

SUD BOSNE I HERCEGOVINE



СУД БОСНЕ И ХЕРЦЕГОВИНЕ

COURT OF BOSNIA AND HERZEGOVINA

Case File No.: X-KR-07/346
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Before the Trial Panel: Judge Vesna Jesenković, Presiding Judge
Judge Šaban Maksumić
Judge Staniša Gluhajić

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

versus

LJUBO TOMIĆ and KRSTO JOSIĆ

VERDICT

Prosecutor's Office of Bosnia and Herzegovina: Mr. Adnan Gulamović, Prosecutor

**Defense Counsel for the accused Ljubo Tomić: Mr. Petko Pavlović, Attorney-at-Law
Defense Counsel for the accused Krsto Josić: Mr. Nenad Rubež, Attorney-at-Law**

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File No: X-KR-07/346
Sarajevo, 12 March 2010

The Court of Bosnia and Herzegovina, in the panel comprising Judge Vesna Jesenković as the Presiding Judge and Judges Šaban Maksumić and Staniša Gluhajić as the Panel Members, assisted by Legal Advisor Lejla Konjić as the Record Keeper, in the criminal case against the accused Ljubo Tomić and Krsto Josić for the criminal offense of war crimes against civilians in violation of Article 173(1)(c) in conjunction with Article 29 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC BiH) on the formal charges filed by the Prosecutor's Office of Bosnia and Herzegovina File No. KT-RZ-174/07 dated 16 April 2009, following the open main trial, in the presence of Prosecutor Adnan Gulamović of the Prosecutor's Office of Bosnia and Herzegovina, the accused Ljubo Tomić and Krsto Josić, and Defense Counsels for the accused persons, attorneys-at-law Petko Pavlović and Nenad Rubež, on 12 March 2010 rendered and publicly pronounced the following:

V E R D I C T

The accused persons:

1. **LJUBO TOMIĆ**, son of Pero and Nevenka, maiden Sandić; born on 29 June 1964 in the village of Malešići, Municipality of Zvornik; residing at Malešići 136; ethnic Serb; citizen of BiH; JMBG 2906964183895; a heavy equipment operator by profession; not married; literate; completed secondary mining school; served military service in Štip in 1984; former member of the RS Army from 1992 until the general demobilization; registered with Military Records of Zvornik; average financial status; no previous convictions;
2. **KRSTO JOSIĆ a.k.a. Krele**, son of Ivan and Cvijeta, maiden Ristanović; born on 10 June 1965 in the village of Malešić, Municipality of Zvornik; residing at Čelopek bb, Municipality of Zvornik; ethnic Serb; citizen of BiH; JMBG: 1006965183916; a construction worker by profession; married with one child; literate; completed secondary construction school; served military service in Kičevo in 1984/1985; former member of the RS Army from February 1992 until the end of 1995; registered with Military Records of Zvornik; average financial status; no previous convictions;

pursuant to Article 284(1)(c) of the CPC BiH are hereby

A C Q U I T T E D O F A L L C H A R G E S

that they allegedly:

In the course of the war in Bosnia and Herzegovina, during an armed conflict, as members of the Army of the Serb Republic of BiH, acted contrary to the International Humanitarian Law, in violation of Article 3(1)(a) of the Genève Convention relative to the Protection of Civilian Persons in Time of War dated 12 Aug 1949, in the manner that:

On 26 June 1992, in the woods Marhoši located outside the town of Kozluk, Municipality of Zvornik, which was previously surrounded by the members of the military formations of the Zvornik Territorial Defense Forces, i. e. the members of the Army of the Serb Republic of Bosnia and Herzegovina, in order to track down the remaining Kozluk Bosniaks, including a certain number of previously expelled residents of the village of Kaludrani who had hidden there having feared for their safety, recognized their neighbors Nurija Nuhanović, Izet Nuhanović, Šemso Nuhanović, and Muradif Nuhanović, and shot at them from firearms with an intention of killing them, and on that occasion they killed Izet Nuhanović, Šemso Nuhanović, and Muradif Ibrahimović, while Nurija Nuhanović managed to escape,

committing thereby the criminal offense of War Crimes Against Civilians in violation of Article 173(1)(c) in conjunction with Article 29 and Article 180(1) of the CC BiH.

II

Pursuant to Article 189(1) of the CPC BiH, the accused persons are hereby relieved from paying court expenses and such expenses shall be charged against the Court's budget.

III

Pursuant to Article 198(3) of the CPC BiH, the injured parties are hereby referred to take civil action as regards the property claims they may have.

Reasoning

I - Case history

A. Charges

1. By the Indictment File No. KT-RZ-174/07 dated 16 April 2009, the Prosecutor's Office of BiH charged Ljubo Tomić and Krsto Josić with the commission of the

criminal offence of War Crimes Against Civilians in violation of Article 173(1)(c) in conjunction with Article 29 and Article 180(1) of the CC BiH.

2. The Indictment was confirmed by the Court on 22 April 2009.
3. At a plea hearing held on 8 June 2009, the accused Ljubo Tomić and Krsto Josić pleaded not guilty to the crime as charged by the Indictment.
4. The main trial in this case commenced by the reading of the Indictment on 31 August 2009 and was completed on 5 March 2010.

B. Evidence presented

• Prosecution's evidence

5. During the course of the main trial, the Prosecution presented evidence in the form of testimony of the following witnesses: Nuriya Nuhanović, Nizama Nuhanović, Borislav Rikanović, Agan Ibrahimović, and Šerif Islamović. The Prosecution also proposed and examined the expert witness Vedo Tuco, MD.
6. During the course of evidentiary procedure, the Prosecution tendered the following pieces of evidence under the corresponding file numbers: (T-1) Examination record of witness interview with Nizama Nuhanović, File No. KT-RZ 11/06 dated 20 February 2007; (T-2) Examination record of witness interview with Borislav Rikanović File No. KT-RZ 11/06 dated 26 December 2006; (T-3a) Examination record of witness interview with Nuriya Nuhanović File No. KT-RZ 586/96 dated 11 May 2006; (T-3b) Examination record of witness interview with Nuriya Nuhanović File No. KT-RZ-11/06 dated 26 December 2006; (T-4) Examination record of witness interview with Šerif Islamović File No. KT-RZ 11/06 dated 5 March 2007; (T-5) Findings and opinion of forensic court expert Vedo Tuco, MD, MSc File No. KT-RZ 174/07 dated 2 October 2009; (T-6) Republic of Bosnia and Herzegovina Official Gazette, Year I, #1 dated 9 April 1992; (T-7) Republic of Bosnia and Herzegovina Official Gazette of 20 June 1992; (T-8) Notification of the Prosecutor's Office of BiH File No. KTA-RZ-339/06 dated 22 September 2006; (T-9) Letter of the Prosecutor's Office of BiH File No. KTA-RZ-339/06 dated 13 February 2007; (T-10) Decision of the Tuzla Cantonal Court dated 3 April 2007; (T-11) Letter of the Court of BiH File No. X-KRN-07/346 dated 23 May 2007; (T-12) Order of the Tuzla Cantonal Court File No. KRI 67/03 dated 3 April 2003; (T-13) Letter/Information Delivery Notice of the Tuzla Cantonal Court File No. KRI-67/03 dated 28 December 2006; (T-14) Photo documentation of the exhumation File No. 08-02/3-5-04.6-5900/03 dated 20 October 2003; (T-15) Forensic Examination Report File No. KTA-104/03 dated 14 January 2004; (T-16) Identification Record File No. Z.KOZ-13 dated 7 May 2004; (T-17) DNA Report File No. Z.KOZ-13 dated 26 April 2004; (T-18) Certification of Death File No.

