the appearance of the column and the position of the detainees in it. Witness S2 stated that he was taken by bus to the warehouse. Witness S4 also testified with regard to this circumstance, while the description of the event itself is supported in detail by the Mitrović's and Stevanović's statement.

452. With regard to this matter, the Trial Panel concluded on page 37 (English version, page 39) as follows:

"... based on the presented evidence the Panel has established that the first section of the building (the left-hand side section when facing the warehouse from the road) was first filled with the captives who arrived by bus, and after that, since this bigger section was already full, the captives from the column went into the right-hand side section. S2, speaking about the left section, testified that the captives were urged to enter and then to sit down, and they were crowded closely together. Witness S1 testified that the right section of the hangar, where he was, was so crammed with people that it was not possible to sit down, and there was no space at all between the standing men."

[14] Srebrenica video recording ("Srebrenica Video"), transcript ("Video Transcript"), pg. L0092465-70 (Evidence O-193). This evidence includes the video recording made by journalist Zoran Petrović.

453. Therefore, contrary to the appellate claims, specific evidence exists regarding the details of apprehension and placing the detainees inside certain parts of the warehouse.

454. Accordingly, the Appellate Panel finds that the conclusion drawn by the Trial Panel regarding this circumstance is the only reasonable conclusion that any reasonable trier of fact would draw.

455. For the foregoing reasons, the appellate complaints asserting the opposite are refused as unfounded.

456. **The Defense Counsel for the Accused also states that the Trial Panel erred because it did not adduce evidence of a ballistic expert analysis, that is, an expert analysis of the weapons by which the execution was committed in order to establish whether the killing was committed by the weapons the Accused had been issued with.**

457. The Appellate Panel finds the complaints of the Defense unfounded.

458. The Appellate Panel notes that the Trial Panel found all of the decisive facts it deemed relevant to this circumstance in other pieces of evidence presented to the Court, either by the Defense or by the Prosecutor's Office or as the Court's evidence. Thus, it was not necessary to present a ballistic expert analysis.

459. The Trial Panel found there was no dispute concerning the type of the used weapons and to whom they belonged. Thus, the Trial Panel already knew the answers to the questions that would be possibly answered by the ballistic expert witness. The Appellate Panel concludes the finding of the Trial Panel to be reasonable and finds that the referenced facts were sufficiently proved even without the referenced expert analysis.

460. The Appellate Panel reiterates that the main trial is a procedural stage at which facts are established given that evidence is adduced at this stage. The parties (therefore the Defence as well) have full evidentiary initiative, while the court plays only a secondary role at this stage of the proceedings. With respect to the evidentiary procedure, the Court may at any time order the presentation of evidence or put questions to witnesses of the adverse parties. In so doing, the Court is guided by the need to establish decisive facts and ultimately to be able to conclude whether such facts have been established or not. Thus, when the Court makes a discretionary decision and finds that presentation of some evidence would result in proving a decisive fact that was obtained on the proposal of either party or after an objection was raised, the court will order the presentation of such evidence. In contrast, should the court find that certain evidence need not be presented or that it is irrelevant since it does not lead to establishing decisive facts, such piece of evidence would not be presented

461. The Defense had the possibility during the entire course of the proceedings to propose ballistic expert analysis of the casings found at the crime scene. However, it never used this possibility.

462. Pursuant to the foregoing, the grounds of appeal on this issue are refused as unfounded.

463. **The Defense Counsel claims that the extermination of a certain group is not possible without jeopardizing its ability for biological reproduction, supporting this with the findings and opinion of an expert witness specialist in demographics, Svetlana Radovanović**.

464. After the analysis of the findings and opinion of the foregoing witness expert, the Trial Panel stated on page 67, the following:

> *"Whether those are mass killings or individual killings, whether in reality they affect the survival of the group or not, and whether they result in appreciably serious consequences for the "biological reproduction capacities" of the analyzed group is not relevant to the factual and legal analysis of the elements of the criminal offense, its commission, and the finding that the offense was committed with that specific intention."*

465. The Appellate Panel finds the conclusion of the Trial Panel to be reasonable. The Trial Panel established all of the decisive facts concerning a protected group pursuant to Article 171(1) of the CPC BiH, having consulted relevant international jurisprudence. Therefore, the objection of the defense counsel on this issue is refused as unfounded.

MEDAN BRANISLAV

466. **The Defence argues that the Trial Panel erroneously found that the acts of the Accused standing guard had equal weight as those shooting at the detainees. The acts of the Accused, as indicated in the Appeal, allegedly were not unlawful because the Accused allegedly could not suspect that killings would take place.**

467. The Accused Branislav Medan himself, in his appeal, states that there was not a single piece of evidence or a witness statement indicating that he pointed his rifle towards the windows thus preventing the prisoners to flee. He also states that he was not aware that the prisoners would be killed and that he could not have done anything to prevent escape.

468. The Appellate Panel finds that such conclusion by the Defence Counsel is contrary to the presented evidence. The unlawfulness of the acts of the Accused is explicitly elaborated in several places in the appealed decision, as well as his knowledge of the attack, and his role in the relevant incident. Regarding these circumstances, the Trial Panel reached their conclusion following the review of the case record evidence, primarily the testimonies of Hajra Ćatić, Momir Nikolić, Witnesses S1 and S2 and witness Major Franken, who spoke about the atmosphere in Potočari at the time, based on which one could conclude what the outcome of the episode they called the *liberation of Srebrenica* would be*,* and those of witness S4, as well as the Accused Mitrović and Stevanović (their investigative statements) who identified the Accused among the group of people who had been in the front of the

warehouse and subsequently, having received an order, together with the Accused Mitrović and Jakovljević (and one Ivanović) went behind the back of the warehouse to secure openings and thus prevent detainees from escaping during the shooting.

469. In the opinion of the Appellate Panel, the lawlessness that prevailed in Potočari provided the people with a feeling of superiority, inviolability and impunity which is also the case with the Accused Branislav Medan. This Accused was a member of the special force, a police officer, an official whose professional ethics required him to preserve law and order. Therefore, the conduct of the Accused was expected to have been more observant within the temporal and geographical context in which he acted. However, not only did he fail to protect law and order but it was the Accused who was one of those responsible for the ordeal of the prisoners. It follows from the testimony of witness S4, who abstained from the killings of the prisoners in the warehouse, that the Accused had a choice.

470. The corroborating facts that the Accused actually stood guard behind the back of the warehouse, contrary to the claims of the appeal, were reasonably found by the Trial Panel from the statements of S4, Petar Mitrović, Miladin Stevanović and Aleksandar Radovanović given during the investigation. They spoke about the role and the position of the Accused Medan on the relevant occasion.

471. Acting in the described manner and adopting the goal of his acts (killings) as a common one, the Accused Medan contributed to a *decisive extent* to the perpetration of the criminal acts aimed at killing of the detainees. The criminal level of his acts on one hand and those of direct executioners on the other may be differently assessed with lawful consideration by the Appellate Panel, in the context of sentencing, which is *in favorem* of the Accused.

472. Accordingly, the appellate arguments asserting the opposite are refused as unfounded.

473. **The Defense also claims that the killings of the prisoners were committed in self-defense.**

474. Such a conclusion by Defense Counsel is contrary to the presented evidence which is explained in detail on page 58 /page 55 in the English version/ of the Trial Verdict:

> *"The defense argued that any killing that was done was in self-defense because of the advance and intended attack by prisoners from the warehouse after Krsto and the prisoner were killed, and Čuturić injured. The facts do not support that the Accused acted in necessary defense pursuant to Article 24 of the CC of BiH. In particular, the Panel concludes, as reasoned below, that there was no "attack" as that term is used in Article 24, and that the response of the Accused was clearly and indisputably massively disproportionate to any threat from the unarmed prisoners, who were unquestionably well-secured in the warehouse. Therefore, none of the elements of the "necessary defense" exception provided for in Art. 24(1) and (2) of the CC of BiH are met."*

475. It is true that the killings of the prisoners in Kravica were preceded by an incident in which one of the prisoners grabbed the rifle of a Skelani Platoon member (Krsto Dragičević) and killed him, while Rade Čuturić, Deputy Commander of the Detachment was injured trying to prevent the prisoner from continuing to shoot at others. The prisoner was killed immediately. Soon after, fire was opened upon the prisoners, first from a M84 machinegun and then from automatic rifles, fire which was followed by throwing of hand-grenades. The killings of the prisoners in the warehouse lasted for about an hour and a half whereupon the Detachment left the location to be replaced by members of other units who continued shooting and throwing hand-grenades long into the night.

476. However, as the Trial-Panel Verdict reasonably determined the perpetrator of Krsto's killing was detected and was already dead before the fire was opened at the remaining prisoners. Taking into account the overall circumstances of the entire event no prisoner in the warehouse was culpable of Krsto's death. Also, the prisoners were unarmed, exhausted and some were wounded and injured, while the Accused were armed with automatic rifles, a M84 machinegun and hand-grenades. The warehouse was a completely closed area but for the windows on the back which were guarded by the Accused Jakovljević, Medan (and Mitrović). Consequently, the prisoners were not a threat of any kind to the armed soldiers, and there is no indication of acting in self-defense.

477. By standing guard under the window in order to prevent any escape of the captives while the mass killing was going on inside the warehouse, the Accused Medan stepped into the punishable zone of the commission of a crime because his act was unlawful. Thus his actions, pertaining to the killing of the captives, were correctly qualified as co-perpetration.

478. The Appellate Panel finds that any reasonable trier of fact, under the circumstances, would have reached the same conclusion as that of the Trial Panel.

479. Therefore, the appeal on this issue is refused as unfounded.

V.III VIOLATIONS OF THE CRIMINAL CODE UNDER ARTICLE 298 THE CPC OF BiH

480. The Defense Counsels for the Accused also contest the Trial Verdict, due to the alleged violations of the Criminal Code, claiming that the Trial Panel erroneously applied the Criminal Code by accepting the legal qualification of the criminal offence as stated in the Indictment, that is, by qualifying the actions of the Accused under the CC of BiH which came into force on 1 March 2003.

481. In the reasoning of the referenced claims in the Appeal, the Defense Counsels refer to the provisions of Articles 3 and 4 of the CC of BiH which set up the principles of legality and non-retroactivity as the fundamental principles of criminal law.

482. Special emphasis is placed upon the principle under Article 4(2) of the CC of BiH which provides that if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

483. The Appeal further notes that the assessment as to which law is more lenient to the perpetrator shall always be made *in concreto*, taking into account a specific case and the specific perpetrator, in order to establish which law is generally more advantageous to the particular perpetrator.

484. Considering that both the CC of SFRY which was adopted based on the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of SFRY (the adopted CC of SFRY)[15], being the law which was in effect at the time relevant to the Indictment, and the CC of BiH provide for the same criminal offence with the same legal elements (Genocide), the defense submits that the adopted CC of SFRY is more lenient to the Accused as it foresees the term of imprisonment ranging from 5 years to 15 years, and in the event of an aggravated form of the criminal offense, 20 years, while the CC of BiH foresees the imprisonment for a term not less than 10 years or a long-term imprisonment.

485. The Defense is of the view that Article 4a of the CC of BiH to which the Trial Verdict refers does not prevent the application of Article 4 of the CC of BiH when it comes to the mandatory application of a more lenient law, since Article 4a stipulates the possibility of prosecuting all forms of criminal offences in violation of the general principles of international law, which are offences that had not been foreseen by the national legislation at the time of perpetration.

486. The Appellate Panel finds the grievances in the Appeal to be unfounded.

487. Specifically, Article 3 of the CC of BiH stipulates the principle of legality as one of the fundamental principles of criminal law. The referenced Article reads as follows:

> *Criminal offences and criminal sanctions shall be prescribed only by law.*
> *No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.*

488. Article 4 of the CC of BiH stipulates the principle of time constrains regarding applicability as follows:

489. The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

490. If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

491. In Article 4a) of the CC of BiH, the Code also defined an exception from the application of Articles 3 and 4, stipulating the following:

[15] Decree with the Force of Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia which has been adopted as the Republic law during the imminent threat of war or a state of war (*Official Gazette of RBiH*, No. 6/92) and the Law on Confirmation of Decree Law (*Official Gazette of RBiH*, No. 13/94)

Articles 3 and 4 of this Code 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.

492. It follows from the referenced legal provisions that, in principle, the law which was in effect at the time of the commission of the offence (rule *tempus regit actum*) shall be primarily applied to the perpetrator.

493. This principle may only be departed from in the interest of the Accused, that is, only if the law has been amended upon the commission of the offence so as to be more lenient to the perpetrator.

494. The Defense rightfully argues that the matter of the more lenient law is to be decided on *in concreto*, that is, by comparing the old and the new law(s) with regard to the specific case.

495. However, the comparison of the text of the laws may only provide a reliable answer if the new law decriminalizes something which was a criminal offence under the old law, which evidently makes the new law more lenient.

496. In all other cases when the criminal offence is punishable under both laws, the solution is not simple at all. Therefore, it is necessary to establish all of the circumstances which may be relevant to the selection of the more lenient law.

497. These circumstances primarily relate to the provisions on sentencing and meting out or reducing the sentence (which of the laws is more lenient in that regard), measures of warning, possible accessory punishments, new measures that substitute the punishment (community service, for example), security measures, legal consequences of the conviction, as well as the provisions pertaining to the criminal prosecution, whether it was conditioned by an approval.

498. It is indisputable that the criminal offence of Genocide of which the Accused has been found guilty, was stipulated as a criminal offence by both the CC of SFRY (Article 141 of the adopted CC of SFRY) and the CC of BiH (Article 171 of the CC of BiH).

499. The provision of Article 141 of the Adopted CC of SFRY reads as follows:

"Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.'

500. Article 171 of the CC of BiH reads as follows:

Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:

a) Killing members of the group;
B) Causing serious bodily or mental harm to members of the group;
C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
D) Imposing measures intended to prevent births within the group;
E) Forcibly transferring children of the group to another group,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

501. Furthermore, the act of killing of members of a group, being the act of commission of the criminal offence of Genocide of which the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan were found guilty forms an act of perpetration of the criminal offence of Genocide under both Criminal Codes.

502. It follows from the foregoing that both the Adopted CC of SFRY and the CC of BiH identically defined the criminal offence of Genocide, therefore when assessing which law is more lenient to the perpetrator, the foreseen punishment should be analyzed.

503. Although the Appeals properly refer to the foregoing legal provisions and principles, they erroneously conclude that the Adopted CC of SFRY is more lenient to the Accused from the punishment aspect, that is, that it stipulates a more lenient sanction for this criminal offence.

504. Specifically, the Defense for the Accused completely disregards the maximum punishment foreseen by the Adopted CC of SFRY for the criminal offence of Genocide – death penalty and, with no reasoning whatsoever, they conclude that the maximum punishment for the referenced criminal offence is fifteen, or for an aggravated form of the offense, twenty years of imprisonment.