292/09 dated 31 March 2009; (T-19) Forensic Expertise Report File No. KTA-104/03 dated 19 January 2004; (T-20) Identification Record File No. Z.KOZ-14 dated 7 May 2004; (T-21) DNA Report File No. Z.KOZ-14 dated 26 May 2004; (T-22) Certification of Death File No. 291/09 dated 31 March 2009; (T-23) Forensic Expertise Report File No. KTA-104/03 dated 19 January 2003; (T-24) Identification Record File No. Z.KOZ-15 dated 22 July 2004; (T-25) DNA Report File No. Z.KOZ-15 dated 5 May 2004; (T-26) Certification of Death File No. 290/09 dated 31 March 2009; (T-27) Letter/Information Delivery Notice of the Tuzla Police Department File No. 08-02/4-1-04.3-7787/06 dated 22 December 2006; (T-28) CIPS printouts for Ljubo Tomić; (T-29) CIPS printouts for Krsto Josić; and (T-30) Examination record of witness interview with Agan Ibrahimović File No. KT-RZ-11/06 dated 21 February 2007.

- **Defense's evidence**

7. Defense for the first accused Ljubo Tomić proposed and examined the following witnesses: Krsto (Petko) Josić, Dragan (Slavko) Tomić, Dragomir Tomić, Zoran Josić, Cvijan Tomić, Milan Blagojević, and Veselin Erdelić.
8. During the course of the proceedings, Defense for the second accused Krsto Josić proposed and examined the following witnesses: Dragan (Savo) Tomić, Mitra Božić, Ljubinka Stevanović, Radica Đokić, and Jovica Stevanović, including the court expert Vidak Simić.
9. Defense Counsels for both the first accused and second accused tendered the following documentary evidence: Findings of the court expert Vidak Simić, MD dated 24 September 2009, attachment includes discharge summaries with epicrisis and findings and opinion of the Medical Board dated 26 February 1996 (O 1); Set of photographs made by the court expert Vidak Simić, MD marked a through f (O 2); Memorandum of the Federation BiH Ministry of Veterans File No. 07-03-1683-1/09 dated 6 October 2009 (O 3); Death certificates for Šemso Nuhanović, Muradif Ibrahimović, Izet Nuhanović, all dated 22 October 2009 (marked a, b, and c) (O 4); Petition for Declaration of Death for Izet Nuhanović dated 7 December 1998 (O 5); Petition for Declaration of Death for Šemso Nuhanović dated 2 December 1998 (O 6); Petition for Declaration of Death for Muradif Ibrahimović dated 13 October 2004 (O 7); Record of the Kalesija Municipal Court File No. R-394/98 dated 25 March 1999 (O 8); Decision of the Kalesija Municipal Court File No. R2-394/98 dated 13 July 1999 (O 9); Decision of the Kalesija Municipal Court File No. R2-182/04 dated 30 November 2004 (O 10); and Decision of the Kalesija Municipal Court File No. R-411/98 dated 14 July 1999 (O 11).

C. Procedural decisions of the Court

10. Following completion of presentation of the evidence by the Defense, the Prosecution proposed to the Court on 3 February 2010 to allow testimony of a court expertise as regards the second accused Krsto Josić's wound healing, i.e. to examine a general surgeon court witness.
11. Defense Counsels for the accused opposed this motion, arguing that this piece of evidence is unnecessary and it would only result in prolongation of the proceedings.
12. Article 239(2) of the CPC BiH requires from the Court "to ensure that the subject matter is fully examined and that everything is eliminated that prolongs the proceedings but does not serve to clarify the matter".
13. Furthermore, Article 263(2) of the CPC BiH prescribes: "If the judge or the presiding judge finds that the circumstances that a party tries to prove are irrelevant to the case or that the presented evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence".
14. The Panel considered the Prosecution's proposal in the light of the aforesaid provisions and found that the presentation of the proposed evidence was not necessary as the court expertise of the second accused Krsto Josić's injury was already carried out by the court expert Vidak Simić whose findings and opinion of the injury presented before the Court was detailed, clear, concise, and comprehensive. Cross-examining the court expert Simić, the Prosecution asked several questions to which the court expert provided complete and clear answers consistent with his findings and opinion. Thus, the presentation of an additional court expertise would not contribute to full understanding of the matter at hand in the existing circumstances and, as the Panel found, it would only lead to unwarranted prolongation of the proceedings.
15. On 3 February 2010, the Prosecution proposed to tender additional pieces of evidence in the form of suspect statements by the accused persons given during the course of investigation, and noted that the statements were taken in accordance with the procedural code in effect at the time the accused persons were interviewed.
16. Defense Counsels for the accused persons opposed this proposal by the Prosecution arguing that the accused persons (the suspects at that time) had not been advised in accordance with the novelized provisions contained in Article 78 of the CPC BiH.
17. The Panel examined arguments of both sides and decided to refuse the Prosecution's motion and not to allow the suspect statements of the accused persons

to be tendered into the record file. The Panel made such decision for the following reasons.

18. The right of the accused not to present their defense or to answer the questions posed (right to remain silent) is guaranteed under Article 6(3) of the CPC BiH. In this particular case, the accused persons exercised this right and did not present their defense at the main trial. Article 273(3) of the CPC BiH proscribes that “the statements of the accused given during the course of investigation may, upon decision of the judge or the presiding judge, be read and used as evidence in the main trial, only if the accused was, during his questioning at investigation, instructed as provided for in Article 78 Paragraph (2) Item (c) of this Code. “
19. The accused persons Ljubo Tomić and Krsto Josić were interviewed during the course of the investigation as suspects and during their interviews they were advised on their rights and obligations pursuant to the CPC BiH in effect at that time. However, provisions of Article 78 of the CPC BiH, which was in effect at the time the accused persons were interviewed, did not include a requirement under which a relevant institution conducting the interview with a suspect was responsible to caution the suspect that his statement obtained during the investigation was admissible in the court and that it could be read out and used in the main trial (as is now clearly stipulated under the novelty provisions contained in Article 78 of the CPC BiH).
20. Although the accused persons were, as indicated above, advised on their rights pursuant to the procedural code in effect at the time, the warnings and notices put to him at the time of his interview (that he could waive the right to present his defense or answer the questions, that he could comment on the offence he had been charged with and present all facts and evidence in his favor), as the Panel found, did not allow the Prosecution to subsequently tender during the trial the statement of the accused persons as evidence without their consent after the amendments to the CPC BiH took effect.
21. The Panel noted that the legislator’s intention was to correct previous impreciseness of Article 78(2) of CPC BiH as to the possible use of suspect’s statement at the main trial and also to harmonize this Article with the Convention which, pursuant to Article 2 of the Constitution of BiH, takes precedence over any other law. This was effected by amending Article 78(2)(c) of the CPC BiH which now prescribes that a suspect may comment on charges against him and present all facts and evidence in his favor and that, if he does so in the presence of defense counsel, the statement made is allowed as evidence at the main trial and may, without his consent, be read out and used at the main trial. As defined under this provision, the relevant authority (the Prosecutor’s Office, or rather an authorized official conducting the interview) is now required to caution the suspect prior to giving the statement that

his statement is admissible at the main trial and that it can be read out and used at the main trial even without his consent. It is only when such requirements are satisfied that the Prosecution can request that the suspect's statement given during the investigation is read out at the main trial.