505. Contrary to the grievances of the Appeal, which is also properly noted by the Trial Panel, the Adopted CC of SFRY stipulated the punishment of imprisonment for not less than five years or death penalty for the criminal offence of Genocide, unlike the CC of BiH which prescribes a prison term of not less than ten years or a long-term imprisonment (twenty to forty five years in prison) for the same criminal offence.

506. Although the Trial Panel properly stated these facts, it erroneously referred to the application of Article 4a of the CC of BiH in its reasoning, and passed the conclusion that

"[...]The principle of mandatory application of a more lenient law is excluded in prosecuting those criminal offenses which at the time of their commission were absolutely foreseeable and generally known to be in contravention of general rules of international law[...]"

and, based on that, it applied the CC of BiH to this particular case.

507. This interpretation is erroneous since Article 4a), being an exception from the application of a more lenient law, is only applicable if the more lenient law would prevent the trial or punishment for the acts which are criminal according to the general principles of international law.

508. It is not possible to have a trial or punishment for an act only if that act has not been defined as a criminal offence, that is, as an act of the commission of a certain criminal offence, considering that Article 3(1) of the CC of BiH stipulates that the criminal offences and the criminal sanctions may only be prescribed by law.

509. Thus, for example, Article 4a of the CC of BiH is only applicable to the criminal offence of Crimes against Humanity which was committed at the time when the Adopted CC of SFRY was in effect, since the latter law did not foresee that particular criminal offence at all.

510. The application of Article 4 of the CC of BiH would indicate that the Adopted CC of SFRY is more lenient to the perpetrators as it does not incriminate the act committed by the Accused at all, consequently, the perpetrators could not be tried or punished for the referenced offence.

511. In such a case, Article 4a of the CC of BiH, that is, Article 7(2) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) should be directly applied considering that, pursuant to Article 2/II of the Constitution of BiH, the ECHR is directly applicable to BiH and has priority over all other laws. This Article does not allow that, by reason of non-incrimination of certain acts which are criminal under the general principles of international law, the perpetrators of these acts avoid trial and punishment.

512. Accordingly, Article 4a) of the CC of BiH provides for an exceptional departure from the principles under Articles 3 and 4 of the CC of BiH in order to ensure the trial and punishment for such conduct which constitutes a criminal offence under international law, that is, which constitutes a violation of norms and rules that enjoy general support of all nations, that are of general importance and are considered or constitute universal civilization achievements of contemporary criminal law, in a situation when such actions have not been foreseen as criminal offences in national, that is, domestic criminal legislation at the time of perpetration.

513. In this case, the law in effect at the time of the commission of the crimes, as well as the law currently in effect, both provide for the criminal offence of Genocide. Therefore, it is evident that the legal requirements for a perpetrator of the criminal offence of Genocide to be tried and punished exist under both laws.

514. However, notwithstanding its reference to erroneous legal provision (to Article 4a), the Trial Panel, in this particular case, actually did apply the law which is more lenient to the perpetrators, that is, the CC of BiH.

515. Specifically, when meting out the punishment, having balanced all the relevant mitigating and aggravating circumstances, the Trial Panel concluded that the necessary and

proportionate penalty for the commission of the crime was 40 to 42 years of long term imprisonment.

516. Considering that the maximum punishment for the criminal offence of Genocide is long-term imprisonment of 45 (forty five) years under the CC of BiH, it is evident that the intention of the Trial Panel was to impose a severe punishment and that it was therefore oriented towards that particular maximum.

517. In comparing the respective punishments prescribed under the Adopted CC of SFRY and the CC of BiH with respect to the maximum prescribed sentence, it follows that the Adopted CC of SFRY prescribed the death penalty as the maximum punishment, while the CC of BiH foresees a long-term imprisonment (ranging from 20 to 45 years).

518. Pursuant to the foregoing, in this specific situation, the CC of BiH is more lenient to the Accused as it prescribes the term of imprisonment which is, by all means, more lenient than the death penalty.

519. The position of the defense is unacceptable as it entirely fails to notice that, at the time of the commission of the offence, the death penalty was also stipulated for that criminal offence, thus implying that the referenced sanction may simply be eliminated from the provision of Article 141 of the CC of SFRY.

520. In such a manner, the law which actually does not exist would be applied, that is, one sanction would be eliminated and substituted by another without any explicit legal provision.

521. The Constitutional Court of BiH shared this position in its decision AP 1785-06 in the *Maktouf* case:

> *In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstic, Galic, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law.*
>
> "*In this context, the Constitutional Court holds that it is simply not possible to "eliminate" the more severe sanction under both earlier and later laws, and apply only other, more lenient sanctions, so that the most serious crimes would in practice be left inadequately sanctioned*".

522. Based on the foregoing, the Appellate Panel finds that the Trial Panel properly applied the CC of BiH as the law which is more lenient to the perpetrator in this specific case, and it therefore refused as ungrounded the grievances in the appeal claiming the opposite.

523. The Appellate Panel finds that, based on the properly established state of facts, the Trial Panel drew an erroneous legal conclusion that the Accused possessed a genocidal intent while committing the offence which thus resulted in an erroneous legal qualification of the form of the Accused's participation in the perpetration of the offence.

524. Specifically, the Trial Verdict states on page 140 (English version, page 118) that:

> "*The underlying criminal act of killing co-perpetrated by the Accused constitutes probative evidence from which the Accused's genocidal intent can be inferred beyond doubt when viewed in light of their exposure to the broader context of the events of Srebrenica, and their basic knowledge of the genocidal plan*".

525. In considering the existence of the Accused's genocidal intent, the Trial Panel took into account the number of victims, the use of derogatory language toward members of the targeted group, the systematic and methodical manner of killing, the weapons employed and the extent of bodily injury, the methodical way of planning, the targeting of victims regardless of age, the targeting of survivors, and the manner and character of the perpetrator's participation.

526. Based on the foregoing, the Trial Panel eventually found that:

> *In this case, the Panel considered evidence of the acts of the principle perpetrators (Section VI.C) and analyzed that evidence together with the general context in which the acts occurred (Section V) and the perpetrators' knowledge of that context (Sections VI.A and B).*[16]

527. The Trial Panel concluded beyond any reasonable doubt that the murder of the majority of more than 1000 Bosniaks in the Kravica warehouse was co-perpetrated by the Accused with the aim to destroy Bosniaks, a protected group, in whole or in part.

528. Considering the presented evidence and the factual findings of the Trial Panel, the Appellate Panel finds that no reasonable trier of facts could have reached a conclusion that the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan possessed the genocidal intent to destroy a protected group in whole or in part.

529. Specifically, the Appellate Panel is satisfied that the Trial Panel considered all available, necessary evidence and determined all relevant facts related to the existence of the essential elements of the criminal offence of Genocide.

530. As already reasoned, the Appellate Panel finds that the Trial Panel did not erroneously or incompletely establish the state of facts and the Appellate Panel has therefore refused the grievances in the appeal indicating the opposite. Therefore, in this part of the Verdict, the Panel will not deal with the state of facts. Instead, on the grounds of the established state of facts, the Appellate Panel shall provide a proper legal qualification of the form of each Accused's participation in the perpetration of the referenced criminal offence.

---

[16] In accordance with this analysis, see the Trial Chamber Judgment in the *Akayesu* case; Trial Chamber Judgment in the *Ndindabahizi* case; see the Trial Chamber Judgment in the *Cyangugu* case.

531. In the Trial Verdict, the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan were found guilty of having participated in the killings in the Kravica warehouse together with Petar Mitrović and according to the Trial Panel, their acts contributed decisively to the commission of the criminal offence, for which they were found guilty as co-perpetrators under Article 171(a) in conjunction with Article 29 and Article 180(1) of the CC of BiH.

532. The specific actions taken by the Accused were described in the Operative Part of the Trial Verdict:

> *I. Milenko Trifunović in his capacity of Commander of the 3rd Skelani Platoon as a constituent element of the 2nd Šekovići Special Police Detachment, which he commanded, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan, as special police officers within the same Platoon, Džinić Brano as a special police officer in the 2nd Šekovići Special Police Detachment in the period from 10 July to 19 July 1995, in which the VRS and MUP carried out a widespread and systematic attack against the members of Bosniak people inside the UN protected area of Srebrenica, with the common purpose and plan to exterminate in part a group of Bosniak people by means of forced transfer of women and children from the Protected area and by organized and systematic capture and killing of Bosniak men by summary executions by firing squad, having had the knowledge of the plan to exterminate in part a group of Bosniaks, on 12 and 13 July 1995 were deployed along the Bratunac – Milići road, on the section of the road between villages Kravica and Sandići, Municipality of Bratunac, and undertook the following actions:*
>
> c) *on July 13, secured the road and participated in the capture and detention of several thousand Bosniaks from the column of Bosniaks (trying to reach the territory under the control of the Army of R BiH patrols), while Trifunović encouraged them to surrender;*
>
> d) *on the same day, conducted security duties in or around Sandići Meadow, Municipality of Bratunac, where they were detaining at least one thousand captured men,*
>
> e) *on the same day conducted in a column more than one thousand Bosniak male prisoners into the warehouse of the Farming Cooperative Kravica and detained them together with other imprisoned Bosniak males who were brought to the warehouse on buses, the total number of whom exceeded one thousand, in the Farming Cooperative warehouse and put most of them to death in the early evening hours in the following manner: the Accused Milenko Trifunović and Aleksandar Radovanović, together with Petar Mitrović, fired their automatic rifles at the prisoners; Brano Džinić threw hand grenades at them and the accused Slobodan Jakovljević, Medan Branislav and Petar Mitrović (after opening rifle fire) moved to the back of the warehouse where they stood guard to prevent the prisoners from escaping through the windows;*

533. The Trial Panel's finding that the Accused acted against persons within a protected group is indicated in the Trial Verdict and the Appeals, as reasoned in the part concerning the established state of facts, failed to refute this finding.

534. In order to find the commission of the offence of Genocide, it is necessary to establish a genocidal intent on the part of the Accused, considering also any awareness of and attitude towards a genocidal plan.

535. The Trial Panel Verdict not only found that the Accused had knowledge of the genocidal plan to destroy in part or in whole the protected group of Bosniak men and that they participated in their killings with intent, but it also found that they shared the genocidal intent.

536. The Appellate Panel holds that the finding of the intent of the Accused to kill members of the protected group is the only reasonable conclusion which may be drawn based on all evidence presented in that regard.

537. Similarly, the conclusion that the Accused had been aware of the existence of the genocidal plan which was subsequently executed also follows from the presented evidence.

538. However, although the Trial Panel reasonably found that the Accused possessed knowledge of the genocidal plan and intended to kill members of the protected group, the Appellate Panel finds that the Trial Panel erroneously found that the Accused also acted with a specific intent to destroy in part or in whole the national, ethnic, racial or religious group of people. Such specific intent was not proven beyond a reasonable doubt from the established state of facts.

539. Specifically, the Trial Panel found the existence of the specific intent to destroy in part or in whole the protected group of Bosniak men follows from several direct pieces of evidence. The Trial Verdict states that more than 1000 persons were executed in the Kravica warehouse, that the Accused took part in those killings, that the Accused knew that people they were shooting at were Bosniaks who had lived in the protected zone of Srebrenica and that there were verbal exchanges between the prisoners and the shooters containing ethnic and religious slurs and curses.

540. Further, the following is emphasized at page 141 (English version, page 119) of the Trial Verdict:

> *The killing proceeded in a methodical manner. Three, including Mitrović, were assigned to keep guard at the back of the warehouse to prevent any of the victims from escaping through the window openings along the back wall. Other members of the Detachment who had marched the column to the warehouse, were ordered to make a semi-circle in front of the warehouse. The right section of the warehouse, where the column was deposited and which was not secured, was the side first targeted; while the left side, which was secured, was targeted second. Between the massacre in the right side and the massacre in the left, the shooters took a break. The manner in which they targeted the rooms was also organized. In the first room, the first to fire was the operator of the M84 machine gun, shooting from the side of*

the door opening. He was followed by the other shooters who cross-fired from both sides of the opening into and through the room of dying men. The shooters would change places at the doorways in order to reload their weapons. Clips were being refilled by one person designated for this task from additional ammunition supplies on the site.[17] *At the conclusion of the shooting, the Accused Džinić and at least one other man threw hand grenades into the room full of dead and dying men. The grenades came from two boxes that had been supplied to the site. After a break during which the men relaxed, the Accused resumed the killing and commenced firing on the Bosniaks held in the left side of the warehouse, in the same order and in the same manner. Throughout, the three Accused Mitrović, together with Branislav Medan and Slobodan Jakovljević, at the rear of the warehouse continued to ensure that no prisoner escaped death. The task was undertaken in a calculated and thorough way. The Accused, together with others, remained at the warehouse until officially relieved by another unit sent for that purpose.*

541. Additionally, the Trial Panel particularly pointed out the fact that the weapons used against the unarmed men crowded into the two warehouse rooms included a M84 machine gun which was positioned on a table at the side of the entrance, automatic rifles which were methodically refilled and hand grenades, apart from inflicting lethal injuries, also produced explosions that were heard several kilometers away.

542. Finally, the Trial Panel found that (page 144-145, English version, page 121-122):

From the manner and character of their participation, it is apparent that the Accused did not simply intend to kill the victims; they intended to destroy them. The acts in which the Accused participated for around an hour and a half were the most physically destructive acts imaginable, committed and experienced at close range, within the sight and smell of the carnage and of the sounds of the dying. Trifunović and Radovanović, members of the Second Detachment, stood at the entrance of the rooms and emptied one clip after another into the mutilated bodies of the dying men piled on the floor. The Accused and members of the Second Detachment, Mitrović, Jakovljević and Medan, stood at their stations at the open windows at the other side of the rooms witnessing the slaughter, guns ready to prevent any attempts by the victims to escape. The Platoon member, Džinić, lobbed grenade after grenade at close range into the masses of dying human beings. All persisted in their task for a total of around an hour and a half, in a systematic and methodical way, and even took a break after the first room, before starting all over again to reduce the living men in the second room to the condition of those in the first. (Trial Verdict, pages 144-145)

543. To continue in imposing this level of devastation for the length of time that they did demonstrates a determination to destroy that has few equals.

544. The Appellate Panel finds that all the foregoing facts and circumstances indicate that there actually existed a genocidal plan to destroy in part or in whole a group of the Bosniak

[17] Witness S4;

people and that the Accused did possess knowledge of the existence of the referenced plan. However, based on the evidence presented with regard to their state of mind and mental attitude towards the action, the Appellate Panel finds that, based on the presented evidence, it is not possible to conclude beyond a reasonable doubt that the Accused shared the special intent to destroy, in part or in whole, the protected group of Bosniaks.