22. The Panel also noted that Article 125 of the Law on Amendments to the CPC BiH prescribes that the cases in which indictments were confirmed before the existing law took effect should be tried pursuant to provisions of the previous CPC BiH, unless the provisions of the new law are more favorable for the suspect or the accused.
23. Having in mind the aforementioned, the Panel found that provisions of the existing CPC BiH are more favorable for the accused as they are explicit and imperatively require that prior to the interview conducted in the investigation, the suspect is to be cautioned as to the possibility that his suspect statement could be used as a piece of evidence at the main trial, and that in that case the suspect's consent is not required to read out and use at the main trial his statements from the investigation.
24. Having in mind that in this specific case the accused persons Ljubo Tomić and Krsto Josić (when interviewed as suspects) were not cautioned as to such possibility, the Panel found that there were no grounds to grant the proposal of the Prosecution and allow that their statements given during the investigation be read out.

D. Closing arguments

- **Closing argument of the Prosecution**

25. In their closing argument, the Prosecution recapped the testimonies of the prosecution's witnesses, noting that Nizama Nuhanović, the witness who allegedly heard from Nurija Nuhanović that the victims were fired upon by two persons, namely Ljubo Tomić and Krsto; that the Prosecution's witness Borislav Rikanović heard that the victims were killed and that they were killed by the Serb troops in the woods up in the hills outside Kozluk and that he saw the accused persons several times at the beginning of the war in the village of Malešići and they were wearing uniforms and weapons; then that the prosecution's witness Šerif Islamović confirmed in his testimony that he saw Nurija Nuhanović on 26 June 1992 when he told him that the victims were killed by the Tomićs and that after the war he mentioned to him a person called Ljuba who participated in this event; that the prosecution's witness Agan Ibrahimović stated in his testimony that during the expulsion from Kozluk they were hiding in a shrub when Nurija Nuhanović said that the victims were killed in the Marhoši woods and that he was going to go back to see what happened.

26. As regards the documentary evidence tendered by the Prosecution, the Prosecutor argued that they corroborate the averments of the Indictment that the victims were indeed killed on 26 June 1992 and that they were killed by the accused persons Tomić and Josić. The Prosecutor also noted that the testimony of the witness Nuriya Nuhanović was truthful and his claims were corroborated by other witnesses who were interviewed by the Tuzla Cantonal Prosecutor's Office and who testified before the Court of BiH. The Prosecution further noted that the defense witnesses Cvijan Tomić, Zoran Josić, Krsto Josić, and Dragan Tomić failed to provide in their testimonies an alibi for the accused Tomić as regards his participation during the period of time in question and thus failed to disprove the Prosecution's arguments as regards his participation.
27. Furthermore, the Prosecution commented on the witnesses for the second accused Josić who testified before this Court. As regards these witnesses, the Prosecutor argued that the purpose of their testimonies was to prove that the accused Josić was wounded in early May 1992 and that during the period of time in question he was recuperating at his sister's home, and as a result he was not physically able to be at the location where the criminal offence he was charged with was committed, but such claim is completely flawed.
28. Finally, the Prosecution argued that on the basis of the evidence presented, the Panel could unequivocally and beyond any reasonable doubt reach a reasonable conclusion about the criminal responsibility of the accused persons for the criminal offense they were charged with.

- **Closing arguments of the Defense**

29. In his closing argument, attorney-at-law Petko Pavlović, Defense Counsel for the accused Ljubo Tomić, made the following comments.
30. Firstly, Defense Counsel contested the territorial and subject matter jurisdiction of the Court of BiH in this case, arguing that the Bijeljina court effectively has actual territorial and subject matter jurisdiction. Defense Counsel also commented on the legal qualification of the offense as charged by the Indictment arguing, that the factual description of actions comprising the commission of the criminal offense the accused persons were charged with does not exist. He also noted that the provisions of the CC of the SFRY are more favorable for the accused than those of the CC BiH. Additionally, Defense Counsel addresses both prosecution and defense witnesses commenting on each individual testimony. As for the prosecution witness Nizama Nuhanović, Defense Counsel claimed that she gave a false testimony before this Court. For the witness Borislav Rikanović, he noted that this witness stated in the direct examination that he did not know who killed the victims or where they were

killed. Furthermore, as regards the testimony of the witness Nurija Nuhanović, Defense Counsel claimed that he lied regarding the alleged involvement of the accused persons in the event in question, that he did not see who shot the victims and if they were killed at that particular occasion. Defense Counsel also claimed that this witness was not reliable and could not be given credence. As Defense Counsel asserted, court expert Vedo Tuco, MD, could not establish in his expert testimony the exact cause of death for the victims, arguing that the expert testimony of this court expert could not be aggravating for the accused persons Tomić and Krstić. As to the witness Agan Ibrahimović, Defense Counsel argued that his testimony was not reliable and it could not be given credence because it clearly revealed the discrepancies between his court testimony and the statement given during the investigation as regards the conversation between him and the witness Nurija Nuhanović, while the witness himself repeatedly said “I did not said that” during the presentation of his witness statement in court.

31. As Defense Counsel argued, defense witnesses for the accused Ljubo Tomić (Dragomir Tomić, Zoran Josić, Krsto Josić, Cvijan Tomić, and Dragan Tomić) testified before this Court that the accused Tomić was with them in the village at the time in question, and that he was never a member of the unit led by Petko Tomić. Furthermore, Defense Counsel claimed that the victims were killed as members of the Army of RBiH and not as civilians.
32. Finally, Defense Counsel argued that the Prosecution failed to prove that the accused persons Tomić and Josić hold individual and commanding responsibility for the crime against three Bosniak civilians which allegedly occurred on 26 June 1992 in Marhoši outside Kozluk, and thus proposed to the Court to acquit the accused Ljubo Tomić on the basis of the *in dubio pro reo* principle and pursuant to Article 284(c) in conjunction with Article 3 of the CPC BiH.
33. In his closing argument, attorney-at-law Nenad Rubež, Defense Counsel for the second accused Krsto Josić, argued that on the basis of the evidence presented by the Prosecution it could not be concluded that his client committed the criminal offence he was charged with, as the testimonies of the witnesses were contradictory and failed to provide logical explanation relevant to other evidence. As to the testimony of the witness Nurija Nuhanović, Defense Counsel claimed that he did not speak the truth as his statements were contradictory, mutually conflicting, illogical and mutually exclusive, and that they were inconsistent with the testimonies of other witnesses for both the Prosecution and the Defense, including documentary evidence. In relation to the testimony of the witness Šerif Islamović, Defense Counsel claimed that his testimony was contradictory to itself, to the testimonies of this witness before the Kalesija Municipal Court and the Tuzla Cantonal Prosecutor’s Office, as well as to the testimonies of the witnesses Nurija Nuhanović, Agan Ibrahimović and Nizama Nuhanović, which altogether proved

that he did not tell the truth, but also that Nuriya Nuhanović did not tell the truth and that his testimony could not be given credence either. Defense Counsel also argued that the testimony of the Prosecution's witness Agan Ibrahimović contradicted the testimonies of other witnesses and that the witness was uncertain and that as such could not be accepted as credible. According to the claims of Defense Counsel, witness Nizama Nuhanović did not tell the truth and was evidently in collusion with Nuriya Nuhanović. Also, the testimony of this witness was, in Defense Counsel's view, unreliable in particular as regards the names of individuals who allegedly shot at her husband Šemsudin Nuhanović. Furthermore, Defense Counsel for the accused Josić argued that the witness Borislav Rikanović's testimony did not connect the killing of the victims with the accused persons in any way whatsoever. Furthermore, testimony of the forensic court witness Vedo Tuco, MD, and the documentary evidence presented by the Prosecution, in the view of Defense Counsel, effectively proved the groundlessness of the charges pressed against the accused persons, specifically that the victims were not killed by gunfire and that they were not killed at the site where they were found in the Marhoši woods.

34. Defense Counsel also addressed testimonies of the defense witnesses and the documentary evidence adduced during the proceedings in this case. The defense witness Dragan Tomić, as Defense Counsel argued, testified about the wounding of the accused Josić and stated that Josić was a civilian at the time of the wounding, that he was at his sister's home in the village of Trnovica at the time in question and that he daily went to Loznica for bandaging. Defense Counsel further argued that the witness Ljubinka Stevanović corroborated that she saw the accused in his sister's house and that the accused went to Loznica for regular medical check ups. The defense witnesses Radica Đokić and Jovica Stevanović, as Defense Counsel noted, corroborated that the accused Josić was at their home after the wounding, and that they were together the day before, on that day and the day after the expulsion from Kozluk. Defense Counsel also noted that the witness Mitra Božić corroborated that the accused Josić stayed at his sister's home in Trnovica. Defense Counsel noted that the testimony of the court expert Vidak Simić, MD, in which he gave details of his expertise, absolutely and unambiguously proved that the accused Josić was not able to use his right arm during the time period in question, or more specifically that he could not have used weapons at all.
35. Finally, Defense Counsel referred to the presented documentary evidence and argued that the charges as indicted were not proved whatsoever or were rather proved to be incorrect, and thus urged the Court to acquit his client of the charges.

II – Jurisdiction of the Court of BiH and applicable law

36. Defence attorneys for the accused primarily questioned the jurisdiction of the BiH Court and application of the CC BiH, submitting that the District Court in Bijeljina has territorial and subject matter jurisdiction, and that the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY) should have been applied in relation to the accused as a more lenient Code.
37. Since the issue of court jurisdiction and other previously raised issues should be resolved before the ruling on the merits on the case, and bearing in mind that these two issues are closely related, the Panel shall analyze them in the same section of the Verdict.
38. Taking into consideration the objections raised by the defence attorneys pointing at the subject matter and territorial jurisdiction of the Court of BiH, the Panel first notes that Article 11(1) of the CC BiH and Article 7 of the Law on the Court of BiH define the criminal jurisdiction of the Court of BiH. Article 7 of the Law on the Court of BiH states: *„The Court shall have jurisdiction over the crimes defined in the Criminal Code of Bosnia and Herzegovina and other BiH laws“*.
39. Also, Article 11(1) of the CC BiH stipulates that the criminal legislation of BiH shall apply to anyone who perpetrates a criminal offense within its territory. Furthermore, Article 23 of the CPC BiH stipulates that the Court shall have jurisdiction “to adjudicate in the first instance criminal matters within the scope of its material jurisdiction set forth by law”.
40. The Panel notes that the Constitutional Court of BiH rendered the conclusion that the Law on the Court of BiH is in accordance with the BiH Constitution and that prosecuting war crimes on the state level is an important step forward in the enforcement of justice and the rule of law as an instrument of the state of Bosnia and Herzegovina aimed at the establishment of a sovereign criminal judicial practice and meeting its obligations under international criminal law. Accordingly, the Panel holds that the motions of the defence attorneys for the accused, in terms of the jurisdiction of the BiH Court in this criminal case, are unfounded.
41. As regards the application of the CC SFRY as the allegedly more lenient law, the Panel took into consideration the following:
42. The criminal offense that the accused are charged with is punishable under the Criminal Code issued in 2003, that is, after the period when the incidents alleged in the Indictment took place. However, the actions of the accused constituted a criminal offense at the time of their perpetration pursuant to both the general

principles of international law and the CC SFRY, which was in force at the time concerned.

43. When ruling on the application of the law, the Panel took into consideration the provisions under Article 3, 4 and 4(a) of the CC BiH, and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).
44. The Panel holds that the offense with which the accused are charged constitutes a criminal offense pursuant to customary international law, and that the general principles of international law (Article 4(a) of the CC BiH) as well as the general principles of law recognized by civilized nations (Article 7(2) of the ECHR) can apply.
45. The Panel also took into consideration the decision of the Constitutional Court of Bosnia and Herzegovina in the Abduladhim Maktouf case (No. AP-1785-06) implying that the application of the CC BiH in the cases of crimes against humanity (crimes committed before this Code entered into force) and the values protected by international law is in accordance with the ECHR and the Constitution of BiH.
46. Having concluded that the application of the CC BiH is not contrary to the Constitution of BiH and the ECHR, the Panel must analyze whether the CC BiH is more stringent than the CC SFRY.
47. The Panel holds that the following interpretation in the Maktouf case is also applicable to this specific issue:
 - a. "68.... 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.
 - b. 69. In this context, the Constitutional Court holds that it is simply not possible to "eliminate" the more severe sanction and apply only other, more lenient sanctions, so that the most serious crimes would in practice be left inadequately sanctioned.." ¹
48. The foregoing implies that the Constitutional Court clearly notes that one cannot simply ignore the existence of death penalty in the CC SFRY and take that law as

¹ Decision of the Constitutional Court, case AP-1785-06

more lenient because, regardless of the death penalty, it stipulated a lower maximum than the CC BiH for the most severe prison sentence.

49. Taking these principles as a starting point, the Panel analyzed relevant legal provisions of the earlier law (CC SFRY) and the CC BiH and found that if a certain criminal offense is punishable by death penalty, the severity of that provision cannot be ascertained by eliminating the maximum punishment, but one has to take into account the maximum possible punishment.
50. Accordingly, the Panel notes that the CC BiH is the more lenient law in this specific case, because it stipulates a long term imprisonment as the maximum penalty, whereas the accused, if convicted, would be sentenced to death under the CC SFRY.

III - The Court's finding and reasoning

A. Standards of proof

51. In the course of analyzing and evaluating evidence presented during the main trial, the Panel abided by some basic principles stipulated in the CPC BiH as well as in the ECHR. These principles will be stated below.
52. Article 3(1) of the CPC BiH stipulates that a person shall be considered innocent of a crime until his guilt has been established.
53. The purpose of the trial is to provide for an innocent person to be acquitted and for a perpetrator of an offense to be convicted in legally prescribed proceedings under the conditions provided by the Criminal Code of Bosnia and Herzegovina (Article 2(1) of the CPC BiH).
54. Furthermore, the prosecutor is responsible for proving the guilt of the accused and the prosecution must establish this beyond any reasonable doubt, because in the case of any doubt with respect to the existence of facts composing the characteristics of a criminal offense, the decision rendered shall be the most favourable for the accused (Article 3(2) of the CPC BiH).
55. Finally, the Court is bound to study and evaluate evidence that is exculpatory as well as inculpatory for the accused (Article 14 of the CPC BiH).