545. As the contested Verdict reasonably concludes, the Accused had knowledge of the existence of the genocidal plan even before 13 July 1995. The Appellate Panel determines that such a conclusion has been properly corroborated by the statements of witness S4 and the specific information that the Accused obtained during 12 and 13 July 1995, that is, upon their arrival in the Srebrenica area.

546. Moreover, the Appellate Panel considers reasonable the finding of the Trial Panel that the Accused were aware that their detachment was involved in the second phase of the "Srebrenica liberation" task, which did not imply a military attack on the protected zone as it had already "fallen". The Accused could have clearly realized what their task would be already on 12 July 1995 when, in everyone's sight, some of the members of the Detachment "swept the terrain". That is, they transferred and escorted the remaining people to Potočari. Further, the Accused could have clearly seen many buses and trucks with Bosniak women, children and old persons (but without men), and witness S4 confirmed in his testimony that they had discussed among themselves that the remaining men would probably be executed. The Trial Panel established the foregoing facts beyond reasonable doubt, including the following circumstances at pages 136-137/ (English version, page 115):

> *"On 13 July, the "huge" number of surrendering Bosniaks materialized. Consistent with the orders of the preceding day, members of the 2nd Detachment, including members of the Skelani Platoon, searched the surrendered prisoners, taking their valuables and money; and forced prisoners to discard their personal belongings, including their documents. Piles of discarded belongings and papers were left by the side of the road, visible on the video taken contemporaneously, as well as to all those in the area, and even found months later by Jean-René Ruez when he examined the Sandići meadow in 1996. The condition of the Bosniaks that were surrendering was "shocking", according to Stevanović. There were wounded, ragged men of all ages and boys as young as 7th grade who surrendered on the road and were taken to the meadow. The results of the ambushes and shelling was apparent from the injuries many suffered. Two facts are significant in assessing the understanding of the Accused at this point: 1) the condition of the men and boys who were surrendering confirmed that they did not pose a military threat and were, in any event, non-combatants once they surrendered; and 2) the "huge" number of surrendering Bosniaks predicted on the day before was accurate, but still there was no provision for food, sanitation, adequate water, medical care for the wounded, or shelter from the intense heat.*"

547. Considering the foregoing, the Appellate Panel finds that the conclusion of the Trial Panel that the Accused knew that the captured Bosniak men would be executed is the only reasonable conclusion which could be reached by a reasonable trier of fact.

548. However, the Accused's knowledge of the genocidal plan and the genocidal intent of others is not sufficient to find them guilty of the criminal offence of Genocide. Entering a conviction for Genocide, one of the most severe crimes against mankind, requires evidence that the Accused themselves possessed the genocidal intent, rather than the mere knowledge of such an intent of others.

549. The Trial Panel properly set the standard for proving the specific intent by stating that it may be difficult to find explicit manifestations of intent by the perpetrators but that circumstances and facts surrounding the perpetrator's acts can establish a genocidal intent beyond a reasonable doubt.

550. In this particular case, the Accused were aware of the genocidal plan and the fact that it was designed by someone else. As members of the 3rd Platoon Skelani and of the 2nd Detachment of Special Police Šekovići (Accused Džinić) the Accused acted under the orders of their superiors and took actions by which they contributed to the commission of the criminal offence, acting with direct intent.

551. However, given the established state of facts it is only possible to conclude beyond a reasonable doubt that the Accused acted with intent to deprive of life, that is, to decisively contribute to the deprivation of life of the detained Bosniaks.

552. Contrary to that, the circumstances and facts analyzed by the Trial Panel in Section C, 1 through 9, do not establish beyond a reasonable doubt the conclusion that the Accused also shared the genocidal intent. It is true, the Accused participated in the killings which were committed in an extremely cruel and inhumane manner and they persisted in performing the task started, observing the assignment of tasks set beforehand (who was to keep guard, who was to shoot, by which turn, who was to refill....). Their commitment to the execution of the task they were assigned, the number and age of the victims, the weapons employed and even the slurs indicate that the Accused eagerly performed their task but they cannot be equaled to others who took the unlawful actions with the specific aim to destroy in part or in whole the protected group.

553. It follows from the testimony of the witness S4 that, even in Srednje, the soldiers predicted the reason for their transfer to Bratunac. This witness stated in his testimony that, upon reaching Bratunac and when searching the terrain, they realized that their task would be to "kill the men and separate those infirm". According to this witness, even while in Srednje, some of the members of the Detachment protested against their transfer to Bratunac. This witness himself was thinking of running away and he stated that the reason for their protests was the fact that they did not want to meet with people they knew, as they supposed that they would be killed.

554. Both witness S4 and the Accused Mitrović similarly confirmed that, in the evening on that day there was a rotation, that is, their platoon was replaced, as Mitrović alleged, by volunteers from Serbia. This is important because it was found in the course of the proceedings that the killing of the Bosniaks detained in the warehouse lasted throughout the night which meas that the Accused participated only in the first part of the execution, lasting for one hour and a half and then other persons continued to kill the remaining survivors. Furthermore, witness S4 also stated that, before they left the location, their commander

Trifunović said that what had happened was terrible, that many people got killed and that, eventually, they would be the ones to "pay". The witness confirms that he was present at the funeral of Krsto Dragičević and the lunch after the funeral, and he stated that those present commented on what had happened saying that it was regrettable, that it should not have happened and that someone would have to be held accountable for that.

555. The Appellate Panel finds the foregoing facts important in determining the non-existence of the genocidal intent of the Accused. Specifically, lacking explicit evidence to clearly prove the existence of the genocidal intent of the Accused, the Panel had to derive its conclusion based on such indirect pieces of evidence. It is necessary to take into account one of the fundamental principles of criminal proceedings - the principle *in dubio pro reo* - in case of a doubt about the existence of the facts which constitute the elements of the criminal offence or on which the application of a certain provision of the criminal legislation depends, the Court shall render a decision which is more favorable to the Accused.

556. The Appellate Panel is satisfied that the foregoing facts (protests against leaving for Bratunac, concerns about what had been done and in which manner) raise doubts about the reasonableness of the finding of the Trial Panel that there existed the genocidal intent of the Accused.

557. The BiH jurisprudence has not previously dealt with the criminal offence of Genocide. Therefore, the Appellate Panel reviewed the ICTY jurisprudence concerning this special element of the criminal offence, considering that ICTY Tribunals have tried this criminal offence of genocide in several cases. This particularly includes the judgments of the ICTY Appeals Chamber in *Radislav Krstić, IT-98-33-1, 19 April 2004,* who was, inter alia, prosecuted for the same event and who was the VRS Major General and the Commander of the Drina Corps at the time when the offence was committed.

558. According to the ICTY findings, all of the crimes which followed the fall of Srebrenica occurred within the Drina Corps zone of responsibility (para. 135). General Krstić knew about the genocidal intent of some members of the Main Staff of VRS and he also knew that the Main Staff of VRS did not have sufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan (para. 137).

559. The Appellate Panel in this case has also reached conclusions identical to those rendered by the Appeals Chamber in *Krstić,* which primarily include the following:

> "*129. Given that the subordinate Brigades continued to operate under the Command of the Drina Corps, the Trial Chamber found that the Command itself, including Radislav Krstić as the Commander, must have known of their involvement in the executions as of 14 July 1995. The Trial Chamber found that Krstić knew that Drina Corps personnel and resources were being used to assist in those executions yet took no steps to punish his subordinates for that participation. As the Trial Chamber put it, "there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets." The Trial*

Chamber inferred the genocidal intent of the accused from his knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions. However, knowledge on the part of Radislav Krstić, without more, is insufficient to support the further inference of genocidal intent on his part.