56. Article 6(1) of the ECHR lays an obligation on all courts to “provide adequate reasons for their decisions”². On the other hand, whilst acknowledging the domestic judicial authorities' prerogative to assess the evidence and decide what is relevant and admissible, the Court reiterates that Article 6(1) places the “tribunal” under a duty to conduct proper examination of the submissions, arguments and evidence adduced by the parties³. In this connection, the court must analyze and clarify all significant disparities in the reports of the parties to the proceedings and indicate whether these reports should be declared inadmissible and, if so, on what grounds⁴.
57. During the evaluation of witness testimonies, the Panel aimed at reviewing their testimonies as a whole, with respect to both the content of the testimony and to their conduct in the course of the testimony. The credibility of witnesses is assessed not only by their knowledge of the subject matter of their testimonies, but also by their truthfulness, reliability and awareness of their obligation to tell the truth after taking oath.
58. It is not only important that a witness testimony is sincere, but it also has to be reliable. The Panel took into consideration that the reliability of a witness testimony depends on his knowledge of the facts, however the reliability of a witness testimony is greatly affected by the passage of time, the instability of human perception, as well as the traumatic effects of the incident concerned. The Panel compared the facts in the witness testimony with the facts established in the testimonies of other witnesses, as well as with the documentary evidence in order to determine whether they are corroborated or disputed by other evidence in this case.
59. Also, the Panel analyzed the adduced documentary pieces of evidence in order to determine their reliability and probative value.
60. Pursuant to the stated principles as well as the principle of free evaluation of evidence (Article 15 of the CPC BiH), the Panel carefully evaluated all pieces of evidence, both individually and in their correlation, and accordingly rendered the decision stated in the operative part.

B. Probative value of evidence adduced with regard to individual charges

61. The Indictment of the BiH Prosecutor's Office charges the accused with the criminal offense of War Crimes against Civilian Population under Article 173(1) c) of the Criminal Code of BiH.

² European Court for Human Rights, *Georgiadis v. Grčke*, 1997, para 606.

³ *Van de Hurk v. Nederlands*, 19 April 1994, para 59;

⁴ *Khamidov v. Rusia*, 2 June 2008, para 173

62. The factual description stated in the Indictment alleges that the accused Ljubo Tomić and Krsto Josić, as members of the Army of the Serb Republic of BiH during the war in Bosnia and Herzegovina, acted contrary to the provisions of international humanitarian law by violating Article 3(1)a) of the Geneva Convention relevant to the Protection of Civilians in Times of War, as follows: on 26 June 1992, in the woods named *Marhoši* in the township of Kozluk, Municipality of Zvornik, which had previously been surrounded by members of the military formations of the Serb Republic of Bosnia and Herzegovina, with the view to finding the remaining Bosniaks from Kozluk, including a certain number of previously expelled residents of the village of Kaludrani who had hidden there having feared for their safety, they recognized their neighbors Nurija Nuhanović, Izet Nuhanović, Šemso Nuhanović and Muradif Nuhanović, and shot at them with fire arms with the intention of killing them, and on that occasion they killed Izet Nuhanović, Šemso Nuhanović, and Muradif Ibrahimović, while Nurija Nuhanović managed to escape.
63. The Panel will not analyze in detail the existence of general elements of the criminal offense of War Crimes against Civilian Population, which are reflected in the existence of the state of war, armed conflict or occupation, the existence of the nexus between the act and the armed conflict, and the violation of the rules of international law, as it would be redundant, bearing in mind the presented facts in terms of the presence of the accused at the crime scene when the criminal offense that they were charged with was committed. As reasoned and analyzed in detail further in this Verdict, the Panel has not found beyond reasonable doubt that the accused Ljubo Tomić and Krsto Josić are the ones who killed Šemso Nuhanović, Muradif Ibrahimović and Izet Nuhanović in the woods of *Marhoši*, wherefore it would be needless to analyze further the *Chapeau* requirements needed for the existence of the criminal offense concerned.
64. The analysis of evidence for the charges concerned should be started by analyzing certain indisputable findings pertaining to the relevant facts. Therefore, on the basis of all the presented prosecution and defence evidence, including both testimonies and documentary evidence, and bearing in mind that they have not been disputed by the defence, the Panel has found indisputable the following facts:
- On 26 June 1992, some villagers of the vacated villages of Kozluk and Kaludrani, who were Bosniaks by ethnicity, including Nurija Nuhanović, Šerif Islamović, Agan Ibrahimović, Izet Nuhanović, Šemso Nuhanović and Muradif Ibrahimović, were hiding from members of the army of the Serb Republic of BiH in the woods of *Marhoši*, Kozluk, Zvornik Municipality.⁵

⁵ Testimonies of witnesses Nurija Nuhanović, Šerif Islamović and Agan Ibrahimović.

- Izet Nuhanović, Šemso Nuhanović and Muradif Ibrahimović were killed and their mortal remains were found in the *Marhoši* woods in 2003, where Lutvo Marhošević found them while he was clearing the forest. ⁶
65. However, it is disputable whether the accused Ljubo Tomić and Krsto Josić were the ones who killed the aforementioned persons.
66. The Prosecution's theory that the accused committed the criminal offense concerned is primarily based on the testimony of one witness, Nuriya Nuhanović, who identified the accused as persons who committed the murders alleged in the charges.

C. Evaluation of the testimony of witness Nuriya Nuhanović

67. During the evaluation of this witness testimony, the Panel's position was that if the Court decision is based on a single witness testimony then there must not be any doubt about the accuracy and truthfulness of this testimony.
68. Accordingly, the Panel first made a thorough analysis of this witness testimony, relating it with other pieces of evidence, and concluded that no reasonable trier of fact could find beyond a reasonable doubt that it was the accused Ljubo Tomić and Krsto Josić who killed the aforementioned persons, for the following reasons:
69. The testimony of witness Nuriya Nuhanović has not been corroborated with any other testimony or documentary evidence, and this testimony itself is not authentic and verifiable, which can be concluded from the analysis of the testimony in question.
70. In the course of his testimony at the main trial, the witness Nuhanović stated *inter alia* that he was hiding from the Serb army in the *Marhoši* woods during the relevant period together with his son Izet, Šemso Nuhanović and Muradif Ibrahimović. He states that around 8.30 p.m. he saw Ljubo Tomić and "Kojo" Josić at 15 meters distance laughing and setting hay on fire, when a dog's sudden barking drew the accused's attention so the witness Nuhanović got up and started running through the woods, while the other three men stayed at the same location where they were hiding. The witness further states that he turned around several times to see what was going on while being fired upon. During the main trial this witness stated once

⁶ Death certifications for Muradif Ibrahimović, Izet Nuhanović, Šems Nuhanović, DNA reports for Muradifa Ibrahimović, Izeta Nuhanović, Šemso Nuhanović, Forensic Examination Report for Muradif Ibrahimović, Izet Nuhanović, Šemso Nuhanović (exhibts T15 through T26), Photo-documentation made on 20 October 2003 during the exhumation in the *Marhoši* woods (exhibit T14), Record on Exhumation, No. Kri 67/03 dated 14 April 2003 (exhibit T13), Testimony of Witness Nuriya Nuhanović.

that he saw only Ljubo firing at him⁷, and then he claimed that he personally saw both the accused firing at him⁸, but in the statement given during the investigation he stated that he heard that they were shooting at him.⁹

71. Upon the analysis of this part of the witness Nuhanović's testimony, the Panel notes that it is justified to question whether it would be realistic that a person who is running away in panic and fear over his life while being fired upon would turn around a number of times, as he stated himself, and observe who was firing at him¹⁰. This witness describes some actions quite differently but in both cases the event is described in detail as though he is certain that the event took place exactly as described.

All these inconsistencies and lack of logic cannot be disregarded by the Panel when taking its final stand in terms of reliability and admissibility of this witness testimony.

72. Further in his testimony, Nurija Nuhanović states that while running away from bullets he reached the Kozluk-Kaludrani road, and then, when he realized that there was nobody around him, he went back and stood behind an oak tree in order to see what would happen next. While he was hidden behind the tree in the woods, around 9 p.m. he saw the accused shooting at 30-40 meters distance at the place where the other three men were hidden and, as he stated, "...each man was killed at the place where he was lying..."¹¹, and further during his testimony he repeated several times that he did not see them shooting at the men. During the cross-examination, when asked whether he saw the accused shooting at those men, he answered, "I did not see them shooting at those men", and added, "would you be able to see at 40 meters distance if I am now shooting at this man lying right here..."¹²

73. So, the witness Nurija Nuhanović says himself that he did not see the accused themselves killing Izet Nuhanović, Šemso Nuhanović and Muradif Ibrahimović, which can be concluded from this witness statements given during the investigation, implying that he was not at all sure what happened to his son and the

⁷ Page 12 of the Transcript of Nurija Nuhanović's Testimony made during the main trial dated 28 September 2009. (...Ljubo broke off from Kojo and went 4 or 5 meters away, he fired three or four bullets at me, I am not sure due to the fear and panic...

Page 68 of the Transcript (...not them, Ljubo fired upon me alone.....)

⁸ Page 40 of the Transcript of Nurija Nuhanović's Testimony at the main trial dated 28 September 2009 (...both of them fired at me...yes, I personally saw it...)

⁹ Record on Examination of Nurija Nuhanović during the investigation, No. KTRZ586/96 dated 11 May 2006 (...when the dog started barking, I jumped and started running, I ran about 30-40 meters when I heard the shooting.....)

¹⁰ Page 22 of the Transcript of Nurija Nuhanović's Testimony at the main trial dated 28 September 2009 (...I saw that, because I turned around a number of times to see what was going on...)

¹¹ Page 12 of the Transcript of Nurija Nuhanović's Testimony at the main trial dated 28 September 2009

¹² Page 60 of the Transcript of Nurija Nuhanović's Testimony at the main trial dated 28 September 2009.

other two men, and that he thought and hoped that they had been captured¹³, as well as from his testimony at the main trial stating that he hoped that they did not kill them, because they knew them¹⁴ as well as the statement that he was sure that these three persons were killed only when their mortal remains were found¹⁵.

74. During his further testimony, witness Nuhanović states that the accused, having killed the three men, left the woods and headed towards the village, and in one part of his statement he said that he saw them passing by him and shooting in the air, but after that he stated, “..I did not see them; they passed by; I could not...nobody else could...later, a group came after them, after the two of them...¹⁶” and continued, “I heard them shooting, but I did not see...a group of armed men came by; they were shooting on their way, shooting in the air ...¹⁷”. Therefore, this witness confirms that there were also other armed soldiers at the same place and time, and that they were shooting, whereby it is justified to question whether any of them could have killed these men.
75. Furthermore, this witness states that he continued running away and met a group of his neighbours including Šerif Islamović and Agan Ibrahimović, who were also hiding from the Serb army, and said, “the Tomić’s killed my Izet and Šemso and Muradif”. Then, as he states, he planned to go back and check what happened to his son but, as he stated, the neighbours prevented him from doing so.
76. When asked why he did not go back to check what happened to them if he was not sure if his son and the other two men were killed or wounded, or if they needed help, since he saw that the soldiers who had shot them left and proceeded towards the village, the witness explained that he did not do so because he had his jacket torn up as he was hit and scratched by bushes and branches preventing him from going back to that location (30-40 meters away) .
77. It is logical and reasonable to wonder if this situation (torn jacket) could prevent anyone from going back to check if his child (son in this case) was killed, particularly bearing in mind that there were no soldiers present at the relevant location.
78. Furthermore, Nuriya Nuhanović was hiding in the woods with other men around 25 days, but he never went to the site where, according to him, were the bodies of his

¹³ Record on Examination of Nuriya Nuhanović made during the investigation, number KTRZ586/96 dated 11 May 2006(..I was not sure what happened to my son; I thought that he might be captured...)

¹⁴ Page 13 of the Transcript of Nuriya Nuhanović's testimony at the main trial dated 28 September 2009 (...I hoped that they shot next to them just to scare them, because they knew them...)

¹⁵ Page 55 of the Transcript of Nuriya Nuhanović's testimony at the main trial dated 28 September 2009.

¹⁶ Page 71 of the Transcript of Nuriya Nuhanović's testimony at the main trial dated 28 September 2009.

¹⁷ Page 72 of the Transcript of Nuriya Nuhanović's testimony at the main trial dated 28 September 2009.

son and the other two men. The Panel notes that Nuriya, as he said himself, hoped that those men were alive, that they were not killed on that day. The hiding continued until 19 July 1992, when they were taken to the camp in Zvornik.

79. The Panel particularly notes that it is absolutely illogical and unclear why Nuriya Nuhanović, when he met the group of his friends, did not say immediately that he had seen Ljubo Tomić and Krsto Josić (whom he knew from before) and that they had killed his son and the other two men, bearing in mind that most people from that group knew both Tomić and Josić and that it was the state of war, that it was quite uncertain what would happen to all of them, wherefore it would be logical that he wished to tell to as many people as possible who killed his son so that the perpetrators would not escape punishment.
80. Furthermore, during all this time (from 1992 to 2003), after Lutvo Marhošević¹⁸ found by chance the mortal remains of the killed men in the woods, this witness never reported the incident to anyone (not even to the law enforcement authorities in the RS and the Federation of BiH, or in Germany where he resided) – the incident when his son was killed, nor did he tell the names of the perpetrators to a friend, neighbour or a relative of the other killed men (who were certainly quite interested in identifying the perpetrators of this crime).
81. This witness did not go to the crime scene (which is very close to his house) even in 2000 when he returned to Kaludrani (five years after the war in BiH and eight years after the incident), in order to try to find the mortal remains of his son and bury him. The witness gives several reasons for this. Once he said that he was afraid of the Serb authorities who would, as he stated, “look for him even in a rat hole to kill him”, but the second time he stated that he assumed that the bodies of these killed men had been moved to another location, wherefore he did not look for them.
82. These explanations of the witness are entirely unconvincing and illogical, and do not provide an answer to the key question – if he knew the names of the persons who killed his son and the other two men, why he did not say that to anyone until 2003, when their skeleton remains were found by chance by Lutvo Marhošević, and whether this means that his son and the other two killed men would still be unaccounted for if Lutvo Marhošević did not find the mortal remains by chance, and that he would not do anything to punish the perpetrators, although he knew who they were.

¹⁸ Page 23 of the Transcript of Nuriya Nuhanović’s testimony dated 28 September 2009 (..Lutvo Marhošević was cleaning the woods and found these human skeletons sometimes in April 2003... he informed Ismet and Halim Ibrahimović Halima i Ismeta about that, and they told me....)