Further, at the Appeals hearing the Prosecution emphasized - as evidence of Krstić's genocidal intent - the Trial Chamber's findings of incidents in which he was heard to use derogatory language in relation to the Bosnian Muslims. The Trial Chamber accepted that "this type of charged language is commonplace amongst military personnel during war." The Appeals Chamber agrees with this assessment and finds that no weight can be placed upon Radislav Krstić's use of derogatory language in establishing his genocidal intent".

560. Although not a binding precedent to Court, the cited positions of the ICTY Appeals Chamber are important in rendering a decision in this case. This is primarily so because this matter pertains to the application of the standards of international law by the ICTY which has abundant experience and considerable authority in this matter and also due to the fact that this matter also pertains to the responsibility from the same event from the perspective of a person who was highly-positioned in the chain of command. Without excluding the possibility that "common soldiers" may also commit genocide and share a genocidal intent, the Appellate Panel in this particular case finds that it is not possible, based on the presented evidence, to establish with certainty that, Trifunović, Džinić, Radovanović, Jakovljević and Medan, through the actions they took, shared the genocidal intent possessed by some members of the Main Staff. The Accused's knowledge of the plan and their participation in its implementation does not establish that they also shared the genocidal intent. As already stated, the use of derogatory language during the perpetration of the criminal offence does not necessarily lead to the conclusion that the Accused possessed such a complex and serious criminal intent to commit genocide.

561. Genocide is one of the most serious crimes known to mankind and guilt for its perpetration may only be found if the intent to commit genocide is established beyond a reasonable doubt.

562. The Appellate Panel finds that, based on the presented evidence and the established state of facts, it is not possible to find such intent of the Accused beyond a reasonable doubt.

563. Precisely for this reason, the Panel is obliged to render a decision that is more favorable to the Accused, that is, to find that the Accused did not have such genocidal intent.

564. What remains to be established is the mode of participation of the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan, with regard to the facts established beyond reasonable doubt.

565. Bearing in mind all the foregoing, the Appellate Panel holds that the Accused participated in the perpetration of the referenced criminal offence as accessories to genocide

and not as co-perpetrators of genocide as was wrongly determined by the Trial Panel Verdict.

566. An accessory is defined in Article 31 of the CC BiH as follows:

> *1) Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.*
>
> *2) The following, in particular, shall be considered as helping in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.*

567. An accessory, as a form of complicity, represents the intentional support of a criminal offence committed by another person. That is, it includes actions that enable the perpetration of a criminal offence by another person.

568. The criminal offence of Genocide is by its nature specific due to an additional subjective element that must be fulfilled, "genocidal intent", with respect to the following acts:

a. Killing members of the group;
b. Inflicting serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group or the community conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group,

They must be committed with a specific genocidal intent in order to be considered acts of perpetration of that criminal offence.

569. This conclusion is also corroborated by ICTY jurisprudence which is based on the position that what differentiates an accessory to genocide from the perpetration of genocide, is the intent. If the person whose actions contributed to the perpetration of genocide had the intent to bring about the destruction of a group in whole or in part, then that person is a perpetrator of genocide.

570. If a person is only aware of the genocidal intent of the perpetrator, but the person did not share the intent, the person is an accessory to genocide.

571. In the present case, considering that all of the essential elements of the criminal offence of Genocide have been satisfied, except for the genocidal intent (as stated above),

the Appellate Panel finds that the actions of the Accused constituted the acts of aiding/accessory in the perpetration of the referenced criminal offence.

572. Specifically, this Panel finds that Genocide was committed in Srebrenica in July 1995. Due to its nature, that crime could not have been committed by a single person but it had to include the active participation of a number of persons, each of whom had a role. However, it is evident that not all participants in the events in Srebrenica at the referenced time acted with the identical state of mind, nor did they take the same actions. The Court's role in this particular case is to establish the criminal responsibility of every Accused person individually, considering their actions, purport and intent.

573. Based on the established facts, it is possible to conclude beyond reasonable doubt that, at the time of the offence, the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan, being aware of the existence of other persons' genocidal plan, performed the actions by which they considerably contributed to the commission of that offence, therefore they participated in the criminal offence of Genocide as accessories.

574. Article 314(1) of the CPC of BiH stipulates that the Appellate Panel shall render a Verdict revising the Trial Verdict if the Panel determines that the decisive facts have been correctly ascertained in the Trial Verdict and that in view of the state of the facts established, a different Verdict must be rendered when the law is properly applied. The Appellate Panel, by granting in part the Appeal by the Defense Counsels for the Accused, revised the Trial Verdict with regard to the legal evaluation and qualification of the offence. At the same time, the Appellate Panel intervened concerning the factual description of the offence in a manner which fully reflects the state of facts, the elements of the offence and the responsibility for which the Accused were found guilty by the Appellate Verdict, which is more favorable to the Accused.

VI. DECISION ON CRIMINAL SANCTION

575. With regard to the grounds of appeal from the decision on the criminal sanction, the Appeals of all of the Accused referred to this ground of appeal only in the introductory part, failing to state their objections concerning the findings of the Trial Verdict, except for the Appeal of the Defense Counsel for the Accused Branislav Medan, which contains reasons for this ground of appeal. Therefore, the Appeals could not be reviewed in this respect, except for the Appeal of Accused Medan.

576. Therefore, on this ground of appeal, the Appellate Panel will rule in reference to the Appeal of the Defense Counsel for the Accused Medan and pursuant to Article 308 of the CPC of BiH (Extended Effect of the Appeal) "*An appeal filed in favor of the accused due to the state of the facts being erroneously or incompletely established or due to the violation of the Criminal Code shall also contain an appeal of the decision concerning the punishment […]".* The Appellate Panel will review whether the Trial Panel erred in the application of the criminal sanctions, making the Verdict unlawful, and also in view of the revision of the Trial Verdict, considering that the Accused are now found guilty of the criminal offence of Accessory to Genocide.

577. In deciding on the punishment, the Appellate Panel found that the Trial Panel properly established all decisive facts and properly applied the law. Therefore, no errors were made to make the Trial Verdict unlawful in the part concerning the sanction. Accordingly, the Appellate Panel largely relied on the findings made in the Trial Verdict, primarily with regard to the general considerations and requirements which the law foresees to be the criteria that should be taken into account when meting out punishment and also on individual facts and circumstances relevant to sentencing in this particular case.

578. Thus, the Trial Verdict properly found:

> *The purposes of sentencing are set out in both the general and special sections of the CC of BiH. Article 2 of the CC of BiH establishes as a general principle that the type and range of the sentence must be "necessary" and "proportionate" to the "nature" and "degree" of danger to the protected objects: personal liberties, human rights, and other basic values. In the case of genocide, the nature and degree of the danger will always be severe. The type of sentence the Court can legally impose in the case of genocide is limited to jail, and the range has been established as 10 to 20 years, or long-term imprisonment of between 20 and 45 years. The distinction between a 10 to 20 year sentence and a long-term sentence has consequences for the convicted person, including not only a longer period of incarceration, but also: more severe restrictions on the personal liberties of the convicted person within the prison system (Art. 152 LoE[18]); less privacy as to correspondence and telephone calls (Art. 155 LoE); and a longer mandatory sentence before consideration for parole or community privileges (Art. 44(4) CC of BiH). On the other hand, long-term sentencing also provides for more intensive and individualized treatment for rehabilitation (Article 152(3) LoE).*
>
> *In addition to the general principle pronounced in Article 2, the CC of BiH prescribes further purposes and considerations the Court must address when determining and pronouncing a sentence. These are of two types: those that relate to the objective criminal act and its impact on the community, including the victims; and those that relate specifically to the convicted person.*
>
> ***Pursuant to Article 2 and Article 48 of the CC of BiH, the sanction must be necessary and proportionate to the danger and threat to protected objects and values.***
>
> "*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."*[19]

[18] *The Law of Bosnia And Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures*, Official Gazette No. 13/05.