D. Comparing the testimony of Nurija Nuhanović with testimonies of other witnesses, and their analysis

83. As already stated, the Panel had to evaluate Nurija's testimony in a critical and circumspective manner, since he was the only direct witness, and to look for its corroboration in other presented evidence, but did not find it in this specific case. In order to establish the criminal responsibility for such a severe criminal offense that the accused are charged with on the basis of a single witness (in this case it is Nurija Nuhanovic), the witness testimony should be so clear and indisputable that other witness testimonies shed no doubt on it, but on the contrary, they should corroborate the testimony, which is certainly not the case here.
84. In this specific case, the statements of Nurija Nuhanović are not corroborated by any witness or a documentary piece of evidence. The Panel notes that all other heard prosecution witnesses are just indirect witnesses, who obtained their information from a single eyewitness (Nurija Nuhanović). These witnesses are Nizama Nuhanović, Agan Ibrahimović and Šerif Islamović. The Panel will later analyze these witness testimonies.
85. Witness **Nizama Nuhanović** states that Nurija Nuhanović gave her the first official information about the death of her husband Šemso Nuhanović six months after the incident in question (sometimes in late 1992) when Nurija told her on the phone from Germany that Tomić's fired at her husband and the other two men, but later, as this witness says, she met him in person and he told her everything in detail. She states that he even told her the names on that occasion (Ljubo and Kosta).
86. When asked by the defence during the cross examination to clarify why she did not mention the names of the alleged perpetrators during the investigation statement¹⁹, since she claims that she learned their names before she made the statement before the Prosecutor's Office, she gave an unclear explanation and stated, "I don't know the names, I don't remember, but I know that he was killed by two men - Serbs, who else could it be..."²⁰. Also, when asked during the main trial if Nurija told her that he had seen the accused shooting at them or if he just saw them at the crime scene, the witness states, "he did not tell me that...just mentioned the two men...I cannot say what I..."²¹, but further during her testimony she stated that Nurija did mention to her these names.²²

¹⁹ Page 25 of the Transcript of the Record of Nizama Nuhanović's statement made during the investigation, number KTRZ 11/06 dated 20 February 2007)

²⁰ Nizama Nuhanović's Testimony at the main trial dated 1 September 2009

²¹ Page 32 of the Transcript of Nizama Nuhanović's Testimony at the main trial dated 1 September 2009)

²² Page 32 of the Transcript of Nizama Nuhanović's Testimony at the main trial dated 1 September 2009)

87. However, Nurija Nuhanović entirely disproved her statement and said explicitly at the main trial that he had never spoken to Nizama on the phone while he was in Germany or anywhere else, that he had never met her to talk about this incident and that he had never told her the names of the perpetrators.
88. This witness testimony is absolutely in collusion with the Record of the Municipal Court in Kalesija dated 25 March 1999, when this witness stated that she had seen with her own eyes that Chetniks singled out her husband in Klisa on 1 June 1992 and took him in the direction of Karakaj, and did not receive any news about him thereafter²³.
89. In relation to the same event, this witness stated at the main trial that on 1 June 1992, when the villagers of Kaludrani were expelled, she went to Klisa - Bijeli potok with other women and children who were expelled from other places, that her husband had stayed home, that they said good bye to each other and that he said that he would escape through the woods with the other men.
90. Based on everything aforementioned, the Panel did not give credence to the testimony of this witness, because it was unconvincing, unclear, imprecise and because on different occasions the witness differently interpreted the essential facts, such as the moment and the circumstances under which she last saw her husband. Her testimony is even contrary to Nurija's testimony, who states that he never spoke to her about this incident or told her the names of the perpetrators.²⁴
91. On the occasion concerned, Šerif Islamović and Agan Ibrahimović were in the group of men that Nurija Nuhanović met when he was running away from the scene. They testified in this case as prosecution witnesses.
92. Witness **Šerif Islamović** stated at the main trial that Nurija "got pale as a ghost" on the occasion concerned and said, "they killed my Izet, Šemso and Muradif..."²⁵. Then he stated that Nurija did not mention any specific names of people who did it, but just said that those were the Tomić's²⁶, but later he stated that Nurija mentioned a person called Ljubo after the war, saying that this person participated in this incident and said, "I heard it from Nurija. Nurija said that they had told him".²⁷

²³ Petition to declare the death of Šemso Nuhanović dated 2 December 1998 (Exhibit T-6), Record of the Municipal Court in Kalesija No. R-394/98 dated 25 March 1998 (Exhibit T-8), Decision of the Municipal Court in Kalesija No. R2-394/98 dated 13 July 1999 (Exhibit T-9)

²⁴ Page 82 of the Transcript of Nurija Nuhanović's Testimony at the main trial dated 28 September 2009

²⁵ Page 9 of the Transcript of Šerif Islamović's Testimony at the main trial dated 12 October 2009

²⁶ Page 10 of the Transcript of Šerif Islamović's Testimony at the main trial 12 October 2009

²⁷ Page 20 of the Transcript of Šerif Islamović's Testimony at the main trial dated 12 October 2009

93. As opposed to this testimony, this witness did not mention during the investigation that Nurija said that it had been done by Tomić's or that Nurija gave him any names.
94. When asked by the panel members to clarify these discrepancies in his statements, this witness again provided different answers to the same questions in a quite confusing, unclear and insecure manner. First he said that Nurija mentioned a person called Ljubo, saying that he saw him in the woods²⁸. Second time he said that he had told him that after the war²⁹, but then he said that the first time when he saw Nurija after this incident was a few days before the trial, and in the end he said that Nurija mentioned that name when the mortal remains of the killed men were found³⁰.
95. This witness testimony in the part related to his statement that Nurija mentioned certain Ljubo is entirely unreliable, unclear, imprecise and contrary to Nurija's own testimony, who claimed that he had never mentioned any names of perpetrators to Šerif Islamović.
96. Witness **Agan Ibrahimović** states that on the day concerned he came and said, "it seems that they are killed, I am going to check it", but did not mention any perpetrators³¹. Witness further states that he saw Nurija a month later, but said that he did not mention the killed persons then or any time later. He said, "I am not sure. I don't like to speculate"³². Witness Ibrahimović states that in 1999 he returned to Kaludrani, but did not talk to Nurija about the incident concerned, although his cousin (Muradif Ibrahimović) was among the killed men, and in relation to that he added, "Nurija does not know about my cousin, since he does not know about his son. Nurija also only heard about it"³³.
97. The stated testimonies undoubtedly imply that these witnesses have no specific information as to who killed their relatives, and that Nurija Nuhanović never told them that it was done by the accused, which has been confirmed by Nurija himself, who claims that he never spoke to them about the incident.
98. In addition to the aforementioned witnesses, the prosecution also examined the witness Borislav Rikanović, who testified about the accused's membership in the Republika Srpska Army. Besides, this witness states that he knows Nurija Nuhanović, but Nurija never told him who had killed his son.

²⁸ Page 28 of the Transcript of Šerif Islamović's Testimony at the main trial dated 12 October 2009

²⁹ Page 29 of the Transcript of Šerif Islamović's Testimony at the main trial dated 12 October 2009

³⁰ Page 29 of the Transcript of Šerif Islamović's Testimony at the main trial dated 12 October 2009

³¹ Page 12 of the Transcript of Agan Ibrahimović's Testimony at the main trial dated 4 November 2009

³² Page 12 of the Transcript of Agan Ibrahimović's Testimony at the main trial dated 4 November 2009

³³ Page 26 of the Transcript of Agan Ibrahimović's Testimony at the main trial dated 4 November 2009

99. The Prosecution also heard the **expert witness, doctor Vedo Tuco**, who took part in the exhumation and identification of the mortal remains in Kozluk, Zvornik Municipality, on 14 April 2003. This expert witness confirms that the DNA analysis shows that the mortal remains belong to Izet Nuhanović, Šemso Nuhanović and Muradif Ibrahimović (which the Panel does not find disputable, as already stated). However, the expert witness confirmed that the specific cause or the time of these persons' death could not be confirmed by the examination of the skeleton remains.
100. It is important to note that the submitted documentary evidence³⁴ shows that the date recorded for the death of Šemso Nuhanović, Izet Nuhanović and Muradif Ibrahimović is 1 June 1992, not 26 June 1992, as the prosecution alleges in the Indictment, stating that this date as the date of these persons' death is established on the basis of statements made by Nizama Nuhanović and Nurija Nuhanović.
101. As we can see, relevant parts of Nurija Nuhanović's testimony that incriminate the accused have not been confirmed by any other heard witness, nor by any adduced documentary evidence, wherefore this testimony does not have the probative value necessary to render a convicting verdict on the basis of such a testimony.
102. Therefore, this witness, whether consciously or unconsciously, probably wishing that someone be held responsible for his son's death, which is certainly very painful and tragical for him, is trying to convince himself of something that is not sustainable or supported by facts. At the very least, the Panel could not find beyond reasonable doubt that the accused Ljubo Tomić and Krsto Josić were the ones who committed the murders in question as described in the Indictment.
103. The defence presented documentary evidence as well as the testimonies of many witnesses including the expert witness Vidak Simić, who testified in relation to the accused's alibis.
104. **Witnesses of the defence for the first accused** Ljubo Tomić (Krsto (Petko) Josić, Dragan Tomić, Dragomir Tomić, Zoran Josić and Cvijan Tomić) stated that during the time concerned they organized village guards in which the accused Ljubo Tomić participated, and argued that on the day concerned he was all the time with them in the area of Malešići.
105. The Panel also took into consideration the witness testimonies of the **defence for the second accused** (Dragan Tomić, Ljubinka Stevanović, Mitra Božić, Radica Đokić and Jovica Stevanović) who testified that the second accused Krsto Jokić was at his

³⁴ Decision of the Municipal Court in Kalesija, No. R2-394/98 dated 13 July 1999 (T and O 9) and the Decision of the Municipal Court in Kalesija, No. R2-182/04 dated 30 November 2004 (O 10)

sister's in Trnovica at the time concerned, undergoing medical treatment as a consequence of his being wounded, and that he did not leave Trnovica, except when he went to Loznica for rebandaging. Additionally, the defence for the second accused examined the expert witness Vidak Simić, who conducted the expert analysis of the accused Krsto Josić's injury.

106. **Expert witness Simić** conducted the aforementioned analysis on the basis of the letter of discharge with the case history, number 3333/915 OP 186/242708, on the basis of Findings and Opinion of the Medical Board for examination of persons referred to in the Law on Rights of Disabled War Veterans and Families of Killed Soldiers, No. 1229/96 dated 26 February 1996, and on the basis of the examination of Krsto Josić.
107. Based on the aforementioned, the expert witness made a report establishing that the injury sustained by the accused Krsto Josić is qualified as a severe bodily injury, the healing of which takes at least four to six weeks, which is why the accused Josić was unfit for military service at least 10 to 14 weeks following his injury. The expert witness stated that the accused Krsto Josić, bearing in mind his injury, was certainly unfit for military on 26 June 1992, and that during the rehabilitation and recovery period he was unable to move around a lot and carry a burden on the right side of his body, and that he could not use handheld firearm, particularly a long barrel weapon³⁵.
108. Finally, at the main trial on 3 February 2010, the expert witness stated that bearing in mind the nature of injury, the accused Krsto Josić was not capable of taking part in military operations or carry and fire a rifle during the period concerned.
109. The Panel took into consideration the presented defence evidence, but did not find it necessary to analyze these pieces of evidence in detail, since the previously stated and evaluated pieces of evidence are sufficient to raise serious doubts about the allegations in the Indictment.

IV - Conclusion

110. Article 281 of the CPC BiH stipulates that the Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, conclude whether the fact(s) have been proved.
111. In this specific case, the testimony of Nurija Nuhanović remains isolated and substantially challenged by other evidence and clues. Many discrepancies and illogicalities in the testimony of Nurija Nuhanović and between his testimony and

³⁵ Findings and Opinion of expert witness Vidak Simić, dated 24 September 2009 (Exhibit O-1)

other (indirect) witness testimonies altogether imply that his testimony cannot be used as a reliable factual basis in order to find beyond reasonable doubt that the accused Ljubo Tomić and Krsto Jović are guilty as charged.

112. The principle of *in dubio pro reo* is one of the basic rules of the domestic³⁶ and international criminal law, as well as the jurisprudence of the ICTY and ICTR³⁷. Pursuant to this principle, in order to find a person guilty of a crime, the prosecutor must prove certain fact beyond reasonable doubt. Also, according to the case law of this court, which requires the principle of fair trial and proper application of regulations, when a single witness testimony is the key piece of evidence in the case, “it is absolutely necessary to consider that testimony very carefully”, and it “must not raise any suspicion as to its exactness and truthfulness”³⁸, bearing in mind the gravity of the criminal offense that the accused are charged with³⁹.
113. Bearing in mind all the aforementioned, the Panel finds that the evidence presented by the prosecution does not have the necessary convincing power in terms of the incriminations concerned to prove that the accused committed the crimes as charged in the Indictment. Therefore, the Panel finds it justified to use the principle *in dubio pro reo*, which applies in this case, meaning that the facts incriminating the accused must be established with absolute certainty or “beyond reasonable doubt”, and in case of a doubt about these facts – and this panel has found that such a doubt does exist – they cannot be regarded as established. On the other hand, the underlying premise of the aforementioned rule states that the facts exculpatory for the accused are taken as established even if they are just probable.
114. Since the legislator finds that it has not been proven that the accused committed the criminal offense as charged, whereby he is acquitted of charges (Article 284(c) of the CPC BiH), the legislator implicitly but unambiguously enabled the application of the *in dubio pro reo* principle in favour of the accused, because if the available evidence points only to certain knowledge in respect of the facts that the accused committed the criminal offense charged in the Indictment, then he definitely must be acquitted and thus the Court may not and must not render a convicting verdict if there is no strong and doubtless conviction about the accused’s guilt⁴⁰.

³⁶ See *Prosecutor v. Radmilo Vuković*, X-KRŽ-05/217, Appellate Verdict dated 13 August 2008, page 10; *Prosecutor v. Željko Lelek*, X-KRŽ-06/202, Appellate Verdict dated 12 January 2009, para 119, page 27; *Prosecutor v. Nikola Andrun*, X-KRŽ-05/42, Appellate Verdict dated 19 August 2008, page 43;

³⁷ See *Tadić*, Decision on the motion for extension of time limit, para 73; *Čelebići* Trial Verdict, para 601; *Jelisić* Trial Verdict para 108.; *Akayesu* Trial Verdict, para 319.

³⁸ *Prosecutor v. Radmilo Vuković*, X-KRŽ-05/217, Appellate Verdict dated 13 August 2008, page 5;

³⁹ *Prosecutor v. Zigiranyirazo*, MKS-01-73-A, Appellate Verdict dated 16 November 2009, para 51, 73

⁴⁰ See the Appellate Verdict of the BiH Court in the case *Ranko and Rajko Vuković*, No. X-KRŽ-05/217 dated 13 August 2008

115. Based on the aforementioned principle, bearing in mind that the prosecution has not proven beyond reasonable doubt that the accused Ljubo Tomić and Krsto Josić committed the criminal offense that they are charged with, the Panel has acquitted them of the charges pursuant to Article 284(c) as read with Article 3 of the CPC BiH.

V - Decision on costs

The costs of criminal proceedings referred to in Article 185(2), subparagraphs a) through f) of this Code and the necessary expenditures of the accused and the necessary expenditures and remuneration of the defense attorney shall be paid from budget appropriations, pursuant to Article 189(1) of the CPC BiH.

VI - Decision on the claim under property law

The Panel has rendered the decision on the claim under property law pursuant to Article 198(3) of the CPC BiH, under which the families of the injured parties are referred to take civil action since the verdict of acquittal has been rendered.

Record taker

Lejla Konjić

PRESIDING JUDGE

JUDGE

Vesna Jesenković

LEGAL REMEDY: This Verdict may be appealed with the Panel of the Appellate Division of this Court within 15(fifteen) days following the day of reception of the Verdict in writing.