[19] Opening paragraph of UN General Assembly Resolution 96(I), 11 December 1946

Punishment of genocide is a principle "recognized by civilized nations as binding on States, even without any conventional [treaty] obligation."[20]
The effectiveness of the sentence must take into account not only the fact that genocide was found to have been committed, but also the manner in which the specific act of genocide was committed in each particular case. "Genocide embodies a horrendous concept, indeed, but a close look at the myriad of situations that can come within its boundaries cautions against prescribing a monolithic punishment for one and all genocides or similarly for one and all crimes against humanity or war crimes."[21] *In addition to the threat that was posed to the protected values and persons by the commission of genocide against them generally, the Panel examined the actual damage done to the protected persons in this particular case*.

Pursuant to Article 48 of the CC of BiH, the sanction must be necessary and proportionate to Suffering of the Direct and Indirect Victims

The direct victims of the crime of genocide for which the Accused have been convicted are the hundreds of men who lost their lives during the first approximately one and one half hours of the massacre at the Kravica warehouse on 13 July 1995, as well as the women and children related to these men whose families and lives were irreparably destroyed by the loss of these men in this particular way. The indirect victim is the protected group of Bosniaks from Srebrenica whose existence was threatened by the genocidal act.

The suffering imposed physically and physiologically on the direct victims was extreme. The detained males of all ages who were killed in the Kravica warehouse were unarmed prisoners who had been captured or surrendered to the Bosnian Serbs in exchange for promises of safety. Their psychological and physical suffering during the first approximately one and one half hours of the massacre is indescribable.

Pursuant to Articles 6 and 39 of the CC of BiH, the sentence must be sufficient to deter others from committing similar crimes.

Prevention of genocide has always been linked with punishment. The very title of the Genocide Convention makes that point clear. In order to prevent genocide, the crime must be named and the perpetrators of the crime must be held accountable and not be permitted to profit from their participation in genocide. Deterrence is of particular importance in the present case. The Accused were direct perpetrators of the killings.

Pursuant to Article 39 of the CC of BiH, the sentence must express community condemnation of the Accuseds' conduct.

The community in this case is the people of Bosnia and Herzegovina, and the entire world community, who have, by domestic and international law, mandated that

[20] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 ICJ Reports 16, p. 23.
[21] *Krstić* Trial Judgment, para. 694.

genocide be unequivocally condemned, and that commission of genocide be subject to effective punishment. Condemnation of genocide has been given primacy within the international community by virtue of its recognition as jus cogens, that is, a norm from which no derogation is permitted;[22] *as well as its recognition as a norm that is enforceable erga omnes, by which all States are recognized as having an obligation to enforce.*[23] *Genocide has been described as a crime "directed against the entire international Community rather than the individual."*[24] *This community has made it clear that these crimes, regardless of the side which committed them or the place in which they were committed, are equally reprehensible and cannot be condoned with impunity. The legislation of Bosnia and Herzegovina reflects this same resolve.* ***The particular crime of genocide committed in this case was carried out in a manner that is particularly reprehensible and the sentence must reflect the nation's and the world's condemnation of this activity.***

Pursuant to Article 39 of the CC of BiH, the sentence must be necessary and proportionate to the need to increase the consciousness of citizens to the danger of crime.

The danger of genocide lies not only in the physical destruction of those in the targeted group, but also in the soul-destroying nature of the intent with which it is carried out, and the risk of its contagion. The imposition of a penalty for this crime must demonstrate that genocide will not be tolerated, but it must also show that the legal solution is the appropriate way to recognize that crime and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the act can contribute to reconciliation by providing a response consistent with the Rule of Law. It can also promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved.

Pursuant to Article 39 of the CC of BiH, the sentence must be necessary and proportionate to the need to increase the consciousness of citizens to the fairness of punishment.

Penalties for genocide, what has been labeled the "crime of crimes", have included the most serious punishment that can be imposed by national and international legal systems. National jurisdictions have imposed the death penalty for convictions of genocide, even in those states where the death penalty had been repealed or abandoned for all other crimes.[25]

---

[22] *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Decision on Further Requests for the Indication of Provisional Measures, 13 September 1993, p. 440.; Vienna Convention on the Law of Treaties, *entry into force* 27 January 1980, Art. 53.

[23] *Barcelona Traction Light and Power Company* (Belgium v. Spain), Judgment of 5 February 1970, 1970 ICJ Reports 4, p. 32; *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Decision on Preliminary Objections, 11 July 1996, para. 31.

[24] William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000), pg. 6.

[25] Rwanda, considered a *de facto* abolitionist state, executed 22 offenders convicted of genocide by its domestic Court in 1997; Israel, which had abolished the death penalty for all other crimes, retained it for genocide and

Bosnia and Herzegovina has embraced the abolition of the death penalty for all crimes, a position that is entirely consistent with the respect for human life that makes the act of genocide so abhorrent. The murder of one person can fairly justify a sentence of long-term imprisonment. Participation in the murder of several hundred defenseless people in the manner evident in this case, even without genocidal intent, would fairly demand the severest of sentences available in domestic law. No penalty can adequately reflect the seriousness of depriving hundreds of persons of life, the psychological pain inflicted on their families, or the even graver crime that was committed when that deprivation of life was accompanied by the aim to deprive an entire group of human beings of their right to exist. The fairness of the sentence then depends not only on the correlation between the seriousness of the crime, the harm done by its commission, and the condemnation in which it is held, but also and more specifically, on the relationship of the available sentencing options to the sentence imposed for the particular crime.

The statutory requirement of fairness also requires consideration of the individual circumstances of the criminal actor in addition to the criminal act. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again (Arts. 6 and 39 of the CC of BiH); and (2) rehabilitation (Art. 6 of the CC of BiH). Rehabilitation is not only a purpose that the CC of BiH imposes on the Court; it is the only purpose related to sentencing recognized and expressly required under international human rights law, to which the Court is constitutionally bound. Article 10(3) of the ICCPR provides: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

There are a number of statutory considerations relevant to the sentencing purposes of rehabilitation and specific deterrence that affect the sentencing of the individual convicted person (Art. 48 of the CC of BiH). These include: degree of liability; the conduct of the perpetrator prior to the offense, at or around the time of the offense and since the offense; motive; and the personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts warrant. The point of these considerations is to assist the Panel in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community, but to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

579. Although the Trial Panel properly established all of the decisive facts which must be considered when rendering a decision on the type and length of sentence, the Appellate Panel determines that the Trial Panel inadequately evaluated the specific contributions of each of the Accused in the perpetration of the offence. The Accused committed the offence with many other people who acted in different ways. The horrendous consequences did not

---

sentenced Adolph Eichmann to death. Schabas, *Genocide*, pgs. 396-397. The death penalty has been justified as a 'fair' sentence for the commission of genocide in recognition that those who commit a crime which has as its aim to deprive an entire group of people of their right to exist on earth have forfeited their own right to exist. *Id.*, pg. 397.

occur as a result of the actions of a few perpetrators only. The sentences pronounced by the Trial Panel failed to adequately consider the individual and different actions of each of the accused.

580. Also, the Trial Panel noted that "*Whereas the maximum sentence available under law might be fair in this case, the Panel is mindful that as horrendous as this act of genocide was, there are those who committed multiple acts of genocide, as well as those whose crime was the commission of the larger genocidal plan, of which the genocide at the Kravica warehouse was but a part. Therefore the maximum sentence must, in fairness, be reserved for those crimes that, though qualitatively no more heinous, may quantitatively exceed even this crime*, nevertheless, it imposed a sentence which is almost the maximum possible for this criminal offense under the law and this Panel finds it too severe considering the specific circumstances to which importance should be attached when it comes to individual sentencing.

581. The Accused have been found guilty as accessories to genocide. Therefore, in deciding on the sentence of the Accused, the following provisions are relevant:

> Accessory is defined under Article 31 of the CC of BiH, and paragraph 1 stipulates the accessory's punishment:
>
> > *1) Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced,*
>
> Article 32 of the CC of BiH - Limitations in Responsibility and Punishability of Collaborators, paragraph 1 reads:
>
> > *1) The accomplice shall be considered criminally responsible within the limits set by his own intent or negligence, and the inciter and the accessory within the limits of their own intent.*

582. It follows from the foregoing provisions that the law requires the Court to pay due attention to the limits of the Accused's intent as an accessory. It is the Court's discretion to decide on the punishment either "*as if he himself perpetrated such offence*" or "*but the punishment may be reduced*". This indicates that the law proceeds from a position that acting as an accessory is the mildest form of complicity which reflects that accessories most often support the offence committed by the perpetrator.

583. In this particular case, the Accused are found to be accessories as a result of their actions only because the evidence does not establish beyond a reasonable doubt that the Accused acted with genocidal intent while committing the acts of which they were found guilty. However, their actions as accessories are the actions of co-perpetration in the killings, which far exceed the standard actions of an accessory in the commission of the criminal offences in relation to offenses where "special intent" is not required. Therefore, the punishment cannot be reduced.

584. Accordingly, in determining the type and length of the sentence for the Accused, the Appellate Panel takes into account all circumstances affecting the duration of sentence. The Appellate Panel finds that the circumstances related to the manner of commission of this specific criminal offense and the resulting consequences indicate that the offense was committed in a particularly cruel manner with extremely severe consequences which the Panel considers an aggravating circumstance as it goes beyond the elements required for the criminal offense. The fact that the Accused are now found guilty as accomplices as mode of participation in the commission of the criminal offense is now considered a lesser circumstance, but that does not justify granting the legal possibility to reduce the punishment below the prescribed special minimum. The Appellate Panel also takes into account that the Accused had no prior convictions, that no other criminal proceedings are pending against them, and that the Accused Trufunović, Radovanović and Jakovljević have families.

585. The Appellate Panel, however, also takes into account certain specific circumstances on the part of the Accused. With regard to **Milenko Trifunović**, the Appellate Panel finds as an aggravating circumstance the fact that at the relevant time, the Accused was the Commander of the 3rd Platoon Skelani. The Appellate Panel notes that the Accused Trifunović was not found guilty on the theory of command responsibility. His role specifically puts him in a different position in relation to the other Accused who were ordinary soldiers, subordinate to him. In this context, his position as a commander is considered to be an aggravating circumstance because his level of responsibility and duties as a commander, in relation to the other Accused, is far greater.

586. With respect to the Accused **Brano Džinić,** in addition to the common aggravating and mitigating circumstances, regarding this Accused, the Appellate Panel also finds that in relation to the other Accused, he showed a greater level of readiness to commit this criminal offense. After the shooting stopped, he threw hand grenades at the detainees in the warehouse so that no one could survive. The Appellate Panel considers such determination of the Accused to be an aggravating circumstance.

587. With respect to the Accused **Aleksandar Radovanović**, in addition to the foregoing common circumstances, the Appellate Panel finds an aggravating circumstance in the fact that the Accused showed a certain approving attitude concerning the killings in Kravica and thus demonstrated his agreement with the related actions. Such a conclusion ensues from the fact that the Accused Radovanović derided S4 when S4 refused to participate in the killing. He rebuked S4 calling him by names. By doing so, the Accused also encouraged the killing of the detainees in the warehouse.

588. With respect to the Accused **Slobodan Jakovljević**, the Appellate Panel finds that at the time of the incident in Kravice, the Accused was at the back side of the warehouse standing guard and did not actually fire his weapon. This does not diminish his criminal responsibility but the consequences of his actions cannot be compared with the consequences that resulted from the actions of the other Accused who fired at detainees. In this specific case, this circumstance is considered to be a mitigating circumstance with regard to the Accused Jakovljević.

589. Since only the Defense Counsel for the Accused **Branislav Medan**, Attorney Borislav Jamina, presented the reasons for his objection to the sentence, the Appellate Panel will particularly refer to his Appeal and provide the relevant arguments bellow.

590. In his Appeal, the Defense Counsel for the Accused Medan claimed that the Trial Panel failed to consider the following mitigating circumstances: the Accused had no prior convictions, he opposed going to Srebrenica, he stood at the back side of the warehouse and did not fire his weapon and consideration of his attitude toward Bosniaks before and after the war.

591. The Appellate Panel finds this ground of appeal to be well-founded, in addition to the stated ones. The Appellate Panel considers the foregoing circumstances to be mitigating circumstances regarding the Accused Medan.

592. Considering all of the foregoing, the Appellate Panel is satisfied that the sentences of long-term imprisonment of 33 (thirty-three) years for the Accused Milenko Trifunović; of 32 (thirty-two) years for the Accused Brano Džinić; of 32 (thirty-two) years for the Accused Aleksandar Radovanović; of 28 (twenty-eight) years for the Accused Slobodan Jakovljević; and of 28 (twenty-eight) years for the Accused Branislav Medan, to be entirely adequate and commensurate to the gravity of the committed offence considering the circumstances, consequences, manner of perpetration and the specific actions of the Accused, as well as to the personal circumstances of the Accused as the perpetrators. The Appellate Panel determines that such sentences will fully achieve the purpose of punishment as stipulated by the law.

593. Pursuant to Article 56 of the CC of BiH, the time that the Accused spent in custody until the order to serve their sentences shall be credited towards the sentence of imprisonment pursuant to the respective Decisions of the Court, as follows: for the Accused Milenko Trifunović from 22 June 2005; for the Accused Aleksandar Radovanović, from 22 June 2005; for the Accused Brano Džinić, from 22 June 2005; for the Accused Slobodan Jakovljević from 21 June 2005; and for the Accused Branislav Medan, from 23 August 2005.

594. With regard to the claims under property law and the costs of the criminal proceedings, the Trial Panel Verdict shall remain unchanged.

595. Pursuant to the foregoing and the provisions of Articles 313, 314 and 315(1)(a) and paragraph 2) of the CPC of BiH, the Appellate Panel decides as stated in the operative part of this Verdict.

Record-taker
Vahida-Ramić Sanida

PRESIDENT OF THE PANEL
J U D G E
Lukes Tihomir

NOTE ON LEGAL REMEDY: No appeal lies from this Verdict.

I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.
Sarajevo, 11 November 2009

Snežana Vukadinović
Certified Court Interpreter for English

Dinka Bevrnja
Certified Court Interpreter for English

Alisa Rajak
Certified Court Interpreter for English